

FILED

AUG 19 2009

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY Q. S. D.

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

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

No. 07-2107

DONNA PLATT,
Bar No. 012317

**DISCIPLINARY COMMISSION
REPORT**

RESPONDENT.)
_____)

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on August 8, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed May 20, 2009, recommending censure and two years of probation with the State Bar's Law Office Management Assistance Program ("LOMAP"), restitution, and costs. Both the Respondent and the State Bar filed an objection, which was jointly withdrawn. *See* Joint Notice of Withdrawal of Notices of Appeal and request to vacate Oral Argument filed June 29, 2009.

Decision

Having found no facts clearly erroneous, the nine members of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, two years of probation (LOMAP), restitution, and costs of these disciplinary proceedings, including any costs incurred by the Disciplinary Clerk's office.¹ The amount of restitution and terms of probation are as follows:

¹ The Hearing Officer's Report is attached as Exhibit A.

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\$1,000.00

1. Within 30 days from the date of the final Judgment and Order, Respondent shall contact LOMAP at (602) 340-7313 and submit to a LOMAP examination of her office procedures, including but not limited to, compliance with ERs 5.5, 8.1, 8.4(a), 8.4(c), 8.4(d) and Rules 31, 52 and 53. The LOMAP director shall develop "Terms and Conditions of Probation" and those terms shall be incorporated herein by reference. The probation period is effective the date of the final Judgment and Order and will conclude two years from that date.² Respondent shall be responsible for any costs associated with LOMAP.

3. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the imposing entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The Hearing Officer shall conduct a hearing within 30-days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by

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a preponderance of the evidence.

RESPECTFULLY SUBMITTED this 19th day of August, 2009.


Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 19th day of August, 2009.

Copy of the foregoing mailed
this 19th day of August, 2009, to:

Stanley R. Lerner
Hearing Officer 7V
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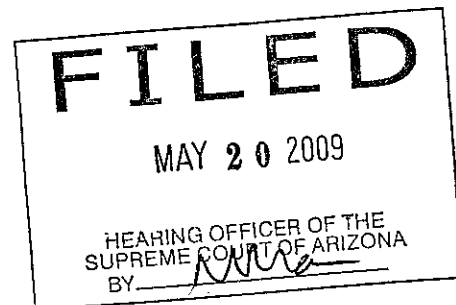
by: Evelyn Liza

/mps

EXHIBIT

A

Stanley R. Lerner, Hearing Officer 7V
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**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

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

DONNA PLATT,
Bar No. 012317

Respondent.

No. 07-2107

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 7V,
Stanley R. Lerner)

FINDINGS OF FACT

Jurisdiction

The Complaint in this matter was filed on November 7, 2008. Respondent filed her Answer on December 4, 2008. A hearing on the merits was held on March 2, 2009, March 3, 2009, and March 4, 2009.

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 October 21, 1988. (Answer ¶ 1.)

Background

1) Ms. Platt was a litigation paralegal for seventeen (17) years for Charles Brewer. She subsequently went to work as a paralegal for Pat McGroder for eighteen (18) months and spent two years at Richard Treon's firm. (Transcript 572:8-25)

2) Ms. Platt graduated from University of Arizona Law School in 1988. (Transcript 574:11-12) During law school, she clerked for Richard Treon (two years) and Tony Palumbo and Chip Harris (one year). (Transcript 574:14-16) After law school, she went to work for Tony Palumbo and Chip Harris at Harris & Palumbo. (Transcript 574:16-20)

3) Donna Platt first practiced with Mr. Treon's firm (three years) and subsequently with Ken Tucker for four years. She then went to work for Dan Cracchiolo at Burch & Cracchiolo for 5 years. She then went out on her own. (Transcript 575:9-25)

4) Ms. Platt has no prior State Bar complaint. (Transcript 577:9-11) She has never had a serious complaint by a client. (Transcript 577:13-16)

5) Ms. Platt has the A/V designation. (Transcript 580:9-10)

6) The exhibits in the case include testimonials from Pat McGroder, Mick LaVelle, Don Kunz and Tony Palumbo. (Transcript 577:17-23) (Exhibits 25, 26, 27 and 30). Richard Treon also testified about his high regard for Ms. Platt and her work. Ms. Platt is highly respected by some of the finest lawyers in town. Mr. Treon testified that Ms. Platt complied with the standard of care.

7) Donna Platt is sixty-eight (68) years old. (Transcript 675:22-23).

8) Ms. Platt does not present a danger to the public or to her clients.

9) Former Chief Justice of the Arizona Supreme Court, Thomas Zlaket testified favorably about Respondent in connection with the issue of time and closing argument when he testified using the words "stunned" and "drastic" when referring to Judge Albrecht barring closing arguments by Respondent. (Transcript 659:11-18)

The Fassl Case

10) When Donna Platt obtained the Fassl case, she represented Esther Fassl, who was still alive, and her children, Joan, Ron, and Charles. (Transcript 580:14-581:3) Esther subsequently died. Ms. Platt filed a wrongful death case on behalf of the three children. (581:16-20). She also filed an elder abuse claim. (Transcript 581:21-22)

11) Joan died 6-12 months before trial. (Transcript 581:23-582:1).

12) The essence of the lawsuit was that Ms. Fassl received substandard healthcare during her residency in a group home owned by Golden Years, a "bed and board" facility. Home

Health Resources, "HHR," a licensed home health agency contracted with visiting nurses to provide medical treatment and supervise all aspects of the patient's healthcare, prepare (physician approved) nursing plans to meet her needs. HHR contracted to provide all the medical care that Ms. Fassl required. (Transcript 582:19-584:18).

13) Ms. Platt originally sued Golden Years. She also sued the doctor involved, Dr. Borjeson. She subsequently added Home Health Resources, who employed some of the nurses and the individual nurses.

