BEFORE THE PRESIDING DISCIPLINARY JUDGE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **MEYER L. ZIMAN,** **Bar No. 002624,** Respondent.	**PDJ-2011-9067** **REPORT AND ORDER IMPOSING SANCTIONS** Nos. 10-1394, 10-2329, 11-0130

On February 29, 2012 and March 1, 2012, the Hearing Panel ("Panel") composed of Jan Enderle, a public member from Maricopa County, James M. Marovich, an attorney member from Maricopa County, and the Presiding Disciplinary Judge ("PDJ") held a two day hearing pursuant to Supreme Court Rule 58(j), Ariz.R.Sup.Ct. Craig D. Henley appeared on behalf of the State Bar of Arizona ("State Bar") and Joseph E. Collins appeared on behalf of Respondent. The witness rule was invoked.[1] The Panel considered the testimony, the parties' Joint Pre-Hearing Statement and the exhibits listed without objection in the Joint Pre-Hearing Statement, individual pre-hearing statements, individual proposed findings of fact and conclusions of law, and evaluated the credibility of the witnesses. The PDJ and Panel now issue the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz.R.Sup.Ct.

[1] Consideration was given to the testimony of Sonda Hudson, Lusia Rascon, Cheryl Morrissey, Christopher DeJolie, Diane Hendrickson, Miodrag Jocic, Michelle Lorenz, David Whitman and Antonio Roscacci, Esq.

I. SANCTION IMPOSED:

ATTORNEY SUSPENDED FOR ONE YEAR AND UPON REINSTATEMENT, TWO YEARS OF PROBATION WITH THE STATE BAR'S MEMBER ASSISTANCE PROGRAM ("MAP") AND LAW OFFICE MANAGEMENT ASISTANCE PROGRAM ("LOMAP"), RESTITUTION AND COSTS.

II. PROCEDURAL HISTORY

The Probable Cause Order was filed on September 12, 2011 and the Complaint in this matter was filed on October 17, 2011 alleging violations of Rule 31(a)(2), Rule 41(g), ERs 1.5(c), 1.7, 1.7(a), 8.4(c), 8.4(d). On November 14, 2011, Respondent filed his Answer. An initial case management conference was held on November 1, 2011 and a final prehearing conference was held on February 1, 2012. The matter was then set for a two day evidentiary hearing.

Upon conclusion of the hearing on the merits, the PDJ ordered the parties' to submit closing arguments and proposed findings of fact and conclusions of law. The parties filed their proposed facts and conclusions on April 6, 2012.

III. FINDINGS OF FACT

At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on September 26, 1970.

COUNT ONE (File No. 10-1394/Ruelas)

1. In or around June 2010, Respondent contacted Ms. Rascon and informed her that he had requested certain records but received records for his client "K. Jr." rather than "K. Sr."[2]

2. When Ms. Rascon asked Respondent to resubmit his request,

[2] See Exhibits 2 at Bates SBA000003, Exhibit 3 at Bates SBA000004; see also Exhibit 5 at Bates SBA000010-11, Exhibit 12 at Bates SBA000030, Answer, page 7-8, ¶ E - F

Respondent got frustrated and began berating Ms. Rascon.[3]

3. When Ms. Rascon told Respondent that she would be sure the copy service got his request, Respondent again got frustrated.[4]

4. Ms. Rascon informed Respondent to only contact Ms. Hudson for future requests.[5]

5. Respondent became frustrated stating that everyone tells him to call back to speak to someone else.[6]

6. After yelling a string of expletives at Ms. Rascon, Respondent hung up.[7]

7. In or around June 2010, Respondent contacted Ms. Hudson and informed Ms. Hudson that he had requested medical records for his clients but only received records for the client's son.[8]

8. When Ms. Hudson asked Respondent to refax the requests and explained that she only worked at the hospital one day a week, Respondent became frustrated and started cursing.[9]

9. When Ms. Hudson told Respondent that his language was inappropriate and there were better ways to handle the situation, Respondent replied that his language was appropriate and continued yelling profanities.[10]

10. When Ms. Hudson then said "excuse me but you are talking to a lady,"

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[3] Id.; see also Answer, page 8 ¶ F
[4] Id.
[5] Id.
[6] Id.
[7] Id.
[8] Id.; see also Answer ¶ 7 and ¶ F
[9] Id.
[10] Id.

Respondent stated that she was not a lady and that she was nothing but a slut who worked for a copy service.[11]

11. As testified to by Ms. Hudson, Respondent then repeated the word "slut" slowly and loudly.[12]

12. Ms. Hudson hung up the phone and reported the incident to Ms. Rascon.[13]

13. In or around July 2010, Respondent called to check on his records request.[14]

14. Ms. Rascon asked if she could put him on hold, and Respondent said "well that's a stupid question to ask, what if I don't want to hold."[15]

15. After being told that the requested records had been sent, Respondent immediately hung up.[16]

Testimony of witness Sonda Hudson

Sonda Hudson testified she has been employed for 7 years by IOD Inc., a medical records copying service which serves Maryvale Hospital. Ms Hudson testified about the policies and procedures for obtaining records and her assigned duties. Ms. Hudson stated that Respondent called on June 10th and advised her he had previously requested medical records for both father and son but only received medical records for the son. Ms. Hudson stated she did not receive the request for the records of the father and that if Respondent sent in another request, she would

[11] Id.
[12] Id.
[13] Id.
[14] Id.
[15] Id.
[16] Id.

get the records out the next day. Ms. Hudson stated that Respondent became enraged and began cursing. (using many explicatives).

