BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **ROBERT M. COOK,** **Bar No. 002628** Respondent.	No. 08-1815, 09-0240, 09-0366, 09-0562, 09-0293, 09-1020 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

The State Bar filed the Complaint in this matter on November 25, 2009. The Hearing Officer was assigned on December 9, 2009. An Initial Case Management Conference was held on December 28, 2009. Respondent filed an Answer on January 7, 2010. The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on March 19, 2010. The Hearing on the Agreement was held on March 22, 2010.

FINDINGS OF FACT[1]

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on September 26, 1970. (TR 4:14)

COUNT ONE (File no. 08-1815 – Nancy Termini)

2. On August 30, 2007, Respondent and Nancy Termini entered into a written agreement ("the agreement") under which Respondent agreed to represent Ms. Termini "in connection with the malpractice action against Geraldine Miller and Mohave County et al, and Frontier." (TR 5:15 through 6:3)

[1] The facts are found in the Tender of Admissions and Agreement for Discipline by Consent and the transcript of the hearing.

3. The financial terms of the agreement included that Respondent would represent Ms. Termini for a fee "in the amount of $50,000.00, inclusive of cost[s] and expenses together with one third (1/3) of any and all amounts collected either by litigation, or settlement subject to a setoff of the aforementioned $50,000.00." (TR 6:4-12)

Respondent would contend that this was part of the signed fee agreement that called for a flat fee, earned upon receipt, which did not require monthly statements. Respondent kept records of his time for purposes associated with a flat fee arrangement, that is, if requested, he could produce records and provide the required "look back" for the client and for compliance with the applicable ERs. This was not clarified in the fee agreement.

The State Bar would contend that the signed fee agreement called for a minimum amount of a flat fee ($50,000) plus an additional fee of a stated fraction (one-third) of all sums recovered above the minimum flat fee, plus costs. The State Bar would contend further that the fee agreement required Respondent to furnish to Ms. Termini a monthly statement of costs incurred on her behalf. At the hearing the Bar clarified that the fee agreement itself was not the problem. The problem was with Respondent's lack of communication with the client and in not supplying timely monthly statements for cost billing. (TR 9:16 through 10:19)

4. The attached general terms of the agreement provided that Respondent's "statements for services rendered and costs incurred will be prepared and mailed to the address listed in the engagement letter during the month following the month in which services are rendered and costs advanced."

5. Despite the foregoing provision of the agreement, Respondent failed to prepare and mail to Ms. Termini statements for services rendered and costs incurred during the month following the month in which services were rendered and costs advanced.

6. Respondent did not send a statement for services rendered and costs incurred to Ms. Termini until requested to do so which statements were sent June 9, 2008, via e-mail from Respondent's assistant.

7. Respondent mailed a final statement for services rendered and costs incurred to Ms. Termini on September 20, 2008.

8. On April 16, 2008, in Federal Court, Respondent filed suit ("the suit") on behalf of Ms. Termini against defendants Frontier Communications of America, Inc., Gail Tarson, Geraldine Miller, Marilyn Figueroa, Kelli Brice-Donlea, Dianna Thornton, Denise Brumbaugh, Lee F. Jantzen, Kenneth Upton, Mohave County and the City of Kingman.

9. In the suit, in general Respondent alleged that Ms. Termini's former employer and co-employees, and government agencies and employees, wrongly retaliated against her and assisted the governmental agencies who wrongly charged her with and indicted her for arson.

10. The criminal arson charge against Ms. Termini ultimately was dismissed.

11. The suit included allegations that the defendants violated Ms. Termini's civil and Constitutional rights, violated her right of privacy, defamed her and wrongfully terminated her from her employment.

12. The suit also included a claim of legal malpractice against Ms. Termini's' first criminal defense attorney, Geraldine Miller.

13. While representing Ms. Termini in Federal Court, Respondent failed to comply with certain filing requirements and deadlines imposed by relevant rules of procedure and practice. (TR 11:5 through 12:5)

14. Respondent failed to add certain parties to the court's electronic filing data screen, and a Civil Cover Sheet was not attached. At the hearing Respondent explained that his computer system went dark on April 28, 2008. (TR 14:3-11) This prevented him from complying with the e-filing requirements of Federal Court. Respondent did not have notice of

the court's rulings. Respondent recognized that it was his responsibility to have e-filing capability with the Federal Court. (TR 14:15 through 15:21)

15. If this matter had proceeded to a contested hearing, the State Bar would have offered evidence that Respondent alleged in his complaint that all eleven defendants wrongfully discharged Ms. Termini from employment even though she was employed only by the defendant Frontier Communications of America. Were this matter to proceed to a contested hearing, Respondent would deny this allegation. This matter was not resolved at the hearing. Therefore the Hearing Officer has not found the Bar's fact in this paragraph to have been proven.

16. In some instances, Respondent alleged legal conclusions rather than facts in his complaint which were challenged as insufficient to overcome prosecutorial immunity and to state a claim.

17. From May 14, 2008, through June 27, 2008, ten of the eleven defendants moved to dismiss the complaint, and two defendants alternatively moved for a more definite statement. One defendant answered.

18. On July 16, 2008, the court granted the defendants' City of Kingman and Kenneth Upton's Motions for More Definite Statement, and gave Respondent until August 5, 2008 to file an Amended Complaint with the specificity discussed in the court's order.

19. Respondent failed to file the Amended Complaint by the August 5, 2008, deadline.

20. On August 5, 2008, the due date for filing the Amended Complaint, Respondent for the first time filed a Motion for Extension of Time to File Plaintiff's Amended Complaint ("Motion for Extension").

21. Respondent's Motion for Extension failed to comply with Local Rule of Civil Procedure 7.1(c) (electronic filing).

22. Respondent's Motion for Extension failed to comply with the Administrative Policies and Procedures Manual of the Court in that he failed to include a proposed Order as an attachment to the motion.

23. On August 7, 2008, the court ordered Respondent to cure the deficiency in his Motion for Extension within one business day.

24. Respondent failed to cure the deficiency in his Motion for Extension within the time ordered.

25. On August 11, 2008, the court denied Respondent's Motion for Extension because he failed to comply with the Administrative Policies and Procedures Manual of the Court and the court's order to cure the deficiency within the time ordered.

26. On August 11, 2008, the court further ordered that if Respondent did not file the now-untimely amended complaint that day, the case would be dismissed for failure to prosecute and failure to comply with a court order pursuant to Rule 41(b), Fed. R. Civ. P.

27. On August 13, 2008, Respondent filed a "Motion to Set Aside Court's Order of August 11, 2008" pursuant to Rule 60(b), Fed. R. Civ. P. ("Motion to Set Aside").

28. In his Motion to Set Aside, Respondent contended that the court's order was entered by mistake by the court's deputy clerk. At the hearing Respondent clarified that his paralegal mistakenly thought the court's deputy clerk had made a mistake. (TR 36:1-6)

29. In his Motion to Set Aside, Respondent contended further that the clerk's mistake was due to Respondent's mistake in failing to provide a courtesy copy of his Motion for Extension to the judge via e-mail.

30. In his Motion to Set Aside, Respondent contended further that there was a stipulation for him to have an extension of time within which to file an amended complaint.

31. Respondent's Motion to Set Aside failed to comply with Local Rule of Civil Procedure 7.1(c) (electronic filing).

32. On August 19, 2008, Respondent filed an amended complaint.

33. Respondent's amended complaint failed to comply with Local Rule of Civil Procedure 7.1(c) (electronic filing).

34. On August 19, 2008, to avoid penalizing Ms. Termini for Respondent's errors, the court entered an order permitting the amended complaint to proceed forward even though it was untimely and filed without a time extension from the court.

35. In the same order, the court clarified that the court's order of August 11, 2008, which was the subject of Respondent's Motion to Set Aside, was not entered in error as Respondent claimed.

36. Respondent failed to email a proposed form of order to chambers on the Motion for Extension.

37. Respondent did not familiarize himself with the requirements for electronic filing which had been in effect since August 1, 2005.

38. In the August 19, 2008 order, the court admonished Respondent to "familiarize himself with the requirements of electronic filing, which have been in effect since August 1, 2005."

39. Respondent contended in his Motion to Set Aside that he should have been granted an extension to file the amended complaint because opposing counsel did not oppose the extension.

40. In the August 19, 2008 order, the court admonished Respondent that opposing counsel is not the final decision-maker on extensions of time and opposing counsel can never suspend the rules for filing motions and orders. Hence, counsel should not rely on such stipulations as an assurance that the court will approve the requested extensions. At the hearing Respondent recognized that the judge must rule on a stipulation for extension of time before an attorney can have the extension. (TR 36:13-16)

41. Rule 60(b), Fed. R. Civ. P., authorizes a party to file a motion for relief from a final judgment, order or proceeding.

42. The court's order of August 11, 2008, was not a final judgment, order or proceeding that had been entered in the case. (TR 36:22 through 37:6)

43. In the August 19, 2008 order, the court admonished Respondent that reliance on Rule 60(b) in his Motion to Set Aside was misplaced because the court's order of August 11, 2008, was not a judgment that had been entered.

44. In his response to the State Bar of Arizona's screening of this matter, Respondent denied missing any critical filing deadlines or knowingly failing to comply with judicial orders. He explained that his office experienced computer system crashes and staff unfamiliarity with the case and Federal court electronic filing requirements. In his disclosure statement, he admitted his lack of familiarity with the procedures but contends throughout that the final amended complaint filed three months after the first complaint was a competent and well drafted document that stated a viable cause of action.

45. On September 19, 2008, Respondent filed a Motion to Withdraw as Counsel of Record for Ms. Termini ("Motion to Withdraw").

46. In filing his Motion to Withdraw, Respondent failed to comply with Local Rule of Civil Procedure 83.3(b) (relating to withdrawal and substitution) and the administrative policies and procedures manual governing electronic filing.

47. On September 19, 2008, Respondent sent Ms. Termini a "rough billing statement" for charges totaling $95,075.17 which, minus Ms. Termini's prior payment of $50,000, left an alleged "balance due" of $45,075.17.

48. Were this matter to proceed to a contested hearing, Respondent would contend that the purpose of this statement was to demonstrate the amount of work actually done on the case, an amount far in excess of the flat fee. Were this matter to proceed to a hearing, the State Bar would offer evidence that Respondent's "rough billing statement" for charges totaling $95,075.17 did not accurately demonstrate the amount of work actually done on the case and that the money's worth of work Respondent did do did not exceed the flat fee. This matter was

not resolved at the hearing. The Hearing Officer has not found the Bar's version to have been proven. Bar Counsel said at the hearing that "We did not make much of that because it was not his effort to try to collect money. We would have made an issue of it if we thought that the 50,000 dollar flat fee that he charged her was in and of itself unreasonable for the type of case and work that he had done." (TR 28:11-19)

49. On September 26, 2008, the court denied Respondent's Motion to Withdraw for failing to comply with Local Rule of Civil Procedure 83.3(b) and the administrative policies and procedures manual governing electronic filing.

50. In the court's order of September 26, 2008, the judge granted Ms. Termini's Motion to Terminate Counsel and Proceed Pro Se.

51. In the court's order of September 26, 2008, the judge directed Respondent to release Ms. Termini's file to her immediately so she could meet a deadline to respond to four pending motions to dismiss.

52. Ms. Termini received her file from Respondent on October 11, 2008. If this were to proceed to a contested hearing, Respondent would contend he sent copies of pleadings to her as they were filed in court.

