

**FILED**

APR 18 2005

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY *Pick Williams*

**BEFORE A HEARING OFFICER  
OF THE SUPREME COURT OF ARIZONA**

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5 IN THE MATTER OF A MEMBER ) No. 03-0507  
6 OF THE STATE BAR OF ARIZONA, )  
7 )  
8 **DANIEL INSERRA,** )  
9 **Bar No. 017284** )  
10 ) **HEARING OFFICER'S REPORT**  
11 )  
12 ) **RESPONDENT.** )  
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**PROCEDURAL HISTORY**

12 A Probable Cause Order was filed on November 21, 2003. A Complaint  
13 was filed on December 29, 2003. Respondent filed an Answer on February 26,  
14 2004. The parties filed a Tender of Admissions and Agreement for Discipline by  
15 Consent and a Joint Memorandum in Support of Agreement for Discipline by  
16 Consent on May 13, 2004. The Disciplinary Commission reviewed this matter on  
17 November 13, 2004. On December 17, 2004 the Disciplinary Commission  
18 remanded the matter back to this Hearing Officer. The parties filed an Amended  
19 Tender of Admissions and Agreement for Discipline by Consent (Amended  
20 Tender) and an Amended Joint Memorandum in Support of Agreement for  
21 Discipline by Consent (Amended Joint Memo) on March 22, 2005. The parties  
22 submitted their costs on March 23, 2005. The parties filed Medical Records in

1 support of the Amended Joint Memo on March 30, 2005. A hearing on the  
2 amended consent documents was held on April 4, 2005.

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4 **FINDINGS OF FACT**

5 1. Respondent was admitted to practice law in Arizona on October 19,  
6 1996.

7 **COUNT ONE (File No. 03-0507)**

8  
9 2. Eric Kurland (Mr. Kurland) consulted with Respondent in September  
10 1997 regarding a dispute he was having with his landlord.

11 3. In 1997, after the consultation, Mr. Kurland filed a complaint against  
12 his landlord for failing to return Mr. Kurland's security deposit, seeking to  
13 recover treble damages (the 1997 lawsuit). Defendant counterclaimed for  
14 damages to the premises. Mr. Kurland then retained Respondent to represent  
15 him. The lawsuit was set for trial in June 1999.

16  
17 4. In March 1999, defendant's counsel took Mr. Kurland's deposition.  
18 During the deposition, defense counsel discovered that Mr. Kurland had not  
19 returned his set of keys to the leased property.  
20

21 5. Defense counsel then filed a motion for summary judgment arguing that  
22 Mr. Kurland had not properly delivered possession of the property and was barred  
23 from suing for his security deposit.  
24  
25

1           6. Harboring doubts about Mr. Kurland's position, Respondent  
2 nevertheless failed to conduct any research on landlord/tenant law or make any  
3 meaningful argument opposing summary judgment, which was then granted.  
4

5           7. Respondent filed an appeal from the summary judgment and then  
6 abandoned the appeal.

7           8. Respondent then entered into negotiations with defense counsel to  
8 resolve the dispute. Defendant agreed to dismiss his counterclaim without  
9 prejudice, and a defense judgment on Mr. Kurland's claim would be presented to  
10 the court along with defendant's application for attorney's fees.  
11

12           9. Respondent agreed that defendant could bring a new action against Mr.  
13 Kurland for damages to the property and Mr. Kurland would waive any defense  
14 that the issue of attorney's fees had already been decided.  
15

16           10. Judgment was then entered against Mr. Kurland in the 1997 lawsuit for  
17 approximately \$5,900.00, which represented the attorney's fees incurred by  
18 defendant.  
19

20           11. The events listed in paragraphs five through ten above occurred without  
21 Mr. Kurland's knowledge or consent.  
22

23           12. Mr. Kurland was married on August 7, 1997, but defense counsel had  
24 been unsuccessful in adding Mr. Kurland's wife to the 1997 lawsuit, which left  
25

1 the \$5,900.00 judgment against Mr. Kurland only, and not the marital  
2 community.

3  
4 13. In August 2000, in order to attach community property, defendant filed  
5 a lawsuit against Mr. Kurland and his wife (the 2000 lawsuit). The complaint  
6 sought to add Mr. Kurland's wife to the previous judgment and sought damages  
7 against both for alleged damage to the leased property. Respondent never  
8 advised Mr. Kurland and his wife of this filing and did not consult with them  
9 prior to filing the answer.  
10

11 14. Even if Mr. Kurland had been aware of the 2000 lawsuit, he could not  
12 pursue a counterclaim because Respondent had abandoned the appeal in the 1997  
13 lawsuit.  
14

15 15. Defense counsel filed a motion for partial summary judgment, claiming  
16 that the previous judgment constituted a community property debt as a matter of  
17 law based on Respondent's agreement to the judgment, which the court granted.  
18

19 16. There was a court-ordered mediation in the 2000 lawsuit that  
20 Respondent waived without consulting with Mr. Kurland.