Ms. Hudson stated she initially "let it slide" did not say anything regarding his language, however the cursing continued. Ms. Hudson asked Respondent to refrain from cursing, as "he was speaking to a lady." Ms. Hudson testified that Respondent said "You are nothing but a slut that works for a copy service." Ms. Hudson testified that she asked him "I am a what!" and that he again referred to her as a slut and repeated the word slowly. Ms. Hudson ultimately hung up on Respondent. Ms. Hudson stated she is positive Respondent called her a slut. She has never had a problem in distinguishing words ending in "t" or "g".

After the call, Ms. Hudson stated that she contacted her supervisor to inform her of the incident. Ms. Hudson e-mailed a summary of her communications with Respondent to the Medical Records Director of Maryvale Hospital, Jill Herschel, who then forwarded the e-mail to the hospital's legal department. Ms. Hudson further stated that Respondent has never apologized to her and she requested that in the future, she have no further contact with Respondent. *See* Exhibit 2.

Testimony of witness Luisa Rascon

Ms. Rascon testified that she has been employed by Maryvale Hospital for approximately seven years. During the relevant time period (approximately June 2010) she worked in the medical records department and received a call from Respondent checking on the status of a records request. Ms. Rascon stated Respondent called and indicated he had only received one set of records when he had previously requested records on both a senior and junior family members' record. Ms. Rascon stated she then checked the copy service request, which

indicated that the records had been sent. Ms. Rascon reassured Respondent that if he re-submitted his request to her attention, she would ensure it reached Sonda Hudson for processing on Tuesday. Ms. Rascon stated that Respondent became frustrated and upset, said "this is bullshit, fuck, fuck, fuck" and then terminated the conversation by hanging up on her.

Ms. Rascon stated she was also present when Respondent called back to speak to Sonda Hudson and she transferred that call to Ms. Hudson. After Ms. Hudson spoke with Respondent, she came out and informed Ms. Rascon that she would no longer accept calls from him because of his inappropriate language and to transfer his calls in the future to the Medical Director, Jill Herschel. Ms. Rascon further stated she reported the incident to Jill Herschel and sent an e-mail regarding the call. She did this because this type of call was out of the ordinary and she was asked to document the conversation by risk management which she did. *See* Exhibit 3.

Respondent testified he has practiced law for 42 years of practice and in the last 10-15 years, he has primarily practiced in the area of personal injury. Respondent stated he routinely calls various hospitals for records but sometimes gets frustrated because the process for obtaining records can at times be frustrating. He admits his level of frustration is increased when he perceives staff is not being helpful. Respondent explained that it is a long process and when records are not timely received, it causes him to become frustrated. He admits he was the caller. Respondent stated he did not use the term slut when speaking to Ms. Hudson; He in-artfully used the term slug, but he was merely referring to the process being slow, sluggish and cumbersome. The Panel finds he used the word

slut. Respondent's testimony is implausible. He initially testified he did not have an independent recollection of the call. This transformed into recalling the call and then morphed into a vivid recollection of the call. He does not believe it is inappropriate to use either term (slut or slug) in a business setting and that Ms. Hudson merely reverted to the more familiar term of slut during the conversation.

IV. CONCLUSIONS OF LAW

COUNT ONE (File No. 10-1394/Ruelas)

The Panel finds clear and convincing evidence is present that Respondent violated Rule 42, Ariz.R.Sup.Ct, specifically Rule 31(a)(2)(E) and Rule 41(g). Respondent failed to refrain from engaging in unprofessional and offensive conduct by failing to adhere to the provisions set forth in the Supreme Court Rules, the Oath of Admission to the State Bar, and the Lawyer's Creed of Professionalism.

V. FINDINGS OF FACT

COUNT TWO (File No. 10-2329/Jocic)

1. Miodrag and Gordana Jocic (hereinafter referred to as "Complainants") are husband and wife and parents of their disabled 30-year-old daughter, Maja Jocic.[17]

2. On August 31, 2010, all three were involved in a rear-end automobile accident while their vehicle was stopped at a red light.[18]

3. On September 4, 2010, Complainants hired Respondent on a contingency fee basis to represent them and their daughter regarding the accident.[19]

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[17] See Answer ¶ 17
[18] See Answer ¶ 17

4. Complainants signed Respondent's one page fee agreement on their own behalf.[20]

5. Respondent's fee agreement contains a number of deficiencies and failed to state whether his fee would be determined before or after expenses were deducted from any settlement or judgment.[21]

6. Respondent through counsel acknowledged that "[t]he handicapped child did not sign the contract...[i]t is a rudimentary legal principle that someone whose is (sic) severely handicap as is Maja, is not capable of entering into contracts."[22]