53. Ms. Termini noticed that the file she received from Respondent did not contain many things referenced in the "rough billing statement" that Respondent earlier sent her.

54. Upon terminating representation, Respondent failed to provide to Ms. Termini her entire file. Respondent contests this claim. The evidence at the hearing on the Tender of Admissions in this case did not resolve this issue. Therefore the fact alleged by the Bar has not been proven.

55. During the time that Respondent represented Ms. Termini, and although he and his staff exchanged many e-mails and spoke often on the phone, he failed to effectively communicate with her about the status of her case.

56. During the time that Respondent represented Ms. Termini, he failed to effectively consult with her regarding her intentions for the suit.

57. Prior to filing the amended complaint, Respondent failed to effectively communicate with Ms. Termini about the content of the amended complaint or give her a reasonable opportunity to read and edit the amended complaint.

58. Respondent failed to notify Ms. Termini that the defendants filed Motions to Dismiss the Amended Complaint.

59. On October 2, 2008, Respondent's one-year probation in State Bar of Arizona matters 06-0426 and 06-0472 began. At the hearing the Bar clarified that since Respondent in Count One did not get Ms. Termini's file to her until October 11, 2008, his violation of ER 1.16 was a violation of his condition of probation (which directed that he not commit any violations of ethical rules). (TR 42:14 through) However, Bar Counsel at the hearing moved to dismiss the Rule 53 (e) violation (violating probation) as it relates to Count One. (TR 43:2-17) Therefore, the fact in this paragraph was not found as it is not relevant to an alleged violation of an ER in this Count.

COUNT TWO (File no. 09-0240 – Vomero)

60. On approximately September 11, 2006, Dr. Joseph Vomero and Mrs. Lynette Vomero ("Vomeros") bought 316 acres of New Mexico land from Phil and Teresa Stonich/Agua Negra Springs Ranch, LLC ("Agua Negra") and Yamanoha LLC, for $480,000.

61. The Vomeros paid $144,000 as a down payment, which paid for 96.06 acres "free and clear" and financed the remaining 220 acres by a note payable to Yamanoha, LLC for $336,000.

62. The Vomeros made interest only payments on the Yamanoha note totaling $23,310 through July 2007.

63. On approximately July 20, 2007, Phil Stonich, a principal owner of Agua Negra, offered to buy the land back from the Vomeros for $608,000.

64. After deducting the principal amount of the Yamanoha note of $336,000, the amount due from Agua Negra to the Vomeros was $272,000.

65. On approximately July 27, 2007, the Vomeros signed quitclaim deeds to Mr. Stonich and/or Agua Negra in exchange for payment to the Vomeros of $272,000 within 30 days.

66. Neither Mr. Stonich nor Agua Negra paid the Vomeros $272,000 within 30 days as agreed, or at all.

67. On approximately December 10, 2007, the Vomeros accepted a promissory note from Mr. Stonich and/or Agua Negra in the form of the assignment and assumption of real estate contract and quitclaim deed. (TR 52:3-25)

68. On December 13, 2007, Respondent entered into a written agreement to represent Phil and Teresa Stonich, and their LLC, Agua Negra of which they were the sole members, in connection with their status as debtors in Chapter 11 Bankruptcy Proceedings ("Stonich Bankruptcy" and "Agua Negra Bankruptcy"). (TR 50:20 through 51:9)

69. On approximately February 19, 2008, the Vomeros received a Notice of Bankruptcy which directed them to attend a Meeting of Creditors on March 18, 2008.

70. At the March 18, 2008 Meeting of Creditors, the Vomeros learned that Mr. Stonich listed the Vomeros as secured creditors. (TR 53:6-14)

71. The Vomeros filed a Proof of Claim as a secured creditor because according to a letter filed by the First National Bank of New Mexico ("Bank"), and a Notice of Filing of Motion for Relief from Stay, the Vomeros were then accepted as such.

72. The Vomeros learned that the Bank challenged their status as secured creditors.

73. On approximately May 13, 2008, Respondent contacted the Vomeros regarding the Stonich Bankruptcy and/or the Agua Negra Bankruptcy.

74. Respondent conducted a telephonic conference call between Respondent, Phil and Teresa Stonich, the Vomeros and other creditors in the Stonich Bankruptcy and/or the Agua Negra Bankruptcy on approximately May 14, 2008.

75. During the foregoing telephonic conference call, Respondent agreed to represent the Vomeros and file a Proof of Claim for the Vomeros in the Phil and Teresa Stonich and the Agua Negra Bankruptcy for a fee of $900. At the hearing the evidence showed that this was the inception of the conflict. (TR 59:5 through 60:19) Respondent recognized that the basic conflict between a creditor and a debtor in a Chapter 11 (reorganization) bankruptcy proceeding is that the creditor wants to get as much money from the proceeding as possible while the debtor wants to have as much money left over after the reorganization to continue to do business. (TR 59:1-21) Respondent testified that he decided when he filed the disclosure statement and plan of reorganization that there was not a conflict in this case. (TR 59:21-24) But Respondent recognized that at the very least there was a potential for conflict in his representation of both the debtor and creditor in this bankruptcy proceeding. He also recognized that if the conflict could be waived, that Respondent failed to obtain a written waiver from both Phil and Teresa Stonich and from the Vomeros. (TR 60:23 through 62:22)

76. Although the Vomeros already had filed a Proof of Claim, Respondent advised them that he would file a new proof of claim for them as mixed secured and unsecured creditors in the proper amount. Respondent did submit to the court in the Stonich and Agua Negra bankruptcies a Disclosure Statement which referred to the Vomeros' claims as mixed-secured and unsecured, in amounts which were approved of in writing by the Vomeros voting for in the plan of reorganization. The disclosure statement was approved by the court in both cases and contained in the plan of reorganization which was voted for in writing by the Vomeros. Were this matter to proceed to a contested hearing, the State Bar would offer evidence that the bankruptcy court's approval of Respondent's disclosure statement signified

merely that it contained sufficient information about the plan of reorganization to allow the plan to proceed to a vote. This fact was not established at the hearing on the Tender of Admissions.

77. On May 15, 2008, the Vomeros paid Respondent $900 by Wachovia Bank check no. 1033 for Respondent to file a Proof of Claim for them.

78. Respondent deposited the foregoing check into his Wells Fargo Bank general account on May 16, 2008.

79. Respondent did not communicate to the Vomeros in writing the scope of the representation and the basis or rate of the fee and expenses for which the Vomeros would be responsible except as set forth in paragraph 76 above.

80. Respondent did not file the Proof of Claim for the Vomeros until October 21, 2008. Respondent maintains that the filing of the disclosure statement and the plan of reorganization voted for by the Vomeros with the claim explicit in each document fulfilled the purpose of the Proof of Claim and, if the plan were approved by the court, would have resulted in a favorable resolution for the Vomeros. The Proof of Claim is a separate document that the Vomeros expected Respondent to file. Bar Counsel stated at the hearing that the failure to file the Proof of Claim until October 21, 2008 impacted ER 1.2 (complying with the client's objectives), ER 1.3 (diligence and promptness) and ER 1.4 (communication with client). (TR 67:16 through 69:5)

81. Respondent did not communicate with the Vomeros regarding the status of their Proof of Claim for over 6 months. (TR 70:21 through 71:2) Respondent contends that in late July of 2008, the Vomeros obtained separate counsel, Jeff Sandell, which action prohibited direct communication. Prior to that time, the communication related to the pleadings including the vote on the plan of reorganization.

82. On September 3, 2008, the bankruptcy trustee filed a Motion to Approve Sale of Real Property.

83. On October 21, 2008, Respondent filed a Response to Trustee's Motion to Sell New Mexico Real Property on behalf of his clients, the debtors Phil and Teresa Stonich, by attaching Proof of Claim forms on behalf of creditors including the Vomeros.

84. The Proof of Claim Respondent filed on behalf of the Vomeros was for $136,000, which was the amount of the claim Respondent advised after conferring with the Vomeros, and for which the Vomeros voted in the plan of the reorganization.

85. Respondent failed to communicate to the Vomeros that he filed the Proof of Claim.

86. On April 10, 2009, the State Bar of Arizona sent to Respondent a screening letter regarding his conduct in the present matter.

87. On April 21, 2009, Respondent paid the Vomeros $900.

SUMMARY - COUNT TWO (ALSO APPLICABLE TO COUNTS THREE AND FOUR)

The Hearing Officer engaged in an extended question-and-answer with Bar Counsel at the hearing on two allegations in Counts Two through Four. (TR 72:7 through 76:18) The first allegation was that Respondent's failure to timely file a Proof of Claim for the creditors (while Respondent also represented the debtors) caused the creditors to suffer in the Chapter 11 bankruptcy (that was later converted by the bankruptcy judge into a Chapter 7 bankruptcy). The second allegation was that when Proofs of Claims were filed they were for lesser amounts of money than the creditors were owed. The Hearing Officer asked, "Did his alleged lack of doing something cause their position to go - - to be ruined, or did his - - the way he did something lessen the amount of their claim, in the Bar's perspective." Bar Counsel responded, "MR. SANDWEISS: I understand what you're saying. On the basis of filing the proof of claim, no, I can't connect the two. We were a little disturbed that Mr. - - I keep saying Mr. - - Dr. and Mrs. Vomero were in for 480,000. The proof of claim was filed for 136,000, while they were being represented by counsel for the debtors, and that's where the conflict of interest lights

started ringing. Now, whether even that led to the destruction of the Vomero's claim is tenuous. I can't establish that by clear and convincing evidence." (TR 72:17 through 73:7) Several pages later in the transcript of the hearing, Bar Counsel stated, "I think the best we would be able to prove by clear and convincing evidence is that there was a potential for injury." (TR 75:15-17)

The concern of the Hearing Officer is that Respondent has already been censured by the Court for a prior disciplinary matter, yet the Bar is requesting in their Tender of Admissions that he be censured again for conduct in six separate counts of the current Complaint. At first blush the stipulated sanction for the misconduct in this Complaint seems too light. But the Tender of Admissions in this case was a bit unusual. It contained 293 paragraphs as Findings of Fact. On closer examination at least 20 of those paragraphs described unresolved disputes of fact. A hearing on an Agreement for Discipline by Consent should focus on the factual basis for the agreement and the reasoning behind the stipulated sanction. This case seemed to present itself as a hybrid type of hearing, part agreement and part contested. This reflects the status of the parties' negotiations. They were able to agree on many facts, but were unable to agree on others.

Bar Counsel Mr. Sandweiss responded to the Hearing Officer's question about a hybrid hearing as follows: "MR. SANDWEISS: Well, I don't think there is such a thing as a hybrid hearing. THE HEARING OFFICER: Okay. MR. SANDWEISS: We are either here for a consent hearing or an adversary hearing, and we choreographed this in such a way to make this a consent hearing. So I don't think your role includes to make rulings on contested issues of fact. It's to simply recognize what we agree on, make sure there's enough of a record, I suppose, to support those things that we agree on, or at least - - I misspoke. Your role would be to accept the things we agree on factually. Those things that we disagree on, where we'd say if we went to a hearing, the State Bar would contend X and the Respondent would contend Y. Number one, is there enough of a factual basis for either side, you know, in terms of their plausibility for

consent purposes rather than making findings one way or the other as to who's right and who's wrong. And are there too many of them on too important issues to -- too two O's - - that it undermines the consent, to the point where you would say to yourself, you're not really consenting to anything anymore. There's nothing meaningful. I think we are consenting to something meaningful. I think that we have enough here to support a consent. We have enough of an agreement on the ERs." (TR 154:10 through 155:11)

As much as possible the Hearing Officer attempted to find facts that supported one side or the other on a fact that was in dispute. However, this was not easily done because the only witness called at the hearing was the Respondent. In fairness to the State Bar, Bar Counsel offered to move into evidence exhibits to support his position. But facing 293 paragraphs of facts and six counts the Hearing Officer chose instead to focus on the Tender of Admissions and the majority of facts that were stipulated.

