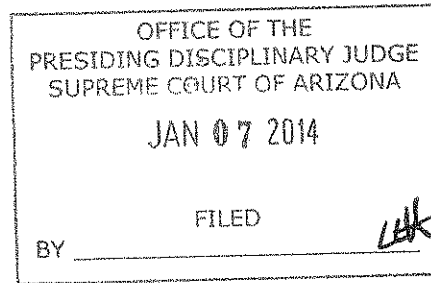


Craig D. Henley, Bar No. 018801
Senior Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Telephone: 602-340-7272
Email: LRO@staff.azbar.org



Geoffrey M. T. Sturr, Bar No. 014063
Osborn Maledon PA
2929 North Central Ave., Ste. 2100
Phoenix, Arizona 85012-2765
Telephone: 602-640-9377
Email: gsturr@omlaw.com
Respondent's Counsel

**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

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

Mark Deatherage,
Bar No. 010208,

Respondent.

PDJ-2013-⁴9002

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

[State Bar No. 11-3829]

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent Mark Deatherage, who is represented in this matter by counsel, Geoffrey M.T. Sturr, hereby submit their Tender of Admissions and Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. Respondent voluntarily waives the right to an adjudicatory hearing on the complaint, 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 admission and proposed form of discipline is approved.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, Ariz. R. Sup. Ct., ERs 1.6, 1.7(a)(2) and 1.8(b). Upon acceptance of this agreement, Respondent

agrees to accept imposition of the following discipline: Reprimand with one (1) year of probation requiring Respondent to complete no less than six (6) hours of Continuing Legal Education in addition to his annual MCLE requirement and complete the "Ten Deadly Sins of Conflict" program within ninety (90) days. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding.¹ The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit "A."

The State Bar has informed Complainant of the proposed resolution.

FACTS

GENERAL ALLEGATIONS

1. 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 November 9, 1985.
2. At all times relevant, Respondent was a shareholder of Gallagher & Kennedy, P.A. ("G&K").

COUNT ONE (State Bar File No. 11-3829)

3. In April 2007, G&K undertook the representation of Jesse P. Truitt and several companies in which he has a controlling interest: Arizona Medical Buildings, L.L.C. ("AMB"); Associated Medical Development, Inc. ("AMD"), which owns AMB; Medical Associates of Arizona, L.L.C. ("MAA"); MDMED, Inc.; and Terra Loma Development, Inc. ("Terra Loma") (collectively, the "Clients").
4. The adverse parties were Dr. John S. Truitt, his wife Shireen Truitt, and Chasm Investments, LLC ("Chasm"), all of whom were represented by the Complainant.

¹ 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.

5. G&K's representation of the Clients arose from disputes between Jesse and his uncle, Dr. Truitt, over ownership and management of real and personal properties and business entities.

6. Respondent had primary responsibility for the representation from the outset until about August 2007 and then again beginning in about February 2011.

7. On April 10, 2007, Gallagher & Kennedy caused an action to be filed in Pima County Superior Court on behalf of AMB and Jesse captioned *Arizona Medical Buildings, LLC, et al. v. Chasm Investments, LLC, et al.*, C20071914 (the "1914 action"). Other related actions were filed in Pima County Superior Court, including C20074334, C20074380, C20074398, C20087106, C20088383, C200088606 (originally filed in Pinal County), and C20112768 (originally filed in Cochise County), all of which were consolidated with the 1914 action (collectively, the "Pima County Lawsuit").

8. The primary dispute (addressed in the 1914 action) was whether a group of real and personal properties were owned by Jesse/AMB, or by Dr. Truitt/Chasm.

9. Another dispute (addressed in the 4334 action) was Dr. Truitt's contention that he owned 100% of MDMed, AMD/AMB, and Terra Loma.

10. A third dispute (addressed in the 4380 action, and to some degree in the 1914 action as well) involved an ownership interest in Sierra Vista Medical Center Partnership ("SVMCP").