7. The Progressive Insurance policy provided for $15,000.00 medical per person, $30,000.00 per accident, and $10,000.00 property damage. The Colorado Casualty's policy provided for $25,000.00 medical per person, $50,000.00 per accident, and $25,000.00 property damage.[23]

8. On September 14, 2010, Colorado Casualty, Complainants' insurance carrier, sent Respondent a written appraisal for the damage done to Complainants' vehicle claiming a value of Eighteen Thousand Two Hundred Fifty Six Dollars and 51/100 ($18,256.51).[24]

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[19] See Answer ¶ 17; see also Exhibit 14 at Bates SBA000033
[20] See Exhibit 14 at Bates SBA000033
[21] See Exhibit 14 at Bates SBA000033; see also Answer ¶ 20, Exhibit 21 at Bates SBA000045, Ariz.R.Sup.Ct. 42, ER 1.2, 1.5
[22] See Exhibit 34 at Bates SBA000076 [Response to Question 1]; and Exhibit 14.
[23] See Answer ¶ 22
[24] Id.

11. On September 15, 2010, Complainant notified Respondent by fax to reject any offer regarding property damage based upon Colorado Casualty's appraisal.[25]

12. On or about October 6, 2010, Complainants on their own obtained a report from a certified appraiser that their vehicle was worth Twenty Four Thousand Four Hundred Ninety Seven Dollars ($24,497.00).[26]

13. Complainants submitted that appraisal to Progressive Insurance Company.[27]

14. On October 19, 2010, Respondent sent a demand letter to Progressive Insurance demanding payment of the policy limits and stating that Complainants' vehicle was valued "somewhere in the area of $20,000.00."[28]

15. In the October 19, 2010 demand letter, Respondent also proposed a distribution of the policy limits among the three clients.[29]

16. At some point during the representation, Respondent, Complainant and Michelle Lorenz, an adjuster from Colorado Casualty Insurance Company and/or its parent company Safeco, spoke on the telephone regarding the value of Complainant's vehicle.[30]

17. During a telephone conversation with Complainant and Michelle Lorenz, a Colorado Casualty Insurance Company adjuster, Respondent screamed at

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[25] Id.
[26] Id.
[27] Id.
[28] Id.; see also Exhibit 15 at SBA000034
[29] See Exhibit 15 at Bates SBA000037
[30] Id.

Mr. Jocic and stated he would no longer represent him if Mr. Jocic did not agree to accept Colorado Casualty's offer.[31]

18. In or about early November 2010, Complainants requested an accounting of Respondent's representation of Complainants and their daughter.[32]

19. On November 3, 2010, Respondent sent a letter to the claims department at Progressive Insurance, without his clients' approval, stating, "[W]e agreed to settle the above-referenced claims of my clients, Miodrag Jocic for $15,000.00, Gordana Jocic for $9,000.00, and Maya [sic] Jocic for $6,000.00. . . . My clients and I agree to hold harmless [the at-fault driver] and Progressive Insurance Company for all medical expenses known and unknown incurred by my clients that relate to the accident of August 31, 2010."[33]

20. On November 15, 2010, Respondent sent a letter to Complainants identifying the agreed upon distribution among the three (3) clients but stating that Complainants had the right to "decide to accept these offers" and specifically stated "[y]ou do not have to accept the offer from Progressive of policy limits."[34]

21. On November 27, 2010, Complainants received a check from Colorado Casualty Insurance Company for property damage.[35]

22. Complainants were upset that the insurance company paid $8,044.91 to Desert Schools Federal Credit Union, a lienholder based upon the loan it made to Complainants to purchase the vehicle.[36]

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[31] See Exhibit 21 at Bates SBA000045
[32] See Answer ¶ 25
[33] See Answer ¶ 26
[34] See Exhibit 20 at Bates SBA000043
[35] See Exhibit 22 at Bates SBA000048
[36] Id.; see also Exhibit 16 at Bates SBA000038

23. Complainants claim Respondent never disclosed to them that part of any settlement proceeds would have to be paid to the lienholder on their automobile title.[37]

24. On November 29, 2010, Respondent met with Complainants and explained that he had received three checks from Progressive Insurance - one for each Complainant and one for their daughter.[38]

25. During the meeting, Respondent asked Complainants to sign the checks and explained how he would distribute the settlement funds.[39]

26. During the November 29, 2010 meeting with Complainants, as the conversation deteriorated, Respondent attempted to hit Complainant-Miodrag, hit his binder, bit his own fists, and then escorted Complainants from his office stating: "I am done. Door is on the left side. Fucking people."[40] In essentially terminating them as clients, Respondent never informed them he considered his work completed and would still demand his percentage fee.