14) Respondent discovered that the defendant nursing home, homeowners, and attending doctor were uninsured and essentially uncollectible. (Transcript 390:22 – 391:7; Answer ¶ 9)

15) The defendant nurses were insured by CNA Insurance Company and their employer, HHR, was insured by AIG Insurance Company. (Answer ¶ 9)

16) Golden Years had no insurance, and Dr. Borjeson, also had no insurance. (Transcript 585:19-23)

17) Respondent considered the case "the grosses (sic) case of malpractice, abuse and neglect that the doctors in this case have seen, that I personally have seen" (Ex. 36, p. 9) and a very strong liability and damages case (Transcript 492:10 – 493:7)

18) Prior to the Fassl case, Respondent had not been before Judge Albrecht. (Transcript 374:15-17)

19) Ron Fassl's and Charles Fassl's depositions were taken before trial, and Ron testified in his deposition about Charles loss of consortium claim. (Transcript 466:13-18; 483:11-14)

20) After the December 7, 2004, pretrial conference Judge Albrecht issued a minute entry which contained the following:

a) A firm trial date of May 16, 2005;

- b) Estimated length of trial of 12 days;
 - c) An order for a jointly completed time and witness estimate form, with the form attached;
 - d) Instructions regarding motions in limine and in particular an order that responses were due in 10 days;
 - e) The Court's general daily/weekly schedule for holding trial. (SB Ex. 4)
- 21) Ron had an auto accident the first weekend after trial started. (Transcript 593:23-25)
- 22) Ron Fassl was in terrible condition and had been flown by medical helicopter to Barrows Neurological Institute for head injury treatment. At the time of trial, Ron was barely coherent. Charles was very sick. He had pancreatitis in addition to internal cancer at the time of trial. (Transcript 592:19-593:14)
- 23) The deaths and disabilities of the statutory beneficiaries impacted the value of the case. (Transcript 592:11-16)
- 24) Ms. Verna Lytle, one of the defendants in the Fassl case, testified that Donna Platt was prepared at trial. (Transcript 403:4-5) She did not waste time; rather, "she fired off the questions". (Transcript 404:2-9) Donna Platt did not shuffle papers and appeared to know what she was doing. (Transcript 404:12-15.) Verna said she was terrified she would be hit with a large adverse verdict.
- 25) Joanne Bateman was the plaintiff's nursing expert. Dr. Levine was an expert on geriatric medicine who would testify as to the treatment received by Ms. Fassl. (Transcript 585:19; 587:11) These witnesses had opinions which were precluded from testimony because of Judge Albrecht's rulings on Defendant's Motions in Limine.

26) Mr. Wisbaum, an APS investigator, would have testified regarding his investigation. (Transcript 587:20-25) Mr. Wisbaum was precluded from testifying because of Judge Albrecht's rulings on the Defendant's Motions in Limine.

27) The jury verdict in the matter awarded the Estate of Esther Fassl \$75,000.00. There was a twenty-five (25%) allocation to fault to Golden Years. Paul McKerahan got fifteen percent of the fault. Joan Blackowski got sixty (60%) of the fault. (Exhibit 6, page 22.) (Transcript 626:10-627:25)

The Defendants' Motions in Limine

28) On April 25, 2005, the defendant nurses and HHR each filed various motions in limine, on of which dealt with an Adult Protective Services (herein "APS") report. (Respondent's (herein "R") Ex. 28, PLATT0698-0699)

29) On April 26, 2005, Respondent filed three motions in limine. (R Ex. 28, PLATT0698)

30) On May 5, 2005, the defendants filed responses to the plaintiff's motions in limine. (R Ex. 28, PLATT0698)

31) Respondent was prepared to argue the motions in limine at the pretrial hearing on May 10, 2005 without having filed any responses. (SB Ex. 20, SBA000109)

32) On May 10, 2005, at the pretrial hearing Judge Albrecht stated that:

a) There was a lack of responses to motions in limine, which Donna Platt said she was prepared to argue the motions; (SB Ex. 20, SBA000109)

b) "I do not have oral argument on motions in limine. I will rule on those, and you will be advised of my rulings before the trial date;" (Id.)

c) The trial was to be completed in 12 days; (SB Ex. 17, SBA000081-000083)

d) She would be keeping specific track of each party's allotted time; (Id.)

e) Additional time would only be provided for “unanticipated” events; (SB Ex. 17, SBA000083)

f) The Court’s time estimates for allocated time counted, not the pretrial estimates provided by the parties; (SB Ex. 17, SBA000085)

33) At 8:26 p.m. on Thursday, May 12, 2005, Respondent filed “Plaintiff’s Request for Oral Argument on Motion in Limine Re: Peer Review of Medical Providers” along with “Plaintiff’s Offer of a Reply in Support of Motion in Limine Re: Peer Review of Medical Providers; Exhibit A, Plaintiff’s Request for Oral Argument, or in the Alternative, a Reply.” (R Ex. 33)

34) On May 13, 2005, The Court filed its rulings on all motions in limine (the minute entry is actually dated May 12, 2005). (SB Ex. 5)

35) The Court, noting that no objection had been raised nor responses filed by plaintiffs, granted all of the defendants motions in limine, including preclusion of Wisbaum’s APS report. (Id.)

36) At 4:45 p.m. on Friday, May 13, 2005, the last business day before the May 16, 2005, trial, Respondent filed “Plaintiffs’ Request for Reconsideration, Motion for Oral Argument and Written Response to Defendants’ Motions in Limine.” (R Ex. 34)

37) In that May 13, 2005 pleading Respondent’s preamble stated:

Plaintiff was prepared to argue orally the defendants’ Motions in limine at the pretrial hearing earlier this week and there was not an opportunity to do so. Due to the press of preparing for trial and other exigent matters, and the fact that plaintiff is a sole practitioner, there has not been an earlier opportunity to reply in writing to the Defendants’ Motions.

38) Respondent claims that she believed she had until May 16, 2005, to respond to the defendants’ motions in limine.

