

**FILED**  
OCT 13 2004  
HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY *P. Williams*

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

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5 IN THE MATTER OF A MEMBER ) No. 02-1506  
6 OF THE STATE BAR OF ARIZONA, )  
7 )  
8 **RAYMOND J. SLOMSKI,** )  
9 **Bar No. 007223** )  
10 ) **HEARING OFFICER'S REPORT**  
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12 ) **RESPONDENT.** )  
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**PROCEDURAL HISTORY**

The parties filed a Tender of Admissions and Agreement for Discipline by Consent (Tender) and a Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memo) on September 24, 2004. No hearing has been held.

**FINDINGS OF FACT**

1. Respondent was at all relevant times an attorney licensed to practice law in Arizona, having been admitted on May 15, 1982.
2. A Probable Cause Order was filed on April 16, 2004. A copy of the order is attached to the Tender as Exhibit A. No formal complaint has been filed.
3. Respondent represented Plaintiff Terry D. Henderson in the case of *Terry D. Henderson, et al. v. Kimberly Qualitycare Inc., et al.*, No. CV 1996-010499, which was tried to a jury before the Honorable M. Jean Hoag of

1 Maricopa County Superior Court. This was a wrongful death case arising from  
2 the suicide of Ms. Henderson's husband, Ken, who at the time of his death was  
3 receiving home health care from the defendants.  
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5 4. During a portion of his closing argument in that case, Respondent  
6 sought to appeal to the jurors' emotions, including by making references to his  
7 personal experiences.  
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9 5. The judge sustained defense counsel's objections to this portion of  
10 Respondent's closing argument, and directed Respondent several times to  
11 rephrase his argument. As the judge subsequently explained in a minute entry,  
12 she did so because she believed that Respondent "repeatedly crossed the line from  
13 drama to melodrama and from acceptable to unacceptable." A copy of the  
14 judge's minute entry is attached to the Tender as Exhibit B.  
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16 6. Respondent reacted to the judge's statements by modifying the  
17 subject matter and wording of his argument several times. Respondent did not  
18 abandon the generally emotional tenor of his closing argument, however. If this  
19 matter were to proceed to a hearing, Respondent would testify that he continued  
20 to pursue this type of argument because he believed it was not improper and did  
21 not understand that the Court meant to require him to abandon the general  
22 approach of making an emotional appeal to the jurors.  
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1           7.     The judge granted the defendants' motion for a new trial. In her  
2 minute entry explaining the ruling, the judge excerpted the above-referenced  
3 portions of Respondent's closing argument, explaining that Respondent's  
4 improper argument had deprived the defendants of a fair trial. Eight months later,  
5 the judge mailed a copy of her minute entry to the State Bar, with a cover letter  
6 asking the Bar to "review the transcripts and determine if Mr. Slomski's behavior  
7 is of such a kind and degree that he has violated any relevant canons of ethics."  
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9 A copy of the judge's letter is attached to the Tender as Exhibit C.  
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11           8.     The Court of Appeals affirmed the trial judge's new-trial order. The  
12 Court held that the trial judge had not abused her discretion in finding that  
13 Respondent's closing argument included "impermissible attempts to sway [the]  
14 jurors by appealing solely or primarily to their emotions." (The Court declined to  
15 rely on another of the trial judge's findings – that Respondent had inaccurately  
16 paraphrased certain jury instructions during his summation – concluding that "any  
17 misstatements made by [Respondent] were not serious enough, in and of  
18 themselves, to justify setting aside the jury's verdict.") A copy of the Court of  
19 Appeals' Memorandum Decision is attached to the Tender as Exhibit D.  
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22           9.     If this matter were to proceed to a hearing, the State Bar would take  
23 the position that Respondent negligently failed to conform his closing argument  
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1 to the directions expressed by the judge in her rulings on objections and other  
2 statements during the argument.

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4 10. Respondent violated Rule 42, Ariz. R. S. Ct., ERs 8.4(d) and 3.4(e),  
5 by failing to comply with the trial judge's rulings on objections and other  
6 statements during his closing argument.

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8 **CONDITIONAL ADMISSIONS**

9 11. Respondent conditionally admits that his conduct, as set forth above,  
10 violated ER 8.4(d), which provides that it is professional misconduct for a lawyer  
11 to "engage in conduct that is prejudicial to the administration of justice."