27. Respondent gave Complainants the Progressive settlement checks and releases for signature if they wanted to accept Progressive Insurance's tender of the policy limits or return if they reject the offer and file a lawsuit.[41]

28. Complainants did not sign the Progressive settlement checks and releases and sought alternate counsel.[42]

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[37] See Exhibit 22 at Bates SBA000048
[38] See Answer ¶ 28
[39] Id.
[40] See Exhibit 22 at Bates SBA000046; see also Exhibit 29 at Bates SBA000061-2 ¶¶ 4, 12
[41] See Answer ¶ 28
[42] See Answer ¶ 31

29. Respondent admits that "[t]here were animated discussions", but claims that this was due to a language barrier and Complainant's refusal to allow an interpreter to be present.[43]

30. Respondent failed to provide Complainants with an accounting until December 28, 2010 when he sent a calculation and payment of medical bills incurred in this accident.[44]

31. Respondent falsely informed them that one of the insurance companies was in bankruptcy and had no money for a second appraisal of his vehicle.

32. Respondent participated in the State Bar's Fee Arbitration Program and was awarded his fee in the amount of $7,500.00 or 25% of the gross recovery and $509.55 in costs. The only issue before the Arbitrator was if the fee charged was reasonable for the amount of work performed.[45] This further injured his clients, assuring he would receive an entire fee, having refused to consult with his clients regarding the settlement.

33. Mr. Jocic filed a complaint with the Attorney General's Office.[46]

34. In his response to the State Bar's investigation regarding a guardian for the disabled client, Respondent responded it is not applicable because there was no known guardian.[47]

35. Respondent did not advise the Jocics to seek independent counsel for Maja or take any actions to have a guardian appointed during the settlement negotiations. [Respondent's Hearing testimony]

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[43] Exhibit 29 at Bates SBA000061-2 ¶¶ 4, 12
[44] See Answer ¶ 25 and SB Exhibit 24.
[45] See Respondents' Exhibit A, Bates 17.
[46] Exhibit 22.
[47] Exhibit 34, Bates 81.

36. Respondent admits it not clear how the settlement proceeds are to be divided. [Respondent's Hearing Testimony]

37. Exhibit 17 does not reflect that the matter is settled prior to the execution of signed releases.

Diane Hendricks

Ms. Hendricks testified that she did not witness conversation between Respondent and Mr. Jocic. She was on the back side of the building heard pounding and the client yelling. Mr. Ziman appeared frustrated and the other attorney wanted to call police.

Testimony of Miodrag Jocic

Mr. Jocic testified he met with Respondent and told him he was not the guardian for his disabled daughter Maja but that he and his wife have cared for her all his life. In the past he has signed medical releases on Maja's behalf.

Mr. Jocic stated he did not authorize Respondent to settle the claims for the listed amounts in Exhibit 17. There was a fee dispute with Respondent. Mr. Jocic stated he was concerned because his property settlement was inadequate, his medical liens were not paid and he had not been compensated for lost wages. He had negotiated a more favorable property settlement by himself. At the meeting on November 29, 2010, Respondent was just asking for his money and did not have an accounting of the medical liens. Mr. Jocic said he would not sign the settlement checks without an accounting at which time, Respondent erupted, bit his own hands, tried to hit him with a binder, opened the conference room door and said "I am done; fucking people". Mr. Jocic acknowledged that during the conference call with insurance adjustor Michelle Lorenz, he stated "what do I have to do, kill

someone or pray to God for cancer" but that no one would listen to him about the value of the car.

Respondent testified that Mr. Jocic informed Respondent that his daughter, Maja was disabled when they presented for the initial consultation. There were no physical signs of disability but Mr. Jocic told Respondent he takes care of all his daughter's needs. Respondent stated he took the personal injury case on contingency fee basis. (Exhibit 14) However, client Maja's signature does not appear on the retainer agreement for contingency representation and he has no independent recollection that she did sign a fee agreement. Respondent acknowledges that the fee agreement states that "No dismissal of settlement will be made without the consent of Client and Attorney." This statement in Respondent's fee agreement is contrary to ER 1.2 regarding settlement agreements, which provides that the client determines whether or not a settlement offer is accepted. The fee agreement also provides for an attorney fee of ¼ or 25% of recovery but does not indicate if the contingency fee is ¼ of the gross or net percentage of recovery. In addition, a breakdown of the distribution of any settlement fees is not captured in the fee agreement.

Respondent stated he is aware that the State Bar offers sample fee agreements on their website but that he has used this form since 2000 and in his practice of 42 years, he has never had a client question the distribution of the settlement proceeds. Respondent is open to changing fee agreement form. Aware of limited recovery pool and that claims of individual clients would exceed policy. In his demand letter, Respondent states he suggested the following disbursements to Progressive Insurance Company: $12,500 for Gordana, $12,500 for Miodrag and $5,000 for Maja. (See Exhibit 15) Respondent admits that a copy of the letter was not sent to the client. In

addition, Respondent admits the fact sheet in Exhibit 17 dated 11/3/2010 was prepared to settle any and all claims but clients were not aware of that proposed distribution and did not receive a copy of the fact sheet. These amounts were different than previously suggested at the direction of Progressive claims adjustor, Dave Whitman based on the dollar amount of medical bills. Respondent admits he did not have the clients' authority to approve the proposed distribution proposed in Exhibits 15 or 17 and the clients ultimately did not agree to the distribution.