When the facts were finally found it is apparent that the most serious allegation was the conflict of interest described in Counts Two through Four and again in Count Six. When that matter is more closely examined it is clear that even the expert witnesses consulted by the parties differed on whether this situation was a conflict. As Bar Counsel stated in reference to the experts, "MR SANDWEISS: And I just want to add, Your Honor, that - - what adds to the mix is we each had experts. MR. VAN WYCK: Right. MR. SANDWEISS: Both of whom were qualified. I think our expert is more qualified, but it doesn't mean that opposing expert is unqualified, and they gave conflicting opinions." (TR 156:11-18)

Bar Counsel admitted that the Bar could not establish actual injury to the litigants. The record even suggests that the debtors the Stonichs were friends and relatives of these creditors and that the Proofs of Claims previously filed were for amounts of money that were unjustifiably high. As counsel for Respondent stated at the hearing (after Respondent testified that he would not file the inflated Proofs of Claims), "Mr. Van Wyck: And that, frankly, was the other conflict. That was the red flag that should have gone up, because the Vomeros and each

one of these - - the Cravens and the Stoniches, they were all friends and relatives, and there may have been some gilding the lilies on the amounts that were claimed." (TR 62:23 through 63:7) Both sides hired expert witnesses on the issue of whether Respondent's representation of the debtors and the creditors in this situation was a conflict of interest. As Respondent's counsel explained, "MR. VAN WYCK: And I - - the experts disagreed on this. Our expert said there was not a conflict on it, and their expert said there was. I certainly believe there was, and my client now believes there was certainly a potential conflict,..." (TR 62:5-9)

Finally, the Hearing Officer asked Bar Counsel a more specific question: "THE HEARING OFFICER: Let me ask you this, then. If you, David Sandweiss, think that Robert Cook caused damage to at least three of these claimants in the several hundred thousand dollar range per claimant, even the Vomeros, why is it that you have agreed to a censure for somebody who has already been censured and placed on probation? MR SANDWEISS: Because we can't make that connection." (TR 74:23 through 75:6)

COUNT THREE (File no. 09-0366 – Craven)

88. The parties agreed to incorporate herein by this reference the consent provisions of Count Two above as if more fully set forth herein.

89. On approximately June 7, 2007, Christine M. Craven ("Ms. Craven") bought land sold to her by Phil Stonich, Teresa Stonich and/or Agua Negra and/or Yamanoha.

90. Phil Stonich, Teresa Stonich and/or Agua Negra later agreed to take back the land in exchange for a promissory note payable to Ms. Craven for $512,000.

91. Neither Mr. Stonich, Mrs. Stonich nor Agua Negra paid Ms. Craven in accordance with the terms of the promissory note.

92. On December 13, 2007, Respondent entered into a written agreement to represent Phil and Teresa Stonich, and Agua Negra, in connection with their status as debtors in Chapter 11 Bankruptcy Proceedings ("Stonich Bankruptcy" and "Agua Negra Bankruptcy").

93. Respondent conducted a telephonic conference call between Respondent, Phil and Teresa Stonich, Ms. Craven and other creditors in the Stonich Bankruptcy and/or the Agua Negra Bankruptcy on approximately May 14, 2008.

94. During the foregoing telephonic conference call, Respondent offered to represent Ms. Craven and file a Proof of Claim for her in the Stonich and Agua Negra Bankruptcy for a fee of $900.

95. On May 15, 2008, at Respondent's instructions, Ms. Craven direct deposited into Respondent's bank account $900.

96. On May 15, 2008, Ms. Craven sent a note to Respondent by Fax that stated, "I need a proof of claim."

97. Respondent did not communicate to Ms. Craven in writing the scope of the representation and the basis or rate of the fee and expenses for which Ms. Craven would be responsible.

98. After May 15, 2008, Respondent failed to communicate with Ms. Craven.

99. Respondent did not file the Proof of Claim for Ms. Craven until October 21, 2008. Respondent maintains that the filing of the disclosure statement and the plan of reorganization voted for by Ms Craven with the claim explicit in each document fulfilled the purpose of the Proof of Claim and, if the plan were approved by the court, would have resulted in a favorable resolution for Ms. Craven.

100. Respondent did not communicate with Ms. Craven regarding the status of her Proof of Claim for over 6 months. Respondent contends that in late July of 2008, Ms. Craven obtained separate counsel, Jeff Sandell, which action prohibited direct communication. Prior to that time, the communication related to the pleadings including the vote on the plan of reorganization.

101. On September 3, 2008, the bankruptcy trustee filed a Motion to Approve Sale of Real Property.

102. On October 21, 2008, Respondent filed a Response to Trustee's Motion to Sell New Mexico Real Property on behalf of his clients, the debtors Phil and Teresa Stonich, by attaching Proof of Claim forms on behalf of creditors including Ms. Craven.

103. The Proof of Claim Respondent filed on behalf of Ms. Craven was for $236,000.

104. Respondent failed to communicate to Ms. Craven that he filed the Proof of Claim.

105. On October 22, 2008, Ms. Craven attended a bankruptcy court hearing and learned from the bankruptcy trustee that Respondent had not filed a Proof of Claim for her as he previously had promised and for which he had charged Ms. Craven $900.

106. Were this matter to proceed to a contested hearing, the State Bar would offer evidence that if Respondent filed a Proof of Claim on October 21, 2008, that information was not known on October 22, 2008 to the bankruptcy trustee or to Ms. Craven. Were this matter to proceed to a contested hearing Respondent would dispute this and contend that the Trustee knew or should have known based on the disclosure statement, the plan of reorganization, the title company report and the creditors own proofs of claim submitted earlier. This fact dispute was not resolved at the hearing. Therefore the Hearing Officer was not able to find that either fact in this paragraph was proven.

107. On October 22, 2008, Ms. Craven, reasonably believing that Respondent had not filed a Proof of Claim for her as promised, filed a Proof of Claim on her own for $492,000.

108. On March 6, 2009, the State Bar of Arizona sent to Respondent a screening letter regarding his conduct in the present matter.

109. On April 21, 2009, Respondent paid Ms. Craven $900.

COUNT FOUR (File no. 09-0562 – Wilker)

110. The parties have agreed to incorporate herein by this reference the consent provisions of Count Two and Three above as if more fully set forth herein.

111. William and Betty Wilker ("the Wilkers") bought land sold to them by Phil Stonich, Teresa Stonich and/or Agua Negra and/or Yamanoha.

112. Phil Stonich, Teresa Stonich and/or Agua Negra later agreed to take back the land in exchange for a promissory note payable to the Wilkers for $155,100.

113. Neither Mr. Stonich, Mrs. Stonich nor Agua Negra paid the Wilkers in accordance with the terms of the promissory note.

114. On December 13, 2007, Respondent entered into a written agreement to represent Phil and Teresa Stonich, and Agua Negra, in connection with their status as debtors in Chapter 11 Bankruptcy Proceedings ("Stonich Bankruptcy" and "Agua Negra Bankruptcy").

115. Respondent conducted a telephonic conference call between Respondent, Phil and Teresa Stonich, the Wilkers and other creditors in the Stonich Bankruptcy and/or the Agua Negra Bankruptcy on approximately May 14, 2008.

116. During the foregoing telephonic conference call, Respondent offered to represent the Wilkers and file a Proof of Claim for the Wilkers in the Stonich and Agua Negra Bankruptcy cases for a fee of $900.

117. On May 17, 2008, at Respondent's instructions, the Wilkers direct deposited into Respondent's bank account $900.

118. Respondent did not communicate to the Wilkers in writing the scope of the representation and the basis or rate of the fee and expenses for which the Wilkers would be responsible.

119. After May 17, 2008, Respondent failed to communicate with the Wilkers.

120. Respondent did not file the Proof of Claim for the Wilkers until October 21, 2008. Respondent maintains that the filing of the disclosure statement and the plan of reorganization voted for by the Wilkers with the claim explicit in each document fulfilled the purpose of the Proof of Claim and, if the plan were approved by the court, would have resulted in a favorable resolution for the Wilkers.

121. Respondent did not communicate with the Wilkers regarding the status of their Proof of Claim for over 6 months. Respondent contends that in late July of 2008, the Wilkers obtained separate counsel, Jeff Sandell, which action prohibited direct communication. Prior to that time, the communication related to the pleadings including the vote on the plan of reorganization.

122. On September 3, 2008, the bankruptcy trustee filed a Motion to Approve Sale of Real Property.

123. On October 21, 2008, Respondent filed a Response to Trustee's Motion to Sell New Mexico Real Property on behalf of his clients, the debtors Phil and Teresa Stonich, by attaching Proof of Claim forms on behalf of creditors including the Wilkers.

124. The Proof of Claim Respondent filed on behalf of the Wilkers was for $236,000.

125. Respondent failed to communicate to the Wilkers that he filed the Proof of Claim.

126. On October 22, 2008, Ms. Craven attended a bankruptcy court hearing and learned from the bankruptcy trustee that Respondent had not filed a Proof of Claim for the Wilkers as he previously had promised and for which he had charged the Wilkers $900.

127. Were this matter to proceed to a contested hearing, the State Bar would offer evidence that if Respondent filed a Proof of Claim on October 21, 2008, that information was not known on October 22, 2008 to the bankruptcy trustee or to Mr. Wilker. Were this matter to proceed to a contested hearing Respondent would dispute this and contend that the Trustee knew or should have known based on the disclosure statement, the plan of reorganization, the title company report and the creditors own proofs of claim submitted earlier. The Hearing Officer was not able to find that either Respondent's or the Bar's assertion of fact in this paragraph was proven.

128. On April 13, 2009, the State Bar of Arizona sent to Respondent a screening letter regarding his conduct in the present matter.

129. On April 21, 2009, Respondent paid the Wilkers $900.

COUNT FIVE (File no. 09-0293 – Craig-Bolze)

130. On March 23, 2007, Mrs. Betty R. Craig-Bolze ("Mrs. Bolze") hired Respondent to represent her in connection with property ownership and Residential Trust issues regarding the residential property located at 4113 East Sahuaro Dr., Phoenix AZ (the "property"). (TR 91:1-5)

131. Mrs. Bolze paid Respondent the agreed flat fee inclusive of costs of $10,000 on March 23, 2007.

132. Mrs. Bolze informed Respondent that her deceased husband, Duane Bolze ("Mr. Bolze"), who also had been her trusted lawyer, had asked her to sign her interest in the property to a trust he created (the "trust"). Were this matter to proceed to a contested hearing, the State Bar would offer evidence that Mr. Bolze deceived and defrauded Mrs. Bolze into signing away her interest in the property. Were this matter to proceed to a contested hearing, Respondent would contend that Mrs. Bolze did not read the trust document prior to signing. This fact dispute was not resolved by evidence at the hearing.

