BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **BERNALD C. PORTER,** **Bar No. 001228,** Respondent.	**PDJ 2017-9108** **FINAL JUDGMENT AND ORDER** [State Bar No. 16-1800] **FILED DECEMBER 11, 2017**

The Presiding Disciplinary Judge having reviewed the Agreement for Discipline by Consent filed on November 29, 2017 pursuant to Rule 57(a), Ariz. R. Sup. Ct., accepts the parties' proposed agreement. Accordingly:

IT IS ORDERED Respondent, **Bernald C. Porter**, is reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective the date of this order.

IT IS FURTHER ORDERED Mr. Porter shall be placed on probation for a period of two (2) years with the State Bar's Law Office Management Assistance Program (LOMAP).

IT IS FURTHER ORDERED Mr. Porter shall contact the State Bar Compliance Monitor at (602) 340-7258, within ten (10) days from the date of this Order. Mr. Porter shall submit to a LOMAP examination of his office procedures.

Mr. Porter shall sign terms and conditions of participation, including reporting requirements, which shall be incorporated herein. Mr. Porter shall be responsible for any costs associated with LOMAP.

CAUTION RE NON-COMPLIANCE WITH PROBATION

If Respondent fails to comply with any of the foregoing probation terms, and the State Bar of Arizona receives information thereof, Bar Counsel shall file a notice of noncompliance with the Presiding Disciplinary Judge, pursuant to Rule 60(a)(5), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether Respondent has breached a term of probation and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the State Bar of Arizona shall have the burden of proof to prove noncompliance by a preponderance of the evidence.

IT IS FURTHER ORDERED Mr. Porter shall pay the costs and expenses of the State Bar of Arizona in the amount of $1,200.00, within thirty (30) days from the date of this order. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office regarding these proceedings.

DATED this 11th day of December, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed

this 11th day of December, 2017, to:

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Respondent

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by: AMcQueen

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **BERNALD C. PORTER,** **Bar No. 001228** Respondent.	**PDJ 2017-9108** **DECISION AND ORDER ACCEPTING DISCIPLINE BY CONSENT** [State Bar No. 16-1800] **FILED DECEMBER 11, 2017**

A Probable Cause order issued on August 30, 2017 and a formal complaint was filed on September 18, 2017. The answer was filed on October 11, 2017. The parties filed a Notice of Settlement on September 18, 2017. The parties filed their Agreement for Discipline by Consent (Agreement) filed on November 29, 2017 pursuant to Rule 57(a), Ariz. R. Sup. Ct.

Rule 57 requires admissions be tendered solely "…in exchange for the stated form of discipline…." Under that rule, the right to an adjudicatory hearing is waived only if the "…conditional admission and proposed form of discipline is approved…." If the agreement is not accepted, those conditional admissions are automatically withdrawn and shall not be used against the parties in any subsequent proceeding. Mr. Porter has voluntarily waived the right to an adjudicatory hearing, and waived all motions, defenses, objections or requests that could be asserted upon approval of the proposed form of discipline. The Agreement states that the State Bar

has provided notice as required by Rule 53(b)(3), Ariz. R. Sup. Ct., or will by the date of the filing of the agreement, (November 29, 2017), to the complainant, with both notice of this Agreement and of the right to object within five days The PDJ waited ten (7) business days from November 29, 2017, to consider the Agreement. No objections have been filed.

The Agreement details a factual basis to support the conditional admissions. Mr. Porter conditionally admits he violated Rule 42, ERs 1.3 diligence, 1.4 communication, 1.5(d)(3) fees, 1.15(d) safe keeping property 1.16(d) terminating representation, 3.2 expediting litigation, 8.1(b) failure to respond, 8.4(d) conduct prejudicial to the administration of justice, and Rule 54(d). Through the Agreement allegations of violations of ERs 8.1(a) and 8.4(c) are to be dismissed if the Agreement is accepted. The agreed upon sanctions include a Reprimand with Probation for two (2) years under the Law Office Management Assistance Program (LOMAP), and costs totaling $1,200.00 to be paid in full within thirty (30) days from the date of this order. The conditional admissions are briefly summarized.