Respondent testified that he prepared Exhibit 18 on November 4, 2010 to inform Colorado Casualty that the claim with Progressive had settled and to advise Colorado Casuality of an under-insured motorist ("UIM") claim. Although the fax (Exhibit 18) states that "we have settled the 3 liability claims with Progressive Insurance for the policy limits. Please now set up a UIM claim for each of my clients and let me know who UIM adjustor and phone number is." Respondent admits the clients were not aware of the action and did not receive a copy of Exhibit 18.

Respondent stated he was aware that the limited pool amount would impact amount recovered by each client and allowed Mr. Jocic to make the decision regarding the distribution of funds. Respondent states Gordana and Maja never spoke to him and that Mr. Jocic always spoke for wife and daughter. Respondent admits there was no informed consent for concurrent representation, only a fee agreement and subsequent conversations.

Respondent admits there are no documents that appoint Mr. Jocic as the guardian for his adult daughter. Respondent acknowledges he approved/accepted Progressive's distribution amount and had obtained the settlement checks based on verbal communications with Mr. Jocic. [Exhibit 20]

Although Exhibit 21 demonstrates that the client did not agree or understand the fee agreement and distribution of settlement funds, Respondent maintains the amounts of each check did not matter. Respondent stated it was important to get the funds into the trust account and then the funds could be distributed however Mr. Jocic wanted.

A complaint against Respondent was filed by Mr. Jocic with the AG's office and Respondent filed a response. Respondent advised that a dispute arose with Mr. Jocic at the meeting on November 29, 2010, to obtain signatures on the checks and releases. Mr. Jocic began pounding his fist and demanded how he would be paid and how Respondent would be paid. Mr. Jocic wanted to be reimbursed for any loss of income and then Respondent would be paid his ¼ or 25%.

Respondent admits he became frustrated at the November 29, 2012 meeting, raised his voice, used explicatives during the meeting, and told the clients to leave. He says he repeatedly asked that Mr. Jocic bring interpreter because of the confusion and language barrier, but Mr. Jocic refused and continually said that he understood. The panel finds Respondent's testimony inconsistent and implausible.

Respondent also testified as to his procedures for handling and disbursing settlement proceeds. In the case of Maja, Respondent stated his procedure was that if it was determined she needed a conservatorship or guardianship after receiving the settlement funds, he would file with the court for approval of her settlement and the parents' funds would be delayed pending that approval. This was never discussed with the Jocic because "substance trumps form" and he believed the father could make a proper decision about the limited amount of

settlement and distribution as it was a minor amount of money that would eat into her proceeds and he has cared for her all his life. Respondent stated he does not recall who signed the authorization for release of Maja's medical records.

Respondent acknowledges that the authority to settle lies with the client, who is the ultimate authority and their decision controls. Respondent said he received the settlement checks from Progressive and met with Mr. and Mrs. Jocic on November 29, 2010. Maja was not present at that meeting, only Mr. and Mrs. Jocic and Mrs. Jocic had never spoken to Respondent; she only accompanied her husband and he does all of the talking for the family. Respondent stated the confrontation began when he discussed the outstanding medical liens and explained the procedure for resolving those liens. He also reminded the medical liens were, his costs and fees totaled, he became angry and pounded his fists on the table. Respondent stated Mr. Jocic demanded that his medical liens and lost wages be paid prior to Respondent receiving his fee. The representation was terminated on that day.

VI. CONCLUSIONS OF LAW

COUNT TWO (File No. 10-2329/Jocic)

The Panel finds clear and convincing evidence is present that Respondent violated Rule 42, Ariz.R.Sup.Ct, specifically ER 1.5(c), 1.7, 1.7(a), 8.4(c), 8.4(d), Rule 31(a)(2)(E) and Rule 41(g), Ariz.R.Sup.Ct. Based on the allegations sufficiently pled in the complaint and the testimony at hearing, the Panel determined Respondent also violated ER 1.14 (client with diminished capacity) based on his representation of Maja Jocic, a disabled individual. Respondent had an obvious conflict, an obligation to advise the clients of the conflict and to seek

independent legal advice, and obtain a written informed consent. There was a significant risk that the clients' interest were materially limited by the Mother and Father's interests.

The Supreme Court of Arizona has previously held that the attorney was not denied due process when State Bar Disciplinary Board added allegations of unethical conduct to the complaint against him following his testimony at a disciplinary hearing, since he had ample time and opportunity to respond to the allegations. *In re Riley*, 142 Ariz. 604, 691 P.2d 695. *In re Tocco*, 194 Ariz. 453, 984 P.2d 539 (1999) (holding that a lawyer can be convicted of uncharged ethical violation if it is not based on separate incidents of misconduct). Rule 47 also provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as such.