133. Mrs. Bolze informed Respondent that her deceased husband was of sound mind at the time he persuaded her to sign the trust, and that he deliberately deceived and defrauded her into signing the trust. Respondent contends he was not informed of this until after the filing of the complaint. At the hearing Respondent characterized Mrs. Bolze's statements to him on this subject as, "It was a growing recollection of her husband's deceit." (TR 92:14) Otherwise this fact dispute was not resolved at the hearing.

134. In the trust document each of the 17 pages of substantive content began a new article, and none of those pages bore Mrs. Bolze's signature or initials. Were this matter to proceed to a contested hearing, the State Bar would contend that the trust document bore obvious signs of fraud. Were this matter to proceed to a contested hearing Respondent would

contend that the trust document arguably bore signs of fraud and Mrs. Bolze did not ever read the document before signing. This dispute was not resolved through evidence at the hearing.

135. It was obvious that the trust document was prepared in such a way as to easily substitute new pages for the original pages after Mrs. Bolze signed the one signature page without her being the wiser.

136. On January 29, 2008, Respondent filed suit on behalf of Mrs. Bolze against various defendants for "Declaratory Judgment; Quiet Title; [and] Injunctive Relief".

137. In his Complaint, Respondent failed to allege that Mr. Bolze deceived and defrauded Mrs. Bolze. Were this matter to proceed to a contested hearing, Respondent would contend that Mrs. Bolze did not read the document so that fraud was not capable of being proven.

138. In his Complaint, Respondent alleged that Mr. Bolze suffered from oxygen "depravation" (*sic*) for which he was prescribed oxygen and that his condition was exacerbated by his failure properly to connect his oxygen breathing apparatus.

139. Respondent alleged further that Mr. Bolze's failure properly to connect his oxygen breathing apparatus contributed to uncharacteristic behavior marked by confusion, fear and reduced competency. Were this matter to proceed to a contested hearing, Respondent would contend that this was to show that Mr. Bolze's health was such as to show that the husband did not intend to deprive her of the residence and the title should be quieted in her. Respondent also testified that he thought a quiet title action was the appropriate document to file, "And not to impugn a 40-year lawyer's reputation, with no - - on something that she admitted throughout she never read." (TR 96:13-18) Respondent said he told Mrs. Bolze that Respondent did not believe her husband was a crook.

140. Respondent did not allege a cause of action in his Complaint for Declaratory Relief or for a Declaratory Judgment.

141. On February 28, 2008, the defendants alleged to be the primary parties in interest (the "defendants") filed their Answer.

142. On April 8, 2008, the defendants filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c), Ariz.R.Civ.P ("A.R.C.P.") (the "motion").

143. In their motion, the defendants asserted that a motion pursuant to Rule 12(c), A.R.C.P., tests the sufficiency of the Complaint and that the factual allegations in the Complaint are deemed to be true.

144. In their motion, the defendants asserted that in Respondent's Quiet Title action, he admitted that the trust owns the property and that Mrs. Bolze did not own the property.

145. In their motion, the defendants asserted also that Respondent insinuated in the Quiet Title action that the defendants committed fraud but did not plead the elements of fraud with particularity as required by Rule 9(b), A.R.C.P.

146. On April 11, 2008, the defendants served their Disclosure Statement pursuant to Rule 26.1, A.R.C.P.

147. Respondent requested an enlargement of time by which to file his response to the defendants' motion, to May 19, 2008.

148. On May 5, 2008, the court granted Respondent's request for an enlargement of time by which to file his response to the defendants' motion, to May 19, 2008.

149. On May 19, 2008, Respondent filed a "Stipulation" to the effect that the parties agreed that he may have an additional enlargement of time by which to file his response to the defendants' motion, to May 23, 2008. The reason that Respondent sought the "Stipulation" was that his office suffered a computer crash from April 28-30, 2008.

150. On May 21, 2008, Respondent filed his response to the defendants' Rule 12(c) motion. He asserted in his response that he properly pled the Quiet Title action, that the Complaint did not allege fraud thereby rendering irrelevant Rule 9(b) A.R.C.P., and that the Complaint states a cause of action that ought not be dismissed.

151. On May 27, 2008, the defendants filed their reply to Respondent's response to the motion.

152. In their reply, the defendants contended that Respondent apparently believed that the motion was a Motion to Dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(6), A.R.C.P., when, in fact, it was a Motion for Judgment on the Pleadings under Rule 12(c), A.R.C.P.

153. In their reply, the defendants contended further that the two types of motions alluded to above are assessed according to different legal standards and, under the standards applicable to Rule 12(c) motions, the defendants' motion should be granted.

154. On June 13, 2008, the court issued an order setting oral argument on the motion for July 2, 2008.

155. On July 2, 2008, Respondent appeared for oral argument by telephone, and the parties stipulated on the record that Respondent should file an amended complaint.

156. On July 2, 2008, the court issued an order that if Respondent filed an amended complaint by July 11, 2008, the defendants' pending motion would be deemed moot.

157. On July 11, 2008, Respondent filed an amended complaint ("amended complaint"), which rendered moot the defendants' pending motion.

158. Respondent's amended complaint alleged only one count, for Quiet Title.

159. In his amended complaint, Respondent alleged that Mr. Bolze "may have inadvertently created a cloud on the title" of the property. Respondent testified at the hearing that an internist friend of Respondent's gave him the idea that Mr. Bolze's oxygen deprivation may have caused him to cloud the title. Mr. Bolze had Mrs. Bolze sign a quitclaim deed, quitclaiming her interest in the property to the trust. (TR 99:1-15)

160. On July 17, 2008, the defendants filed a new Motion for Judgment on the Pleadings ("new motion") pursuant to Rule 12(c), A.R.C.P.

161. In their new motion, the defendants argued that Respondent's amended complaint was even more defective than his original one.

162. Respondent's deadline to respond to the new motion was August 5, 2008.

163. Defense counsel served the defendants' new motion on Respondent by mail to Respondent's address listed on Respondent's amended complaint.

164. The new motion was returned to defense counsel because the address Respondent listed on his amended complaint was incorrect. At the hearing Respondent testified that he had moved his law office to Yuma on July 1, 2008. (TR 100:18-22)

165. Defense counsel or his office staff contacted Respondent or his office staff and obtained Respondent's agreement to accept service of the new motion by FAX and to return a signed acceptance of service form acknowledging receipt of the new motion.

166. Defense counsel sent the new motion by FAX to Respondent several times, and he or his office staff attempted to contact Respondent or his office staff several times to confirm receipt of the new motion and to inquire into the status of the signed acceptance of service form.

167. Through an exchange of written correspondence between Respondent and defense counsel, the latter agreed that July 25, 2008, was the service date on which defense counsel sent the new motion to Respondent by FAX, thereby establishing August 13, 2008, as Respondent's response deadline.

168. On August 13, 2008, Respondent wrote to defense counsel denying that he "officially" accepted service of the new motion until July 30, 2008.

169. On August 13, 2008, Respondent advised defense counsel that he needed an enlargement of time by which to respond to the new motion because of a computer crash.

170. Defense counsel acceded to Respondent's request and granted Respondent an extension to August 20, 2008 to respond to the new motion.

171. On August 20, 2008, Respondent filed a Motion to Enlarge the time for him to respond to the new motion ("Motion to Enlarge"). At the hearing Respondent could not remember why he filed another motion for enlargement of time. (TR 106:14-21)

172, Respondent's Motion to Enlarge was pursuant to Rule 16, A.R.C.P.

173. Rule 16, A.R.C.P., pertains to pretrial conferences, scheduling and management.

174. In Respondent's Motion to Enlarge, he argued that his office suffered a computer crash and that extending the time for him to respond to the new motion would allow time to conduct a settlement conference. But at the hearing Respondent said that the computer crash occurred in April, 2008 and he and his office staff were still recovering from that crash in August, 2008 and were even still recuperating from that crash as of December, 2009. (TR 105:16 through 106:13)

175. On August 22, 2008, the defendants filed an objection to Respondent's Motion to Enlarge ("objection").

176. In their objection, the defendants recited the dilatory practices in which Respondent engaged in connection with postponing filing a response to the new motion.

177. In their objection, the defendants alluded to the similar dilatory practices in which Respondent engaged in postponing filing his response to the defendants' motion in connection with the original complaint.

178. In their objection, the defendants pointed out to the court that Respondent had not yet even served a Disclosure Statement pursuant to Rule 26.1, A.R.C.P.

179. In their objection, the defendants demonstrated that in the time it took Respondent to write letters and motions relating to his requested postponements of the deadlines by which to respond to the motion and new motion, he could have filed the response already.

180. The court allowed Respondent until August 29, 2008, by which to file a response to the new motion.

181. On August 28, 2008, Respondent filed his response to the new motion.

182. Respondent entitled his response, "Plaintiff's Response to Defendants' Motion to Dismiss".

183. Respondent's response began: "Against the cacophony of white noise, the discordant, acerbic blend of attorney whining, together with discourteous conduct all around, Plaintiff Betty R. Craig-Bolze nevertheless respectfully submits..." This Hearing Officer finds this statement to be even more offensive in light of Respondent's testimony at the hearing when he was questioned about his requests for extensions of time to respond to defendants' first Motion for Judgment on the Pleadings. "THE HEARING OFFICER: And the reason given for the stipulation was that your office had suffered a computer crash from April 28th to the 30th. MR. COOK: Yes, sir. All attorneys we dealt with during that time were, I think, most accommodating." (TR 97:21-25) Respondent's explanation of these offensive comments at the hearing was that he was also referring to himself. (TR 117:9 through 119:23) The Hearing Officer did not believe his explanation. Respondent impressed the Hearing Officer as a very intelligent person who does not communicate well with others. He certainly knew his words were meant to criticize his opposing counsel. If anything, opposing counsel had been extremely patient with Respondent's dithering. His characterization of opposing counsel's conduct in the case was, based on the record before this Hearing Officer, a blatant inaccuracy.

184. Respondent attached to his response a document purporting to be an affidavit that he prepared for Mrs. Bolze to sign.

185. The "affidavit" was prepared from Mrs. Bolze's handwritten notes to Respondent in which she expressed opinions about the validity of her lawsuit and the defendants' defenses to that suit.

186. The "affidavit" included Mrs. Bolze's comments, conclusions, observations and questions about her case.

187. On September 4, 2008, the defendants filed their reply to Respondent's response to the new motion and demonstrated, as before, that Respondent did know the difference between a Motion for Judgment on the Pleadings pursuant to Rule 12(c), A.R.C.P., and a Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted pursuant to Rule 12(b)(6), A.R.C.P.

188. On October 23, 2008, the court granted the defendants' new motion.

189. On October 23, 2008, the court further ordered the defendants to lodge a form of judgment with the court by November 17, 2008.

190. On October 31, 2008, the defendants lodged a form of judgment with the court and filed their affidavit of attorney fees in which they sought an award of $7,048.00 in legal fees and $191.00 in taxable costs.

191. Respondent failed to file an objection to the defendants' form of judgment in which they sought attorney fees of $7,048.00 and $191.00 in costs. At the hearing Bar Counsel acknowledged that the failure to object to the form of the judgment did not prevent Mrs. Bolze's from appealing the judgment, but it prevented her from appealing the amount (not the fact) of attorney fees. (TR 121:4 through 122:18)

192. On December 5, 2008, the court entered judgment in favor of the defendants and against Mrs. Bolze dismissing the amended complaint and awarding $4,500.00 in attorney fees and $191.00 in costs.