On June 29, 2007, Mr. Porter undertook representation of a client with an initial retainer of $10,000, which was deemed "earned and non-refundable." The fee agreement was not compliant with ER 1.5(d)(3). He filed suit for his client in December 2007. A counterclaim was filed. While there was occasionally cause for

delay, the agreement stipulates "there were long intervals in which Respondent took no discernible action to advance his clients' case."

When the jury trial commenced, his client contracted shingles. The medication he was given impaired his ability to express himself. The court directed health records substantiating his condition be provided and upon the motion of Mr. Porter, declared a mistrial. When defense counsel stated he would file for attorney fees, Mr. Porter stated he had no objection to the anticipated motion. The client gave the medical records to Mr. Porter to deliver to the judge. Mr. Porter failed to do so.

In September 2014, Mr. Porter told his client he would file a motion to set a new trial date. He did not do so. On September 22, 2014, the clients sent him an email requesting a copy of the motion. Mr. Porter did not respond. On November 7, 2014, he emailed his client stating he would check with the court as to a new court date by November 14, 2014. He did none of those things. From April 16, 2014 to March 16, 2015 he took no action in the case.

He emailed his clients on January 9, 2015, telling them he suffered a "massive heart attack" in November 2014 while visiting his family and stated he underwent emergency surgery for "5 hours or so." He also told his clients he had suffered multiple strokes and could not travel until March 2015. He assured them he would notify the court of his situation. He did not. On March 16, 2015, the court dismissed the case without prejudice. The court sent the dismissal to Mr. Porter on May 28,

2015. Mr. Porter did not notify his clients of the dismissal and they learned the case has been dismissed for inactivity after obtaining subsequent counsel.

Mr. Porter also failed to provide the case file, receipts for fee payments, trust account records, and a statement or accounting despite repeated requests from subsequent counsel. Mr. Porter further collected monies from the clients for depositions to pay the court reporter and then failed to pay the court reporter, thereby keeping the money.

On June 8, 2015, Mr. Porter filed a motion to set aside the dismissal, which was denied. Mr. Porter blamed others for his failings and ethical violations including court administration and the post office. He ultimately paid the court reporter out of the clients' funds and refunded the clients $5,000.00 representing unearned advanced fees. He was not responsive to the State Bar's investigation and did not provide the requested documents.

Rule 58(k) provides sanctions shall be determined under the *American Bar Association Standards for Imposing Lawyer Sanctions*, ("*Standards*"). The parties agree *Standard* 4.12 *Failure to Preserve the Client's Property* applies to Mr. Porters violation of ER 1.15(d) and provides that suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Standard 7.2, *Violation of Duties Owed as a Professional* is applicable to Mr. Porter's violations of ERs 1.16(d), 8.1(b) and Rule 54(d) and provides that suspension is generally appropriate when a lawyer knowingly 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.

As stipulated, Mr. Porter knowingly violated his duties to clients, the legal system, and as a professional causing actual harm to clients and the legal system. The parties further stipulated Mr. Porter negligently violated ERs 1.3, 1.4, 1.5(d)(3), 3.2 and 8.4(d).

The parties agree factors 9.22(a) prior disciplinary offenses, (c) pattern of misconduct, (d) multiple offenses and (i) substantial experience in the practice of law are present in aggravation. In mitigation are factors 9.32(b) absence of dishonest or selfish motive, (c) personal and emotional problems as evidence by sealed Exhibit C, and (m) remoteness of prior offenses.

Upon review of these factors, the parties agree that a reduction in the presumptive sanction of suspension is justified. The objectives of discipline are met by imposing a reprimand and probation. Accordingly:

IT IS ORDERED accepting and incorporating the Agreement and any supporting documents by this reference. The agreed upon sanctions are reprimand, two (2) years of probation (LOMAP), and costs and expenses totaling $1,200.00.

There are no costs incurred by the Office of the Presiding Disciplinary Judge. A final judgment and order is signed this date.