11. In 2008, a *quo warranto* trial was held on Dr. Truitt's claim in the 4334 action that he owned 100% of MDMED, AMD/AMB, and Terra Loma. The trial court declared that Jesse was and remained the 51% owner of the companies and that Dr. Truitt owned only 49%.

12. In December 2010, in the 4380 action, the court granted summary judgment motions filed by G&K on behalf of Jesse (and also by SVMCP through its attorney), declaring that the sale of Dr. Truitt's interest in SVMCP was to Jesse individually, not to AMD. The court deferred entering final judgment in favor of Jesse until the second issue (performance of Jesse's payment obligations) was resolved in the 1914 action.

13. By 2010, G&K had incurred substantial attorneys' fees and costs during its representation of the Clients which had not been paid.

14. During 2010, Respondent had discussions with Jesse about an agreement under which, among other things, G&K would accept a discounted payment for fees and costs then owing, G&K would provide a discounted hourly rate for future fees, and the Clients would provide security for the payment of future fees.

15. On October 21, 2010, Respondent presented Jesse with a draft agreement, setting forth those and other terms.

16. Respondent believed, based on his and other G&K attorneys' communications with Jesse, that the funds to be used to make the discounted payment would be obtained through the sale of certain real property in Casa Grande, Arizona owned by Terra Loma.

17. In mid-February 2011, after being advised by Jesse that the Casa Grande property was due to be sold on or about February 23, 2011, Respondent sent Jesse a revised form of the proposed agreement.

18. After Jesse failed to enter into the proposed agreement or an alternate agreement, and in light of the imminent anticipated closing of the sale of the Casa Grande property, Respondent was directed by G&K's Board of Directors to explore the possibility of G&K seeking a provisional remedy with respect to the net proceeds of that sale.

19. Respondent sought the assistance of Joe Cotterman, a former G&K partner who is no longer with the firm, because of his experience with provisional remedies. With assistance from Respondent, Cotterman prepared a draft complaint, application for provisional remedy without notice, and supporting affidavits.

20. Respondent was asked by the G&K Board of Directors to determine whether G&K could seek a provisional remedy before withdrawing from its representation of the Clients. Respondent recalls reviewing the Arizona Rules of Professional Conduct, including ERs 1.7 and 1.16 and the accompanying comments. He did not review any cases, nor did he review any ethics opinions. Respondent concluded that the pursuit of a provisional remedy did not create an immediate conflict of interest such that prior withdrawal was required under ER 1.16(a)(1).

21. Respondent reasoned that the pursuit of a provisional remedy was a mechanism to sequester the net sale proceeds which did not involve, at this stage in the proceeding, the pursuit of claims against the Clients or the prospect of G&K recovering any proceeds. The remedy would merely preserve for the firm the right to seek recovery against the sequestered funds in the future if necessary. Although Respondent concluded that it was not necessary for G&K to withdraw before filing the provisional remedy action, he understood that the firm would need to withdraw from the representation soon after the action was filed.

22. On February 22, 2011, Respondent and Cotterman filed in Maricopa County Superior Court, a complaint and application for provisional remedy without notice, captioned *Gallagher & Kennedy v. Jesse P. Truitt, et.al.*, CV2011-004014, against the Clients (the "Maricopa County Action"). Attached to the G&K Complaint as Exhibits A and B, respectively, was a copy of a letter to the Clients setting forth the terms of the representation along with a client payment summary and ledger.

23. Attached to the Application for Provisional Remedy as Exhibits A and B, respectively, were affidavits by Respondent and G&K attorney Dean Short detailing the amount of outstanding fees, discussions between G&K and the Clients regarding the sale of the Casa Grande property and G&K's unsuccessful attempts to resolve with Jesse the firm's outstanding fees, the proposed sale of the Casa Grande property, and information about a bank account maintained by Terra Loma.

