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

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| IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, | ) | Nos 06-1221, 05-0749, 05-0778 |
| **EDMUND D. KAHN, Bar No. 002152** | ) | |
| RESPONDENT | ) | **HEARING OFFICER'S REPORT AND RECOMMENDATIONS** |

## PROCEDURAL HISTORY

Complaint was filed by the State Bar of Arizona on September 29, 2006, alleging three counts

**Count One** relates to Respondent's use of the terms "Law Offices of Edmund D Kahn", "Edmund D Kahn, Esq " "Edmund D Kahn, Attorney at Law" and/or "Also admitted in New Mexico and New York" on official documents and correspondence during a period when he was neither admitted to practice in Arizona nor or New Mexico, and his admission in New York was based on false certifications to the New York State Bar, and to his use of the phrase "also admitted in New Mexico and New York" on notices sent to clients between April and August 2005 pursuant to Rule 72, Ariz.R Sup Ct - all in violation of ERs 3 3(a)(1) and 3 3(a)(3), 5 5(b)(1) and 5 5(b)(2), 8 4(c)and (d), and Rule 53, Ariz R Sup.Ct, and Rules 31 and 74-80, Ariz R Sup.Ct

**Count Two** alleges that Respondent failed to comply with Rule 72, Ariz.R.Sup Ct. prior to or during his period of suspension from practice in Arizona [between April 23, 2005 and August 4, 2005] in violation of ERs 5 5(b)(2) and Rules 31, 72(a) and (b), and Rules 75-80, Ariz R Sup Ct

**Count Three** relates to Respondent's conduct toward Ms Anita Gutierrez between February 1998 and February 2006, and further alleges that Respondent improperly used the term "Attorney at Law" during a period of time when he was suspended from practice in Arizona [between April 23, 2005 and August 4, 2005], in violation of ERs 4 2, 4 3, 5 3, 5 5(b)(2), 8 4(c) and 8 4(d) and Rules 31, and 74-80 Ariz R Sup Ct.

Respondent filed his Answer on October 14, 2006 in which he denies the allegations and alleges bad faith on the part of the Bar for bringing the Complaint

On or about October 14, 2006 Respondent served Request for Admissions, Request for Production and Notice of Service of Interrogatories on the Bar He also served a Motion to Strike making specific reference to Paragraphs 4-7, 10, 13, 22, 28, 32-36, 38, 40, 61, 80, 81, 103 and 104 as "redundant, immaterial, impertinent, scandalous " "De minimus", "obvious, unprofessional, bad faith, scurrilous" The Bar responded to the Motion to Strike on October 26, 2006

On November 3, 2006 the State Bar filed a Notice of Intent to Use Prior Discipline.

Respondent filed a Disclosure Statement on or about November 17, 2006

On or about November 21, 2006 the State Bar filed Notice of Service of Discovery Papers including the Bar's Responses to Respondent's Request for Admissions, Request for Production, Responses to Uniform Contract Interrogatories and Responses to Non-Uniform Interrogatories

The first telephonic Case Management Conference was held on November 29, 2006 at 2:00 p m at which this Hearing Officer ordered, *inter alia,* that all discovery shall be completed on or before January 8, 2007, that all pre-hearing motions shall be filed by January 12, 2007, Responses to such Motion to be filed by January 22, 2007 A second Pre-Hearing Conference was set on January 26, 2007 A hearing was set on February 8 and 9, 2007 Respondent's Motion to Strike was denied

On or about December 4, 2006 Respondent filed a Motion to Compel requesting that the Bar be ordered to "make good faith answers to non-uniform interrogatories previously served upon it or suffer appropriate sanctions Specifically, Respondent complained about the Bar's responses to "interrogatories concerning the anticipated testimony of their star witness, one Anita Gutierrez"

On December 12, 2006 this Hearing Officer denied the Motion to Compel ruling that the State Bar was not responsible for answering questions directed toward its witness - who was neither the "real party in interest" nor an affiliate of the Bar The Hearing Officer determined that the Non-uniform Interrogatories should go to Ms Gutierrez directly - which was accomplished prior to the hearing

The Settlement Conference, which was held in December 2006, was unsuccessful

On or about December 18, 2006 Respondent filed a Motion for Summary Judgment/Dismissal alleging as to Count I of the Complaint that (a) he didn't know he was suspended from practice in New Mexico, and (b) his use of the questioned letterhead did not go to "the public" but only to the Bar and the Supreme Court, (c) that he represented only himself in his interaction with the Bar and Court, and (d) that the charge is "barred by the doctrine of res judicata" because the issue of his non-compliance with

Rule 72 was previously raised to the Supreme Court in response to his application for reinstatement and the application was nevertheless granted Respondent argued in that Motion, and at hearing that, by granting his application for reinstatement, the Supreme Court was ruling essentially that he was in compliance

The State Bar responded on January 10th The Motion was discussed at the final Pre-Hearing Conference on January 26th and it was agreed that ruling on the Motion could be deferred to the Hearing