DATED this 11th day of December, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

COPY of the foregoing e-mailed/mailed
on this 11th day of December 2017, to:

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OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

NOV 29 2017

FILED

BY

Bernald C. Porter, Bar No. 001228
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Telephone 602-370-7205
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Respondent

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **BERNALD C. PORTER, Bar No. 001228,** Respondent.	**PDJ 2017-9108** **State Bar File No. 16-1800** **AGREEMENT FOR DISCIPLINE BY CONSENT**

The State Bar of Arizona and Respondent, Bernald C. Porter, who has chosen not to seek the assistance of counsel, hereby submit their Agreement for

Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct.[1] A probable cause order was entered on August 30, 2017, the State Bar filed a formal complaint on September 18, 2017, and Mr. Porter filed his answer on October 11, 2017. Respondent voluntarily waives the right to an adjudicatory hearing, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admissions and proposed form of discipline is approved.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ERs 1.3, 1.4, 1.5(d)(3), 1.15(d), 1.16(d), 3.2, 8.1(b), and 8.4(d); and Rule 54(d). The State Bar conditionally dismisses the charges that Respondent violated ERs 8.1(a) and 8.4(c).

Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Reprimand with Probation for two years (LOMAP). Respondent also agrees to pay the costs and expenses of the disciplinary proceeding within 30 days from the date of this order, and if costs are not paid

[1] All references to rules are to the Arizona Rules of the Supreme Court unless stated otherwise.

within the 30 days interest will begin to accrue at the legal rate.[2] The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit A.

CAUTION RE NON-COMPLIANCE WITH PROBATION

If Respondent fails to comply with any of the foregoing probation terms, and the State Bar of Arizona receives information thereof, Bar Counsel shall file a notice of noncompliance with the Presiding Disciplinary Judge, pursuant to Rule 60(a)(5). The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether Respondent has breached a term of probation and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the State Bar of Arizona shall have the burden of proof to prove noncompliance by a preponderance of the evidence.

The State Bar has, or by the time this consent is filed will have, informed Complainant of this consent agreement and his right to object thereto in writing within five days, pursuant to Rules 53(b)3. and 57(a)2.D.(vi).

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[2] Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

COUNT ONE of ONE (File no. 16-1800/ DeRose)

FACTS

1. Respondent was licensed to practice law in Arizona on May 15, 1961.

2. On June 29, 2007, Respondent agreed to represent Lloyd Carroll and Deborah Miku ("clients") in a construction defect case.

3. Respondent charged the clients "an initial retainer" of $10,000, half of which was deemed "earned and non-refundable."

4. Respondent was obligated by Supreme Court Rule 42, ER 1.15, and Supreme Court Rule 43, to deposit $5,000 of the "initial retainer" into his Interest on Lawyer's Trust Account (IOLTA).

5. Respondent's written fee agreement did not contain the language required by Supreme Court Rule 42, ER 1.5(d)(3), relating to fees deemed "earned on receipt" or "non-refundable."

6. In December 2007 Respondent filed suit for the clients in Navajo County Superior Court against Tim and Ava Dickinson, dba TAD Construction and Excavating, and Western Surety Co. ("defendants"), bearing the case number CV2007-0616.

7. The defendants filed a counterclaim.

8. For various reasons including the death of an expert witness, the trial was postponed multiple times.

9. However, there were long intervals in which Respondent took no discernible action to advance his clients' case.

10. Several times the clients expressed to Respondent frustration over the delays and asked Respondent to do something to move their case toward trial.

11. A civil jury trial was held on April 14 and 15, 2014.

12. On the second day of trial Mr. Carroll was unable to testify coherently.

13. During a recess, he and Respondent explained to Judge Higgins that Mr. Carroll had contracted shingles and took medication for it that impaired his ability to express himself.

14. At Respondent's request, Judge Higgins declared a mistrial.

15. When Judge Higgins declared a mistrial defense counsel, David Martin, said he would file for attorney's fees and costs.

16. Respondent said he had no objection to Mr. Martin's anticipated motion to recover attorney's fees and costs.

17. When Judge Higgins declared a mistrial, he told Respondent to provide medical proof from Mr. Carroll's doctor as to the latter's health condition.

18. The clients gave Mr. Carroll's health records from April, 2014 to Respondent to submit to Judge Higgins.

19. Respondent did not furnish Mr. Carroll's health records to Judge Higgins.

20. In September 2014 Respondent told his clients he would file a motion to set a new trial date, but did not do so.

21. On September 22, 2014, the clients sent Respondent an email, stating: "Bern-Lloyd has asked me to request a copy of the motion for a new trial date that you told him was filed with Navajo County courts at the beginning of September. Patiently waiting Lloyd & Deb."

