

**BEFORE A HEARING OFFICER**

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

Nos. 00-0258, 00-0698

**WALTER E. MOAK,**  
Bar No. 004849

**HEARING OFFICER'S REPORT  
AND RECOMMENDATION**

RESPONDENT.

**PROCEDURAL HISTORY**

The State Bar of Arizona filed its three-count Amended Complaint against Respondent on July 27, 2001. On May 21, 2002, the parties filed their Stipulated Facts and List of Disputed Issues ("Stipulated Facts"), wherein the parties identified Paragraphs 19, 33-35, 45 and 57 of the Amended Complaint and aggravation and mitigation evidence as the only disputed facts in this proceeding. A hearing on the disputed facts was held on June 28, 2002. On August 7, 2002, the parties filed a Stipulated Supplement to the Record ("Supplement"). On August 7, 2002, the State Bar filed an additional response to Hearing Officer's request to supplement the record. On August 9, 2002, the parties filed Proposed Findings of Fact, Conclusions of Law, and Recommendations ("Proposed Findings").

**FINDINGS OF FACT**

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on April 30, 1977.

***COUNT ONE (File No. 00-258)***

2. On or about August 6, 1997, a married couple, Renee and Jacob Luster (the "Lusters"), retained Respondent to represent them in a personal injury claim arising out of a traffic accident which occurred on August 3, 1997. Jacob Luster was the driver of the vehicle in which the Lusters were riding. Renee Luster was in the passenger seat.

1 3. Respondent agreed to represent the Lusters. Respondent interviewed both Renee  
2 Luster and Jacob Luster and was assured by Renee that she did not complain of any  
3 conduct on the part of Jacob. Respondent advised both Renee and Jacob that, if a  
4 subsequent claim arose against Jacob, Respondent would not be able to represent either  
5 party. On approximately November 14, 1997, Respondent withdrew from representing  
6 Jacob. That withdrawal was accomplished by letter dated November 14, 1997, to  
7 Jacob E. Luster, in which Respondent stated: "You and Renee informed me that you  
8 wanted me to continue to represent Renee and that [Jacob] would find another attorney."

9 4. Respondent filed suit on behalf of Renee Luster on June 2, 1998, against James  
10 Pender, the driver of the other vehicle.

11 5. James Pender filed an answer on July 6, 1998. In his answer, the defendant  
12 claimed Jacob Luster was a non-party at fault.

13 6. Respondent took the defendant's deposition, and determined that the case could  
14 not be pursued on Renee Luster's behalf without bringing Jacob Luster into the suit as a  
15 defendant. Respondent thereafter-notified Renee Luster by letter dated October 27, 1998,  
16 that Respondent would be withdrawing from her representation, and that she needed to  
17 hire another attorney. On approximately October 29, 1998, Renee Luster telephoned  
18 Respondent with respect to a separate lawsuit brought in the name of James Pender.  
19 During that telephone conference, Respondent again advised Ms. Luster that he could no  
20 longer represent her and that she would have to find another attorney due to the conflict  
21 of interest that had developed with regard to Jacob Luster. Thereafter, Ms. Luster  
22 informed Respondent that Mr. Luster would consent to Respondent's continuing  
23 representation of Ms. Luster. By letter dated March 4, 1999, Respondent responded  
24 "Jacob must discuss with his own attorney whether he will give me permission to  
25 continue to represent you even though a civil complaint is filed against him on your  
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1 behalf.” [SF Exh. C] The March 4 letter went on to state that Mr. Luster had not yet  
2 discussed the matter with his replacement counsel, Ron Huser. Accordingly, Respondent  
3 gave Ms. Luster the following advice: “[I]t is my recommendation that the present  
4 lawsuit be dismissed and a new lawsuit be filed by you without counsel naming both  
5 James Pender and Jacob Luster as defendants. After Luster is served with the suit papers,  
6 he will have to deliver them to his attorney and you can send Jacob non-uniform  
7 interrogatories asking him if he has any objection to Moak Law Office, P.C. representing  
8 you in the action against him and Pender. If he does object, you will have to get another  
9 attorney or prosecute the matter on your own.”

10 7. On March 24, 1999, respondent’s office sent a letter to Renee Luster, asking her to  
11 call Respondent about re-filing the lawsuit. State Bar’s Exhibit 1. On April 23, 1999,  
12 Respondent and Theresa Goering, counsel for defendant, James Pender, filed a stipulation  
13 to dismiss the Pender action without prejudice.

14 8. In his response dated April 3, 2000, to the State Bar of Arizona, Respondent stated  
15 that he sent a letter to Renee Luster on April 28, 1999. Ms. Luster later claimed she  
16 never received that letter. The letter was mailed to the same address as had been used in  
17 previous correspondence to Ms. Luster. Respondent sent 19 letters to Renee Luster at the  
18 same address, and all of these letters were delivered and received by Ms. Luster.  
19 Respondent never received notice of a change of address from Ms. Luster.