On or about January 11, 2007, Respondent filed a Motion to Preclude Evidence and Disqualify the Hearing Officer - the former based on the State Bar's alleged failure to provide Respondent with information regarding the anticipated testimony of Ms Gutierrez, the latter upon the fact that the Hearing Officer is a member of the State Bar These Motions were denied in a written Order on January 18, 2007

Both parties filed Pre-Hearing Statements, and Respondent filed a Trial Brief

A final Pre-Hearing Conference was held on January 26th, and the hearing was held in Prescott, Arizona on February 8, 2007 by Hearing Officer 7N At the hearing, State Bar's Exhibits 1 through 36 and 38 through 56 were admitted by stipulation Petitioner's Exhibits 37 and 57 were admitted by Hearing Officer ruling [TR 48, 52] Respondent's Exhibits A through H were admitted by Hearing Officer ruling [TR 56] Respondent's Exhibits I, J and K were denied admission as not relevant [TR 193-4] Respondent's Exhibits L through E-1 were admitted on Stipulation

Both parties filed Post Hearing Memoranda, and oral argument was held via telephone on March 8, 2007 The transcript of oral argument was filed March 21, 2007

**In Count One** the State Bar alleges violation of Rule 42 Ariz R Sup Ct ER 3 3(a)(1) and 3 3(a)(3), 5 5(b)(1) and (b)(2), 8 4(c) and (d) and Rule 53, Ariz R Sup Ct, Rules 31 and 74-80, Ariz R Sup Ct

Rule 31(a)(2)(A), Ariz R Sup Ct defines "practice of law" as providing legal advice or services to or for another by

1 preparing any document in any medium intended to affect or secure legal rights for a specific person or entity,

2 preparing or expressing legal opinions,

3 representing another in a judicial or other formal dispute resolution process

4 preparing any document through any medium for filing in any court . or tribunal for a specific person or entity, or

5 negotiating legal rights or responsibilities for a specific person or entity

Rule 31(a)(2)(B), Ariz R Sup Ct defines "unauthorized practice of law" as including

1 engaging in the practice of law by persons or entities not authorized to practice . ,

2 using the designations "lawyer" attorney at law" "Esq " or other equivalent words by any person or entity who is not authorized to practice law in this state the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state

ER 3 3 Candor toward the Tribunal states in relevant part

(a) a lawyer shall not knowingly

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer,

(3) offer evidence that the lawyer knows to be false

ER 5 5 Unauthorized Practice of Law states in relevant part

(b) a lawyer who is not admitted to practice in this jurisdiction shall not

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction

ER 8 4 Misconduct states in relevant part

It is professional misconduct for a lawyer to

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation,

(d) engage in conduct that is prejudicial to the administration of justice

Rule 53 Grounds for Discipline states in relevant part

Grounds for discipline of members and non-members include the following:

(a) Violation of a rule of professional conduct in effect in any jurisdiction

(c) Willful violation of any rule or order of the court

Rule 31 Regulation of the Practice of Law states in relevant part.

(a) Authority to practice Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar

(b) Restrictions on Disbarred Attorneys' and Members' Right to Practice No member who is currently suspended or on disability inactive status and no former member who has been disbarred shall practice in this state or represent in any way that he or she may practice law in this state

Rule 74 deals with Certificates of Good Standing and is not involved

Rule 75-80 describes the procedures to be utilized in the prosecution of matters involving the unauthorized practice of law, including that "an unauthorized practice of law proceeding shall be disposed of by dismissal or by the filing of a complaint in the superior court " [Rule 78(a)]

**In Count Two** the State Bar alleges Respondent violated Ariz R Sup Ct Rule 42 ER 5 5(b)(2), Rule 31, Rule 72(a) and (b) and Rules 74-80.

Rule 72 Notice to Clients, Adverse Parties and Other Counsel states in relevant part

(a) Recipients of Notice, Contents Within ten (10) days after the date of the commission or court order or judgment imposing discipline a respondent suspended shall notify the following persons by registered or certified mail, return receipt requested, of the order or judgment, and of the fact that the lawyer is disqualified to act as lawyer after the effective date of same

1 All clients being represented in pending matters, and

2 Any co-counsel in pending matters, and

3 Any opposing counsel in pending matters, or in the absence of such counsel, the adverse parties, and

4 Each court and division in which the respondent has any pending matter, whether active or inactive

(c) Duty to Withdraw In the event the client does not obtain substitute counsel before the effective date of the suspension it shall be the responsibility of the suspended lawyer to move in the court or agency in which the proceeding is pending for leave to withdraw

**In Count III**, the State Bar alleges Respondent violated Ariz R Sup Ct Rule 42 ER 4 2, 4 3, 5 3, 5 5(b)(2), 8 4(c) and (d), Rule 31 and Rules 74-80