24. On February 25, 2011, Maricopa County Superior Court Judge Jeanne Garcia granted the application for provisional remedy without notice.

25. On March 11, 2011, Respondent sent Jesse a letter asking him to consent to G&K's withdrawal as counsel to the Clients.

26. Jesse advised G&K he would not consent to withdrawal and expressed his desire to have G&K continue to represent the Clients and to continue to work out a payment agreement that would enable G&K to continue with the representation.

27. On March 28, 2011, Judge Garcia conducted a probable cause hearing on the Application wherein Respondent, Cotterman and G&K associate Tim Overton appeared on behalf of G&K while Jesse appeared telephonically.

28. Following the hearing, the Court affirmed the Court's February 25th order and ordered Jesse to advise G&K in advance of the date escrow would close on the sale of the Casa Grande property.

29. On May 26, 2011, Respondent filed in Pima County Superior Court a motion to withdraw.

30. On June 2, 2011, the Pima County Superior Court denied G&K's motion.

31. G&K thereafter continued to represent the Clients in the Pima County Action.

32. The Casa Grande property was sold in October 2011.
33. G&K never exercised any of the provisional remedies authorized by the Court in the Maricopa County Action.
34. G&K did not receive any monies from the sale of the Casa Grande property.
35. On November 8, 2012, G&K filed a notice of dismissal of the Maricopa County Action, which was dismissed on November 15, 2012.
36. Respondent and Overton tried the 1914 action for four weeks in November 2011, partly to a jury and partly to the court. Judgment in the 1914 action was entered on May 4, 2012. The court and jury ruled in the Clients' favor on all material claims.
37. A final judgment in the Clients' favor was entered in the 4380 action on September 7, 2012.
38. Dr. Truitt appealed those judgments.
39. On December 6, 2011, the Complainant, Dr. Truitt's counsel in the Pima County Lawsuit, filed a motion to disqualify G&K which was based, in part, on G&K's filing the Maricopa County Action, and simultaneously sent the motion to the State Bar.
40. On February 1, 2012, Pima County Superior Court Judge Scott Rash, after holding a hearing, denied the motion to disqualify.
41. On November 8, 2012, G&K withdrew as counsel for the Clients in the remaining proceedings in the Pima County Litigation.
42. With the Clients' consent, Respondent and Overton undertook the representation of the Clients in the appeal of the judgments in the 1914 and 4380 actions.
43. On September 12, 2013, the Court of Appeals affirmed the judgment in the 1914 action.

44. While Respondent reviewed the applicable ethical rules and comments prior to filing the Maricopa County Action, Respondent now understands and freely admits that he reached incorrect conclusions, both with respect to whether G&K could file the Maricopa County Action before withdrawing from its representation of the Clients in the Pima County Lawsuit, and the disclosure of client confidential information in the Maricopa County Action.

45. Respondent's error should be viewed in light of the following:

- a. Respondent's analysis of the pertinent events and relevant Rules and the filing of the Maricopa County Action occurred within a period of four days;
- b. Respondent unsuccessfully attempted to withdraw from the Pima County Lawsuit;
- c. The ongoing fee dispute and the unsuccessful attempt to withdraw did not impact the attorney-client relationship;
- d. Respondent consistently protected the Clients' rights throughout the representation including, but not limited to, the trial and appellate process.

CONDITIONAL ADMISSIONS

Respondent's 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, Ariz. R. Sup. Ct., specifically ERs 1.6, 1.7(a)(2), and 1.8(b).

CONDITIONAL DISMISSALS

The State Bar has conditionally agreed to dismiss allegations of Rule 42, Ariz. R. Sup. Ct., ERs 4.1(b) and 8.4(d) as the evidence presented indicates that Respondent's actions were based on a negligent review and incorrect interpretation of the ethical rules.