193. On December 26, 2008, Respondent filed a Notice of Appeal to the Arizona Court of Appeals.

194. Respondent's Notice of Appeal stated that he appealed not only from the judgment entered by the court on December 11, 2008 but, also, from the form of judgment that the defendants lodged with the court pursuant to the court's order of October 23, 2008.

195. On February 3, 2009, Respondent filed a "Notice of Withdrawal of Counsel of Record" in Superior Court without complying with relevant rules of procedure for withdrawing as counsel of record in a pending matter.

196. On February 6, 2009, the Arizona Court of Appeals entered an order that Mrs. Bolze's filing fee of $280.00 was due by February 23, 2009, and that her opening brief was due 40 days from the date of the order.

197. On February 18, 2009, the defendants served a Notice of Deposition and Subpoena Duces Tecum on Mrs. Bolze by which they scheduled Mrs. Bolze's debtor's examination for March 31, 2009.

198. Neither Respondent nor Mrs. Bolze paid the Court of Appeals filing fee by February 23, 2009. (TR 123:17-24)

199. On March 5, 2009, the Court of Appeals entered an order dismissing the appeal as abandoned.

200. Mrs. Bolze retained new counsel to assert a legal malpractice claim against Respondent.

201. Respondent's professional liability insurer accepted Mrs. Bolze's claim and paid her a settlement of a sum which Respondent characterizes as a moderate portion of her claim.[2] At the hearing Respondent testified that he paid from $25,000 to $30,000. (TR 124:18) On further clarification Respondent first testified that he paid most of the settlement, the insurer carrier paid some of it, and the carrier raised Respondent's malpractice insurance premium. (TR 125:22 through 126:11) Respondent then testified that he had been paid $10,000 by Mrs. Bolze. To get her lawsuit against him settled Respondent had to pay his insurance carrier the $10,000 that Mrs. Bolze had paid him, and he had to pay his deductible, and then the insurance carrier "made up the balance" of the settlement. (TR 127:20 through

[2] The parties agreed at the hearing to amend this paragraph of the Tender of Admissions that had originally stated that the insurance carrier paid a $50,000 settlement. (TR 124:8 through 126:22)

128:4) Respondent testified that he did it this way so that the lawsuit settlement would not count against him with his malpractice carrier. He said, "And, yes, I did it to count as a no ding." (TR 128:6) Respondent's counsel indicated at the hearing that the original claim by Mrs. Bolze against Respondent was for hundreds of thousands and that Respondent considered the settlement to be for nuisance value. (TR 129:3-5) The settlement confirms the fact that there was at least potential harm done to Mrs. Bolze by Respondent's mishandling of her underlying lawsuit. (TR 129:5-10)

202. On October 2, 2008, Respondent's one-year probation in State Bar of Arizona matters 06-0426 and 06-0472 began.

203. Were this matter to proceed to a contested hearing, the State Bar would offer evidence that at various times while Respondent represented Mrs. Bolze, he was rude to her, verbally abused her and hung up the phone on her in mid-sentence. Were this matter to proceed to a contested hearing Respondent would deny this conduct. This matter was not resolved at the hearing.

Bar Counsel accurately described Respondent, "... as somebody who listens to his client's tell him the broad stroke story of what a case is about, decides for himself what is the best way to go about winning the case, and does so without regard to what his clients are telling him, because he knows better." (TR 134:8-12) But Bar Counsel also clearly stated several times that did not think Respondent was in any way dishonest. (TR 134:4-14) Instead the point that was proven was that Respondent was not complying with ER 1.2 and the requirement to pursue the client's objectives as long as they were legitimate. Respondent's counsel also accurately described his client's problem as Respondent wanting to get from point A to point Z in representing a client, but leaving his clients behind at points C, D and E. (TR 135:20-24)

Respondent's description of his own conduct was a bit disjointed. A portion of his testimony was as follows: "I know I wasn't paying attention to Bolze. MR. VAN WYCK: You're

talking about Bolze? MR. COOK: Yes, Bolze. I'm trying very hard there, sir. No, I did not listen to her defamation or take seriously that I could approve 9 or 11 badges of fraud against a well-known lawyer that I knew. Now, I know he was a drunk. I knew that. But I tell you what, I - - she did not tell me at the time that he had defrauded her. Quite the contrary. I didn't plead it. All I can say is, look at what I pleaded. And the fact that the court kept coming back and saying, Mr. Cook, you haven't alleged badges of fraud. That's right, I hadn't. Oxygen deprivation or some other polite way to describe his conduct, because I thought that she should have taken him to the State Bar, and told her so, after he was dead, because he clearly did. Goodness sakes, you're talking about a man that - - but she wouldn't do that either. So it's not always as clear." (TR 137:22 through 138:14) This testimony is characteristic of much of Respondent's testimony at the hearing. It is confusing and susceptible of multiple interpretations. Respondent does not clarify why he would have told Mrs. Bolze to report Mr. Bolze to the State Bar. Why was Respondent looking for "some other polite way" to describe Mr. Bolze's conduct?

Finally, when offered an opportunity to explain what he has learned about himself now that he was going through his second disciplinary proceeding, he showed some introspection, "I learned that my conduct in - - and in advising clients is not good. I do not do well in telling them where I am going. But I know and it works." (TR 139:17-20)

COUNT SIX (File no. 09-1020 – Stonich)

204. The parties incorporate herein by this reference the consent provisions of Count Two, Three and Four above as if more fully set forth herein.

205. Prior to December 13, 2007, Teresa Stonich and her husband Phil Stonich were engaged in the business of real estate development.

206. Were this matter to proceed to a contested hearing the State Bar would offer evidence that as of December 13, 2007, the Stoniches had a net worth of approximately $11

million dollars. However, the Stoniches were unable to meet their monthly payments and expenses and the First National Bank of New Mexico was foreclosing on the New Mexico property which the Stoniches/Agua Negra were hoping to develop.

207. Due to delays in development of some of their real estate holdings, and the above referenced cash flow issues, the Stoniches consulted Respondent for legal advice.

208. Respondent persuaded the Stoniches to file for bankruptcy protection.

209. Were this matter to proceed to a contested hearing, Respondent would contend that this took place amid allegations of fraud that the Stoniches took money from Agua Negra in violation of the rights of the First National Bank of New Mexico. By arguing that the Stoniches and Agua Negra were one for all practical purposes, and by placing both Phil and Teresa Stonich and later, Agua Negra in Chapter 11 bankruptcy, these claims in regard to the Stoniches were defeated. These actions allowed for a reasonable workout proposal for the New Mexico property without jeopardizing the Hawaii properties, which was a major objective of the Stoniches in this proceeding.

210. On December 13, 2007, Respondent and the Stoniches entered into a written fee agreement by which the Stoniches agreed to pay Respondent a flat fee of $100,000 plus costs to represent them in bankruptcy matters.

211. On December 14, 2007, Respondent filed in bankruptcy court a "Disclosure of Compensation of Attorney for Debtor(s)" form ("form") which disclosed that Respondent was charging the Stoniches a $100,000 flat fee.

212. The form stated: "In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including" various activities specifically listed thereafter.

213. Among the "all aspects" and specific activities listed in the form for which Respondent charged the Stoniches $100,000 were, "Representation of the debtors in any

dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding."

214. On December 14, 2007, Respondent filed a bankruptcy petition on behalf of the Stoniches ("Stonich case").

215. On December 18, 2007, the Stoniches paid Respondent his $100,000 fee plus the amount of costs Respondent quoted to the Stoniches (a total payment of $21,539.00). Were this matter to proceed to a contested hearing, the State Bar would offer evidence that the Stoniches paid a portion of the fee by using a cash advance from the Arizona Federal Credit Union to purchase a check back dated, at Respondent's urging, to December 14, 2007. Were this matter to proceed to a contested hearing, Respondent would contest the State Bar's evidence.

216. Some of the real property that the Stoniches were trying to develop was held in the name of a company the Stoniches owned named Agua Negra Springs Ranch, LLC ("Agua Negra").

217. On February 1, 2008, Respondent filed another bankruptcy petition on behalf of the Stoniches, although the named debtor in that case was Agua Negra ("Agua Negra case").

218. The Stonich case and the Agua Negra case were jointly administered in bankruptcy court ("joint cases").

219. Respondent proposed reorganization plans in both the Stonich case and the Agua Negra case.

220. Were this matter to proceed to a contested hearing, the State Bar would offer evidence that, in July of 2008, Mrs. Stonich realized that Respondent's reorganization plan was in actuality a liquidation plan that, if approved and finalized, would have left them with little of their assets or property. If this matter were to go to a contested hearing Respondent would contend that the Stoniches were fully informed of the plan of reorganization and signed off on it as did the creditors. The plan allowed them to continue the Hawaii project while selling the

New Mexico property for a profit and otherwise benefited them far better than the attorney who later represented the Stoniches, which resulted in an actual liquidation plan. In any event, Phil and Teresa Stonich were allowed to use $15,000 per month for cash collateral for personal living expenses.

221. Mrs. Stonich consulted new counsel, Jeffrey Sandell, for legal advice. Mr. Sandell also represented creditors in this bankruptcy matter. Were this matter to proceed to a contested hearing, the State Bar would contend and offer evidence that Mr. Sandell's prior representation of a creditor is immaterial to these proceedings.

222. On July 17, 2008, Mr. Sandell entered an appearance in the joint cases.

223. On July 21, 2008, Mr. Sandell filed a Notice of Withdrawal of Respondent's reorganization plans.

224. On July 25, 2008, the bankruptcy judge declined to accept Mr. Sandell's appearance in the joint cases but acknowledged Mrs. Stonich's request to withdraw Respondent's reorganization plans.

225. On July 25, 2008, the bankruptcy judge also *sua sponte* converted the joint cases from Chapter 11 to Chapter 7 cases.

226. On September 26, 2008, attorney Mark Guinta, on behalf of creditor Sova, opened adversary proceedings against Mr. and Mrs. Stonich ("Sova matter"). Were this matter to proceed to a contested hearing, Respondent would contend that he was not responsible for representation of the Stoniches in adversary proceedings. Were this matter to proceed to a contested hearing, the State Bar would offer evidence that Respondent was legally and contractually obligated to represent the Stoniches in adversary proceedings.

227. On October 8, 2008, Mr. Guinta served copies of the Summons and Complaint in the Sova matter on Respondent but Respondent refused to accept service of process on behalf of Mr. or Mrs. Stonich. Were this matter to proceed to a contested hearing Respondent would contend that he had previously negotiated a favorable resolution of the Sova matter with

his attorney Mark Guinta in the disclosure statement and plan of reorganization which resolution would have obviated the need for the adversary proceedings.

228. On October 27, 2008, Mr. Guinta served Mr. and Mrs. Stonich with the Summons and Complaint in the Sova matter.

229. Mrs. Stonich notified Respondent that she and Mr. Stonich had been served with the Summons and Complaint in the Sova matter but Respondent failed to file an Answer on their behalf.

230. On December 23, 2008, Mr. Guinta filed an Application for Entry of Default and Notice of Clerk's Entry of Default ("Application") against Mr. and Mrs. Stonich in the Sova matter.