22. Respondent did not respond to the clients' September 22, 2014 email with a copy of the purported motion to set for new trial date.

23. On Friday, November 7, 2014, Respondent sent the clients an email, stating: "I will be in Holbrook this next week [November 10-14] and will check with the Court as to a new court date and will report back to you by Friday [November 14, 2014]. Sorry this is taking so long..."

24. Respondent, "this next week," did not "check with the court as to a new court date" and did not "report back" to the clients by the next Friday as he said he would.

25. From April 16, 2014 to March 16, 2015, Respondent took no action in the case.

26. On January 9, 2015, Respondent sent an email to the clients in which he described a "massive heart attack" he suffered in Utah on November 23, 2014 while visiting family.

27. In his January 9, 2015 email, Respondent described a "5 hours or so" emergency surgery where three (3) stents were placed "in the major vessels of my heart and expanded two other vessels by balloon expansion." Respondent elaborated that he was "placed in the cardiac intensive care unit where I stayed until Thanksgiving Day."

28. In his January 9, 2015 email, Respondent continued:

> During Thanksgiving dinner, I suffered a stroke and could not speak properly. When released I was informed that I could not travel . . . until after March 1, 2015. I have been convalescing at my son Jason's home, where this past Sunday morning I suffered another stroke that paralyzed my left side (arm, leg and left side of my face that caused sagging and drooling). I was home alone, but when Jason returned from Church meetings, he and his son, Mason, gave me a Priesthood

> blessing, and miraculously the effects of my stroke resolved themselves immediately. . . . I plan to notify the Court of my situation and reschedule a new trial as soon as possible.

29. Respondent furnished no proof to the court as to his health issues, and did not "notify the court" of his "situation" and "reschedule a new trial."

30. On March 16, 2015, the court issued an order dismissing the case without prejudice due to Respondent and his clients' failure to comply with Rule 38.1(f), Ariz. R. Civ. P., after a mistrial.

31. The dismissal was mailed to Respondent and defense counsel David Martin.

32. On May 28, 2015, the court issued a clarifying order, stating: "The Plaintiffs having failed to comply with Rule 38.1(f), Arizona Rules of Civil Procedure, after a mistrial, and there having been no activity in this case since April 16, 2014, IT IS HEREBY ORDERED dismissing this matter without prejudice."

33. The May 28, 2015 dismissal order was "mailed/delivered" to Mr. Porter and defense counsel David Martin.

34. In May 2015, the clients consulted attorney Jerry DeRose, Complainant herein, due to Respondent's prolonged delay in concluding the case.

35. While the clients were in Complainant's office, Complainant examined the Public Access information for the case.

36. While in Complainant's office, the clients learned for the first time that the case had been dismissed for inactivity on March 16, 2015.

37. By March 16, 2015, the clients had paid Respondent thousands of dollars in attorney's fees, much of it in cash at Respondent's request.

38. Respondent did not give the clients a receipt for their fee payments.

39. Although several times the clients asked for a statement or accounting from Respondent, he never provided one.

40. Complainant sent Respondent initial and follow-up letters asking that he take appropriate steps to resolve the case, and to provide copies of the fee agreement, trust account records, and case file pertaining to the clients.

41. For example, on May 28, 2015, Complainant wrote to Respondent, stating:

> Please be advised that Mr. and Mrs. Carroll have consulted with me regarding the status of the lawsuit you filed on their behalf in Navajo County Superior Court against Tim Dickinson et al. Upon reviewing the public access website and talking to the Navajo County Clerk, I learned that the case had been dismissed without prejudice on March 16, 2015. I have been unable to determine if you have filed a motion to set aside that dismissal; however, Mr. and Mrs. Carroll are

assuming that you have taken care of this matter and that the appropriate pleadings have been filed.

Mr. and Mrs. Carroll are also requesting that you provide them a copy of the retainer agreement and copies of all billing records evidencing and detailing the attorney fees and costs charged against the retainer and fees paid by the Carrolls. They are also requesting a copy of the trust account records of their case.