39) The Court of Appeals, after reviewing the record, found that Respondent failed to respond to the defendants’ motions in limine. (SB Ex. 49, pp. 2, 24)

40) The Court of Appeals also found that the Court did not abuse its discretion by granting the motions in limine without a response and without oral argument. (Id.) The Hearing Officer concludes that the Court of Appeals did not find Judge Albrecht acted arbitrarily or contrary to the facts of law.

41) The Hearing Officer finds the effect of the grant of the Defendant's motions in limine as detrimental to the Fassl case is speculative on actual harm. For purposes of this matter the State Bar did not establish that had Respondent filed a response, this would have changed the outcome of Judge Albrecht's ruling in the Fassl case. Suffice it to say, Judge Albrecht ruled on the Motions in Limine and stated no response was filed.

The \$450,000 Settlement Offer

42) During the first settlement conference in the Fassl case, AIG offered \$25,000.00 and CNA offered \$150,000.00. (Transcript 597:16-598:17)

43) At the second settlement conference, there was only a joint-offer for \$150,000.00. (Transcript 598:18-599:3)

44) On the Friday before trial, May 13, 2005, Ms. Platt talked with Chris Skelly. He communicated a \$450,000.00 joint-offer from the insured defendants. He told Ms. Platt that someone was supposed to call her back "with a deadline" so she would know when the offer expired. (Transcript 599:10-21) These statements demonstrate a lack of certainty about the \$450,000 offer because it came from Chris Skelly, the mediator during a telephone call on May 13, 2005, rather than from Defendant's attorneys.

45) Chris Skelly allegedly told Donna Platt that she should not "take" the offer and "there's more on the table." (Transcript 600:11-12)

46) Respondent relayed and discussed the offer with Ron Fassl, Charles Fassl, and Nancy Birner. (Transcript 601:17; 602:8; 603:1-9)

47) During the discussion of the offer, Respondent agreed with her clients that it was unlikely that CNA and AIG would offer much more than \$450,000. (SB Ex. 94, SBA000713-714)

48) The clients wanted the case settled. (Id.)

49) Nancy Birner was the only witness presented on the issue of the understanding of the client with regard to the \$450,000 settlement offer and her testimony lacked sufficient certainty as to what instructions were given to Respondent.

50) Respondent stated in her responses to the State Bar that the \$450,000 offer “evaporated” (SB Ex. 77, SBA000655), was “retroactively” withdrawn (Id.), “sudden[ly] disappear[ed]” (SB Ex. 94, SBA000714), and was “withdraw[n] ... without warning” (Id.).

51) Cody Hall, Respondent’s opposing counsel representing the defendant nurses and CNA, asserted in correspondence generated at the time of the civil trial (SB Exs. 7 and 13), and testified at the hearing, that Respondent advised him on May 16, 2005, (the first day of trial) that her clients had rejected the \$450,000 offer.

52) The inferences from the foregoing is that a \$450,000 offer was capable of acceptance.

53) Mr. Hall denies assertion that he had offered to set a deadline for acceptance of the \$450,000 offer. (Transcript 716:11 – 718:9)

54) Cody Hall, however, advised Donna Platt that CNA would continue to talk to her about a settlement. (Transcript 607:23-608:2)

55) Ms. Platt eventually settled her client’s claims with CNA for \$350,000.00. (Transcript 722:15-18)

56) It appears that on May 16, 2005 the Respondent was operating under the assumption that the \$450,000 was always going to be available. The Hearing Officer reaches this conclusion based on Respondent’s and Mr. Treon’s testimony that the practice and common

understanding of lawyers in the community regarding settlement negotiations in personal injury cases.

The Trial and Time Limits

57) Respondent admitted time management during a trial is a critical legal skill. (Transcript 398:1-14)

58) Respondent admitted closing argument is a critical part of a trial. (Transcript 488:18 – 489:6)

59) On May 10, 2005, at the pretrial conference Judge Albrecht said she would keep track of time and the trial would have to be completed within the time she allotted to each of the parties. (SB Ex. 17) Judge Albrecht tracked time and on occasion granted additional time.

60) During the trial at the end of each day¹ Judge Albrecht advised the parties, to the minute, how much time they had remaining. (SB Ex. 18, SBA000097; Ex. 21, SBA000118; Ex. 22, SBA000120; Ex. 23, SBA000125; Ex. 25, SBA000133; Ex. 26, SBA000136; Ex. 27, SBA000139; Ex. 28, SBA000142; Ex. 29, SBA000147; Ex. 32, SBA000167)

61) For scheduling convenience, the defendants were allowed to call defense witnesses in the midst of the plaintiff's case. (SB Ex. 38, trial transcript)

62) On fourth day of trial Judge Albrecht specifically advised Respondent about her time limits and the fact that she had used up half her allotted time. (SB Ex. 23, SBA000123 – 000124)

63) During the first weekend of the trial the defendant nurses (CNA policy) settled with the plaintiffs for \$350,000. (SB Ex. 16)

64) On the tenth day of trial Judge Albrecht told Respondent “spending your precious, fading time on an issue that is well established in this case is beyond the pale. If that’s the way you want to spend the last hour you have, have at it.” (Ex. 31, SBA000154)

65) Later on the same day Judge Albrecht gave Respondent additional time because she was not willing to declare a mistrial. (SB Ex. SBA000166)

66) On the eleventh day of trial Judge Albrecht recessed the trial for the day because Respondent asked for more time to respond to the defendants' trial motions. (SB Ex. 33)

67) At the same time Judge Albrecht told Respondent "You will not be granted additional time. You need to find out how to examine those witnesses and present your closing argument in the time that is necessary." (SB Ex. 33, SBA000181)

68) On the twelfth day of trial Judge Albrecht stated

When we reconvened this morning, you had something over two hours remaining. When we reconvened after this afternoon recess, you had 47 minutes remaining. You have now used another hour and one minute. You have no further time. You used more than that in examining this witness. You no longer have a voice in this trial.