20 9. Respondent sent a letter to Ms. Luster on approximately June 14, 1999,  
21 transmitting copies of records received from Dr. Mark A. Letellier.

22 10. By letter dated April 23, 1999, Theresa Goering requested that Respondent contact  
23 her to accept service for Pender. Theresa Goering notified Respondent on two occasions  
24 prior to August 1999 that she would accept service of the second complaint. Respondent  
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1 does not recall any other communications with Ms. Goering with respect to acceptance of  
2 service.

3 11. The statute of limitations on Renee Luster's case ran on August 3, 1999.

4 12. On August 13, 1999, Respondent filed a second complaint naming Renee Luster  
5 as the plaintiff and Jacob Luster and James Pender as defendants. Prior to doing so,  
6 Respondent checked court records and discovered that Ms. Luster had failed to sign and  
7 file the complaint, which had been sent to her with the letter dated April 28, 1999.

8 13. Respondent signed Renee Luster's name on the second complaint without her  
9 knowledge or express consent. Respondent believed Ms. Luster would not object to such  
10 signature and that signing the complaint was in Ms. Luster's best interests.

11 14. Mr. Luster had not consented to being sued by his prior counsel and there is no  
12 evidence Respondent considered his interest before suing him on Ms. Luster's behalf.

13 15. Ms. Luster thereafter hired new counsel, Paul Sacco.

14 16. Renee Luster did not become aware of a second complaint filed by Respondent  
15 until her new counsel reviewed the file at the court.

16 17. On November 10, 1999, counsel for defendant Jacob Luster filed a motion to  
17 dismiss based on the statute of limitations. The motion to dismiss was granted on  
18 January 28, 2000.

19 18. On March 23, 2000, judgment was entered against Renee Luster in favor of James  
20 Pender for costs in the amount of \$86.00.

21 19. Renee Luster lost her claim against defendants Jacob Luster and James Pender.  
22 Renee Luster, represented by Paul Sacco, filed a malpractice action against Respondent  
23 on January 17, 2001.

1 20. Respondent and Ms. Luster have settled that malpractice action. As a condition of  
2 settlement, Respondent paid Ms. Luster Twenty Thousand and 00/100 Dollars  
3 (\$20,000.00).

4 ***COUNT TWO (File No. 00-00698)***

5 **La Paz Accident**

6 21. On or about June 11, 1995, Julian L. Reed was involved in a car accident in which  
7 he was struck by a commercial trucker in La Paz County, Arizona (the "La Paz  
8 accident"). Mr. Reed retained Respondent to represent him in a personal injury claim  
9 arising out of this accident.

10 22. On or about August 26, 1996, Respondent filed a complaint on behalf of Mr. Reed  
11 in La Paz County captioned *Reed v. Wiegand Button Motor Express, et al.*, CV 96-  
12 000077 ("the La Paz case" or "the La Paz trial").

13 **Interrogatories**

14 23. Early in the La Paz case, Scott Alles, counsel for the defendant, sent Respondent a  
15 set of interrogatories. Uniform Interrogatory No. 3 asked, "Have you ever been a party to  
16 a civil lawsuit." Based on information received from Mr. Reed, Respondent answered  
17 "No." Uniform Interrogatory No. 12 read: "List each injury, symptom or complaint  
18 mentioned in answer to Interrogatory No. 8, which you suffered at any time before the  
19 accident." Respondent answered that interrogatory: "None."

20 24. On November 25, 1996, Respondent submitted his initial disclosure statement on  
21 behalf of Mr. Reed. The disclosure indicated, among other things, that the emergency  
22 room physician admitted Mr. Reed for a CT scan of the head "to rule out closed head  
23 injury. . ." The injuries disclosed included "severe head trauma" and resultant visual  
24 field defect. The injuries listed did not include a "brain injury" and there was no  
25 suggestion that Ms. Reed's cognitive functioning was impaired.

1 25. During the discovery phase of the case, Respondent and Mr. Alles wrote a series  
2 of letters to each other concerning the nature of Mr. Reed's head injury. Mr. Alles was  
3 concerned whether Mr. Reed would be claiming any cognitive impairment as part of his  
4 injuries. Respondent ultimately informed Mr. Alles that this client would be claiming a  
5 "cognitive injury," which consisted of a "visual field" problem, and difficulty adding up  
6 numbers. However, no medical testimony was cited to support this cognitive injury other  
7 than the visual field defect, which was previously disclosed.

#### 8 Gila Accident

9 26. On or about July 17, 1998, Mr. Reed was involved in a second motor vehicle  
10 accident in Gila County, Arizona (the "Gila case" or the "Gila accident"). This accident  
11 occurred after Respondent answered the interrogatories referenced in Paragraph 23.

12 27. On approximately July 21, 1998, Respondent visited Mr. Reed at a convalescent  
13 hospital, to which Mr. Reed had already been admitted. While hospitalized, Mr. Reed  
14 had a CT scan of his head and consulted with Dr. Goodell, who concluded that Mr. Reed  
15 had suffered a closed head injury in the Gila case.