21 17. Respondent waived Mr. Kurland's right to a trial on the property  
22 damage issue and allowed the court to make its determination based on the filings  
23 in the 2000 lawsuit. Mr. Kurland was never consulted about this waiver and  
24 never agreed to it.  
25

1 18. Judgment in the 2000 lawsuit was entered against Mr. Kurland and his  
2 wife. The judgment consisted of the previous award of attorney's fees for  
3 approximately \$5,900.00 in the 1997 lawsuit, the \$2,000.00 property damage in  
4 the 2000 lawsuit, and the court-awarded attorney's fees in the 2000 lawsuit,  
5 which amounted to approximately \$3,200.00. Respondent never informed Mr.  
6 Kurland or his wife that this judgment had been entered against them.  
7

### 8 CONDITIONAL ADMISSIONS

9  
10 Respondent conditionally admits that his conduct as described above in  
11 Count One violated Rule 42, Ariz. R. S. Ct., specifically: ERs 1.1, 1.2(a), 1.3,  
12 1.4(a), 3.2, and 8.4(d).  
13

### 14 ABA STANDARDS

15 The *ABA Standards* list the following factors to consider in imposing the  
16 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the  
17 actual or potential injury caused by the lawyer's misconduct, and (4) the  
18 existence of aggravating or mitigating circumstances. *ABA Standard 3.0*.  
19

20 The parties gave consideration to *ABA Standards* 4.43, 4.53 and 6.23 and  
21 stated that censure is generally appropriate when a lawyer is negligent in  
22 determining whether he or she is competent to handle a legal matter, does not act  
23 with reasonable diligence in representing a client, is negligent in complying with  
24 a court order or rule, and causes injury or potential injury to a client.  
25

1 A review of ABA *Standard* 4.0 (Violations of Duties Owed to Clients)  
2 indicates that censure is the presumptive sanction for Respondent's misconduct.

3  
4 ABA *Standard* 4.43 (Lack of Diligence) specifically provides:

5 Reprimand (censure in Arizona) is generally appropriate  
6 when a lawyer is negligent and does not act with reasonable  
7 diligence in representing a client, and causes injury or  
potential injury to a client.

8 Respondent failed to competently represent his client and failed to consult  
9 with his client about two judgments, a mediation hearing, the filing of an answer  
10 in a lawsuit and the waiver of a trial. Respondent failed to diligently pursue the  
11 client's matter and failed to make reasonable efforts to expedite the litigation  
12 consistent with the client's interests. Respondent failed to keep the client  
13 reasonably informed and failed to explain matters to client to the extent necessary  
14 for the client to make an informed decision about the representation.  
15 Respondent's conduct was prejudicial to the administration of justice as he failed  
16 to have the client's matter decided on the merits. Respondent negligently violated  
17 his duty to his client resulting in harm to the client; however the client was made  
18 whole by a malpractice lawsuit and Respondent's agreement to pay any judgment  
19 awarded to his client in that lawsuit.  
20  
21  
22

23 **AGGRAVATING AND MITIGATING FACTORS**

24 This Hearing Officer then considered aggravating and mitigating factors in  
25 this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer

1 agrees with the parties that one aggravating factor applies and should be  
2 considered in this matter:

3  
4 (a) prior disciplinary offenses - Respondent received a censure for trust  
5 account violations in File nos. 00-1982 and 00-2433, and was placed on two years  
6 probation. Although some of the conduct involved in this matter occurred while  
7 Respondent was on probation in the trust account cases, the most serious conduct  
8 in this matter occurred at the same time that Respondent was first diagnosed with  
9 cancer and had two operations within months of each other. Other misconduct in  
10 this matter occurred after Respondent was told he had six months to live. The  
11 misconduct in the trust account cases took place more than a year after  
12 Respondent was informed that the tumor in his lung was benign. The conduct in  
13 this matter that overlapped the time period in the trust account cases occurred in  
14 December 2002 and February 2003. Respondent failed to advise his client that a  
15 judgment was entered against him December 18, 2002, and failed to advise his  
16 client of the amended judgment that was entered on February 4 2003. This  
17 conduct occurred after the judgment and order had been entered on October 24,  
18 2002 in the trust account cases.