(SB Ex. 35, SBA000190)

69) Judge Albrecht dismissed Ron Fassl's claims because there was no evidence from him, including no deposition testimony. (SB Ex. 35, SBA000198 – 000199; Ex. 36, pp. 6, 12) The Hearing Officer will not speculate about a jury verdict would have been if Ron Fassl's testimony had been offered.

70) The jury returned a defense verdict for the defendant nurses and HHR, who were the only insured defendants. (SB Ex. 8, SBA000059) Accordingly, Ron Fassl's claims were moot as to the Defendants that either settled or which were the subject of a defense verdict.

71) The Court entered judgment for HHR \$28,632.20 in costs against plaintiffs.² (SB Ex. 42, SBA000288)

72) After the appeal, because of additional interest, the clients paid HHR \$33,306.46. (SB Ex. 50, SBA000554)

¹ The Court failed to give the times at the end of the second day, but she gave them first thing the next day.

² The Court also awarded costs to the nurses, but because they settled during trial they did not collect them.

73) Respondent appealed and argued that the Court abused its discretion and violated a constitutional right by not allowing a closing argument. (SB Ex. 46)

74) The Court of Appeals, after review of the trial record, found that Respondent was “well aware of the time limitations and failed to budget her time accordingly.” (SB Ex. 49, p. 11)

75) The Court of Appeals found that the decision by Respondent to call certain witnesses was a strategic decision and that Judge Albrecht had not abused her discretion in ending the Respondent’s case and precluding closing argument. (SB Ex. 49, pp. 11-12)

The Client File

76) Ms. Platt testified:

I anticipated that the clients wanted their file, and I wanted to get it to them as fast as I possibly could.

(Transcript 645:10-12)

77) Respondent always understood that the client had the right to a copy of the file. She testified that she did not delay providing it because of fear of a malpractice claim. (Transcript 683:18-24)

78) Ms. Platt never disputed that the client had the right to a copy of their file. (Transcript 683:25-684:2)

79) A full accounting was provided by Respondent to the clients in June of 2005. (Exhibit 29, Platt 0480 *et seq.*)

80) On May 8, 2007, Alex Cornelius, on behalf of the clients, asked Respondent to notify him in writing how many boxes there were for the client file. (SB Ex. 50, SBA000549)

81) On June 8, 2007, in her response to Alex Cornelius’s letter, Respondent did not mention the client file. (SB Ex. 51, SBA000555)

82) Nicholas Cornelius requested a copy of the client file during a conversation with Respondent about his substituting into the case. (Transcript 138:19 – 139:7)

83) On July 10, 2007, Nick Cornelius sent a copy of a letter signed by the clients in which they state “The complete file needs to be made available for pick-up by Mr. Cornelius immediately, please notify Mr. Cornelius when it is available.” (SB Ex. 52)

84) Mr. Cornelius spoke to Respondent about getting the file. (Transcript 149:16-21)
On July 23, 2007, Respondent sent a letter to Mr. Cornelius in which she stated “I will be copying the file as you requested and sending it to you promptly. This would have been done earlier, except for other unavoidable conflicting deadlines.” (SB Ex. 54)

85) On July 10, 2007, Ms. Platt received a letter from Mr. Nicholas Cornelius, with an attachment, which was a letter from Julia Ecker. This was the first time Ms. Platt had seen the Ecker letter. The letter terminated Ms. Platt’s representation and requested the file. (Respondent’s Exhibit 10) (Transcript 641:4-16)

86). Ms. Platt spoke to Mr. Cornelius after she received the letter. She testified:

[If] [t]he clients want a copy of file, that’s fine with me. I have no problem with that. And my only problem is that I’ve got other things on my plate and I can’t do it this minute. I am going to have to go through it first, and I am going to have to do that myself. And it’s a big file, and it’s going to take some time to do that. But I will get on it as quickly as I can. But make sure you understand that I don’t have a problem with giving you the file.

(Transcript 43:2-25)

87) Ms. Platt further testified:

Q. Well, let me ask you this. In your discussions with Mr. Cornelius, did you every talk about, or did he ever express, was there something going on that necessitated some urgency in getting this file?

A. Oh, I had talked to him about that, and no, he just said the clients want to get the file as soon as they can. Yeah, and he – he professed there was no urgency.

(Transcript 677:25-678:7)

88) On July 23, 2007, Respondent notified her professional malpractice insurance company about the deteriorating relationship with her clients and sought legal advice to avert "complaints being brought against me." (SB Ex. 56)

89) Mr. Cornelius then had some more conversations with Respondent about production of the client file. (Transcript 153:14-22; 155:25 – 156:7)

90) After the request for the file was made in July 2007, the first written communication thereafter from Mr. Cornelius was the letter of October 22, 2007. (State Bar Exhibit 60) (Transcript 648:2-10)

91) Ms. Platt had not heard from Mr. Cornelius from July until October. She testified:

Well, what was happening is – is not much. It was – it was in my mind, it was between every brief and every assignment that I had to do, I had that file laying out to, you know, go through it. And it just went on, kept going on the back burner. You have all good inten[tion]s to get it done it gets on the back burner. Then I get this letter October 22nd, and I see that the bond's not yet taken care of, I get this from the first part of this letter. And that surprised me. I assumed Nick had appointed back in July and that this bond would have been paid. (Emphasis Added.)

(Transcript 648:19-649:4)

92) Mr. Cornelius testified:

I understood I had been retained specifically to get the file. And I understood that I had been – the issue for me was get the file, resolve the issue regarding the outstanding fees in the bond account, and close the matter out. To get the file, I needed the substitution of counsel.

(Transcript 142:7-12)

93) Mr. Cornelius testified:

Q: Mr. Cornelius, earlier in your testimony, and I tried to write this down correctly, you stated in order to get the file, you needed a notice of substitution of counsel, and you also needed that notice of substitution to deal with this bond or cost issue with Mr. Ulrich?