VII. FINDINGS OF FACT

COUNT THREE (File No. 11-0130/DeJolie)

1. On or about January 6, 2011, Respondent called the North Scottsdale Ambulatory Surgery Center ("NSASC") and asked Cheryl Morrissey ("Morrissey"), a NSASC employee, to speak with Susan Weber ("Weber"), another NSASC employee, about medical records related to a personal injury case.[48]

2. Morrissey stated Weber was out of the office and inquired whether Respondent would like to leave a message on Weber's voice-mail.[49]

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[48] See Exhibit 37; see also Exhibit 38, Exhibit 40 at Bates SBA000093 ¶ 2, Exhibit 41 at Bates SBA000096-7, Exhibit 42 at Bates SBA000102-3

[49] Id.

3. After several attempts to get Respondent to leave a message, Respondent then stated to Morrissey that he was getting so excited thinking about calling back the next day that "[he] just came all over [him]self."[50]

4. At that time, Morrissey hung up the phone.[51]

5. On or about January 7, 2011, Respondent called NSASC.[52]

6. Morrissey again answered the phone.[53]

7. When Respondent identified himself at "Maurie Sieman", Morrissey attempted to transfer the call to Christopher DeJolie ("DeJolie"), a supervisor, but was unable to do so.[54]

8. Respondent denies he identified himself as "Maurie Sieman" when he called the ambulatory service. The Panel finds he did so identify himself.

9. Respondent testified that he does not recall making the comment to Ms. Morrissey but at 67, it is physically impossible at his age to "come all over himself."

10. Respondent called NSASC again approximately seven minutes later at 12:23 p.m.[55]

11. DeJolie answered the telephone and asked how he could assist Respondent.[56]

12. Respondent refused to talk to DeJolie and asked to speak with Weber.[57]

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[50] Id.
[51] Id.
[52] Id.
[53] Id.
[54] Id.
[55] Id.
[56] Id.

13. When DeJolie informed Respondent that Weber wasn't in the office and asked Respondent his name, Respondent asked for his car.[58]

14. When DeJolie then identified himself to Respondent as the office manager, Respondent once again asked for DeJolie's car.[59]

15. When DeJolie asked Respondent why he asked for his car, Respondent stated he should not have to provide his name if DeJolie wasn't going to give him his car and then hung up.[60]

16. Respondent admits through counsel that he has a vague recollection of the call to NSASC on January 6, 2011, and remembers joking with the person who answered the telephone.[61]

17. Respondent admits though counsel that he also called NSASC on January 7, 2011, and asked to speak with a person in the records department that he had spoken with regarding other cases.[62]

Testimony of witness Cheryl Morrissey

Ms. Morrissey testified she worked at North Scottsdale Ambulatory Surgery Center in January 2011 as a patient admitter. Susan Weber works with her admitting patients and also handles the records requests. Ms. Morrissey stated she received a call on January 6, 2011, and the gentleman asked to speak with Susan Weber. Ms. Morrissey told the caller that Ms. Weber was not available and did he want to leave a message. The caller then stated, "No I would rather call back

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[57] Id.
[58] Id.
[59] Id.
[60] Id.
[61] Id.
[62] Id.

tomorrow and be treated rudely and put on hold for ten minutes." Ms. Morrissey stated that she ignored the comment and asked again if he wanted to leave a message for Ms. Weber. He said no, that he would call back the next day then and stated that he was so excited just thinking about it that "I just came all over myself." Ms. Morrissey stated she has never experienced such vulgar and offensive conduct and she hung up on him. Ms. Morrissey stated she immediately prepared e-mail to her supervisor, Chris Jolie while the incident was fresh in her memory. When he called back the next day, Ms. Morrissey stated she recognized his voice and he identified himself as "Maurie Sieman." Ms. Morrissey stated she transferred the call to her supervisor, Christopher DeJolie. [63] Ms. Morrissey stated that if Mr. Ziman calls the center again, staff has been directed to transfer the call to a supervisor.

Testimony of witness Christopher DeJolie

Mr. DeJolie testified he has been employed at North Scottsdale Ambulatory Surgery Center for six years. On January 7, 2011, Mr. DeJolie stated Ms. Morrissey had received an inappropriate call that left her shaken up. When the gentleman called back a few minutes later, Mr. DeJolie picked up the call from his station, greeted the caller and asked for his name. He immediately asked for Susan Weber. Mr. DeJolie stated he then informed the caller that Ms. Weber was not in the office and again stated "can I have your name"; he refused and responded, "can I have your car." Mr. DeJolie stated he identified himself as the office manager and asked Respondent why he wanted his car. It went back and forth and Respondent

[63] Exhibit 37.

ultimately hung up. Mr. DeJolie stated he has never encountered similar calls and most callers, including attorneys, are professional when requesting records.

Mr. DeJolie stated that the policy regarding inappropriate calls is to log them. He asked his employee Ms. Morrissey to document the call and its content and reported the incident to the charge nurse and administrator.[64]

Respondent admits that he was the caller who spoke to Mr. DeJolie on January 7, 2011. He made the comment because Mr. DeJolie's question was grammatically incorrect.

VIII. CONCLUSIONS OF LAW

COUNT THREE (File No. 11-0130/DeJolie)

The Panel finds clear and convincing evidence is present that Respondent violated Rule 31(a)(2)(E) and Rule 41(g).