12 12. Respondent further conditionally admits that he violated ER 3.4(e),  
13 which provides in pertinent part that a lawyer shall not "in trial...state a personal  
14 opinion as to the justness of a cause, the credibility of a witness, the culpability of  
15 a civil litigant..." Although this ER was not included in the Probable Cause  
16 Order, Respondent understands that the State Bar could include it if a formal  
17 complaint were filed.  
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20 13. The State Bar conditionally admits that it cannot prove by clear and  
21 convincing evidence the alleged violations of ERs 3.4(c) and 3.5(c), Rule 42,  
22 Ariz. R. S. Ct., and Rule 51(e) and (k), Ariz. R. S. Ct., that were included in the  
23 probable-cause order. (All substantive rule violations refer to rules in effect prior  
24 to December 1, 2003.)  
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1 **ABA STANDARDS**

2 The Supreme Court and the Disciplinary Commission consistently use the  
3 *Standards* to determine appropriate sanctions for attorney discipline. *See In re*  
4 *Clark*, 422 Ariz. Adv. Rep. 3, 5 n.2, 87 P.3d 827, 829 n.2 (Apr. 1, 2004). The  
5 *Standards* are designed to promote consistency in sanctions by identifying  
6 relevant factors the court should consider and then applying these factors to  
7 situations in which lawyers have engaged in various types of misconduct.  
8 *Standard 1.3, Commentary.*

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10 This matter involves conduct implicating *Standard 6.2, Abuse of the Legal*  
11 *Process. Standard 6.23* addresses the appropriateness of a censure for such  
12 conduct:  
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15 Reprimand [censure in Arizona] is generally appropriate when a  
16 lawyer negligently fails to comply with a court order or rule, and  
17 causes injury or potential injury to a client or other party, or causes  
interference or potential interference with a legal proceeding.

18 *Standard 6.24* addresses the potential application of an informal reprimand:

19 Admonition [informal reprimand in Arizona] is generally appropriate  
20 when a lawyer engages in an isolated instance of negligence in  
21 complying with a court order or rule, and causes little or no actual or  
22 potential injury to a party, or causes little or no actual or potential  
interference with a legal proceeding.

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

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4 **1. The duty violated**

5 Respondent violated his duties to the legal system by failing to conform his  
6 closing argument to the rulings on objections and other statements made during  
7 the argument by the trial judge. The judge determined that Respondent's failure  
8 to comply with its rulings constituted misconduct necessitating the grant of a new  
9 trial, and the Court of Appeals held that the trial court did not abuse its discretion  
10 in making this finding. Although Respondent asserts that he attempted in good  
11 faith to comply with the court's directions, he should have realized that the judge  
12 found the excessively emotional tenor of the pertinent part of his closing  
13 argument objectionable. Failing that, he should have asked the judge for  
14 clarification of the basis for her rulings, in order to ensure that he did not continue  
15 to run afoul of restrictions deemed appropriate by the court.  
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19 **2. The lawyer's mental state**

20 Respondent was negligent in failing to either understand the basis for the  
21 court's rulings or seek clarification from the judge as to the basis for her rulings.  
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23 If this matter were to proceed to a hearing, Respondent would take the  
24 position that the substance and general tenor of his closing argument were not  
25 inappropriate, that the judge's statements and rulings were insufficiently clear to

1 alert him to the basis for her rulings, and that he could not reasonably have been  
2 expected to conform his argument to the restrictions deemed necessary by the  
3 judge under these circumstances. The State Bar would take the position that  
4 Respondent should have understood the basis for the judge's rulings from their  
5 context, or should have asked the judge for clarification.  
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### 7 **3. The extent of the interference with a legal proceeding**

8 Respondent's failure to comply with the restrictions on his closing  
9 argument deemed necessary by the judge led the judge to grant the defendants'  
10 motion for a new trial. This ruling has made it necessary for the parties and the  
11 court to undertake a new trial of the case.  
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### 13 **AGGRAVATING AND MITIGATING FACTORS**