231. Mr. Guinta served Mr. and Mrs. Stonich, and Respondent with the Application.

232. Respondent still failed to file an Answer on behalf of Mr. and Mrs. Stonich in the Sova matter.

233. On December 26, 2008, the bankruptcy court notified Mr. and Mrs. Stonich that a default had been entered against them in the Sova matter.

234. Mrs. Stonich notified Respondent that a default had been entered against her and Mr. Stonich in the Sova matter.

235. Respondent still failed to file an Answer on behalf of Mr. and Mrs. Stonich in the Sova matter.

236. On December 29, 2008, Mr. Guinta lodged a form of judgment against Mr. and Mrs. Stonich with the bankruptcy court in the Sova matter.

237. On December 29, 2008, Respondent filed a Notice of Appearance and Request for Notice in the Sova matter on behalf of Mr. and Mrs. Stonich.

238. On December 29, 2008, Respondent filed a Motion for Enlargement of Time ("Motion") in Which to Plead in the Sova matter on behalf of Mr. and Mrs. Stonich.

239. In his motion, Respondent alleged that "Mr. Cook has just been retained as of today's date as attorney for Debtors and Defendants in this adversary proceeding . . . ."

240. From January 1-January 24, 2009, Mrs. Stonich continually called or e-mailed Respondent expressing her concern over whether Respondent was properly representing her in the Sova matter.

241. From January 1-January 24, 2009, Respondent either personally or through his assistant told Mrs. Stonich not to worry, to be calm, that Respondent was filing motions, that there was no need to attend court, and that Respondent handled everything with the judge in the Sova matter.

242. On January 24, 2009, Respondent told Mrs. Stonich that she did not retain him to represent her in the Sova matter until December 29, 2008.

243. Prior to January 12, 2009, or at any time, Respondent failed to obtain a ruling from the bankruptcy judge regarding his Motion for Enlargement of Time in Which to Plead in the Sova matter on behalf of Mr. and Mrs. Stonich.

244. On January 12, 2009, the bankruptcy judge signed and entered a default judgment against Mr. and Mrs. Stonich in the Sova matter in the principal sum of $250,000.00 plus interest allowed by law, and further declared the debt nondischargeable in bankruptcy.

245. On January 16, 2009, Respondent filed a Motion to Set Aside Default Judgment ("Motion to Set Aside") on behalf of Mr. and Mrs. Stonich in the Sova matter.

246. Respondent's Motion to Set Aside failed to comply with applicable rules of procedure for such motions.

247. On January 21, 2009, Respondent filed an Answer on behalf of Mr. and Mrs. Stonich in the Sova matter.

248. Beginning on January 27, 2009, Mrs. Stonich sought new counsel in connection with the Sova matter.

249. On February 5, 2009, Mrs. Stonich retained attorney Michael Walker to represent her in connection with the Sova matter.

250. Mr. Walker charged Mrs. Stonich a fee of $20,000.00.

251. Mr. Walker tried to obtain Respondent's signature on a Substitution of Counsel form, but Respondent failed and refused to sign and return the Substitution of Counsel form to Mr. Walker.

252. Ultimately, Mr. Walker managed to resolve the Sova matter for Mrs. Stonich and obtained for her a full release from and satisfaction of judgment to the extent that the default judgment declared the debt nondischargeable.

253. On November 4, 2008, attorney Lorena Chavez, on behalf of creditor Arizona Federal Credit Union ("AZFCU"), opened adversary proceedings against Mr. and Mrs. Stonich ("AZFCU matter").

254. On November 5, 2008, Ms. Chavez served Mr. and Mrs. Stonich with the Summons and Complaint in the AZFCU matter.

255. Mrs. Stonich notified Respondent that she and Mr. Stonich had been served with the Summons and Complaint in the AZFCU matter but Respondent failed to file an Answer on their behalf.

256. On December 8, 2008, Ms. Chavez filed an Application for Entry of Default and Notice of Clerk's Entry of Default ("Application 2") against Mr. and Mrs. Stonich in the AZFCU matter.

257. Ms. Chavez served Mr. and Mrs. Stonich with the Application.

258. Mrs. Stonich notified Respondent that she and Mr. Stonich had been served with the Application 2 in the AZFCU matter but Respondent failed to file an Answer on their behalf.

259. On December 9, 2008, the bankruptcy court notified Mr. and Mrs. Stonich that a default had been entered against them in the AZFCU matter.

260. Mrs. Stonich notified Respondent that a default had been entered against her and Mr. Stonich in the AZFCU matter.

261. Respondent still failed to file an Answer on behalf of Mr. and Mrs. Mrs. Stonich in the AZFCU matter.

262. On December 9, 2008, Ms. Chavez lodged a form of judgment with the bankruptcy court seeking a declaration that the AZFCU debt was non-dischargeable, and further seeking monetary damages in the principal sum of $23,342.02, plus contract interest of $190.74, plus continually accruing contract interest, plus attorney fees in the sum of $911.00, plus costs of $250.00, plus statutory interest until paid.

263. On December 29, 2008, Respondent filed a Notice of Appearance and Request for Notice in the AZFCU matter on behalf of Mr. and Mrs. Stonich.

264. On December 29, 2008, Respondent filed a Motion for Enlargement of Time ("Motion 2") in Which to Plead in the AZFCU matter on behalf of Mr. and Mrs. Stonich.

265. In his motion, Respondent alleged that "Mr. Cook has just been retained as of today's date as attorney for Debtors and Defendants in this adversary proceeding . . . ."

266. From January 1-January 24, 2009, Mrs. Stonich called or e-mailed Respondent expressing her concern over whether Respondent was properly representing her in the AZFCU matter.

267. From January 1-January 24, 2009, Respondent either personally or through his assistant told Mrs. Stonich not to worry, to be calm, that Respondent was filing motions, that there was no need to attend court, and that Respondent handled everything with the judge in the AZFCU matter.

268. On January 24, 2009, Respondent told Mrs. Stonich that she did not retain him to represent her in the Sova matter until December 29, 2008.

269. Respondent failed to obtain a ruling from the bankruptcy judge regarding his Motion for Enlargement of Time in Which to Plead in the AZFCU matter on behalf of Mr. and Mrs. Stonich.

270. On January 29, 2009, Respondent filed a Motion to Set Aside Default Judgment ("Motion to Set Aside 2") on behalf of Mr. and Mrs. Stonich in the AZFCU matter.

271. Respondent's Motion to Set Aside 2 failed to comply with applicable rules of procedure for such motions.

272. Respondent's Motion to Set Aside 2 asserted that a Judgment by default was entered against Mr. and Mrs. Stonich on December 9, 2008, when in fact a default but not a default judgment had been entered on that date.

273. Beginning on January 27, 2009, Mrs. Stonich sought new counsel in connection with the AZFCU matter.

274. On February 5, 2009, Mrs. Stonich retained attorney Michael Walker to represent her in connection with the AZFCU matter.

275. Mr. Walker charged Mrs. Stonich a fee of $20,000.00.

276. Mr. Walker tried to obtain Respondent's signature on a Substitution of Counsel form, but Respondent failed and refused to sign and return the Substitution of Counsel form to Mr. Walker.

277. Because Respondent failed and refused to sign and return the Substitution of Counsel form to Mr. Walker, on February 18, 2009, Mr. Walker had to file an Application for Substitution of Counsel with Client Consent on behalf of Mrs. Stonich[3].

278. The bankruptcy judge granted Mr. Walker's Application for Substitution of Counsel on February 20, 2009.

[3] By this time, Mr. and Mrs. Stonich were divorced and Mrs. Stonich reverted to her name Teresa Marie Cerniglia. For the sake of consistency and ease of reference, she is referred to herein as Mrs. Stonich.

279. Mr. Walker obtained a stipulation to set aside default against Mrs. Stonich, which the court granted on February 20, 2009.

280. On March 4, 2009, Mr. Walker filed an Answer on behalf of Mrs. Stonich in the AZFCU matter.

281. On September 22, 2009, Mr. Walker obtained a stipulation to dismiss the AZFCU matter against Mrs. Stonich.

282. Mr. Walker resolved the AZFCU matter for Mrs. Stonich and on September 23, 2009, the bankruptcy judge entered an Order dismissing the AZFCU matter against her only, with prejudice.

283. Prior to and/or during the course of the Stonich case and the Agua Negra case, a legal issue arose as to whether money in the approximate sum of $1,000,000 belonged to Mr. and Mrs. Stonich and/or their bankruptcy estate, or Agua Negra and/or its bankruptcy estate.

284. Were this matter to proceed to a contested hearing Respondent would contend that he advised throughout that the distinction between Agua Negra and the Stoniches for the purpose of bankruptcy was not a viable difference, that there was no distinction for tax or bankruptcy purposes as Phil and Teresa Stonich were the sole members of the LLC. It could be considered a disregarded entity and Phil and Teresa were Agua Negra. The monies were at least commingled, with $300,000 being held as custodians for Vera Solovyow, other portions belonging to the bankruptcy estate of Stonich/Agua Negra, Vomeros et. al., and First National Bank of New Mexico. The bankruptcy estates of Agua Negra and Stonich owed most if not all to creditors and that the proper and legal action was to place the proceeds in a separate account and disclose such to the court. This was done.

285. Were this matter to proceed to a contested hearing, the State Bar would offer evidence that the distinction between the Stonich bankruptcy and the Agua Negra bankruptcy was real, there was a real conflict between them and, therefore, Respondent had a conflict of

interest in representing both of them. The State Bar would offer evidence that, as a result of the existence of the legal issue as to ownership of the aforementioned sum of money, Mr. and Mrs. Stonich, their creditors and/or their bankruptcy estate, and Agua Negra, its creditors and/or its bankruptcy estate, had competing claims to and responsibility for payment of that money.

286. During the entire period referenced above, Respondent represented both Mr. and Mrs. Stonich and/or their bankruptcy estate, and Agua Negra and/or its bankruptcy estate.

287. On June 23, 2009, Respondent filed an Application for Attorney or Other Professional Compensation seeking $266,815.31.

288. On July 10, 2009, Mrs. Stonich filed an Objection to Respondent's Application for Attorney or Other Professional Compensation seeking $266,815.31.

289. On July 14, 2009, the bankruptcy trustees filed Objections to Respondent's Application for Attorney or Other Professional Compensation seeking $266,815.31.

290. On July 15, 2009, the AZFCU filed an Objection to Respondent's Application for Attorney or Other Professional Compensation seeking $266,815.31.

291. On September 16, 2009, Respondent entered into a joint recommendation with the interested parties by which they recommended that the court approve the amount already paid for Respondent's fees and expenses of $101,039.00 and that Respondent make no other claims of any kind for attorneys fees and expenses.

292. On September 22, 2009, the bankruptcy judge granted the aforementioned joint recommendation.

293. Respondent submits he remains the attorney of record for Phil Stonich with respect to the above allegations regarding AZFCU and that he successfully defended Phil Stonich in this matter.