A. I think that is correct. (Transcript 193:7-12)

94) Ms. Platt said that she anticipated that she would hear from Mr. Cornelius as soon as he got the substitution order entered and that the two of them would "sit down and get together and figure out to reasonably take of getting this file copied and over to the clients".

(Transcript 676:15-25)

95) Ms. Platt testified:

Q. Well, okay. I understand that you expected to hear from him and you hadn't in a few months, but you could have called him and tried to move it along yourself, right?

A. **Oh, absolutely, I could have. And, you know, you think you're going to get to that project, and every weekend you put something – you know, you put time away to do that and something else gets you instead.** It ended up getting shoved to the back burner. I must say, one of things is now I'm working without any permanent staff, and it's not like when Candace [sic] was there and your assistant that you could rely on who would remind you. And in the press of other urgent client matters, it just kept getting bumped to the bottom. (Transcript 677:10-24) (Emphasis Added.)

96) The Order of Substitution was not entered by the Court until October 15. Shortly after that, Mr. Cornelius and Mr. Ulrich entered into a Stipulation that authorized Mr. Cornelius to deal with the deposited-funds about week thereafter. (Transcript 194:9-20)

97) On October 22, 2007, Mr. Cornelius sent a letter to Respondent regarding his prior request for the client file and asked her when he might expect to receive the file. (SB Ex. 60)

98) In the early November time frame, Ms. Platt had a conversation with somebody from Mr. Cornelius' office. Ms. Platt testified:

I was told that there was no rush. Nick was in trial, not to worry about it. [I] [I]et him know that we were working on the project, and, you know, have Nick call if he had a problem. (Transcript 679:12-680:6.)

99) A Satisfaction of Judgment was entered by the Court on November 21, 2007. (Transcript 195:5-8)

100) On November 7, 2007, Mr. Cornelius sent a letter to Respondent about his numerous requests for the file, Respondent's promise to provide the file to Quick and Confidential copy services for copying, and a threat to file a motion to compel if the file was not produced. (SB Ex. 61)

101) On November 8, 2007, Mr. Cornelius advised Ms. Platt that he had not been retained to pursue a malpractice case against her. (Respondent's Exhibit 18; Bates No. 617; Transcript 201:23-202:3).

102) On November 19, 2007, Julia Ecker, on behalf of all the clients, submitted a complaint to the State Bar of Arizona. (SB Ex. 64)

103) Exhibit 18 (Bates Platt 0614) is a letter from Donna Platt's office dated November 28, 2007. The letter states, *inter alia*:

The matter you have written about appears important to the client and therefore, to be handled as promptly as circumstances permit. We find nothing in your letter that suggests an urgent deadline or for handling on emergency basis.

104) It goes on to state:

In any event, the task requires the attorney herself to identify which documents are to be made available to complete copying, and cannot be accomplished until she is able to review the documents and safely return to work. (Transcript 167:21-168:25).

105) On November 26, 2007, Respondent's legal assistant sent a letter to Mr. Cornelius in which she asserted that "we" were in the process of copying the files. (SB Ex. 62)

106) In a letter dated November 26, 2007, Ms. Platt's staff advised Mr. Cornelius that Ms. Platt was on medical leave until December 5, 2007. (Exhibit 18, Platt 0616).

107) The letter also states: "Please be advised that Ms. Platt is undergoing a second surgical procedure on November 29, 2007 and is expected to work after December 5" (Transcript 684:3-22)

108) Nancy Birner said she did get framed 8x10 photographs back. (89:23-90:1).

109) On December 12, 2007, Respondent and Mr. Cornelius signed a Statement of Confidentiality with Quick and Confidential. (SB Ex. 65)

110) On January 10, 2008, the State Bar sent Respondent Ms. Ecker's complaint.³ (SB Ex. 66)

111) On January 11, 2008, Mr. Cornelius sent Respondent a letter in which he noted that Quick and Confidential had not received any file from Respondent. (SB Ex. 67)

112) Around January 29, 2008, Mr. Cornelius called and was told that Ms. Platt was out for yet another surgery. (Transcript 686:4-14.)

113) On January 30, 2008, Mr. Cornelius sent Respondent a letter in which he stated regarding a conversation he had with Jim Lee of the State Bar:

a) That Respondent told Jim Lee of the State Bar that she would not provide a date for delivery of the file;

b) That Respondent told Mr. Lee that she was unable to copy the client file because of other client matters. (SB Ex. 69)

114) Exhibit 17 (Platt 0213-214) is a letter from Donna Platt to Nicholas Cornelius dated February 25, 2008 asking him that he confirm that he has made arrangements to procure on behalf of the clients "all exhibits and files from the clerk of the court, and the families photographs and other exhibits presented at trial." She also reiterated that Mr. Cornelius had the availability "of immediate access to the original depositions, voluminous records, and the exhibits". She asked Mr. Cornelius to make arrangements to preserve this evidence to mitigate unnecessary costs. Ms. Platt stated that the ethical rules opinions, as she understood them "would require the clients to pay for any duplicate copies of records otherwise available to them".

³ The delay in sending this was occasioned by initial efforts to resolve the matter without starting a formal investigation by sending the bar charge to a Respondent.

115) On February 29, 2008, Mr. Cornelius sought and received a Temporary Restraining Order against Respondent and her office, which prohibited redaction or destruction of the client file. (SB Ex. 73)

116) On March 10, 2008, after the second hearing on the client file, the Court ordered Respondent to continue review of the file, but to “provide such portion of the client file to the client’s present attorney as possible.”