ER 4 2 Communication with Persons Represented by Counsel, states

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so

ER 4 3 Dealing with Unrepresented Person, states

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the

misunderstanding The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client

ER 5 3 Responsibilities Regarding Nonlawyer Assistants, states in relevant part

With respect to a nonlawyer employed or retained by or associated with a lawyer

a a lawyer who possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

b a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer, and

c a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if

i the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved, or

ii the lawyer . has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action

## FINDINGS OF FACT, BY CLEAR AND CONVINCING EVIDENCE

### COUNT ONE

1 At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on April 6, 1968 Respondent was suspended from the practice of law in Arizona by Order of the Arizona Supreme Court dated March 23, 2005 and effective April 23, 2005 Respondent was reinstated to the practice law on August 4, 2005 Respondent's suspension was due to a determination by the Disciplinary Commission, which was affirmed by the Arizona Supreme Court, that Respondent had engaged in the practice of law between October 19, 2001 and June 25, 2002 - a period when he was suspended from practice due to his failure/refusal to pay Bar dues [Exb 16, 24, 55, W]

2 In his law practice, Respondent regularly uses letterhead which includes that statements "Esq ", "Attorney at Law" and "also admitted in New York and New Mexico" [TR 27, 101, 109, Exb 12, 14, 15, 18, 19, 21]

3 Respondent continued to use letterhead and pleading paper which contained at those phrases during the period when he was suspended from practice in Arizona – between April 23 and August 4, 2005 [TR 27, 109, Exb 16, 17, 18, 19, N, P, R, T, V]

4 Respondent stated in his Rule 72(e) Affidavit on April 25 2005 that he was admitted to practice on New Mexico and New York [Exb 9, N]

5 Respondent was admitted to practice law in the State of New Mexico in 1967

6 From at least 1990 forward, Respondent did not pay bar dues in the State of New Mexico [TR 104]

7 Respondent did not keep the New Mexico State Bar or Supreme Court informed of his address changes [TR 103]

8 Respondent was suspended from the practice of law in New Mexico on July 23, 1990 for failure to pay bar fees [Exb 25, O]

9 Respondent did not receive actual notice of the suspension from the New Mexico Supreme Court because his address had changed [TR 103]

10 Respondent knew that paying dues was an integral part of continuing to be licensed to practice law in New Mexico [TR 104-106

11 Respondent was not admitted to practice law in the State of New Mexico from 1990 to the present

12 His lack of actual knowledge of that fact was his own fault, and was due to his own behavior in not communicating with the New Mexico Bar

13 Respondent claimed at hearing that he continued to use the phrase "admitted in New Mexico" because he had at one time been admitted [TR 107] and did not mean that he was currently practicing or eligible to practice law there

14 Respondent's use of the phrase "also admitted in New Mexico and New York" was reasonably calculated to induce others to believe that he was authorized to practice law in those states

15 Respondent knew or should reasonably have known that the use of the phrase "also admitted in New Mexico and New York" would convey the impression that he was currently admitted to practice in those states

16 Respondent knew or should have known that he was not currently admitted to practice law in New Mexico when he used the phrase "also admitted in New Mexico" on letterhead from approximately 1990 forward including between April 23 and August 4, 2006

17 Respondent was admitted to practice law in the State of New York in 1966, but never practiced law in that state [TR 95, Exb 8, 57]

18 Respondent paid dues in New York until October, 1994, when he signed and swore to the truth of a document indicating that he was "retired from the practice of law as defined in Rules of Chief Administrator of the Courts, 22 NYCRR 118 1(g)" Respondent signed a similar document and certification in 1996, 1998 2000, 2002 and 2004 In 1994 and 1996 Respondent interlineated on the certification "*as to New York" and "in the State of New York" [Exb 57]

19 Rule 22 NYCRR 118 1(g) defines "retired" as "when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law The "practice of law" is defined in the Rule as "giving legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in the state of New York or elsewhere " [Exb 57]

20 Respondent had actual knowledge of the requirements of that Rule when he signed the certifications He intended to modify the application of the Rule to himself by inserting the modifier "only in New York" in 1994 and 1996 [TR 94-98]

21 Respondent knew or should have known that he did not have the authority to modify such a rule

22 There was no modifier in the certifications for 1998, 2000, 2002 or 2004 [TR 98—99, Exb 57] Those certifications were simply false

23 Respondent was notified in July 2005, that his admission to practice in New York was questioned by the Departmental Disciplinary Committee based on the suspension imposed by the Arizona Supreme Court He filed a Response in that matter on July 16, 2005

24 Respondent was "technically" admitted to practice law in New York, except during the reciprocal period based on his suspension from the Arizona Bar, until March 2, 2006 when he was suspended from practice by the New York Supreme Court

25 Respondent's "technical" admission to practice in New York was based on a knowingly false statement – that he was not practicing law in New York or elsewhere - from 1994 forward

**COUNT TWO**

26 By Order of the Arizona Supreme Court dated March 23, 2005 Respondent was suspended from the practice of law in Arizona effective 30 days from the date of

the Order, and required to comply with all of the provisions of Rule 72, Ariz R Sup Ct [Exb 24]