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22 This Hearing Officer agrees with the parties that three factors are present in  
23 mitigation:  
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1 (c) personal or emotional problems - Respondent was diagnosed with  
2 cancer in December 1998. Respondent under went two surgeries, one in  
3 December 1998 and the second in February 1999. Respondent was informed that  
4 the cancer had spread to his lungs and was told that he had approximately six  
5 months to live. A tumor was later removed from Respondent's lung and it was  
6 determined that the tumor was benign. Respondent lost approximately 65 pounds  
7 during this time and experienced other medical problems, which had a substantial  
8 distracting influence on his practice. At this time, Respondent is cancer free.  
9 Additionally, in October 2003 Respondent's father died, leaving him with the care  
10 of his disabled mother, who is afflicted with epilepsy and Krohn's disease. In  
11 August 2004, Respondent separated from his wife, which was followed by  
12 divorce proceedings. As a result of these events he has sought and received  
13 personal counseling from Jewish Family and Children's Services, Scottsdale,  
14 under the care of Counselor Anat Schure, LAC, since August 2004, and  
15 beginning in September 2004 has been prescribed anti-depressant and anti-  
16 anxiety medications by George Sibley, M.D. *See Medical Records in Support of*  
17 *Joint Memo.*

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21  
22 (b) absence of a dishonest or selfish motive - Respondent was not  
23 motivated by a dishonest or selfish motive, but was negligent in his handling of  
24 this matter.  
25



1 (e) full and free disclosure to disciplinary board or cooperative attitude  
2 toward proceedings - Respondent cooperated with the State Bar from the initial  
3 investigation, up to and including entering into the consent agreement.  
4

5 After conducting the hearing on April 4, 2005 reviewing the amended  
6 consent documents, this Hearing Officer also considered mitigating factor (1)  
7 remorse. This Hearing Officer found Respondent's testimony to be credible and  
8 sincere.  
9

10 Based on the ABA *Standards*, the presumptive sanction is a censure.  
11 Although Respondent's conduct caused harm to his former client; however, the  
12 harm was lessened by the commencement of a malpractice lawsuit brought by the  
13 client against Respondent and Respondent's agreement to pay any judgment  
14 awarded to his client in that lawsuit. Respondent was also dealing with a very  
15 serious illness during a portion of the representation. Neither party believes the  
16 aggravating factor should increase the sanction in this matter. This Hearing  
17 Officer agrees.  
18  
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#### 20 **PROPORTIONALITY REVIEW**

21 Sanctions against lawyers must have internal consistency to maintain an  
22 effective and enforceable system; therefore, the court looks to cases that are  
23 factually similar to the case before it. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d  
24 1161, 1171, (1988).  
25

1 In *Matter of McVay*, SB-03-0018-D (2003), McVay failed to adequately  
2 communicate with his clients, failed to provide one client with an accounting,  
3 failed to return documents, failed to file a petition for review, and failed to  
4 adequately prepare for trial. McVay violated ERs 1.3, 1.4, 1.15(b), 1.16(d), and  
5 8.4(d). There were three aggravating factors and two mitigating factors. McVay  
6 received a censure.  
7

8  
9 In *Matter of Bayless*, SB-02-0038-D (2002), Bayless agreed to represent a  
10 client against a business. Bayless failed to keep the client timely advised of  
11 important developments in her case, failed to file a valid disclosure statement,  
12 failed to timely file the disclosure statement, failed to file a settlement  
13 memorandum as required, and failed to file a timely response to a motion for  
14 summary judgment which cost his client \$25,500.00 in damages and \$6,598.32 in  
15 attorney's fees. Bayless' conduct violated ERs 1.1, 1.2, 1.3, 1.4 and 8.4(a).  
16 There were three aggravating factors, including a prior discipline history, and  
17 three mitigating factors. Bayless was suspended for thirty (30) days, was placed  
18 on two-years probation, and was ordered to pay restitution to the client in the sum  
19 of \$35,383.16.  
20  
21

22  
23 In *Matter of Alcorn*, SB-02-0097-D (2002), Alcorn represented a client in a  
24 personal injury action. Alcorn failed to timely provide a written fee agreement,  
25 failed to serve a Rule 26.1 disclosure statement, failed to answer discovery

1 requests from the defendants. In April 1999, defendants filed a motion for  
2 judgment of dismissal that was granted on June 7, 1999. Alcorn failed to timely  
3 inform his client that the court dismissed their lawsuit and he misled the clients  
4 about filing a motion for reinstatement. Alcorn violated ERs 1.3, 1.4, 1.5(c), 3.2  
5 and 3.4(c). There were three aggravating factors, which included a prior  
6 suspension, and five mitigating factors. Alcorn, was suspended for thirty (30)  
7 days and placed on probation for one year.  
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10 In *Matter of Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994), Kaplan failed to  
11 communicate with the client and failed to notify the client that a collection  
12 lawsuit had been dismissed and he ceased pursuing the case without the client's  
13 consent. There was not actual client harm. Kaplan violated ERs 1.1, 1.3, 1.4, and  
14 1.16. Kaplan received a censure and one year of probation. Kaplan was also  
15 ordered to pay restitution for mishandling two cases.  
16