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 sanction is appropriate:

Reprimand with one (1) year of probation requiring Respondent to:

- 1) Complete no less than six (6) hours of Continuing Legal Education in addition to his annual MCLE requirement which address Rule 42, Ariz.R.Sup.Ct., ERs 1.6, 1.7(a)(2) and 1.8(b) [e.g. - Bill and Collect Fees Ethically, Avoiding Ethical Pitfalls, Getting Your Fees From Your Client];
- 2) Complete the Continuing Legal Education program the "Ten Deadly Sins of Conflict" within ninety (90) days of the judgment and order;
- 3) Pay all of the costs and expenses of the disciplinary proceeding.

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 parties agree that the following *Standards* are the appropriate *Standards* given the facts and circumstances of this matter:

1. Rule 42, Ariz. R. Sup. Ct., ER 1.6:

Respondent disclosed confidential information related to the representation of the Clients by filing pleadings containing communications between G&K and the Clients, the amount of fees paid and outstanding during the course of the representation, a Client's banking information, and the anticipated sale of certain property owned by one of the Clients.

Standard 4.23: Reprimand is generally appropriate when a lawyer negligently reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

2. Rule 42, Ariz. R. Sup. Ct., ER 1.7(a)(2):

Respondent had a conflict of interest by initiating an action on behalf of G&K against the Clients to seek a provisional remedy to sequester anticipated sale proceeds to secure the payment of unpaid fees while concurrently representing the Clients in the matter causing the incursion of fees.

Standard 4.33: Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's

own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

3. Rule 42, Ariz. R. Sup. Ct., ER 1.8(b):

Respondent had a conflict of interest by using information related to the representation of the Clients to the disadvantage of the Clients.

Standard 4.33: Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

The duty violated

As described above, Respondent's conduct violated his duties to his Clients.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent acted negligently in determining whether a conflict of interest existed and whether it was permissible to file the Maricopa County Action against the Clients before G&K withdrew from its representation of the Clients, and disclosing confidential information related to the representation of the Clients in the Maricopa County Action.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was potential harm to the Clients.

Aggravating and mitigating circumstances

The presumptive sanction in this matter is reprimand. The parties conditionally agree that the following aggravating and mitigating factors should be considered.

In aggravation:

Standard 9.22(b) selfish motive. [Collection of fees]

Standard 9.22(i) substantial experience in the practice of law. [28 years]

In mitigation:

Standard 9.32(a) absence of a prior disciplinary record.

Standard 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct.

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

Standard 9.32(g) character and reputation.

Discussion

The parties have conditionally agreed that a greater or lesser sanction would not be appropriate under the facts and circumstances of this matter. This agreement was based on the following:

Gallagher & Kennedy PA has an extensive conflict check that was initially performed prior to the institution of the Pima County Lawsuit. The misconduct at issue appears to have resulted from an isolated breakdown in communication between a senior lawyer and the other lawyers at his firm caused by Respondent's mistaken interpretation of the ethical rules.

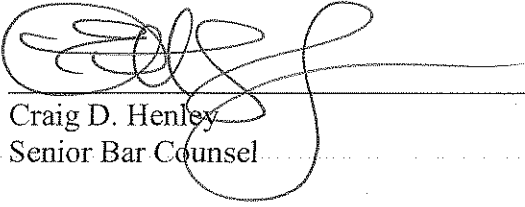
Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

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 the proposed sanction of Reprimand with one (1) year of probation requiring Respondent to complete no less than six (6) hours of Continuing Legal Education in addition to his annual MCLE requirement, complete the "Ten Deadly Sins of Conflict" program within ninety (90) days and pay all of the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit "B."

DATED this 17th day of January, 2014.

STATE BAR OF ARIZONA



Craig D. Henley
Senior Bar Counsel

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

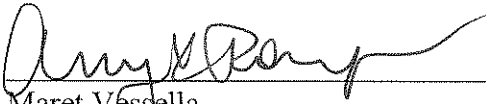
DATED this _____ day of _____, 2013.

Mark Deatherage
Respondent

DATED this _____ day of _____, 2013.