27 On March 28, 2005 the United States District Court, District of Arizona notified Respondent that he was suspended from further practice in that Court based on the Arizona Supreme Court's Order of Suspension

28 On or about April 4, 2005 Respondent submitted a letter to his clients advising them of his 30 day suspension in #SB-04-0154D

29 That letter contains the false statement that he was admitted to practice in New Mexico, and the statement that he was admitted in New York, which was based on his false certification [Exb 14, Q]

30 Respondent did not have a procedure in place for determining whether the Rule 72 letter went to all appropriate individuals, or whether a return receipt was received from all intended recipients [TR 70-71]

31 In April 2005 Respondent was co-counsel for two intervener defendants in the matter of *Friendly House et al v Napolitano et al* which was on appeal to the Ninth Circuit Court of Appeals The other Defendants, including David Berns of the Arizona Department of Economic Security [hereafter ADES], were represented by the Arizona Office of the Attorney General [TR 59-60, Exb 30, 36]

32 No Rule 72 Notice was received by the Ninth Circuit Court of Appeals or the Arizona Office of the Attorney General [Exb 30, 55]

33 At the hearing in 2007, Respondent was unable to state whether such a notice was sent, because the receipts were destroyed about a year after they had been sent (April 2006) [TR 70-73]

34. On May 10, 2005 an attorney at the Arizona Attorney General's Office notified the State Bar that they had not received a Rule 72 notice from Respondent [Exb 30]

35 The State Bar notified Respondent on June 16, 2005 of the non-compliance information received from the Office of the Attorney General [Exb 31]

36 Although he did receive notification of his non-compliance, Respondent did not undertake to send the appropriate notification and took no other remedial action Rather he responded to the State Bar on June 29, 2005, while still under the suspension, by stating that the Attorney General had actual notice, that the *Friendly House* matter was not pending " other than oral argument in San Francisco on June 13, 2005 - a date well after the end of my 30 day suspension " and that the Bar's objection to his reinstatement was made in bad faith [TR 88; Exb 32]

37 Respondent's letter of June 29, 2005, and his Reply to the State Bar's Objection to Reinstatement [Exb 32] represent an acknowledgment that the *Friendly* House matter was "pending" in the Circuit Court and that Respondent had not notified either the District or Circuit Court or the Office of the Attorney General of his Arizona suspension.

38 Respondent failed to notify the Circuit Court of Appeals or the Arizona Office of the Attorney General of his suspension as required by Rule 72, Ariz R Sup Ct

39 Respondent argued at hearing that the Arizona Supreme Court had already reviewed the allegation regarding his participation in the *Friendly House* matter via the State Bar's objection to his reinstatement, and it was therefore inappropriate as a ground for the disciplinary action [TR 75, Exb 32, S, T, U, V, W]

40 The State Bar is not barred by Respondent's reinstatement from complaining about his failure to comply with Rule 72 as a disciplinary matter

41 Respondent had written a letter of inquiry on behalf of a client to the ADES Director, David Berns on April 19, 2005 shortly prior to the effective date of his suspension [Exb 30] No response having been received, that was a "pending' matter on April 23, 2005 when the suspension became effective

42 Respondent did not notify Mr Berns of his suspension

43 Respondent was not required by Rule 72 to notify Mr Berns of his suspension

44 Respondent was administratively suspended from the practice of law in Arizona from October 19, 2001 through June 25, 2002 for non-payment of Bar dues [TR 111]

**COUNT THREE**

45 Respondent represented State Farm as subrogee with regard to a tort motor vehicle action commencing in 1992 against Anita Gutierrez A judgment was obtained in 1992 The judgment was not renewed The judgment became

unenforceable/dormant/expired as a matter of law in July 1997 The original debt was merged into that judgment [TR 113-114]

46 Ms Gutierrez was told by the Arizona Department of Transportation, Motor Vehicle Division [DMV] – first in 1992 and again in 1998 - that her driver's license was suspended due to an unsatisfied judgment placed on her by Respondent She was told by the DMV that she needed to get a Consent form from Respondent in order to get her driver's license reinstated [TR 178, 186-188]

47 In February, 1998 Ms Gutierrez contacted Respondent's law office, and told a staff member that she had been informed by DMV that she must get a consent form from Respondent in order to get her driver's license back [TR 114, 179-80, 186-187]

48 Ms Gutierrez was told by a member of Respondent's staff that she must make a deposit and sign an agreement to make monthly payments [a promissory note] in order to get a consent form from Respondent [TR 187]

49 While Respondent maintained at hearing that it was his office policy to inform adverse parties of their status [TR 135] he had no knowledge that the policy was followed in this case [TR 134-135] and Ms Gutierrez testified, and this Hearing Officer finds, that she was not informed by anyone at Respondent's office that she was an adverse party and/or that she should contact counsel of her own for legal advice [TR 184]

50 Respondent's office mailed a letter to Ms. Gutierrez dated February 24, 1998, which Respondent signed, which forwarded an original Financial Responsibility