XI. SANCTIONS

In determining an appropriate sanction, Court generally utilizes the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") as a guideline. Rule 58(k), Ariz.R.Sup.Ct. The appropriate sanction depends on the facts and circumstances of each case.

Analysis under the ABA *STANDARDS*

When imposing a 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. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004). *See* also *Standard* 3.0.

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[64] Exhibit 38.

The *Standards* however, do not account for multiple charges of misconduct and advise that the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct *See* 1992 amended *Standards, Theoretical Framework, p.* 7.

In this matter, Respondent violated duties owed to clients, the public and as a professional and caused actual and potential injury. The Panel applies the following *Standards* to Respondent's particular misconduct:

Standard 4.31 *Failure to Avoid Conflicts of Interest* is applicable to Respondent's violation of ER 1.7 and provides in part:

> Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
>
> (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client

Standard 4.32 provides:

> Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Standard 5.11(b) *Failure to Maintain Personal Integrity* is applicable to Respondent's violation of ER 8.4(c) and provides that Disbarment is appropriate when:

> (b) a lawyer engages in any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 5.12 provides:

> Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

Standard 7.1, *Violations of Duties Owed as a Professional* is applicable to Respondent's violation of ERs 1.5(c), 1.14, Rule 31(a)(2), Rule 41(g) and provides:

> Disbarment is generally appropriate when a layer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Standard 7.2 provides:

> 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 proceeding.

Respondent's misconduct was knowing and caused actual and or potential harm to clients and the profession. Therefore, the presumptive sanction falls between disbarment and suspension.

DISCUSSION

The *Rules of Professional Conduct* define "unprofessional conduct" as substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism and is ground for discipline. *See* Supreme Court Rule 31(a)(2)(E) and Rule 54(h) (2012). In taking The Oath of Admission to the Bar, lawyers swear that they will abstain from offensive conduct. Respondent repeatedly and intentionally committed offensive conduct. Respondent still does not accept that his conduct is offensive.

The Panel notes that Respondent's misconduct occurred over a period of time with several employees and establishes a clear pattern of misconduct. Prior efforts at rehabilitation from his offensive and unprofessional misconduct have been unsuccessful and clearly the behavior has not been arrested. His testimony that he does not remember aspects of his prior disciplinary record is troublesome and unbelievable. Given his past, similar history, the Panel is not persuaded by Respondent's assertion that he used the word slug as opposed to slut in Count One. Respondent maintains because his statements in Count One and Three were made to the public, did not invoke fear or violence, and were protected by the First Amendment, that no ethical violation occurred.

Lawyers should always strive to treat others with dignity and respect. Rude attacking comments reflect poorly on a self regulating profession. When making business calls, it is not necessary to give grammar lessons, but that is not a sanctionable action. It does however demonstrate a pattern of insensitivity and intentional disregard of others and rules which prior discipline had little impact upon. Worse and more aggressively to the point, it is inexcusable to make profane and insulting remarks. When followed by a pattern of neglect with respect to client matters, his conduct runs the gambit of minor to major transgressions and behavior that he has little apparent interest in controlling or addressing. Collectively there is a pattern that spells indifference to his legal and ethical obligations from which the public has no protection.

Over all, the Hearing Panel found Respondent's testimony to be jaded and unapologetic. Briefly put, he knows the rules but believes he is superior to them, ignores them intentionally and is explosive when he does not receive the special

treatment to which he feels entitled. It is not that he has little regard for other people's feelings in these matters; he has no regard for their feelings. His sense of entitlement has obliterated any sense of duty to his client and any sensibility to others on the remaining counts.

Individuals have an absolute freedom to hold any number of views. Respondent clearly holds other in extreme low regard that he deems inconvenience him. He is entitled to hold that opinion. However, Respondent brandishes his opinion as a battering ram, intentionally offending people. This Panel does not believe these are "slips of the tongue" or inadvertent. Respondent is intentional in his conduct and bull whips people by his words with a zeal. While in his private life he may be as rude, offensive and demeaning as he chooses, in his professional life he may not hide behind his First Amendment rights to ignore his sworn responsibilities. Unprofessional conduct is defined by Rule 31 Ariz. Sup. Ct. as violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona. That Oath requires attorneys in their professional lives to "abstain from all offensive conduct." *In re Abrams* 257 P.3d 167 (2011).

In this matter, when Respondent testified about his experiences with LOMAP, his attitude was more than cynical. He claimed that LOMAP was not helpful, blaming the LOMAP representative because she primarily talked about movies and books. He repeatedly blamed the LOMAP representative for the program's failure to help him and their failure to point out deficiencies in his fee agreement form. He never accepted any personal responsibility concerning LOMAP. For him, he had no responsibility; his unethical actions were their problem, not his.

When confronted about the profanity Respondent used against the employees of the records departments, he claimed entitlement under the 1st Amendment to use profanity. Because he did not receive the medical records to which he felt he was entitled, Respondent became frustrated and angry and lashed out against the employees with profanity. Whether he actually was entitled or not does not matter; when he did not receive the special treatment to which he felt he was entitled, he struck out with anger.