117) On March 24, 2008, Respondent supplied Mr. Cornelius with the first batch of client file documents, eight months after they were first requested.⁴ (SB Ex. 75; R Ex. 19; Transcript 691:14-692:19)

118) In Respondent’s Exhibit 19 is a letter from Donna Platt dated March 24, 2008. The letter states, *inter alia*: “[t]his letter confirms that eleven large binders, containing significant portions of the Fassl file, have been reviewed in the past two weeks, even despite the crush of re-locating our office and other critical deadlines, removing privileged confidential items concerning another client and unnecessary duplicates, and turned over to Q&C. The records have been scanned, the pages Bates stamped, downloaded to a CD and scheduled for delivery to your office this date by Quick and Confidential”. The letter goes on to state: “[t]his production augments the many other documents, bank records, settlement agreements (with full itemization of client costs), and appeals briefs previously supplied to the clients, or to you and your brother Alex within the past six to eight months. Efforts are continuing to produce the remainder of the files as expeditiously as possible within the deadline of May 2, 2008 as ordered by the trial judge”. (Transcript 691:14-692:19.)

119) In March 2008 Respondent advised Mr. Cornelius for the first time that another client’s file was intermingled in the Fassl file. (Transcript 158:25 – 159:7)

120) On March 31, 2008, Respondent responded to the complaint filed by Ms. Ecker.
(SB Ex. 75)

121) In a letter dated April 29, 2008, Ms. Platt cited Ethics Opinion 93-03 which provides:

[O]nce an attorney has given the client a document, the duty to provide such has been satisfied, and the attorney may properly charge the former client for the actual cost of making additional copies which had been previously provided.
(Exhibit 22, Platt 0203).

122) Respondent's Exhibit 21 (Platt 0206-208) is Mr. Cornelius' letter of April 2, 2008. The letter states:

Thank you for your warning to preserve the clients' family photos and personal records. In light of your several references to my apparent professional discourtesy towards you, please be advised that we have received a small box of documents including photographs, informal interview transcripts and other documents totaling less than one complete banker's box from the Clerk's Office.

123) In that letter Respondent stated that "Efforts are continuing to produce the remainder of the file as expeditiously as possible within the deadline of May 2, 2008 as ordered by the trial judge." (SB Ex. 75, SBA000648)

124) At the May 2, 2008 hearing, the third hearing on the client file, the Court ordered complete production of the client file within thirty days. (SB Ex. 82)

125) On June 1, 2008, Respondent completed production of the client file to Mr. Cornelius and included a list of documents and the dates they were delivered to Mr. Cornelius.
(SB Ex. 86)

126) Mr. Cornelius never told Respondent that there was no hurry in getting the file.
(Transcript 141:24 – 143:12) The Hearing Officer finds that this information is not necessary.

⁴ Respondent had supplied the clients with bank records, settlement agreements, and appeals briefs, but this is the first production of the actual litigation file.

127) Respondent never supplied Mr. Cornelius with a list of documents that Respondent had previously provided the clients. (SB Ex. 81, SBA000671) The Hearing Officer finds that this was not necessary.

128) Ms. Platt took the position in discussions with Mr. Cornelius that she did not have to bear the cost of reproducing documents that clients have been provided. (200:22-201:5). This was a reasonable position, but does not excuse the delay in delivery of the file. Further, Respondent testified that she did not want to spend her money on copies when that money could be used to support other client's cases.

129) One of the things Ms. Platt did to facilitate getting information to the clients was having them obtain the exhibits from court. This was not a substitute for getting the file. It just allowed them to get information faster. (Transcript 687:2-688:4). The Hearing Officer finds that non-delivery of the file in Respondent's possession is not excused by the fact that exhibits were in the possession of the Clerk of the Court.

130) Mr. Cornelius understood that there were medical records, photographs, and the like that were in the trial exhibits, along with deposition transcripts. Mr. Cornelius stated it was his intention to obtain those things from the start. (Transcript 179:5-14).

131) Mr. Cornelius went to court and scheduled a TRO hearing sometime in February. (Transcript 686:6-14)

132) Exhibit 23, Bates pages 159-160, is a minute entry order of May 2, 2008. This is the second hearing in front of Judge Davis. Judge Davis said that he expected the clients would be provided all documents comprising the client's file, except those for which there was a claim for privilege, in hard copy form or electronically, with copies being provided in electronic form within thirty (30) days. (Transcript 698:20-699:11.) The order provides:

IT IS ORDERED that all documents that comprise the clients' file, except for those to which there is a claim of privilege, are to be provided to the clients either in hard copy form or are to be copied electronically with copies being provided in

electronic form within thirty (30) days hereof. As to any documents to which a privilege is claimed, a privilege log shall be provided to plaintiffs within thirty (30) days specifying why the documents are privileged.

IT IS FURTHER ORDERED that the original documents in the file that remain in Donna Platt's possession shall be preserved until the State Bar comes to a decision as to how the documents shall be handled.

133) Ms. Platt complied with Judge Davis's orders.

134) The State Bar Exhibit 84 is a letter dated May 16, 2008. With that letter, Donna Platt had additional parts of the file bates stamped, downloaded to a CD and delivered. She listed the records that were being produced. (Transcript 699:12-24.)

135) In connection with the file turnover, Ms. Platt testified:

Q. As you look back on the document production, the time that it took, do you think you did anything wrong?

A. **You know, when you look at the dates here, it looks like it took a heck of a long time to me to turn over this file. It does. It's shocking how much time that went on. To me, it's shocking. When I look at it, I want to say that somehow in the middle of that I should have been able, one would think, to have gotten more of this done quicker than I did.** But I have to tell you that when I was living through it, I didn't seem to an extra hour to eat or sleep. I never saw Charlie Brewer or Dick Treon have so many things to do when they were single practitioners. I've never seen anybody get accomplished what I did in this time frame. It was beyond ridiculous. (Emphasis Added)

And I have to tell you, though, that when I last talked to Alex Cornelius in May, when we settled the petition for review, the appeal, I never understood from Alex that what these clients wanted was the whole file. I never understood that, because what he told me is that they would let us know what they wanted. So it wasn't until – it wasn't until July that I understood that they wanted it all.