Agreement and Consent The letter contained the statement "the original of both the Consent and Agreement are necessary to regain your driving privileges If you do not make your payments each month, we will take further legal action against you " [TR 115-116, 182, Exb 37, 51, B-1]

51 When Ms Gutierrez failed to make regular payments on the promissory note, Respondent filed a Complaint in Superior Court, and obtained a default judgment on December 14, 1998 [Exb 51] In 2003 he applied to renew that judgment In January, 2005 he applied for and received a writ of garnishment [Exb 51]

52 In June, 2005 a Motion for Stay of Garnishment proceedings was filed on behalf of Ms Gutierrez That Motion was ultimately granted on July 7, 2005, and the Default Judgment was Set Aside on October 28, 2005 Respondent filed a Motion for Reconsideration which was denied on November 21, 2005. [Exb 51, C-1, D-1]

53 Respondent filed an Application for Default against Anita Gutierrez on December 28, 2005 which falsely stated that Ms Gutierrez had failed to plead or otherwise defend [Exb 51, E-1]

54 Respondent was previously sanctioned by suspension for continuing to practice law while under suspension (SB-04-0154) and was Informally Reprimanded for "not clearly setting forth the amount of fees to be charged your client, and in failing to follow through in the collection of 1976 taxes on behalf of your client" (Disc Comm No 5-0315)

## CONCLUSIONS OF LAW

## COUNT ONE

1 Use of the phrase "also admitted in New Mexico" at any time after 1990 (when he stopped paying dues in that State) was a fraud upon the public, and constitutes misconduct as defined by ER 8 4(c)

2 By filing certifications which he knew to be false, Respondent was committing a fraud upon the courts of the State of New York

3 Use of the phrase "also admitted in New York ", while true until the New York Supreme Court formally suspended Respondent in 2006, was based on a knowingly false certification, and therefore constitutes a violation of ER 8 4c

4 The allegation of violations in Count I of the Complaint relating to use of the terms "Law Offices of Edmund D Kahn", "Edmund D Kahn, Esq ", "Edmund D. Kahn, Attorney at Law" and/or "Also admitted in New Mexico and New York" are limited to the period of time between April 23 and August 4, 2005, and to use of the phrase "also admitted in New Mexico and New York" on the Rule 72 letter dated April 4, 2005

5. Each of the specific allegations in Count I of the Complaint relates to documents filed or mailed by Respondent to the State Bar or the Supreme Court regarding himself, and to the Rule 72 letter to clients Other than the Rule 72 letter, no allegation in Count I relates to Respondent practicing law on behalf of another person or entity during the relevant time frame

6 Use of the terms "Esq ", "Attorney at Law", and "Law Offices of" by Respondent when he was not authorized to practice law, even if the use was confined to communication with the State Bar and Supreme Court, would constitute the unauthorized practice of law as defined by Rule 31(b)(2), Ariz R Sup Ct if the use was "reasonably likely to induce others to believe that [he] is authorized to engage in the practice of law " Here it cannot be concluded the Respondent was trying to induce the State Bar or the Supreme Court to believe he was authorized to practice law in Arizona when he was not due to the nature and context of the communication.

7 Use of the phrase "also admitted in New Mexico and New York" when Respondent knew or should have known that his admission in New Mexico was suspended and his continued admission in New York was based on his own fraudulent statements was knowing

8 Use of the phrase "also admitted in New Mexico and New York" was at all times reasonably calculated to induce others to believe that he was authorized to engage in the practice of law in those states

9 Stating on the Rule 72 affidavit that he was admitted in New Mexico when he knew or should have known that his New Mexico license was at least suspended, was a falsehood However, the purpose of that question on the Affidavit was to allow the Supreme Court to notify all other states in which he was admitted of the underlying disciplinary action

**COUNT TWO**

10 Respondent was not required to notify Mr Berns of his suspension since Mr Berns was neither a client nor co-counsel in a pending matter

11 Had notification been required to Mr Berns, it should have gone to the Office of the Arizona Attorney General, which represents the Arizona Department of Economic Security

12 No evidence was presented that Respondent represented a party in any matter pending in the District Court in Arizona Respondent did receive notice, dated March 28, 2005, that he was suspended from practice in that Court until further notice No further action was reasonably required of Respondent with regard to Rule 72 notification of the District Court

13 Respondent did represent a client in the matter of *Friendly House, et al v Napolitano et al*, which was pending in the Ninth Circuit Court of Appeals.