Geoffrey M. T. Sturr
Counsel for 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
this _____ day of _____, 2013.

Copies of the foregoing mailed/emailed
this _____ day of _____, 2013, to:

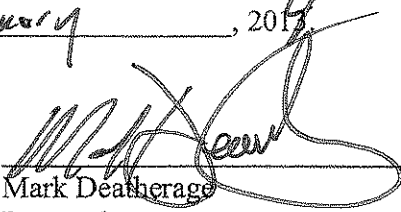
Geoffrey M. T. Sturr
Osborn Maledon PA
2929 North Central Ave., Suite 2100
Phoenix, Arizona 85012-2765
Email: gsturr@omlaw.com
Respondent's Counsel

Copy of the foregoing emailed
this _____ day of _____, 2013, to:

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
Email: officepdj@courts.az.gov
lhopkins@courts.az.gov

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

DATED this 7th day of January, 2013


Mark Deatherage
Respondent

DATED this 7th day of January, 2013


Geoffrey M. T. Sturr
Counsel for 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
this 7th day of January, 2013

Copies of the foregoing mailed/emailed
this 7th day of January, 2013, to:

Geoffrey M. T. Sturr
Osborn Maledon PA
2929 North Central Ave., Suite 2100
Phoenix, Arizona 85012-2765
Email: gsturr@omlaw.com
Respondent's Counsel

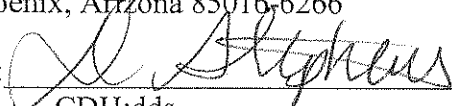
Copy of the foregoing emailed
this 7th day of January, 2013, to:

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
Email: officepdj@courts.az.gov
lhopkins@courts.az.gov

Copy of the foregoing hand-delivered
this 7th day of January, 201~~8~~⁴, to:

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

By:


CDH:dds

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

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

**MARK DEATHERAGE,
Bar No. 010208**

Respondent.

PDJ-2014-9002

FINAL JUDGMENT AND ORDER

[State Bar No. 11-3829]

FILED JANUARY 16, 2014

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on January 7, 2014, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED that Respondent, **Mark Deatherage**, is hereby reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective immediately.

IT IS FURTHER ORDERED that Respondent shall be placed on probation for a period of one year.

IT IS FURTHER ORDERED that Respondent shall complete:

CLE/TEN DEADLY SINS LANGUAGE

Within the one (1) year probation period, Respondent shall complete no less than six (6) hours of Continuing Legal Education addressing ERs 1.6, 1.7(a)(2) and 1.8(b) in addition to his annual MCLE requirement [e.g. - Bill and Collect Fees Ethically, Avoiding Ethical Pitfalls, Getting Your Fees From Your Client].

Additionally, Respondent shall also contact State Bar of Arizona publications at 602-340-7318 to either obtain and listen to the CD or obtain and view the DVD entitled "The Ten Deadly Sins of Conflict" within ninety (90) days of the judgment and order. Respondent may alternatively go to the State Bar website (www.myazbar.org) and complete the self-study online version. Respondent shall provide Bar Counsel with evidence of completion by providing copies of handwritten notes. Respondent shall be responsible for the cost of the CD, DVD or online self-study.

NON-COMPLIANCE LANGUAGE

In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, 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 a term of probation has been breached 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 burden of proof shall be on the State Bar of Arizona 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 \$1,200.00. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 16th day of January, 2014.

William J. O'Neil

**The Honorable 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 16th day of January, 2014.

Copies of the foregoing mailed/emailed
this 16th day of January, 2014, to:

Geoffrey M. T. Sturr
Osborn Maledon PA
2929 North Central Ave., Suite 2100
Phoenix, Arizona 85012-2765
Email: gsturr@omlaw.com
Respondent's Counsel

Copy of the foregoing hand-delivered/emailed
this 16th day of January, 2014, to:

Craig D. Henley
Senior Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: lro@staff.azbar.org

by: MSmith