17 In *Matter of O'Brien-Reyes*, 177 Ariz. 362, 868 P.2d 945 (1994), O'Brien-  
18 Reyes failed to file a notice of appear from a client's DUI conviction until two  
19 days after the deadline and then failed to file a motion for reconsideration for  
20 four months. She also failed to keep clients apprised of the status of their cases  
21 and failed to timely respond to the State Bar's inquiries. O'Brien-Reyes had  
22 previously been informally reprimanded for similar misconduct. O'Brien-Reyes  
23  
24  
25

1 violated ERs 1.1, 1.3, 1.4, and 8.1(b) and Supreme Court Rule 51(h) and (i).

2 Respondent received a censure and one year probation.

3  
4 In this case, Respondent failed to advise his client of his potential exposure  
5 on attorney's fees in a 1997 lawsuit; failed to consult with the client before  
6 agreeing to a form of judgment in the 1997 suit; abandoned the appeal of the  
7 1997 suit; failed to send the client a copy of a 2000 lawsuit filed against the  
8 client; failed to consult with the client in preparing and submitting an answer in  
9 the 2000 suit; agreed to let the judge decide property damage based on the filings  
10 without consulting with the client; stipulated to vacating a mediation without  
11 consulting the client; failed to notify the client when a judgment was entered in  
12 the 2000 suit; and repeatedly failed to communicate with the client during the  
13 entire representation. There are three mitigating factors in this case and one  
14 aggravating factor.  
15  
16

17 Although this case is similar to all of the above-mentioned cases, the  
18 parties do not believe that a suspension is warranted such as was imposed in the  
19 *Alcorn* and *Bayless* matters. Both *Alcorn* and *Bayless* had more extensive  
20 discipline histories than does Respondent and did not have the mitigation that  
21 Respondent does.  
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1 **RECOMMENDATION**

2 The purpose of lawyer discipline is not to punish the lawyer, but to protect  
3 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859  
4 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the  
5 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.  
6 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in  
7 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361  
8 (1994).  
9

10  
11 In imposing discipline, it is appropriate to consider the facts of the case, the  
12 American Bar Association's *Standards for Imposing Lawyer Sanctions*  
13 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.  
14  
15 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

16 Upon consideration of the facts, application of the *Standards*, including  
17 aggravating and mitigating factors, and a proportionally analysis, this Hearing  
18 Officer recommends acceptance of the Tender of Admissions and Agreement for  
19 Discipline by Consent and the Joint Memorandum in Support of Agreement for  
20 Discipline by Consent providing for the following:  
21

- 22  
23 1. Respondent shall receive a censure.  
24  
25

3  
4 and conditions:

- 5 a. Respondent shall submit to a Law Office Management Assistance  
6 Program (LOMAP) audit that will focus on diligence, communication  
7 and office procedures and shall enter into a Probation Contract with  
8 the State Bar that will incorporate the recommendations that are made  
9 based on the LOMAP audit.  
10
- 11 b. Respondent shall submit to a Member Assistance Program (MAP)  
12 assessment to determine if a term should be added to the probation  
13 contract based on Respondent's bout with cancer from 1999 through  
14 2000.  
15
- 16 c. Respondent will find a qualified practice monitor, approved by  
17 LOMAP and bar counsel, within thirty (30) days of execution of the  
18 MOU.  
19
- 20 d. In the event the State Bar receives a charge during Respondent's  
21 probation period that involves conduct by Respondent that occurred  
22 during the effective period of probation, the term of this probation  
23

24  
25 <sup>1</sup> Respondent is currently on probation in File Nos. 00-1982 and 00-2433, for trust account violations.

1 shall be extended until such charge has been investigated and a  
2 determination made by bar counsel and/or the Panelist regarding  
3 disposition of such charge.  
4

5 e. Respondent shall advise LOMAP and the director of membership  
6 records of the State Bar, in writing, of any change in his address or  
7 employment status.  
8

9 f. In the event that Respondent fails to comply with any of the  
10 foregoing conditions, and the State Bar receives information, bar  
11 counsel shall file with the Hearing Officer a Notice of Non-  
12 Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing  
13 Officer shall conduct a hearing within thirty days after receipt of said  
14 notice, to determine whether the terms of probation have been  
15 violated and if an additional sanction should be imposed. In the  
16 event there is an allegation that any of these terms have been  
17 violated, the burden of proof shall be on the State Bar of Arizona to  
18 prove non-compliance by clear and convincing evidence.  
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