14 Respondent was required by Rule 72, Ariz R Sup Ct to notify the U S Circuit Court of Appeals and the Arizona Office of the Attorney General of his suspension "by registered or certified mail, return receipt requested"

15 Respondent negligently failed to notify the Ninth Circuit Court of Appeals of his suspension as required by Rule 72

16 Actual notice to an individual Assistant Attorney General, even the Assistant who was listed as counsel as record in a pending matter, does not constitute "notice" as required by Rule 72

17 Respondent failed to notify the Office of the Arizona Attorney General, as counsel for defendants in the *Friendly House* matter as required by Rule 72 This failure was negligent before he was notified by the State Bar of the failure and intentional thereafter

18 A determination by the Arizona Supreme Court to reinstate Respondent despite notification by the State Bar that Respondent had not fully complied with Rule 72, does not constitute an adjudication of that failure in a disciplinary action

19. Respondent had co-counsel in the Friendly House matter and was not required to withdraw

**COUNT THREE**

20 Anita Gutierez was at all relevant times a person whose interests were in conflict with those of Respondent's client

21 Anita Gutierrez was unrepresented in all relevant matters until approximately June, 2005

22 When Anita Gutierrez approached Respondent's law office in 1998 and requested a Consent, based on information she had received from the Arizona Department of Transportation, Motor Vehicle Division, Respondent knew or should have known that Ms Gutierez could have had her driver's license reinstated pursuant to ARS 28-4073(A) merely by giving proof of financial responsibility because the 1992 judgment had not been renewed

23 Ms Gutierrez was not specifically given wrong legal advice by Respondent's law office when she first approached them She was, however, allowed to continue to

believe that she needed Respondent's consent in order to obtain her driver's license, which was wrong

24 Ms Gutierrez was told by Respondent's office staff that she must sign a promissory note to Respondent in order to receive the Consent which she believed she needed in order to reinstate her driver's license

25 By letter dated February 24, 1998 Respondent advised Ms Gutierrez that "the Consent and [Financial Responsibility] Agreement are necessary to regain your driving privileges" This information was legally erroneous and violates ER 4 3

26 Respondent was responsible for the management of his law office, including having in effect measures which would give reasonable assurance that the staff members conduct is compatible with the professional obligations of the lawyer

27 No one at Respondent's law office advised Ms Gutierrez that she was an adverse party (that her interest was adverse to Respondent's client's interest) nor advised her to obtain legal advice for herself This conduct violates ER 5 3 (c)

28 The Affidavit on Application for Default filed against Anita Gutierrez in December, 2005 contained false information

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz R S Ct , specifically Rule 31(a)(2)(B), Rule 72 and ER 3 3(a)(1) and (3), 4 3, 5 3(b) and (c), 5 5(b) and 8 4(c)

## DISCUSSION

In making her recommendations, this Hearing Officer has considered the evidence presented at hearing, the material cited in the State Bar's Notice of Intent to Use

Prior Discipline, the Pre- and Post-Hearing Memoranda of the parties, the Memoranda filed in response to her Order of August 9, 2007 and the *ABA Standards for Imposing Lawyer Sanctions*

The Hearing Officer is mindful that the purpose of attorney discipline is not to punish the lawyer but to protect the public and deter future misconduct, to protect the public, the profession and the administration of justice, and to instill public confidence in the integrity of the profession *ABA Standards*, *In re Fioramonti*, 176 Ariz 182, 859 P 2d 1315 (1993), *In re Neville*, 147 Ariz 106, 708 P 2d 1297 (1985), *Matter of Horwith*, 180 Ariz 20, 881 P 2d 351 (1994)

**ABA STANDARDS**

**FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS STANDARD 3.0**

ABA *Standard* 3 0 provides that four criteria should be considered (a) the duty violated, (b) the lawyer's mental state, (c) the actual or potential injury caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors in determining the appropriate sanction warranted by Respondent's conduct

**COUNT I**

In considering *Standard* 3 0(a), the duty violated, this Hearing Officer finds that the duty violated in utilizing the appellations "Esq " and " "Attorney at Law", and the phrase "also admitted in New Mexico and New York" when these identifiers were not true was great However, in considering *Standard* #3 0(c) with regard to this misconduct, this Hearing Officer finds the actual or potential harm caused by the misconduct during the relevant timeframe to be minimal in this case because the recipient of the information during the period covered by the Complaint was primarily the State Bar and the Supreme Court – both of which were well aware of Respondent's

status The potential harm from his use of the phrase "also admitted in New Mexico and New York" on his Rule 72 letters to clients was also minimal since they were already his clients

In considering *Standard* 3 0(b), the lawyer's mental state, this Hearing Officer finds that Respondent's behavior was knowing, and that his attitude toward his behavior is quite cavalier Although he did report in his recent Memorandum that he has discontinued the practice, he totally failed to understand or acknowledge any wrongdoing

**COUNT TWO**

In considering *Standard* #3 0(a) the duty violated, with regard to Respondent's failure to notify the U S. Circuit Court of Appeals and the Arizona Office of the Attorney General of his suspension as required by Rule 72, Ariz R Sup Ct , this Hearing Officer finds the duty owed to be great However, in considering *Standard* 3 0(c) with regard to this misconduct, this Hearing Officer finds the actual or potential harm caused by the misconduct to be minimal in this case since the Office of the Attorney General did have knowledge of Respondent's suspension, as did the U S District Court Moreover, Respondent had co-counsel in the matter pending before the Circuit Court and he did not actually participate in any proceeding during the time of his suspension