Please provide those documents to me as soon as possible together with information concerning the status of their case and what efforts have been made to set aside the dismissal of their case.

42. On June 18, 2015, Complainant wrote to Respondent again, stating:

I was distressed by your response to our request for Mr. and Mrs. Carroll's trust and billing records. If your records are maintained electronically it should be a simple matter to print out those records and send them to me. If you kept trust records on spreadsheets it should be a simple matter to make a copy of those spreadsheets and send them to me. I must insist that you send me the Carrolls' trust and billing records immediately. I believe you would agree that you are ethically bound to provide those records in a reasonable manner.

43. On July 31, 2015, Complainant directed a letter to Respondent at the latter's E. Pecos Rd. apartment address in Gilbert, Arizona, stating: "I have made numerous requests for the billing and trust account records for Mr. Carroll. If you do not provide those to me within seven days, I will have no alternative to forward this matter to the Arizona State Bar."

44. On August 7, 2015, Complainant directed the same letter to Respondent at five other addresses in Gilbert, Snowflake, and Mesa, Arizona.

45. On February 16, 2016, Complainant directed another letter to Respondent, to "Please provide our office with the file for Lloyd Carroll at your earliest convenience. Our office will pay to have it sent to us by UPS."

46. Respondent did not provide to Complainant the items Complainant requested and re-requested in his letters to Respondent on May 28, 2015, June 18, 2015, July 31, 2015, August 7, 2015, and February 16, 2016.

47. Respondent took depositions in the clients' case but did not pay the court reporter.

48. Respondent had collected money from the clients to pay the court reporter but Respondent kept the money.

49. On June 8, 2015, Respondent filed a "Motion to Set Aside Order of Dismissal." In that motion, Respondent claimed that he "was shocked" to receive the order of dismissal. He claimed that he filed and served a motion in November 2014 to set the case for a new jury trial.

50. In his motion to set aside the dismissal order, Respondent narrated a story about his office-sharing arrangement, outgoing mail tray, the U.S. mail

receptacle 75 feet from the front door of his office, and office staff routine to get the mail out.

51. In his motion to set aside the dismissal order, Respondent contended:

> Why the pleading [motion to set for trial] was not received by the Clerk of the Superior Court . . . is an absolute mystery. . . . We can only surmise that such was through an error, omission or oversight by the U.S. Postal Service, or the inadvertent failure of office staff to properly deposit such materials in the U.S. Post Office receptacle. God only knows . . .

52. Not only did the court clerk not receive Respondent's supposed motion to set for trial, neither Judge Higgins nor opposing counsel received their copies of Respondent's motion to set for trial, either.

53. After purportedly filing the November motion to set a new trial date, for four months Respondent did nothing to determine the status of his motion.

54. Respondent blamed court administration for failing earlier to furnish notice that the case was placed on the dismissal calendar.

55. In July 2015, opposing counsel, Mr. Martin, filed an opposition to Respondent's motion and asked for attorney's fees of approximately $30,000.

56. Respondent filed a reply.

57. Respondent and Mr. Martin stipulated to postpone an October 2015 date for oral argument on Respondent's motion to set aside the dismissal order.

58. The court reset oral argument to November 12, 2015.

59. The written court order resetting oral argument to November 12, 2015 reflects that a copy of that order was sent to Respondent.

60. On November 12, 2015, the court heard oral argument on Respondent's motion to set aside the dismissal.

61. Respondent did not appear for oral argument on his motion.

62. The clients did appear at the hearing.

63. The clients told Judge Higgins that Respondent's absence reflected his conduct since they hired him.

64. Judge Higgins affirmed the order of dismissal, denied Respondent's motion to set aside the dismissal, awarded attorney's fees to the defendants in a sum to be determined later, and ordered Mr. Martin to file an affidavit of attorney's fees.

65. On December 10, 2015, Mr. Martin filed his itemization of attorney's fees and costs exceeding $30,700.

66. Complainant entered an appearance for the clients in January 2016.

67. Complainant filed an objection to the amount of attorney's fees claimed, arguing that the case was dismissed not on the merits but, rather, due to Respondent's malpractice.

68. Complainant also argued that many of the attorney's fees claimed pertained to the counterclaim, which also was dismissed for failure to prosecute.