SUMMARY OF COUNT SIX

This is the most difficult Count to summarize because in crucial parts of the recitation of facts the parties have been unable to agree. At the hearing the parties attempted to categorize Respondent's conduct in this Count by ER violation. The most serious violation was found to be ER 1.7, conflict of interest. However, in the context of the facts of Count Six the alleged conflict is not easy to describe. Bar Counsel explained that Respondent should have realized that two entities were involved, 1) Phil and Teresa Stonich and 2) Agua Negra. If the one million dollars Agua Negra borrowed was in the Agua Negra bankruptcy estate, then the creditors of Agua Negra would be competing for that sum, but would not have to compete with creditors who were only creditors of the Stoniches, but not creditors of Agua Negra. If the one million dollars was in the Stonich bankruptcy estate (if the Stoniches were found to have withdrawn the money from Agua Negra) the Agua Negra creditors would have to compete with all the creditors of the Stoniches, thereby reducing the Agua Negra creditors' share of the money. (TR 177:16 through 179:4) Respondent's counsel reiterated that Respondent admitted the conflict at least to the extent that he should have discussed the potential with his clients and secured their waiver in writing. (TR 167:2-16, 179:5-10)

Respondent's violation of ER 1.1 (competence) is supported by Respondent's filing of motions to set aside defaults in the Sova and Federal Credit Union cases that did not comply with the rules of procedure. (TR 164:10-12) Respondent violated ER 1.2 (not pursuing the client's objectives) and ER 1.4 (communication) by not effectively explaining to the Stoniches that the reorganization plan was a good plan. (TR 157:6-25) ER 1.5 was violated by Respondent not clarifying the scope of his representation of the Stoniches in his fee agreement. The agreement said that for the $100,000 fee Respondent would represent them in adversary proceedings. For a three or four week period in the summer of 2008 the Stoniches had seen another attorney Mr. Sandell and had asked him to represent them instead of Respondent. Respondent thought he had been fired. (TR 151:11). Mr. Sandell

entered an appearance in the joint cases. However, the bankruptcy judge declined to accept Mr. Sandell's appearance. At that point Respondent (who had not formally withdrawn from representation in the bankruptcy cases) should have clarified his role with the bankruptcy judge, before he decided not to represent the Stoniches in the adversary proceedings. (TR 165:13 through 166:20)

Respondent violated ER 3.1 (non-meritorious pleadings) when he had a fee agreement for a flat fee of $100,000 and Respondent submitted a fee application in bankruptcy court for more than $266,000. He also indicated in a pleading in the adversary proceeding that he had just been retained by Ms. Stonich on December 29, 2008, when his earlier fee agreement said he would represent the Stoniches in adversary proceedings. Even if he felt he had been fired the pleading should have more accurately set forth the sequence of events. (TR 180:14 through 181:11)

Respondent's ER 8.4 (d) violation (prejudice to the administration of justice) is also supported by his fee application. Extra court attention was required when the fee application was objected to by both counsel for the creditors and the trustees. An agreement was reached that Respondent would withdraw the application and remain satisfied with the $100,000 original fee. (TR 186:9-15)

CONDITIONAL ADMISSIONS/CONCLUSIONS OF LAW

Respondent conditionally admits that his conduct as set forth above violated Rule 42, Ariz. R. Sup. Ct., ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.7, 3.1, 3.2, 5.3, and 8.4(d), and Rule 53(e), Ariz. R. Sup. Ct. Respondent's admissions are being tendered in exchange for the form of discipline contained in the agreement which is a censure and probation for two years with terms including participation in the Law Office Management Program (LOMAP) and the Member Assistance Program (MAP) and attendance at specific Continuing Legal Education Programs.

Respondent conditionally admits to violating the following ethical rules in the following manners:

1. He failed to provide competent representation to a client, in violation of ER 1.1;

2. He failed to abide by a client's decisions concerning the objectives of representation and adequately consult with the client as to the means by which they were to be pursued, in violation of ERs 1.2 and 1.4;

3. He failed to act with reasonable diligence and promptness in representing a client, in violation of ER 1.3;

4. He failed to: promptly inform the client of any decision or circumstance with respect to which the client's informed consent was required in a manner that the client was able to understand; reasonably consult with the client about the means by which the client's objectives are to be accomplished in a manner that the client could understand; keep the client reasonably informed about the status of the matter; and promptly comply with reasonable requests for information, in violation of ER 1.4;

5. He failed to communicate to the client in writing, before or within a reasonable time after commencing the representation, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible, in violation of ER 1.5;

6. He represented clients when the representation involved a concurrent conflict of interest or a potential conflict of interest, in violation of ER 1.7 without obtaining the necessary written waiver as required by ER 1.7(b);

7. He brought a proceeding, or asserted or controverted an issue therein, without a good faith basis in law and fact for doing so that was not frivolous, in violation of ER 3.1;

8. He failed to make reasonable efforts to expedite litigation consistent with the interests of the client, in violation of ER 3.2;

9. With respect to a non-lawyer employed or retained by or associated with him, Respondent failed to make reasonable efforts to ensure that the firm had in effect measures

giving reasonable assurance that the person's conduct is compatible with Respondent's professional obligations; failed to make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; ordered or, with the knowledge of specific conduct, ratified the conduct of his employee that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer; and knew of an employee's conduct that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer at a time when its consequences could have been avoided or mitigated but failed to take reasonable remedial action, in violation of ER 5.3;

10. He engaged in conduct that is prejudicial to the administration of justice, in violation of ER 8.4(d); and

11. He violated a term of probation in violation of Rule 53(e), Ariz. R. Sup. Ct.

CONDITIONAL DISMISSALS

The State Bar conditionally agrees to dismiss the allegations of the Complaint as to ERs 1.15, 1.16, 3.4(c), 7.3 and 8.4(c), based on evidentiary concerns and in exchange for the agreement.

RESTITUTION

There are no restitution issues to be addressed.

ABA STANDARDS

The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The court and commission consider the *Standards* a suitable guideline. *In re Peasley,* 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994). In determining an appropriate sanction, both the court and the 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. *In re Tarletz,* 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

In this case there are multiple charges of misconduct. "The standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors." (*Standards, p.7; In re Redekar,* 177 Ariz. 305, 868 P.2d 319 (1994)).

The most serious misconduct is Respondent's concurrent conflicts of interest in the Stonich/Agua Negra bankruptcy case implicated in 4 of the 6 counts in the Complaint. In 3 of the counts, Respondent had a conflict of interest in violation of ER 1.7 by representing both the debtors and creditors in the same bankruptcy case without an appropriate written waiver. In the 4th count involving the bankruptcy case, Respondent had a potential conflict of interest in violation of ER 1.7 by representing 2 debtors in a "jointly administered" but not "substantively consolidated" case that may have developed adverse interests.

Given the conduct in this matter, the most applicable *Standards* are *Standards* 4.32 and 4.33 regarding Duties Owed to the Clients.

4.0 Violation of Duties Owed to Clients

4.3 Failure to Avoid Conflicts of Interest

***Standard* 4.32** provides:

Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

***Standard* 4.33** provides:

Reprimand [Censure in Arizona] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Based on the conditional admissions, the presumptive sanction for the admitted conduct under the *Standards* is either censure or suspension. The commentary to these *Standards* indicate that Censure is the more fitting presumptive sanction. Suspension is appropriate when a lawyer knows of a conflict among several clients "but does not fully disclose the possible effect of the multiple representations, and causes injury or potential injury to one or more of the clients." See Commentary to *Standard* 4.32. Censure is more appropriate in cases of negligence where there is no serious injury to a client. See Commentary to *Standard* 4.32. Respondent contends that he had no actual conflict of interest but admits that he should have obtained written, informed consent conflict waivers from all of the involved clients pursuant to ER 1.7(b). While clients in these consolidated cases did arguably suffer harm due to Respondent's actions, the evidence is not clear and convincing that Respondent's conflict of interest caused injury or serious injury to a client. Respondent maintains that the plan of reorganization filed in the Chapter 11 bankruptcy proceeding provided an appropriate resolution for the Stonich/Agua Negra estates and the creditors, that was far better than the eventual liquidation caused by the liquidation process that took place when Respondent was replaced as attorney.

To determine the applicability of these *Standards* in this case, the factors listed in the theoretical framework must be considered.

The Duty Violated

On the basis of the foregoing, Respondent violated duties owed to his clients.

Respondent's Mental State

Respondent was negligent in failing to appreciate that he had concurrent conflicts of interest and in failing to obtain written, informed consents from the affected clients.

Actual and Potential Injury

As a result of Respondent's conduct in the bankruptcy cases, there was potential injury to the clients. The Stoniches tried to dismiss Respondent from representing them and retain new counsel. The bankruptcy judge *sua sponte* converted the Stonich and Agua Negra cases from Chapter 11 to Chapter 7, refused to allow new counsel to appear as counsel of record and refused to allow Respondent to withdraw. The creditors' whom Respondent represented ended up losing the full amount of their investments. However, Bar Counsel admitted that he could not establish by clear and convincing evidence that Respondent's conduct caused this loss. (TR 74:23 through 75:6)

Aggravation and Mitigation

In deciding what sanction to impose the following aggravating and mitigating circumstances should be considered:

Aggravating Factors:

Standard 9.22 (a), prior disciplinary offenses (Informal Reprimand with one year of probation in File No. 04-0713; Censure and one year of probation with participation in LOMAP and MAP in File Nos. 06-0426 and 06-0472); The current case is Respondent's third disciplinary matter. In File No. 04-0713 Respondent "verbally threatened his client and her former boyfriend because he believed that they had failed to pay him in full as promised". (Hearing Officer's Report File No. 06-0426, page 11) In File Nos. 06-0426 and 06-0472 Respondent was censured for not appropriately supervising his staff and for improperly revealing information about his client to third parties. In defending a client in a civil action Respondent permitted his paralegal to draft an Answer to the opposing party's Complaint. The Answer mistakenly admitted certain allegations in Plaintiff's Complaint. Respondent signed and filed the Answer without reviewing it. The client

terminated Respondent's services before either Respondent or the client discovered the errors in the Answer. Eight months after Respondent's services ended the Plaintiff in the civil action filed a Motion for Summary Judgment based on the admissions in the Answer. The client representing himself failed to respond to the Motion. The Court entered judgment against the client. The client acquired new counsel and moved to set aside the judgment. But in a hearing before the court the client stipulated that his motion to set aside the judgment would be denied. However, later while under oath the client testified that Respondent had instructed him to lie about his net worth in September 2004. When Respondent learned of his client's accusation Respondent wrote a letter to the Department of Homeland Security claiming that this client was involved in criminal activity and that his client and the client's wife were non-U.S. citizens. Respondent wrote to the Yuma County Attorney seeking an investigation of his client for perjury and explaining that Respondent had not suborned perjury. Homeland Security and the Yuma Count Attorney's Office did not bring charges on any of these allegations.

The Hearing Officer made the following observations about Respondent in his February 2008 Report, "After watching and listening to Respondent, considering his actions in this case, and history, the Hearing Officer concludes that Respondent is a passionate and somewhat larger than life individual. While there is certainly much room in the law for passionate professionals, there comes with the passion a responsibility to not let it get the best of you. Simply stated there is a line that discipline and good judgment should keep one from crossing. Whether because of medical problems, burnout, or other factors, the Respondent has, of late, let his emotions get the better of his good judgment. Whatever is causing Respondent to act improperly, he needs to get a better understanding and control of it. These infractions can have a cumulative effect. The letters on behalf of Respondent state that he is an honest, conscientious, compassionate, skilled and ethical attorney. Should he continue to exhibit poor judgment, he faces greater sanction. The Hearing Officer suggests to Respondent that he learn

from this experience and take whatever steps are necessary to assure that there is no repetition." (Hearing Officer's Report File Nos. 06-0426, 06-0472, February 21, 2008)

In the instant case this Hearing Officer has similar impressions about Respondent. Most of the current allegations do not involve unprofessional conduct. One allegation concerns not supervising staff appropriately. But by the third time through the disciplinary system this Hearing Officer is concerned whether a censure is an appropriate sanction to protect the public from Respondent. Respondent has been an attorney for forty years and by now he should not be anywhere close to the line on ethical behavior. In the succeeding paragraphs we will discuss his medical condition and other mitigating factors. But this information can only take the disciplinary system so far with Respondent. He is leaving behind a trail of angry clients. He is the common denominator in these cases.