16 28. Respondent prepared a power of attorney for Mr. Reed's signature, which allowed  
17 for Mr. Reed's admission to a convalescent hospital.

18 29. On approximately September 24, 1998, Respondent sent the defendant's insurance  
19 carrier in the Gila case copies of medical records evidencing treatment costing over  
20 \$50,000, and requested that the carrier disclose the policy limits. The attached medical  
21 records stated, in part: "Closed head injury, probable brain stem involvement." One of  
22 the treating doctors noted that Mr. Reed had a closed head injury, and that Mr. Reed had  
23 started experiencing severe tremor and short-term memory loss, anterograde amnesia and  
24 severe headaches.

1 30. In approximately October 1998, Respondent arranged for a neuropsychological  
2 examination of Mr. Reed in connection with the Gila case. The neuropsychological exam  
3 was performed by Dr. Summers, an associate of Dr. Dan Blackwood. Respondent  
4 arranged for the exam, signed a lien form, and exchanged correspondence with Dr.  
5 Blackwood's office reflecting that the exam was being arranged. The notes concerning  
6 the scheduling of the exam indicate that the type of injury or illness noted was "closed  
7 head trauma".

8 31. When Mr. Reed appeared for the exam referenced in paragraph 27 above, Dr.  
9 Summers called Respondent and told Respondent he was concerned that Mr. Reed might  
10 be malingering.

11 32. Dr. Summers' report was sent to Respondent by opposing counsel, who had  
12 obtained the report through use of a release signed by Mr. Reed. In the report, reference  
13 is made to the earlier phone conversation between Respondent and Dr. Summers.

14 33. In or about late October 1998, Mr. Reed was examined in connection with the Gila  
15 case by a neurologist, and was given an MRI for closed head injury.

16 34. On or about November 6, 1998, Respondent filed a complaint on behalf of Mr.  
17 Reed in Gila County captioned *Reed v. Raul Salgado Morales*, CV 98-223-C01.

18  
19 **La Paz Case: Pre-Trial**

20 35. Respondent failed to disclose Mr. Reed's subsequent brain injury to opposing  
21 counsel in the La Paz trial, as required by Rule 26.1, Ariz.R.Civ.P.

22 36. In January 1999, after the second accident, and after Respondent learned that as a  
23 result of that second accident his client was suffering from a probable brain stem injury  
24 and experiencing severe tremors and memory loss, the parties conducted a deposition of  
25 an ophthalmologist disclosed as a witness by Respondent in the LaPaz case. That witness  
26 testified that Respondent was suffering from a "brain injury."

1 37. Respondent had previously disclosed that his client would claim he had a "visual  
2 field" problem, and would himself testify that he had a "cognitive head injury."  
3 However, this was the first time that a medical expert on that issue was disclosed or that  
4 the words "brain injury," were used. Opposing counsel, Mr. Alles, attempted to conduct  
5 additional discovery concerning the claim for a "brain injury" prior to trial. Respondent  
6 opposed those efforts, which were ultimately denied by the trial court. In opposing those  
7 motions, Respondent did not disclose the subsequent accident or the existence of the  
8 medical records in his possession, which attributed his client's brain injury to the second  
9 accident.

10 38. No "tremors" were mentioned in the medical reports disclosed to opposing  
11 counsel in the La Paz case, nor did Mr. Reed exhibit tremors when his deposition was  
12 taken in the La Paz case.

13 39. On March 22, 1999, Respondent filed a motion in limine in the La Paz case,  
14 seeking to exclude as trial evidence other injuries, lawsuits or claims for damages Mr.  
15 Reed may have had. At the time Respondent filed the motion in limine, he was aware of  
16 the second accident in 1998 in Gila County but it had never been disclosed to his  
17 opposing counsel.

18 **La Paz Case: Trial**

19 40. On or about March 23, 1999, the four-day trial began in the La Paz case.

20 41. Mr. Reed exhibited tremors throughout the La Paz trial, including during his  
21 testimony to the jury.

22 42. In ruling on the post-trial motion described below, the La Paz Trial court  
23 subsequently found: "Throughout this trial, this judge observed significant tremors by  
24 the plaintiff (Mr. Reed). The plaintiff's physical appearance would have had an effect on  
25 the jury's damage award." 3/15/2000 Minute Entry.

1 43. Respondent concedes that the trial judge had the best viewpoint from which to  
2 observe Mr. Reed and does not dispute the court's findings regarding the tremors.

3 44. During Mr. Reed's trial testimony, Respondent asked him to "list all of the  
4 different things that you can remember that were wrong with you as a result of this  
5 collision on June 11<sup>th</sup> of '95."

6 45. Mr. Reed testified in the La Paz trial about his present-day injuries resulting from  
7 the 1995 accident as follows: he had a head injury; he has headaches; he is slow with  
8 figures and with his speech; he has memory problems; he hurt his left arm; his vision was  
9 affected; and it would be difficult for him to receive a health card to continue his  
10 employment as truck driver.