Respondent's testimony further demonstrated a lack of empathy about the feelings of the employees. He testified that it does not bother him when others yell at him or tell him to "fuck off." Because profanity and mistreatment directed at him is okay, he concludes that it should be okay with everybody else. He demonstrated a failure to recognize the feelings of the employees.

When Respondent muttered "those fucking people" loud enough for his clients, the Jocics to hear, he displayed a complete disregard for their feelings and an attitude of superiority, including a complete failure to understand why the Jocics' would feel the way they did. Respondent espouses a debonair nihilism, where moral principles simply do not apply to him.

Respondent refused to adhere to the most fundamental principles of attorney representation by responding to his client's request for information and settling a case without any attempt to include his client in those negotiations. His cavalier actions are identical to those he was previously sanctioned for in, *In re Ziman supra.* It is patently offensive that he then proceeded to fee arbitration knowing the only issue would be the reasonableness, objectively, of the fee. To ignore his clients and then attempt to bully them into accepting an agreement he intentionally kept them from

knowing the details of is the height of duplicity. It is only topped off by his firing them as his clients and demanding a full fee as a reward for his unethical actions.

His clients were injured by these actions. His work was minimal. His clients provided the investigative proof of the value of the car, which he promptly ignored. Being untruthful regarding the bankruptcy of the insurance company to speed up his fee is blatant misconduct. He knew one of the clients was completely disabled and refused to protect her interests. In every aspect his conduct and his prior history are inexcusable.

***Standard* 9.0, Aggravating and Mitigating factors**

Aggravating factors in attorney discipline proceedings need only be supported by reasonable evidence. *Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). The Panel finds the following aggravating factors are present in this matter:

> *Standard* 9.22(a) prior disciplinary offenses (Exhibits 44-47):
> An informal reprimand was imposed in 1991 in File No. 90-1892 for violating ER 1.4 and 1.16.
>
> In 1993, a 90 day suspension and one year of probation (LOMAP and CLE) was imposed by way of an Agreement for Discipline by Consent in File No. SB-92-0073-D for violating ERs 1.2, 1.3, 1.4, 3.2, 3.3, 3.4, 3.5, 8.4, and Rule 41(g).
>
> In 1997 File No. SB-97-0029-D, censure and restitution were imposed for violating ERS 1.2, 1.3, 1.4 and 1.5.
>
> In 2002 File No. SB-01-0195-D, a 30 day suspension was imposed for violating ER 1.15(b).
>
> In 2009 Order of Informal Reprimand and Probation (LOMAP and CLE) was imposed for violating ER 1.1, 1.2(a), 1.3, 1.4, 1.5(b) and 1.16(b) and (d).
>
> 9.22(b) dishonest or selfish motive;

9.22(c) a pattern of misconduct; Respondent was previously suspended for similar misconduct in 1993 when he made an offensive and profane comment to the arbitrator and violated Rule 41(g) and entered into stipulations without knowledge or consent of his client.

9.22(d) multiple offenses;

9.22(g) refusal to acknowledge wrongful nature of conduct; and

9.22(i) substantial experience in the practice of law; [Admitted in 1970]

9.22(h) vulnerability of victim [disabled client]

The Panel finds the following mitigation factor is present:

9.32(e) full and free disclosure to disciplinary board or cooperative attitude towards proceedings.

Respondent asserted that mitigating factor 9.32(c) personal or emotional problems is present, among others. However, the record is devoid of any evidence to support that factor. [*See* Brief of Respondent filed February 15, 2012]

In regards to sanctions, Respondent argues that if any violations occurred, they are technical violations and no harm occurred. Respondent requests that the matter be dismissed. The State Bar asserts that the violations have been proven by clear and convincing evidence and asserts a suspension of no less than one year is appropriate.

Respondent asserted that his misconduct in 1993 was out of character for him, an isolated event, and that he understood the need to avoid such misconduct. To the contrary, this panel finds his conduct in this action to be entirely and miserably consistent. He was put on notice at that time that making profane and insulting remarks may reflect adversely on his fitness to practice. *In re Ziman*, 174 Ariz. 61, 847 P.2d 106 (1993). It is an opinion he testified he had no memory of. He would

have been better served to have remembered it and strove to adhere to its instruction instead of ignore it as an inconvenience.

CONCLUSION

Based on the facts in this matter, consideration of the *Standards* including the numerous aggravating factors present and the sole mitigating factor present, the Panel determined that a suspension of one year, two years of probation upon reinstatement (LOMAP and MAP), and costs of these disciplinary proceedings is the appropriate sanction. Specific terms and conditions of probation will be addressed at the time of reinstatement.

Restitution is awarded to his past clients, the Jocic family in an amount identical to his Fee Arbitration Award, less any actual costs that may have been incurred and unreimbursed in his representation of them.

DATED this 30 day of April, 2012.

William J. O'Neil, Presiding Disciplinary Judge
Office of the Presiding Disciplinary Judge

CONCURRING

James M. Marovich, Volunteer Attorney Member

Jan Enderle, Volunteer Public Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 30th day of April, 2012.

Copies of the foregoing mailed/emailed
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