In considering *Standard* #3 0(b), the lawyer's mental state, this Hearing Officer finds that Respondent's attitude toward his behavior is, again, quite cavalier While this Hearing Officer finds that Respondent did not at first intentionally refuse to notify the Attorney General and the Ninth Circuit Court of Appeals, he was initially clearly

negligent in failing to do so as required by the Rule When informed that he had so failed, his response was, in essence, "well - they know now, that's good enough" which constitutes intentional misconduct, albeit with no actual resulting harm

**COUNT THREE**

In considering *Standard* 3 0(a), the duty violated, with regard to Respondent's failure to inform Ms Gutierrez that she should obtain legal advice for herself, and his statement to her, via letter, that the Consent and [Financial Responsibility] Agreement "are necessary to regain your driving privileges" – and thus the 'requirement" of a promissory note as a prerequisite to signing the Consent, is great A lawyer's obligations to the unrepresented, adverse person is a cornerstone of integrity of the profession In considering S*tandard* #3 0(c) with regard to this misconduct, this Hearing Officer finds the actual or potential harm caused by the misconduct to also be great (serious) Ms Gutierrez had to live under the erroneous impression that she was not entitled to her driver's license for years She had to retain counsel to clear up the situation, and she had to keep defending herself even after the Court informed Respondent of his wrongfulness

In considering *Standard* #3 0(b), the lawyer's mental state, this Hearing Officer finds that Respondent was personally responsible for maintaining the practice that an unrepresented, adverse person who called his office asking for a consent to reinstate the driver's license was not informed of the lack of need for such a consent when the underlying judgment had expired

Although he claimed at hearing that there was an office practice in place for advising unrepresented, adverse parties of their status, Respondent failed to ensure the

policy was followed He firmly believes to the day of filing his Post Hearing Memorandum that Ms Gutierrez was well aware of her adverse status – the implication being that the warning required by Rule would have been redundant since "she KNEW that she could get her own lawyer" *See Respondent's Post Hearing Memorandum, 8-23-07, pg 6* The lack of a sufficient monitoring policy to assure that adverse parties were properly informed was negligent on Respondent's part

In addition, even after the Superior Court found his legal reasoning to be wrong, and the judgment he had obtained was set aside, Respondent continued to pursue Ms Gutierrez by filing an Affidavit of Default Even at hearing, Respondent failed to demonstrate any understanding of his wrongdoing in this regard. His motives in this regard were selfish and his conduct was knowing

In considering *Standard* 9 0 aggravating and mitigating factors, the Hearing Officer finds in aggravation

1 With regard to *Standard* 9 22(a) and Counts I and II, Respondent has been previously disciplined for the offense of practicing law while under suspension *See SB No 04-0154D* (March 2005) which should certainly have alerted him to the specific requirements of Rule 72 The Hearing Officer finds that the other disciplinary action regarding the collection of 1976 taxes (*Disc Comm No 5-0315* April 1985) is too remote to be considered

2 With regard to *Standard* 9 22(c) and Counts I and II there was a pattern of misconduct which Respondent acknowledged at hearing that he would have continued to pursue absent intervention However, the Complaint was limited to a particular time frame during which the "pattern" was limited to letters to

clients Respondent states in his Post Hearing Memorandum that he has "voluntarily changed his letterhead [to delete the phrase "also admitted in New York and New Mexico"] after the State Bar complained about this matter" - although he does so without remorse or understanding of the wrongful nature of the behavior

3 With regard to Count III, while the Respondent's behavior in failing to monitor or enforce his claimed office policy of notification was at best negligent, his behavior in pursuing the victim was selfish after the court has dismissed his action was knowing, the victim was vulnerable, and Respondent refused to acknowledge wrongdoing

4 With regard to all Counts, the Respondent has substantial experience in the practice of law.

In considering *Standard 9 3* the Hearing Officer finds in mitigation

1 Respondent practiced law for a considerable time [1966 to 1984, and 1986 to 2001] without attorney discipline

**STANDARD 5.0 VIOLATIONS OF DUTIES OWED TO THE PUBLIC**

Respondent violated his duty to the public by failing to maintain personal integrity when he failed to maintain and/or monitor an appropriate office policy to inform adverse clients of their status, affirmatively told Ms Gutierrez that she had to sign a promissory note in order to regain/retain her driver's license and pursued collection on the promissory note even after the court had denied his application The behavior was negligent in the first instance and knowing in the second

Respondent violated his duties to the public by using the phrase "also admitted .." in his correspondence and pleading during the relevant time The behavior was negligent

**STANDARD 6.0 VIOLATIONS OF DUTIES OWED TO THE LEGAL SYSTEM**

Respondent violated his duties to the legal system by using the phrase "also admitted " is his correspondence during the relevant time, by failing to notify the appropriate courts of his suspension, and by pursuing legal action against Ms Gutierrez inappropriately The behavior was negligent in the first instance, negligent and then intentional in the second instance, and knowing in the third,