11 46. Mr. Reed testified in the La Paz trial that all of his problems were related to the  
12 1995 accident.

13 47. There was an "overlap" between the injuries sustained in the 1995 accident and  
14 the 1998 accident.

15 48. In subsequent proceedings after the La Paz trial, Mr. Reed admitted that he had no  
16 inkling which accident had caused his injuries. Indeed, he admitted that during his  
17 testimony in the La Paz trial, he ascribed some of his present day injuries to the 1995 La  
18 Paz accident, when in fact those injuries had been sustained as a result of the 1998 Gila  
19 County accident.

20 49. Prior to Mr. Reed's testimony in the La Paz case, respondent prepared him for his  
21 testimony, and told him not to volunteer any information unless he was asked a specific  
22 question.

23 50. In his closing argument in the La Paz case, Respondent emphasized the brain  
24 injury and Mr. Reed's physical condition. Although he did not specifically mention the  
25 tremors, he told the jury: "The head injury is the most significant injury. I mean, we can  
26

1 see the effect of that even now, we don't have to be told that he has got some problems."

2 (emphasis added)

3 51. Although Respondent testified at the hearing in this matter that he was referring to  
4 other physical attributes of Mr. Reed (e.g., squinting, straining, looking down during  
5 answers, slowness of speech, holding his head), when he said "we can see the effect of  
6 [the head injury] even now," he admitted that his closing argument was misleading to the  
7 jury.

8 52. On March 26, 1999, the jury returned a verdict in the La Paz case in favor of the  
9 plaintiff, Mr. Reed, in the amount of \$800,000.

10 53. On July 2, 1999, respondent filed a response to the defendant's motion for new  
11 trial. Respondent opposed the motion. In his supporting statement of facts, respondent  
12 continued to argue that Mr. Reed's "brain injury," suffered in the La Paz accident, was  
13 the cause of the present-day injuries to which he testified in the La Paz trial. Respondent  
14 also argued that the extent of these injuries justified the amount of the verdict. At the  
15 time he made that argument, Respondent had still not disclosed the second accident to his  
16 opposing counsel or the Court.

17 **Gila Case: After the La Paz Trial**

18 54. After the La Paz trial, Respondent discussed obtaining a stipulation to dismiss  
19 without prejudice with opposing counsel in the Gila case.

20 55. On June 28, 1999, Respondent submitted a disclosure statement in the Gila case,  
21 including the allegation that Mr. Reed had suffered a head injury in the 1998 accident at  
22 issue in the Gila case.

23 56. Respondent submitted numerous disclosure statements concerning Mr. Reed's  
24 injuries in the Gila County case. Respondent disclosed a closed head injury with  
25 probable brain stem involvement, tremors, headaches, confusion and tooth trauma. Also,  
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1 Respondent disclosed that Mr. Reed had been examined on July 23, 1998, by Dr. Richard  
2 Goodell for a closed head injury and confusion. Dr. Goodell diagnosed symptoms  
3 consistent with a closed head injury, associated concussion, and confusion. Respondent  
4 disclosed that Mr. Reed sought treatment at Orthopedic Center with complaints of severe  
5 tremor, short-term memory loss, and severe headaches. An MRI was performed on Mr.  
6 Reed.

7 57. The disclosure statements Respondent submitted in the Gila County case  
8 demonstrate he was aware of the overlap between the injuries sustained in the 1995 and  
9 1998 accidents.

10 58. Specifically, Respondent admits that he was aware that a closed-head injury had  
11 been diagnosed as a result of Mr. Reed's injuries in the Gila County case, and that he was  
12 aware of this prior to the La Paz trial in 1999.

13 59. On December 3, 1999, Mr. Reed's deposition was taken in the Gila case.

14 60. During the deposition, Respondent corrected Mr. Reed's testimony on the record  
15 to assure full disclosure of the La Paz accident.

16 61. Respondent admits that by the time of the deposition, he had realized that the Gila  
17 County accident should have been disclosed to opposing counsel in the La Paz case.  
18 However, he did not notify the court or opposing counsel at that time.

19 62. After Mr. Reed's deposition in the Gila case, Respondent knew his opposing  
20 counsel would contact Mr. Alles, his opposing counsel in the La Paz case. Respondent  
21 also realized that the jury may have been misled by the tremors, and he advised Mr. Reed  
22 to expect a new trial.

La Paz Case: Post-Trial

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2 63. The La Paz case was appealed. During the course of the appeal, counsel for the  
3 defense, Scott Alles, was contacted by Respondent's opposing counsel in the Gila case  
4 and became aware for the first time of the second auto accident in Gila County, and of the  
5 Gila case in which Respondent represented Mr. Reed.

6 64. Mr. Alles filed a motion with the Arizona Court of Appeals, seeking an order to  
7 suspend the appeal in the La Paz case and re-vest the trial court with jurisdiction.

8 65. Respondent did not file a responsive pleading in the Court of Appeals.