Q. Donna, do you take your ethical responsibility seriously?

A. Way seriously.

Q. Have you ever been accused in any way, shape or form of any ethical violation?

Mr. McCauly: Asked and answered.

The hearing officer: She can answer it again.

The witness: Never. (Transcript 704:1-705:8) (Transcript 400:16-22.)

Client Pictures

136) Ms. Platt's normal office practice is that when she is provided original client photographs, they are copied and the originals are sent back. She had no reason to believe that practice wasn't followed here. (Transcript 701:7-17)

137) Nancy Birner testified that she might be missing approximately 6 photographs. (Transcript 90:6-7)

138) Julie Ecker testified that she supplied one photograph to Donna Platt, but she had not inspected the files that were returned to see if it was there. (Transcript 128:25-129:8)

139) In one of the boxes of materials provided by Ms. Platt, Mr. Cornelius found a framed photograph of Esther Fassl. (Transcript 190:11-18)

140) Nancy Birner testified that she provided Donna Platt approximately 10 photographs. (Transcript 80:25-81:2)

141) She testified that she provided Donna Platt 8 photographs. (Transcript 85:20-24)

142) Nancy Birner testified that she provided Donna Platt 9 photographs. (Transcript 89:22)

143) Nancy Birner testified that she provided Donna Platt several framed 8x10 pictures. She testified that she "did get those back." (Transcript 88:20-25)

144) At the hearing in this matter Respondent returned a photograph to her former clients.

Harm or potential harm to the clients

145) While its true that Judge Albrecht granted the defendants' Motions in Limine and plaintiff's evidence was precluded at trial, it is not clear from the record what Judge Albrecht

would have ruled if the Motions were responded to or even if the jury would have decided differently if the evidence would have been offered. The granting of the Defendant's Motions in Limine certainly had potential harm to Plaintiff's case, but the State Bar has not shown if in fact the results of trial would have been different had Respondent filed her responses.

146) The clients had to pay HHR \$33,306.46, which included \$4,674.26 in interest accrued during the pendency of the appeal. This was a detriment to the remaining Plaintiffs in the Fassl case. But, it is not clear and convincing that Respondent's alleged unethical conduct caused this detriment.

147) The clients have been deprived of original family photographs, which is harm to the family.

148) The clients incurred attorney's fees in attempting to acquire the client file.

Restitution

149) Julia Ecker paid Nick Cornelius \$1,000 to obtain the client file. (Transcript 126:22 – 127:8)

CONCLUSIONS OF LAW

150) Decisions pertinent to judicial discretion and abuse of that discretion is within the sole discretion of the Court of Appeals courts and therefore the Hearing Officer adopts the following findings of the Court of Appeals as they relate to Judge Albrecht's actions in the underlying trial:

a) the time limits she placed on the Respondent were not an abuse of discretion (SB Ex. 49, p. 9);

b) Judge Albrecht did not abuse her discretion when she enforced the time limits (Id.);

(c) Judge Albrecht did not abuse her discretion by denying Respondent a closing argument (SB Ex. 49, p. 11);

d) Judge Albrecht did not abuse her discretion by ruling on the motions in limine based upon Respondent's failure to respond (SB Ex. 49, pp. 2, 25, and 28).

151) The Hearing Officer has considered the findings of the Court of Appeals in light of the evidence presented at the hearing and adopts the following findings based on the decision of the Court of Appeals in conjunction or to supplement his findings of fact supra:

a) The Respondent was aware of the time limitations placed on her (SB Ex. 49, p.11);

b) The Respondent made strategic decisions that resulted in exhausting the time limits imposed by Judge Albrecht (Id.);

c) Respondent decided to use her time questioning other witnesses rather than introducing Ron Fassl's deposition testimony, which lead to Judge Albrecht dismissing Ron Fassl's claims against Home Health Resources and Golden Years. (SB Ex. 49, p. 12) But, the record here does not substitute as a re-trial of the Ron Fassl claims.

d) Respondent did not respond to defendant's Motion in Limine regarding the Adult Protective Services report (SB Ex. 49, p. 24).

e) The Court of Appeals found that Judge Albrecht did not abuse her discretion.

152) These disciplinary proceedings are not a substitute for a malpractice case. *Matter of Curtis*, 104 Ariz. 256, 908 P.2d 472, 477-478 (1995). It is an abuse of discretion for a trial court to act arbitrarily or make decisions unsupported by fact or law. *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181,184, 692 P.2d 1073, 1078-79 (1985). A lawyer's strategic decisions made in good faith are not necessarily malpractice. *Martin v. Burns*, 102 Ariz 342, 429 P.2d. 660 (1967). In the context of the Fassl case, the strategic decision made by Respondent in light of the trial judge's discretion are not necessarily ethical violations. Respondent's decisions may be considered by some as errors of judgment or negligent, but in these proceedings the

proof required is clear and convincing. This Hearing Officer finds ethical violations have not been established.

Ethical Violations

153) The Hearing Officer finds that the State Bar has not proved by clear and convincing evidence that solely by virtue of Respondent's failure to respond to the defendants' Motions in Limine on or before May 13, 2006 that Respondent violated Rule 42, Ariz.R.Sup.Ct., ER 1.3.

154) The Hearing Officer finds that the State Bar has not proven by clear and convincing evidence that by advising Cody Hall on May 16, 2005 that Respondent's clients rejected the \$450,000 joint offer that Respondent violated Rule 42, Ariz.R.Sup.Ct., ER 1.2(a).

155) The Hearing Officer finds that the State Bar has not proven by clear and convincing evidence that Respondents' manner in which Respondent allocated her time during the trial was an ethical violation under Rule 42 Ariz.Sup. Ct., ER 1.1.

156) The Hearing Officer finds that Respondent, by failing to not timely surrender documents and by unreasonably failing to provide the client file and then only upon court order, violated Rule 42, Ariz.R.Sup.Ct., ER 1.16(d).