69. In February 2016, Respondent also filed an objection to the defendants' request for attorney's fees and costs. He argued that he received the December 2015 attorney's fees motion in February 2016, had no notice of the November 12, 2015 hearing date on his motion to set aside the dismissal, and many of the claimed items were nonrecoverable.

70. The court set oral argument on the attorney's fees request for July 2016 but continued it twice, to September 2016.

71. In August 2016 Complainant received from Respondent the client file, over a year after he requested it and seven months after Complainant entered his appearance for the clients.

72. In September Complainant finally received from Respondent an IOLTA check for $5,000 representing unearned advance fees the clients paid to Respondent.

73. Respondent did finally pay the court reporters out of the clients' funds.

74. Complainant argued the attorney's fees motion for the clients and the court took the matter under advisement.

75. In November 2016, the court issued an order delaying its ruling on the motion for attorney's fees due to inconsistencies in Respondent's filings, and based on its need to hear testimony from Respondent.

76. The court set an evidentiary hearing for March 27, 2017.

77. Respondent testified at the March 27, 2017 hearing.

78. Respondent testified that he did not have notice of the November 12, 2015 oral argument hearing.

79. Respondent testified that although he asked Judge Higgins about the case in the "foyer" [in November 2014], Judge Higgins did not discuss it with him.

80. Judge Higgins decided all pending issues by written order dated May 26, 2017. After summarizing the case in detail, Judge Higgins affirmed his ruling dismissing the case due to a lack of prosecution by the Plaintiffs through their counsel, Respondent.

81. Judge Higgins awarded the defendants attorney's fees of $25,831.21 and court costs of $4,948.70.

82. On June 29, 2016, the State Bar sent to Respondent a letter seeking information responsive to Complainant's charge, as part of its screening investigation.

83. Respondent responded on August 8, 2016.

84. In his response, Respondent claimed that he attached a flash drive containing all of his files in the case.

85. The flash drive, however, did not include all pleadings, and it did not include any financial data accounting for fees and costs incurred, charged, or collected in the case.

86. In his August 8, 2016 response, Respondent claimed that his time and financial itemizations and accountings were lost to a computer crash.

87. On September 22, 2016, as a continuing part of the State Bar's screening investigation, Bar Counsel asked Respondent for the following additional information:

> Mr. DeRose, acting on behalf of his current and your former clients Lloyd Carroll and Deborah Miku, asked for an accounting of money the clients paid to you. That accounting does not appear in your letter dated August 8, 2016, or the flash drive that accompanied it. Please furnish the following items:
>
> 1. An itemized accounting of all money, whether for fees, expenses, or otherwise, these clients (Mr. Carroll and Ms. Miku) paid to you;
>
> 2. An itemization of services rendered or expenses incurred on these clients' behalf;
>
> 3. Your client trust account ledger for these clients;
>
> 4. Your general trust account ledger for the period during which you represented these clients;
>
> 5. Your trust account administrative funds ledger for the period during which you represented these clients;
>
> 6. Duplicate deposit slips for deposits into your trust account for these clients;

7. Trust account bank statements for the period during which you represented these clients; and

8. Copies of your three-way trust account reconciliations for the period during which you represented these clients.

Kindly furnish the requested items by October 7, 2016.

88. On October 4, 2016, Respondent called and asked for a 60-day extension owing to suffering side effects of medical treatment.

89. Bar counsel replied that he merely wanted copies of the same things Complainant requested 16 months earlier, long before Respondent was afflicted with the condition for which he was receiving treatment.

90. Bar counsel further reminded Respondent that although he claimed the requested information was contained on a flash drive he provided in August 2016 in response to the State Bar's first screening investigation letter, that information was not contained on the drive.

91. Bar counsel also reminded Respondent that he merely sought copies of things that already exist, and did not ask Respondent to generate anything new.

92. Bar counsel suggested that at some point over the prior 16 months Respondent should have been able to delegate the photocopying task to an assistant.

93. On March 28, 2017, Respondent asked to have until the end of April to furnish the previously requested documents because he had an appellate brief due April 17, 2017.

94. Respondent said that he had to order copies of the bank records from his bank, his bank was slow to produce them, and they were still in the envelopes in which they arrived.