9 66. On December 20, 1999, the Court of Appeals granted Mr. Alles' motion and  
10 directed him to file a motion for relief from judgment in the La Paz case.

11 67. Mr. Alles filed at least five separate motions after jurisdiction was re-vested in La  
12 Paz County.

13 68. On approximately January 24, 2000, Respondent submitted a response to  
14 defendant's motion for relief from judgment under Rule 60(c) Ariz.R.Civ.P. relief from  
15 order, and also a supporting affidavit in the La Paz case. In the affidavit, Respondent  
16 stated that he received a copy of Dr. Summers' report on November 4, 1999, and that he  
17 was not aware prior to November 4, 1999, of the existence of a report by Dr. Summers.

18 69. On approximately January 24, 2000, Respondent also submitted a response to  
19 defendant's motion for relief from final judgment under Rule 60(c)(2)(3) Ariz.R.Civ.P.  
20 Respondent opposed the motion, and argued that there was "nothing in the record to  
21 indicate that Mr. Reed was trembling during the trial." Respondent also argued that  
22 opposing counsel was to blame for respondent's failure to disclose the Gila County  
23 accident, as opposing counsel had failed to exercise "due diligence."

24 70. On approximately January 24, 2000, Respondent also submitted a response to  
25 defendant's independent motion/action for relief from judgment. Again, Respondent  
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1 argued that opposing counsel was to blame for failing to inquire whether Mr. Reed had  
2 suffered any other accidents.

3 71. On approximately March 15, 2000, the trial court in the La Paz case issued a  
4 memorandum decision and order. The court found: "The Defendant did not receive a  
5 fair trial as a result of Plaintiff's intentional non-disclosure of the accident and injuries  
6 occurring after the accident in this case and Defendant would suffer substantial prejudice  
7 if a new trial were not granted." The court ordered a new trial and awarded defendant  
8 attorneys' fees for the trial preparation, trial and post-trial motions.

9 72. Respondent advised Mr. Reed to hire a new lawyer and that Mr. Reed should  
10 consider suing Respondent for malpractice. Greg Davis assumed the representation of  
11 Mr. Reed. Respondent cooperated fully with Mr. Davis during the transition of the file.

12 **La Paz Case: Hearing on Attorneys' Fees**

13 73. On May 25, 2000, the trial court in the La Paz case held a hearing on the attorney  
14 fee issue. One issue at the hearing was whether attorneys' fees should be awarded  
15 against Respondent, Mr. Reed, or both.

16 74. Mr. Reed was represented at the hearing by Mr. Davis, who filed a pleading on his  
17 behalf. Mr. Reed testified at the hearing.

18 75. At the attorneys' fees hearing, Respondent apologized to the court and requested  
19 that all attorneys' fees be charged against him, not against Mr. Reed.

20 76. By minute entry order dated September 19, 2000, the court ordered Respondent to  
21 pay defendants \$31,493.82.

22 77. Respondent paid that amount in full.

23 ***COUNT THREE (File No. 00-0698)***

24 78. Respondent married Marie C. Moak on or about January 12, 1996, and remained  
25 married to her at all times relevant to this Count.

1 79. During the period of representation, as referenced in Count Two, and prior to  
2 November 19, 1999, Mr. Reed informed Respondent that he was in need of money and  
3 was seeking to obtain loans. Mr. Reed discussed the possibility of obtaining a loan from  
4 a specific third party at a rate of 15% per month.

5 80. Respondent advised Mr. Reed that the appeal of the verdict could take several  
6 years, and if he borrowed money at the rate of 15% interest per month, the interest could  
7 consume the entire recovery.

8 81. Mr. Reed did not obtain a loan from that third party.

9 82. Prior to November 19, 1999, Respondent's wife approached Mr. Reed and offered  
10 to loan money to him.

11 83. Thereafter, on three separate dates, Mr. Reed signed promissory notes evidencing  
12 the receipt of funds and promise to repay. A fourth loan on May 6, 2000, was not  
13 memorialized by promissory note. The dates and loan amounts are as follows:

14 Loan of \$5,000.00 on November 19, 1999. This was a cash loan made to Mr.  
15 Reed by Respondent's wife.

16 Loan of \$3,500.00 on December 3, 1999. This was a cash loan made to Mr. Reed  
17 by Respondent's wife.

18 Loan of \$2,000.00 on March 30, 2000. This was a cash loan made to Mr. Reed by  
19 Respondent's wife.

20 Loan of \$2,500.00 on May 6, 2000. The funds for this loan were paid directly to  
21 Shaffer Cornell, Mr. Reed's attorney in another matter.

22 84. Each of the above-referenced loans was memorialized by a promissory note.  
23 Respondent drafted and prepared the promissory notes memorializing the loans. Mr.  
24 Reed signed the promissory notes evidencing receipt of funds and promise to repay.  
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1 85. Mr. Reed, by terms in the promissory notes, was required to repay the loans at  
2 twenty-five percent (25%) per year.