Standard 9.22 (c), a pattern of misconduct; Respondent failed to supervise staff in the prior disciplinary matter and failed to do likewise in the current case.

Standard 9.22(d), multiple offenses (as stated above, Respondent committed several offenses resulting in violations of 15 separate ERs and Rule 53(e));

Standard 9.22 (h), vulnerability of victims; and

Standard 9.22 (i), substantial experience in the practice of law.

Mitigating Factors:

Standard 9.32(b), Absence of a dishonest or selfish motive; The Hearing Officer did not think the Respondent was in any way dishonest. Respondent honestly thought that he had no conflict in representing the Stoniches and the Vomeros, Cravens and Wilkers in the Stonich bankruptcy. Respondent was careless in not assessing the conflict and seeking written waivers.

Standard 9.32(d), Timely good faith efforts to make restitution or to rectify the consequences of his misconduct; In Count One Respondent paid Ms. Termini the $50,000 she had paid him. (TR 16:7) In Counts Three through Five Respondent paid each client the $900 fee they paid him,

after the bar charge had been filed. In Count Two, Ms. Bolze was paid a settlement, but only after she sued Respondent for legal malpractice.

Standard 9.32(g), Character or reputation; The letters submitted in 2008 attest to Respondents reputation for honesty in many years of practice.

Standard 9.32(h), Physical disability; Respondent suffers from "... a neurological condition called Bilateral Trigeminal Neuralgia/Tic Doloreaux, which causes severe, disabling left and right facial pain." (Hearing Officer's Report, File Nos. 06-0426 and 06-0472, page 11)

Standard 9.32(k), Imposition of other penalties or sanctions; the settlement in the legal malpractice claim brought by Ms. Bolze was another penalty for Respondent.

Standard 9.32(l), Remorse. Respondent appeared to the Hearing Officer to be sincerely remorseful. He stated that he had put in place some checks and balances to make sure he does not take on new clients who may not understand him or with whom he may not be able to effectively communicate. (TR 142:21) He does not appear in court alone. He is always accompanied by one or two paralegals. (TR 143:1) He has been counseled by LOMAP and a representative has visited his practice in Yuma. (TR 145:7) Unlike many individuals in the disciplinary system Respondent has returned legal fees (or in Ms. Bolze's case settled with a client) to the affected clients in this matter.

The State Bar's position in the Joint Memorandum was that the Bar was unaware of evidence to support any of the proposed mitigating factors other than absence of a dishonest or selfish motive and would require that Respondent establish the applicability of those factors at the consent hearing. The Hearing Officer has found the above-referenced factors have been established at the hearing.

In evaluating the aggravating and mitigating factors, the Hearing Officer agrees with the parties that they do not justify varying from the presumptive sanction of censure. Respondent was negligent in his conduct in these matters. Even Bar Counsel admitted that the Bar could

not establish by clear and convincing evidence that Respondent's conduct in the Stonich/Agua Negra bankruptcy matter caused losses to the creditors. Ms. Termini received a refund of her $50,000 fee and it is not clear that anything Respondent did caused the result in her lawsuit. Ms. Bolze was compensated by the settlement in her malpractice claim against Respondent. In spite of these facts Respondent has caused too many problems for clients who he was trying to help. The Hearing Officer thinks that this case is a close call between suspension and censure. Censure and probation is the recommendation because Respondent is doing well with probation. (TR 195:15 through 196:9) Extended probation and monitoring by LOMAP and MAP will protect the public and permit Respondent to more effectively serve clients in the future.

PROPORTIONALITY ANALYSIS

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. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 615, 691 P.2d 695 (1984).

In *In re Droeger*, No. 08-0462, Respondent engaged in a conflict of interest by representing a client with interests directly adverse to a will and codicil that Respondent drafted and witnessed for another client. Respondent delayed the probate process and caused additional costs to be incurred against the estate. Respondent violated ERs 1.7, 3.7 and 8.4(d) and accepted an agreement for Censure and viewing of video *Ten Deadly Sins of Conflict.* There was one aggravating factor (9.22(i) and there were two factors in mitigation (9.32(a) and (l)). The mental state was negligent, and there was actual injury.

In *In re Shell*, No. 08-0358, Respondent engaged in a conflict of interest by representing both an individual and family members with concurrent interests in a criminal matter. Respondent further failed to advise his client in writing of the scope of representation. Respondent violated ERs 1.5(b), 1.7 and 8.4(d). He received a censure and one year of Probation (LOMAP/MCLE). There were 4 aggravating factors (9.22(a), (g), (h), and (i)) and one factor in mitigation (9.32(a)). His mental state was negligent and there was potential injury.

In *In re Crane*, No. 05-0336, Respondent engaged in a conflict of interest by obtaining a power of attorney for his client to settle any claims against him while owing a significant sum to Respondent for his legal services. Respondent further failed to safeguard client property when he paid himself his outstanding legal fees without obtaining the client's consent. Respondent violated ERs 1.7, 1.8 and 1.15. He accepted an Agreement for Censure and two years of Probation (MAP/LOMAP and CLE). There were 2 aggravating factors (9.22(h) and (i)) and one factor in mitigation (9.32(a)). The mental state was negligent (actual or potential injury was not discussed in the publicly available reports).

In *In re Gorey*, No. 07-0264, Respondent engaged in a conflict of interest by provided financial assistance to a client in connection with pending litigation. Respondent further failed to obtain his client's informed written consent to the conflict. He violated ERs 1.7 and 1.8(e) and accepted an Agreement for Censure and one year of Probation (CLE). There was one aggravating factor (9.22(i)) and three factors in mitigation (9.32(a), (e) and (l)). His mental state was negligent; no injury was proven.

In *In re Heldenbrand*, No. 04-0495, Respondent engaged in a conflict of interest by representing two clients with divergent interests in the same dispute. Respondent further failed to adequately communicate with the clients before making decisions about the dispute in question. He violated ERs 1.7(a), 1.4(a) and 1.4(b), and accepted an Agreement for Censure. There were two aggravating factors (9.22(a) and (i)) and two factors in mitigation (9.32(b) and (e)). His mental state was negligent, and there was potential injury.

Common to all counts in this case are violations of ERs 1.2 and 1.4. In addition to the foregoing conflict of interest proportionality cases, the parties have alerted the Hearing Officer to the following two recent cases of lawyers who also violated both ERs 1.2 and 1.4, where Censure was imposed as the principal form of discipline.

In *In re Adelman*, No. 08-1680, Respondent filed an unverified disclosure statement and served improper discovery requests and motions. He violated ERs 1.2, 1.3, 1.4, 3.2, 3.4, 4.4 and 8.4(d). Respondent accepted an Agreement for Censure and one-year of Probation (LOMAP). There were two aggravating factors (9.22(d) and (i)) and two factors in mitigation (9.32(a) and (e)). His mental state was negligent, and the publicly available information is silent as to actual or potential injury.

In *In re Struble*, No. 08-1681, Respondent failed to diligently communicate with and represent clients, failed to consult with his client and failed to supervise an associate within his firm which delayed court proceedings and created additional work for other parties. He violated ERs 1.2, 1.3,1.4, 3.2, 5.1(b), 5.1(c)(1), and 8.4(d). Respondent accepted an Agreement for Censure and one-year of Probation. There were two aggravating factors (9.22(d) and (i)) and two factors in mitigation (9.32(a) and (e)). His mental state was negligent and there was no actual client injury.

Based on the *Standards* and case law, the Hearing Officer agrees with the parties that a Censure and Probation are within the range of appropriate sanctions in this case and will serve the purposes of lawyer discipline. The sanction will serve to protect the public, the profession, and the administration of justice; deter similar conduct among other lawyers; preserve confidence in the integrity of the bar; foster confidence in the legal profession and the self-regulatory process; maintain the integrity of the profession in the eyes of the public; and assist in the rehabilitation of an errant lawyer.

CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to serve the aforementioned purposes. Recognizing that it is the prerogative of the Disciplinary Commission and the Supreme Court to determine the appropriate sanction, the Hearing Officer asserts that the objectives of discipline will be met by the imposition of the proposed sanction of a Censure and Probation, and payment of the costs and expenses of these proceedings.

SANCTIONS

The Hearing Officer recommends that on the basis of the conditional admissions contained herein and the facts established at the hearing the appropriate disciplinary sanctions are as follows:

1. Respondent will receive a Censure;

2. Respondent will be placed on Probation for two years, beginning upon entry of a Judgment and Order herein. The terms of Probation shall include the following:

a. Participation in the Law Office Management Assistance Program ("LOMAP") on terms the director of LOMAP deems appropriate but at a minimum to address conduct implicating ERs 1.1-1.5 and 5.3;

b. Participation in the Member Assistance Program ("MAP") on terms the director of MAP deems appropriate but at a minimum to require a Member Assistance Committee monitor regarding professionalism in relationships with clients;

c. Attendance at Continuing Legal Education programs in:

i. electronic filing (preferably in Federal court), at least 3 hours;

ii. civil procedure (program[s] must emphasize or at least include pleading and motion practice), at least 6 hours;

iii. Bankruptcy, at least 6 hours;

iv. Attendance at or viewing a video of the State Bar's CLE program entitled "Ten Deadly Sins of Conflict";

v. civil appeals (at least 6 hours); and

vi. persuasive/effective legal writing (at least 6 hours).

The foregoing CLE hours may be included in, and need not be in addition to, Respondent's annual CLE requirement.

d. 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.

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

f. Respondent will pay all costs and expenses incurred by the State Bar in bringing these disciplinary proceeding. An Itemized Statement of Costs and Expenses from the State Bar is attached as Exhibit A and incorporated herein. In addition, Respondent shall pay all costs incurred in this matter by the Disciplinary Clerk's Office and the Supreme Court.

Dated this 4th day of May, 2010

Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 4th day of May, 2010.

Copy of the foregoing mailed
this 5 day of May, 2010, to:

Robert B. Van Wyck
150 West Dale, Suite 6
P.O. Box 398
Flagstaff, AZ 86001-4539

David Sandweiss
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Deann Barker

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Robert M. Cook, Bar No. 002628, Respondent

File No(s). 08-1815, 09-0240, 09-0293,
09-0366, 09-0562 and 09-1020

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

11/12/09	Computer investigation; Call to US Bankruptcy Court; Prepare memo to Bar Counsel	$ 105.00
11/23/09	Computer investigation (11/23 & 11/25)	$ 52.33
12/10/09	Computer investigation	$ 7.28
01/27/10	Computer investigation; Phone Conversation with Millers' office	$ 17.50
03/17/10	Expert Witness, Dewain Fox of Sherman & Howard LLC	$4,125.00

Total for staff investigator charges	$4,307.11
Total Costs and Expenses for each matter over 5 cases (1 over 5 cases x (240.00)):	$240.00
TOTAL COSTS AND EXPENSES INCURRED	***$5,747.11***

Sandra E. Montoya
Lawyer Regulation Records Manager

3-19-10
Date