95. Respondent has failed to provide any of the information the State Bar requested in its letter to Respondent dated September 22, 2016.

CONDITIONAL ADMISSIONS

Were this matter to proceed to a formal hearing, Respondent would contest some of the facts set forth above, but his admissions are being tendered in exchange for the form of discipline stated below and are submitted freely and voluntarily and not as a result of coercion or intimidation. Respondent conditionally admits that his conduct violated Rule 42, ERs 1.3, 1.4, 1.5, 1.15(d), 1.16(d), 3.2, 8.1(b), 8.4(d); and Rule 54(d).

CONDITIONAL DISMISSALS

The State Bar conditionally agrees to dismiss the charges that Respondent violated ERs 8.1(a) and 8.4(c), out of evidentiary concerns and in exchange for Respondent's agreement to enter into this consent.

RESTITUTION

Restitution is not an issue in this matter.

SANCTION

Respondent and the State Bar of Arizona agree that based on the facts and circumstances of this matter, as set forth above, the following sanctions are appropriate: Reprimand and probation for two years (LOMAP). If Respondent violates any of the terms of this agreement, further discipline proceedings may be brought.

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in

various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. *In re Peasley,* 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

The duty violated

As described above, Respondent's conduct violated his duties to his clients, the legal system, and as a professional.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent acted with a negligent mental state as to some violations and knowingly with respect to others.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was actual harm to Respondent's clients and to the legal system.

The parties agree that the following *Standards* are applicable:

ERs 1.3 and 1.4

Standard 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

ER 1.5(d)(3)

Standard 4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

ER 1.15(d)

Standard 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

ER 1.16(d)

Standard 7.2 Suspension is generally appropriate when a lawyer knowingly 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.

ER 3.2

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.

ER 8.1(b) and Rule 54(d)

Standard 7.2 Suspension is generally appropriate when a lawyer knowingly 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.

ER 8.4(d)

Standard 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

"The Standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations." *Standards*, "II. Theoretical Framework." Thus, the presumptive sanction herein is suspension.

Aggravating and mitigating circumstances

The parties conditionally agree that the following aggravating and mitigating factors should be considered.

In aggravation:

Standard 9.22 --

(a) prior disciplinary offenses—

April 10, 1990, informal reprimand (currently, admonition), file no. 05-0401, former Rule 29(a), DR 5-105 – Respondent undertook joint representation of partners in a business transaction without making full disclosure and without securing the appropriate consent.

February 18, 1993, informal reprimand (currently, admonition), file no. 89-1831, ERs 1.4 and 8.1(b), and former Rule 51(h) – in representing a client concerning child custody modification, Respondent failed to keep the

client reasonably informed about the status of this case. Respondent also knowingly failed to respond promptly to the State Bar's requests for information.

(c) a pattern of misconduct – Respondent was unresponsive both to successor counsel and to the State Bar, and his misconduct mirrors the 1993 case referenced above;

(d) multiple offenses;

(i) substantial experience in the practice of law;

In mitigation:

Standard 9.32—

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems – Respondent suffered from several illnesses and underwent several medical procedures during his representation of the clients and his dealings with the State Bar, including coronary artery disease, myocardial infarction, stent placements, transient ischemic attack, aphasia, cholelithiasis, cholecystitis, laparoscopic cholecystectomy, bladder cancer, prostate cancer, and transurethral resection of the bladder cancer and prostate. Filed under seal as Ex. C pending this court's ruling on the State Bar's Motion for Protective Order are copies of the following corroborative medical records:

(1) Dr. Stuart B. Porter, D.O., 7/27/2014-7/30/2014;

(2) Dr. Ronald W. Assay, M.D., 11/25/2014-2/12/2015; and

(3) Dr. Donald L. Lamm, M.D., 10/23/2017-11/13/2017.

(m) remoteness of prior offenses.

Discussion

The parties conditionally agree that, upon application of the aggravating and mitigating factors to the facts of this case, the presumptive sanction of suspension should be mitigated to reprimand with probation. Respondent is a senior citizen who encountered health problems at a critical time during his representation of the clients and his dealings with the State Bar that impaired his attentiveness to both. Probation with LOMAP should help Respondent address his issues and, when added to reprimand, will adequately protect the public and serve the other purposes of lawyer regulation. Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent

believe that the objectives of discipline will be met by the imposition of a reprimand with probation, and the assessment of costs and expenses. A proposed form order is attached hereto as Exhibit B.