3 86. The promissory notes, drafted by Respondent, authorized Respondent to withhold  
4 funds Respondent receives on behalf of Mr. Reed and repay the loans with those funds.

5 87. Respondent did not instruct Mr. Reed to seek independent counsel concerning the  
6 proposed loan agreements with Respondent's wife.

7 88. Mr. Reed made no interest or principal payments on the loans.

8 89. The loans were ultimately forgiven as part of the settlement of a malpractice  
9 action which Mr. Reed brought against Respondent as a result of the events described in  
10 Count Two.

## 11 CONCLUSIONS OF LAW

### 12 *COUNT ONE*

13 1. The State Bar proved by clear and convincing evidence that Respondent violated  
14 ERs 1.2 (Scope of Representation); 1.3 (Diligence); 1.4 (Communication); 1.9 (Conflict  
15 of Interest); 3.3 (Candor toward the tribunal); 4.1 (Truthfulness); 8.4(c) (Conduct  
16 involving dishonesty, fraud, deceit, or misrepresentation); and (d) (Conduct prejudicial to  
17 the administration of justice).

18 2. Respondent violated ER 1.2 by filing the second complaint without obtaining Ms.  
19 Luster's decision concerning the objectives of representation and failing to consult with  
20 Ms. Luster as to the means by which they were to be pursued.

21 3. Respondent violated ER 1.3 by failing to act with reasonable diligence and  
22 promptness in representing Ms. Luster. Respondent argues he owed no duty to follow  
23 up with Mr. Luster after he sent the April 28, 1999, letter she denies receiving. He  
24 maintains that at that point she was merely a former client. That position is belied by the  
25 fact that on August 13, 1999, after the statute of limitations ran, he forged her name and  
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1 filed a complaint on her behalf purportedly to protect her rights.

2 4. Respondent violated ER 1.4 by failing to keep Ms. Luster reasonably informed  
3 about the status of a matter. She only learned that he filed the second complaint when her  
4 new attorney checked the court records.

5 5. Respondent violated ER 1.9 by representing Ms. Luster in the same or  
6 substantially related matter in which Ms. Luster's interests were adverse to Mr. Luster's  
7 interests without Mr. Luster's consent after consultation.

8 6. Respondent also violated ERs 3.3, 4.2 and 8.4(c) and (d) by knowingly making a  
9 false statement of material fact to the tribunal by filing the amended complaint and  
10 forging Ms. Luster's signature to the verification.

11 7. The State Bar failed to prove by clear and convincing evidence that Respondent  
12 violated ERs 3.2 (Expediting Litigation) and 4.1 (Truthfulness in statements to others).

13 *COUNT TWO (File No. 00-0698)*

14 8. The State Bar proved by clear and convincing evidence that Respondent violated  
15 ERs 3.3 (Candor to tribunal); 4.1 (Truthfulness in statements to another); 8.4 (c)  
16 (Conduct involving deceit or misrepresentation) 8.4 (d) (Conduct prejudicial to the  
17 administration of justice), and Rule 51 (e) (Willful violation of Rule of Court).

18 9. Respondent violated ERs 3.3, 4.1, ER 8.4(c) and 8.4(d) by knowingly making  
19 false statements of material fact and/or law to the court and the jury when he made his  
20 closing in argument in the LaPaz case. At a minimum, Respondent's statements  
21 contained material omissions (i.e., the existence of a subsequent accident and resulting  
22 injuries) which rendered his affirmative statements false and misleading.

23 10. Respondent violated Rule 51(e), Ariz.R.S.Ct. by failing to properly disclose,  
24 pursuant to Rule 26.1, Ariz.R.Civ.P. Mr. Reed's subsequent head injury and resulting  
25 injuries to opposing counsel in the La Paz trial.

1 11. The State Bar failed to prove that Respondent violated ER 51(k), Ariz.R.S.Ct.  
2 (Willfully violating a court order).

3 **COUNT THREE (File No. 00-0698)**

4 12. The State Bar proved by clear and convincing evidence that Respondent violated  
5 ERs 1.7 (b) (Conflict of interest), 1.8 (a) (Prohibited transactions), (e) (Financial  
6 Assistance), and (i) (Acquiring proprietary interest in cause of action).

7 13. Respondent violated ER 1.7(b) by representing Mr. Reed when that representation  
8 may have been materially limited by Respondent's responsibilities to a third party, i.e.,  
9 his wife.

10 14. Respondent violated ER 1.8(a) by knowingly acquiring a security or other  
11 pecuniary interest adverse to Mr. Reed.

12 15. Respondent violated ER 1.8(e) by providing financial assistance to Mr. Reed in  
13 connection with pending litigation.

14 16. Respondent violated ER 1.8(j) by acquiring a proprietary interest in the cause of  
15 action of the litigation Respondent was conducting for Mr. Reed.

16 17. The State Bar failed to prove that Respondent violated ER 8.4(d) by engaging in  
17 conduct that was prejudicial to the administration of justice.