**STANDARD 7.0 VIOLATIONS OF DUTIES OWED TO THE LEGAL PROFESSION**

Respondent violated his duties to the legal profession by using the phrase "also admitted " is his correspondence and pleading during the relevant time The behavior was knowing

**PROPORTIONALITY ANAYSIS**

In *In re Jeffrey Phillips,* DC nos 98-2204 et al the attorney who failed to adequately supervise his staff was censured and given 2 years intensive probation (LOMAP)

In *In re Robert Yates* SB 02-0069 D the attorney was suspended for 3 years and given 2 years probation (LOMAP) for continuing to engage in the unauthorized practice of law while suspended for non-payment of dues, and failing to notify clients and

opposing counsel of the suspension and failing to respond to or cooperate with the State Bar's inquiry

In *In re Nadia Axford,* SB 02-0115-D the attorney received a one year suspension for continuing to provide legal services to a client during a period of suspension.

In *In re Dunham Biles,* DC no 06-0124 the attorney was given a formal reprimand for practicing law (filing pleadings on behalf of a client while suspended for failure to pay bar dues, and failing to notify the Bar of his current address.

In *In re David Hampton,* SB 05-0151-D the attorney received a 90 day suspension and 1 year probation for failing to supervise his staff thus enabling a suspended lawyer to engage in the unauthorized practice of law

In *In re Michael Lynch,* SB 06-0042-D the attorney received a 90 day suspension and 1 year probation (LOMAP) for practicing law on a broad basis while summarily suspended for failure to comply with CLE requirements

Bar counsel directs our attention to *In re Jeffrey Irwin,* SB 95-0054 D in which an attorney was given a 3 year suspension and 2 years probation for gross dishonesty to the tribunal "in an effort to cover his own mistakes" resulting in an unappealable dismissal of the client's case, failure to timely file required pleadings, arguing to the judge contrary to prior statements, failing to notify a client of pending motions, and lying to the tribunal during the disciplinary proceeding

Respondent directs our attention to *In re Geoffrey Fieger,* SP 07 0048-D in which the Hearing Officer recommended censure after finding that the attorney had negligently used letterhead indicating admission in several states while under suspension

**Reviewing the Standards for Discipline,**

Standard 5 1 Failure to Maintain Personal Integrity states

5 13 Reprimand is generally appropriate when a lawyer knowingly engages in any other [non-criminal] conduct that involves dishonesty, fraud, deceit or misrepresentation that adversely reflects on the lawyer's fitness to practice law

5 14 Censure "is generally appropriate when a lawyer [negligently] engages in any other [non-criminal] conduct that involves dishonesty, fraud, deceit or misrepresentation that adversely reflects on the lawyer's fitness to practice law

Standard 6 1 False Statements, Fraud and Misrepresentation states

6 12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court and takes no remedial action, and causes injury to a party to the legal proceeding or causes an adverse or potentially adverse effect on the legal proceeding

6 13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false , and causes injury to a party to the legal proceeding or causes an adverse or potentially adverse effect on the legal proceeding

Standard 7 0 Violations of Duties Owed to the Profession states

7 2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public or the legal system

7 3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public or the legal system

**RECOMMENDATIONS**

Were the Respondents use of letterhead stating he was "also admitted . " and his failure to notify the Office of the Attorney General and the Circuit Court of Appeals of his suspension the only violations before this Hearing Officer - given the lack of actual harm and mindful that the purpose of attorney discipline is remediation rather than punishment, the recommendation would be for a reprimand Even with Respondent's failure to manage his office so that an adverse party was not properly informed of her status, this Hearing Officer might recommend a reprimand with retaking of the Professional Ethics course and a period of probation with LOMAP supervision However, this Hearing Officer agrees with the State Bar that the violations relating to Ms Gutierrez, which include sending a letter which requires a promissory note on an unenforceable judgment in exchange for her driver's license, knowingly continuing to attempt collection on the "unenforceable" debt, and filing a false statement with the court culminating in actual injury to the victim, are much more serious offenses although not, in this Hearing Officer's opinion, sufficient to warrant the three year suspension suggested by the State Bar After reviewing other decisions, including those cited herein,

and considering the aggravating and mitigating factors found in this matter, this Hearing Officer recommends as follows,

1. Suspension for a period of six months and a day with compliance with Rule 72;
2. Probation for one year upon conclusion of the period of suspension, with monitoring of office policies by LOMAP,
3. Completion of the Professional Ethics course prior to reinstatement,
4. Payment of all costs incurred by the State Bar in connection with these proceedings

RESPECTFULLY SUBMITTED THIS 10TH DAY OF OCTOBER, 2007

C. Eileen Bond/ec

C EILEEN BOND
HEARING OFFICER 7N

Original filed with the Disciplinary Clerk
this 10th day of October, 2007.

Copy of the foregoing mailed
this 10th day of October, 2007, to:

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