DATED this 29th day of November 2017.

STATE BAR OF ARIZONA

David L. Sandweiss
Senior Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

DATED this 29th day of November, 2017.

Bernald C. Porter
Respondent

Approved as to form and content

Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 29th day of November, 2017.

Copy of the foregoing emailed
this 29th day of November, 2017, to:

The Honorable William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
1501 West Washington Street, Suite 102
Phoenix, Arizona 85007
E-mail: officepdj@courts.az.gov

Copy of the foregoing mailed/emailed
this 29th day of November, 2017, to:

Bernald C. Porter
Porter Law Center Chartered
1480 E. Pecos Rd., Ste. 1081
Gilbert, AZ 85295-1835
Email: bern@porterlawcenter.com
Respondent

Copy of the foregoing hand-delivered
this 29th day of November, 2017, to:

Lawyer Regulation Records Manager
State Bar of Arizona
4201 N. 24th St., Suite 100
Phoenix, Arizona 85016-6266

by: _____
DLS: KEC

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Bernald C. Porter, Bar No. 001228, Respondent

File No. 16-1800

Administrative Expenses

The Supreme Court of Arizona has adopted a schedule of administrative expenses to be assessed in lawyer discipline. If the number of charges/complainants exceeds five, the assessment for the general administrative expenses shall increase by 20% for each additional charge/complainant where a violation is admitted or proven.

Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative costs will increase based on the length of time it takes a matter to proceed through the adjudication process.

General Administrative Expenses for above-numbered proceedings	**$1,200.00**

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges	$ 0.00
TOTAL COSTS AND EXPENSES INCURRED	$1,200.00

EXHIBIT B

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A CURRENT MEMBER OF THE STATE BAR OF ARIZONA, **BERNALD C. PORTER, Bar No. 001228,** Respondent.	**PDJ 2017-9108** **FINAL JUDGMENT AND ORDER** State Bar No. 16-1800

The undersigned Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on _____, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED that Respondent, **Bernald C Porter**, is hereby reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective 30 days from the date of this order or _____.

IT IS FURTHER ORDERED placing Respondent on probation for a period of two years, to participate in the State Bar's Law Office Management Assistance Program (LOMAP).

IT IS FURTHER ORDERED that Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258, within 10 days from the date of service of this Order. Respondent shall submit to a LOMAP examination of his office procedures. Respondent shall sign terms and conditions of participation, including reporting requirements, which shall be incorporated herein. Respondent will be responsible for any costs associated with LOMAP.

CAUTION RE NON-COMPLIANCE WITH PROBATION

If Respondent fails to comply with any of the foregoing probation terms, and the State Bar of Arizona receives information thereof, Bar Counsel shall file a notice of noncompliance with the Presiding Disciplinary Judge, pursuant to Rule 60(a)(5), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether Respondent has breached a term of probation and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the State Bar of Arizona shall have the burden of proof to prove noncompliance by a preponderance of the evidence.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of $ _____, within 30 days from the date of service of this Order.

IT IS FURTHER ORDERED that Respondent shall pay the costs and expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings in the amount of _____, within 30 days from the date of service of this Order.

DATED this _____ day of November, 2017.

_____

William J. O'Neil, Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this _____ day of November, 2017.

Copies of the foregoing mailed/emailed
this _____ day of November, 2017, to:

Bernald C. Porter
Porter Law Center Chartered
1480 E. Pecos Rd., Ste. 1081
Gilbert, AZ 85295-1835
Email: bern@porterlawcenter.com
Respondent

Copy of the foregoing emailed/hand-delivered
this ____ day of November, 2017, to:

David L Sandweiss
Senior Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

Copy of the foregoing hand-delivered
this ____ day of November, 2017, to:

Lawyer Regulation Records Manager
State Bar of Arizona
4201 N 24th Street, Suite 100
Phoenix, Arizona 85016-6266

by:_____

Exhibit C

Medical Records Filed Under Seal