18 **PROPORTIONALITY ANALYSIS**

19 Guidance for determining the appropriate sanction is found in the *ABA Standards*  
20 *For Imposing Lawyer Sanctions* ("Standards"), the decisions of the Disciplinary  
21 Commission and the Supreme Court.

22 As stated in the theoretical framework of the *Standards*, and as recommended in *In*  
23 *re Cassalia*, 173 Ariz. 373, 843 P.2d 654 (1992), cases which involve multiple charges of  
24 misconduct should receive one sanction consistent with the sanction appropriate for the  
25 most serious instance of misconduct. Rather than imposing individual sanctions, multiple  
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1 instances of misconduct should be considered as aggravating factors. Thus, it is  
2 appropriate to determine which instance of misconduct is the most serious and then  
3 determine the appropriate sanction, and treat the other acts of misconduct as aggravating  
4 factors.

5 In this case, it appears the most serious misconduct involves Respondent's conduct  
6 in Count Two, including his failure to disclose the Gila County case to the Court, the jury  
7 or the defense in the LaPaz case, as well as his remarks during closing argument. Section  
8 6.11 of the *Standards* provides that disbarment is generally appropriate when:

9  
10 A lawyer, with the intent to deceive the court, makes a false statement,  
11 submits a false document, or improperly withholds material information, and  
12 causes serious or potentially serious injury to a party, or causes a significant  
or potentially significant adverse effect on the legal proceeding.

13 Section 6.12 of the *Standards* states that suspension is generally appropriate when:

14  
15 A lawyer knows that false statements or documents are being submitted to the  
16 court or that material information is improperly being withheld, and takes no  
17 remedial action, and causes injury or potential injury to a party to the legal  
proceeding or causes them adverse or potentially adverse effect on a legal  
proceeding.

18  
19 The *Standards* define "intentional" and "knowing". "Intent" is defined as "the  
20 conscious objective or purpose to accomplish a particular result." *Standards*, Black Letter  
21 Rules at p. 7. "Knowing" is defined as "the conscious awareness of the nature or attendant  
22 circumstances of the conduct but without the conscious objective or purpose to accomplish  
23 a particular result." *Ibid*. In addition, the Rules of Professional Conduct provide that  
24 "'knowingly' denotes actual knowledge of the fact in question". Preamble to Rule 42, Ariz.  
25  
26

1 R. S. Ct., at p. 492.

2 There is some evidence which suggests Respondent may have acted with intent. For  
3 example, his reference to the head injury in closing argument and his subsequent discussion  
4 about a possible stipulation to dismiss the Gila case. However, he also corrected his client's  
5 deposition testimony in the Gila case, which virtually guaranteed that Mr. Alles, his  
6 opposing counsel in the La Paz case, would learn of the subsequent injury. The State Bar  
7 does not contend that Respondent acted intentionally, and on this record, I cannot conclude  
8 that there is clear and convincing evidence that he did so.  
9

10 Respondent concedes and I find that the evidence in this case does establish by  
11 clear and convincing evidence that he acted knowingly. Respondent was consciously  
12 aware that Mr. Reed had been involved in a second accident in Gila County when the La  
13 Paz trial, on the first accident, took place. Respondent was aware that Mr. Reed had  
14 sustained a head injury, and he considered it serious enough to warrant a  
15 neuropsychological exam. He also knew that as a result of that second injury, Mr. Reed  
16 was exhibiting physical symptoms (tremors), which would be visible to the jury in the La  
17 Paz case. Respondent had knowledge of the attendant circumstances, even if he did not  
18 intend that his failure to disclose the second accident would cause a fraud. Respondent  
19 also knew that his client testified to injuries during the La Paz trial that were attributable  
20 and "overlapping" with his injuries in the Gila County case. Furthermore, Respondent  
21 acted knowingly when he argued in closing that the jury could see for itself the effect of  
22 the head injury.  
23  
24  
25  
26

1 It is irrelevant whether Respondent knew he was violating the Ethical Rules when  
2 he failed to disclose the second accident. Every lawyer is responsible for observance of  
3 the Rules of Professional Conduct. The evidence in this case demonstrates that  
4 Respondent acted knowingly. Therefore, the applicable standard is Section 6.12, which  
5 provides suspension is the presumptive sanction.  
6

### 7 Aggravation and Mitigation

8 Four aggravating factors apply in this case:

- 9 (1) Dishonest or selfish motive (Standard 9.22(b));
- 10 (2) A pattern of misconduct (Standard 9.22(c));
- 11 (3) Multiple offenses (Standard 9.22(d)); and
- 12 (4) Substantial experience in the practice of law (Standard 9.22(i))<sup>1</sup>.

13  
14 The following mitigating factors apply in this case:

- 15 (1) Absence of prior disciplinary record (Standard 9.32(a))<sup>2</sup>;
- 16 (2) Full and free disclosure to disciplinary board and cooperative attitude  
17 toward proceedings (Standard 9.32(e));
- 18 (3) Imposition of other penalties or sanctions (Standard 9.32(k)); and
- 19 (4) Remorse (Standard 9.32(l)).