14 This Hearing Officer then considered aggravating and mitigating factors in  
15 this case, pursuant to *Standards* 9.22 and 9.32, respectively. As well as factors  
16 which are neither aggravating or mitigating, pursuant to *Standard* 9.4. This  
17 Hearing Officer agrees with the parties that one aggravating factor applies and  
18 should be considered in this matter: (i) - substantial experience in the practice of  
19 law: Respondent had been practicing law for twenty years when this conduct  
20 occurred, and was an experienced trial attorney with extensive experience  
21 receiving, understanding and reacting to judges' rulings.  
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1 This Hearing Officer agrees with the parties that four factors are present in  
2 mitigation: (a) absence of a prior disciplinary record: Respondent has extensive  
3 experience trying high-stakes, emotionally charged cases, and has never before  
4 received bar discipline in connection with his closing arguments or any other  
5 conduct. (b) absence of a dishonest or selfish motive: Respondent was simply  
6 negligent and did not act out of any dishonest or selfish motive. (e) full and free  
7 disclosure to disciplinary board or cooperative attitude toward proceedings:  
8 Respondent has given his full cooperation to the Bar in this matter. (g) reputation:  
9 Respondent is an AV-rated attorney with a very good reputation. (l) remorse:  
10 Respondent sincerely regrets his actions underlying this proceeding.

11 This Hearing Officer agrees with the parties that one factor is present that  
12 is neither aggravating or mitigating: (f) failure of injured client to complain:  
13 Respondent's client, who was directly affected by the vacation of the judgment in  
14 her favor and grant of a new trial, has not filed a complaint with the State Bar.

### 15 PROPORTIONALITY REVIEW

16 "Generally, attorneys are censured for negligently failing to comply with  
17 court orders or rules..." *Matter of Brown*, 184 Ariz. 480, 483, 910 P.2d 631, 634  
18 (1996) (citing *Standards* 6.23, 7.3). In appropriate circumstances, such a sanction  
19 may be applied pursuant to ER 8.4(d).

1           In *Matter of Manning*, 177 Ariz. 496, 869 P.2d 172 (1994), for example,  
2 the Commission found that the respondent had violated (*inter alia*) ER 8.4(d) by  
3 engaging in conduct that included negligently failing to notify the court and other  
4 parties that a party in litigation had filed bankruptcy, thereby causing them to  
5 spend time on a matter that had been stayed, and failing (due to financial  
6 circumstances) to pay a court-ordered sanction. The Commission determined that  
7 a censure was the appropriate sanction for this negligent misconduct.  
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10           The *Manning* Report relied in part on *In re Ames*, 171 Ariz. 125, 829 P.2d  
11 315 (1992), in which the respondent was censured for conduct that included  
12 negligently failing to comply with a court order directing certain discovery and  
13 trial-preparation actions. Respondent's failure to comply with the order caused  
14 his client's claims to be dismissed and an adverse judgment to be entered. The  
15 court and parties then incurred extra expense in connection with replacement  
16 counsel's efforts to reinstate the dismissed claims. (In *Ames*, the Commission  
17 relied on ERs 1.3, 1.4, and 3.4(c) and (d), rather than 8.4(d), to support the  
18 sanction.)  
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21           Similarly, in *Office of Disciplinary Counsel v. Armengau*, 788 N.E.2d 1068  
22 (Ohio 2003), an Ohio attorney received a public reprimand (the equivalent of a  
23 censure in Arizona) for, *inter alia*, repeatedly referring in cross-examination and  
24 in his closing argument to matters that had previously been ruled inadmissible,  
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1 causing the judge to sustain several objections, excuse the jury from the  
2 courtroom twice, issue corrective instructions to the jury, and find respondent in  
3 contempt of court. Among the rules on which the Ohio Supreme Court relied to  
4 support the reprimand was DR 1-102(A)(5), the Code of Professional  
5 Responsibility's counterpart to the Rules of Professional Conduct's ER 8.4(d).  
6 See *Armengau*, 788 N.E.2d at 1068; Annotated Model Rules of Prof'l Conduct  
7 Rule 8.4, annot. subsection (d) (5th ed. 2003).  
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### 10 RECOMMENDATION

11 The purpose of lawyer discipline is not to punish the lawyer, but to protect  
12 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859  
13 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the  
14 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.  
15 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in  
16 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361  
17 (1994).  
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20 In imposing discipline, it is appropriate to consider the facts of the case, the  
21 American Bar Association's *Standards for Imposing Lawyer Sanctions*  
22 ("*Standards*") and the proportionality of discipline imposed in analogous cases.  
23 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).  
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