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DEC 15 2008

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
JOHNATHAN OLCOTT,)
Bar No. 014859)
)
RESPONDENT.)
_____)

No. 05-2216

DISCIPLINARY COMMISSION
REPORT

This matter came before the Disciplinary Commission on November 15, 2008, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed July 28, 2008, recommending an informal reprimand.¹ The State Bar filed an objection and requested oral argument. Respondent, Respondent's Counsel and counsel for the State Bar were present.

The State Bar argues that the Hearing Officer's findings of fact and conclusions are not clearly erroneous; however, the recommended sanction is inappropriately lenient. The State Bar further argues that the Hearing Officer erred in failing to find a violation of ER 8.4(d) (conduct prejudicial to the administration of justice) and censure or a short-term suspension is appropriate and proportional based on case law.

Respondent argues that the Hearing Officer's findings are not in dispute and accurately reflect the events at issue. Respondent admits that he did not read the fee

¹ The Hearing Officer inadvertently did not recommend costs.

1 applications word for word before signing them for his former partner Cannon.² Under the
2 partnership agreement, Respondent had no control or authority over cases in the Phoenix
3 Office and relied on his partner's forms and staff's assurances that they prepared the
4 elements of the affidavits referring to actual fees and costs based on the filings and the
5 record. Respondent negligently signed the affidavits based on those assurances and the
6 affidavits did not contain false statements related to their purpose of substance.
7 Respondent regrets that he did not read the affidavits or that he did not sign "Jonathan
8 Olcott for Sean Cannon." In addition, the State Bar did not offer any evidence as to the
9 status of the applications and no one has litigated the validity of the affidavits and partner
10 Sean Cannon testified falsely at his disciplinary hearing that he did not handle the cases at
11 issue and that he was regularly present at the office during the relevant time period.
12 Respondent filed a Motion to Consider Post Hearing Evidence, which was denied by the
13 Hearing Officer. Respondent advises that the Hearing Officer's decision was not appealed
14 because Respondent was willing to accept the Hearing Officer's imposition of an informal
15 reprimand.
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17 Decision

18 The nine members of the Disciplinary Commission unanimously recommend
19 accepting and incorporating the majority of the Hearing Officer's findings of fact and
20 conclusions of law, but modify the recommendation to reflect censure and costs instead of
21 informal reprimand.³
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24 ² The Commission considered *Matter of Cannon*, File No. 06-0929 and recommended acceptance
25 of the Agreement providing for censure and two years of probation (LOMAP and MAP) for
26 violating ERs 5.4 and 8.4(d). See final Judgment and Order in File SB-08-0161-D (2008), filed
November 19, 2008.

³ A copy of the Hearing Officer's Report is attached as Exhibit A.

1 The Hearing Officer found that Respondent knowingly violated ER 3.3(a) *Candor*
2 *Toward the Tribunal*; however, the Hearing Officer's Report was confusing in its analysis
3 of the mental state and does not specifically discuss what ABA *Standard* was applied or
4 the degree of injury. See Hearing Officer Report, pp. 11-13. Given that the Hearing
5 Officer specifically found a violation of ER 3.3, which specifically requires a knowing
6 mental state, the Commission determined that the applicable ABA *Standard* is 6.12, and
7 the presumptive sanction is suspension.

8 Additionally, the Hearing Officer erroneously concluded that "the State Bar
9 failed to prove by clear and convincing evidence that Respondent engaged on conduct
10 prejudicial to the administration of justices and Respondent attempted to provide a service
11 for his clients on behalf of his partner." The Commission finds *de novo* that Respondent's
12 filing of a false affidavit is by definition, conduct prejudicial to the administration of
13 justice and a therefore, violation of ER 8.4(d).

14 The Hearing Officer further erroneously concluded that mitigating factor 9.32(a)
15 absence of prior disciplinary offenses⁴ is present and weighs Respondent' prior
16 disciplinary offenses accordingly in determining the appropriate sanction.

18 Conclusion

19 Based on the facts, application of the ABA *Standards* including the additional
20 aggravating factor of prior disciplinary offenses, the Commission determined that censure

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⁴ Respondent was censured and six months probation imposed (TAEPP) in File No. 04-0036, effective 11/04/05 for violating ERs 1.3, 1.4, 1.15 and 8.4(d). Probation was completed on 04/12/06. An informal reprimand and one year of probation (EEP) was imposed in File No. 99-0352, effective 06/29/00 for violating ERs 1.15(a) and (c). Probation was completed on 12/10/02.

and costs is the appropriate sanction.

RESPECTFULLY SUBMITTED this 15th day of December, 2008.

Daisy Flores

Daisy Flores, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 15th day of December, 2008.

Copy of the foregoing mailed
this 15th day of December, 2008, to:

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