157) The Hearing Officer finds that Respondent, by failing to return certain photographs, violated Rule 42, Ariz.R.Sup.Ct., ER 1.15(a).

158) The Hearing Officer finds that the State Bar has not proven by clear and convincing evidence that Respondent's conduct in delaying the production of the client file evidences violations of Rule 42, Ariz.R.Sup.Ct., ER 8.4(c).

159) The Hearing Officer finds that Respondent's statements to the State Bar that the \$450,000 offer "evaporated," was "retroactively" withdrawn, "sudden[ly] disappear[ed]", and was "withdraw[n] ... without warning" does not evidence by clear and convincing evidence a violation of Rule 42, Ariz.R.Sup.Ct., ER 8.4(c). But, the Hearing Officer has concerns that the

testimony of Respondent about the \$450,000, reveals a mindset that the \$450,000 would always be there. The Hearing Officer cautions Respondent that when a settlement offer is countered the offer has disappeared and one should not assume the offer will be available.

160) The Hearing Officer finds that Respondent's failure to promptly deliver the client file was conduct prejudicial to the administration of justice in violation of Rule 42, Ariz.R.Sup.Ct., ER 8.4(d).

SANCTION ANALYSIS

ER 1.16(d) (Client File)

Standard 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system. The evidence in this case does not support a "knowing" violation.

Standard 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. The Hearing Officer finds that the Respondent's state of mind was one of negligence in producing the client's files.

ER 1.15(a) (Safekeeping Property)

Standard 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. The Hearing Officer finds that Respondent was negligent in protecting and delivering the client's property.

ER 8.4(d) (Misconduct)

Standard 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

Standard 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

There was sufficient evidence to overcome the "knowing" element.

Standard 6.27: Respondent acted unreasonably under the circumstances.

Proportionality

In re Counce, 01-2359, relied on by the State Bar, does not apply.

In re Weidner, 03-0016, relied on by the State Bar, does not apply.

Aggravation

Standard 9.22 (b) dishonest or selfish motives was not proven by clear and convincing evidence

The Hearing Officer does not believe that Respondent was trying to avoid a malpractice claim by delaying production of the file, but the Hearing Officer believes that Respondent's conduct was an unreasonable delay nonetheless.

But, the Hearing Officer is concerned that there was a violation of Standard 9.22 (g): refusal to acknowledge wrongful nature of conduct.

Respondent did not take responsibility for her failures and blamed the problems on others and her being overworked. Her attempt to divert Mr. Cornelius's effort to obtain the client file from her by accusing him of errors and delay in acquiring the trial exhibits and asserting that he could cobble the file together from other sources is further evidence of her unreasonable delay.

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

Respondent was a paralegal before becoming a lawyer. (Transcript 359:2-7) Respondent has been a lawyer for almost twenty years.

Mitigation

Standard 9.32 (a) absence of a prior disciplinary record is satisfied.

RECOMMENDED SANCTION

Of the three central ethical breaches of: (1) rejecting the settlement offer; (2) not completing her clients' case within the time limits imposed by Judge Albrecht and not responding to the Motions in Limine; and (3) the refusal to timely provide the clients with their file and property, only the failure to timely provide the file and deliver client's property was proven by clear and convincing evidence. The failure to respond to the defendants' motions in

limine and “running out of time”, are still deserving of some consideration in determining the appropriate sanction.

It is not clear that Respondent, without authority, rejected the settlement of \$450,000. Only in retrospect can it be said that it deprived the clients \$100,000, subjected them to the anguish of reliving their mother/grandmother’s suffering and death, took time away from their normal lives, and forced them to pay the costs out of their settlement recovery against the nurses. The jury could have awarded more than that which was offered, which in that event there would be no complaint at all.

Respondent’s failure to heed the Court’s cautioning regarding trial time management, both pre-trial and at trial, does not rise to the level of an ethical violation by clear and convincing evidence. The conduct which was a cause for the dismissal of Ron Fassl’s claims potentially subjected Respondent to potential damages for malpractice, but does not raise to the level of incompetence as an ethical violation.

Respondent failed to timely provide the clients with their complete file. Her own testimony that it was “shocking” how long it took for her to deliver the file shows her deference to her own needs over those of her clients. The fact that after the clients’ retention of counsel, repeated phone calls and letters, a complaint to the State Bar, and a court ordered injunction, the Respondent still delayed production of the file. The clients expended significant time and money on a matter which should have been resolved in reasonably short order. Respondent’s excuses are not compelling and in no way relieved Respondent of her ethical duties. Additionally, her attempt to blame Mr. Cornelius for the delay in the production of the file lacks insight into her conduct.

The Hearing Officer recommends:

- 1) That the Respondent be censured;

2) Respondent shall be placed on probation for a period of two years, under the following terms and conditions:

a) Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) at 602-340-7313 within 30 days of the date of the final judgment and order. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, compliance with ERs 5.5, 8.1, 8.4(a)(c) and (d), Rules 31, 52 and 53. The Director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be incorporated herein by reference. The probation period will begin to run at the time of judgment and order and will conclude two years from the date that Respondent has signed the "Terms and Conditions of Probation." Respondent shall be responsible for any costs associated with LOMAP.

b) 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.

c) In the event that Respondent fails to comply with the foregoing terms of probation, and the State Bar of Arizona thereof receives information, Bar Counsel shall file a Notice of Non-Compliance 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 practical time, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached, and, if so, to recommend an appropriate action and response. 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 non-compliance by a preponderance of the evidence.

3) Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court of Arizona, and the Disciplinary Clerk's Office in this matter.

Respondent be ordered to pay restitution to Julia Ecker in the amount of \$1,000, and costs of these proceedings.

DATED this 20th day of May, 2009.

Stanley R. Lerner / NM
Stanley R. Lerner
Hearing Officer 7V

Original filed with the Disciplinary Clerk
this 20th day of May, 2009.

Copy of the foregoing mailed
this 21st day of May, 2009, to:

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