20 No other aggravating or mitigating factors are present. Of the mitigating factors, the  
21 most significant is (3), the imposition of other penalties or sanctions. Specifically, with  
22

23  
24 <sup>1</sup> The aggravating factor of substantial experience in the practice of law is often offset by the  
corresponding factor of an unblemished disciplinary record during the same time period. *Matter of*  
*Shannon*, 179 Ariz. 52, 68 (1994).

25 <sup>2</sup> While substantial experience in the practice of law can be an aggravating factor, when combined with  
the absence of any prior discipline, it may be considered a mitigating factor. *Matter of Marce*, 177 Ariz.  
26 25, 867 P.2d 845 (1993).

1 regard to Count I and II, Respondent settled two malpractice actions against him for a  
2 total of \$20,000, and with respect to Count II, Respondent had a judgment taken against  
3 him in excess of \$31,000.

4 **Proportionality**

5 With respect to Count One, *Matter of Huser*, Comm. No. 96-1818 is instructive.  
6 In that case, the lawyer filed an answer and signed a stipulation on behalf of an insured  
7 without that person's knowledge or consent. The lawyer did not have authorization to  
8 represent the client and did not have any contact with the client. The Disciplinary  
9 Commission imposed a censure and probation. However, his case also involves a conflict  
10 of interest. Respondent never obtained an effective waiver from Jacob Luster, his former  
11 client, before filing a complaint against him.  
12

13 With respect to Count Two, *In re Fee*, 182 Ariz. 597, 898, 975 (1995) and *Matter*  
14 *of Alcorn and Feola*, 202 Ariz. 62, 41 P.3d 600 (2002) are instructive. In *In re Fee*, the  
15 lawyer failed to advise a settlement judge about a side agreement concerning the fee he  
16 was to be paid out of the client's share of the settlement proceeds. In that case, no one  
17 was injured, the issue was limited to candor to the tribunal. The Supreme Court imposed  
18 a censure.  
19

20 In *Alcorn and Feola*, the respondent lawyers and opposing counsel entered into a  
21 secret agreement that had an adverse effect on the trial. The Supreme Court imposed a  
22 six-month suspension. Although the conduct in *Alcorn and Feola* was intentional rather  
23 than knowing, there was no selfish motive, only a single offense and no pattern of  
24 misconduct. Indeed, the only aggravating factors present were a prior offense (that was so  
25  
26

1 remote in time and facts that the Court discounted it as a factor) and significant experience  
2 in the practice of law.

3 This case involved the same waste of judicial and public resources as *Alcorn and*  
4 *Feola*, but in that case, both sides were involved in the deception. Here, the other party  
5 was an innocent victim who narrowly escaped an \$800,000 judgment. That judgment was  
6 vacated only when a third party, not Respondent, revealed the true facts. Indeed, as Mr.  
7 Alles testified at the hearing, if Respondent's client had accepted the \$300,000 settlement  
8 Mr. Alles' client had offered after the judgment was entered in the La Paz case, the  
9 deception in this case might never have come to light.  
10

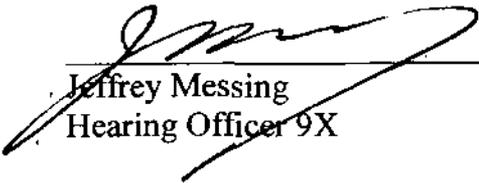
11 In *Alcorn and Feola*, the Respondents were motivated by their unselfish desire  
12 to help their client. They stood to make no personal gain. In contrast, Respondent in  
13 this case was motivated by the potential for personal gain and continued to defend the  
14 validity of the judgment even after the deception was revealed. That selfish motive was  
15 also present in Count Three when he prepared the loan documents to allow his wife to  
16 obtain a 25% return on money lent to his client. The fact that the money was to be  
17 repaid out of the judgment, in violation of E.R. 1.8 (j), undoubtedly play a role in his  
18 decision to defend the La Paz judgment through the post appeal motions. It was only  
19 after the La Paz trial court ordered a new trial and awarded fees that the Respondent  
20 advised his client to hire a new lawyer and accepted full responsibility for his acts.  
21  
22  
23

24 The State Bar has recommended a six-month suspension. On these facts,  
25 however, I conclude that a suspension of six months and one day is appropriate.  
26

**RECOMMENDATION**

I recommend that Respondent be suspended for six months and one day and be required to pay the costs of these proceedings.

DATED this 15 day of August 2002.

  
Jeffrey Messing  
Hearing Officer 9X

Original filed with the Disciplinary Clerk  
this 16<sup>th</sup> day of August, 2002,

Copy of the foregoing mailed  
this 16<sup>th</sup> day of August, 2002, to:

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Respondent's Counsel  
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Phoenix, AZ 85004-2393

Copy of the foregoing hand-delivered  
this 16<sup>th</sup> day of August, 2002, to:

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by: Laurie Smith