

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

**WALTER L. HENDERSON,
Bar No. 003945**

Respondent.

PDJ-2015-9078

FINAL JUDGMENT AND ORDER

[State Bar No. 15-1061]

FILED SEPTEMBER 9, 2015

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on August 21, 2015, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED Respondent, **Walter L. Henderson**, is hereby reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective the date of this Order.

IT IS FURTHER ORDERED Mr. Henderson shall pay the costs and expenses of the State Bar of Arizona in the amount of \$ 1,200.00, within 30 days from the date of service of this Order. 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 9th day of September, 2015.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/mailed
this 9th day of September, 2015, to:

Janet Hong Linton
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Respondent's Counsel

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

WALTER L. HENDERSON,
Bar No. 003945

Respondent.

PDJ 2015

State Bar File No. **15-1061**

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona through undersigned Bar Counsel, and Respondent Walter L. Henderson who is represented by counsel Janet Hong Linton, hereby submit their Agreement for Discipline by Consent pursuant to Rule 57(a), Ariz. R. Sup. Ct. A probable cause order has not been entered. Respondent voluntarily waives the right to an adjudicatory hearing, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admissions and proposed form of discipline are approved.

Pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct., notice of this agreement was provided to the complainants by letter and email on August 12, 2015. Complainants

have been notified of the opportunity to file a written objection to the agreement with the State Bar within five (5) business days of bar counsel's notice.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ERs 1.7, 1.9, 1.10, and 8.4(d). Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Reprimand. The parties agreed that it would have been appropriate to add probation to the sanction of reprimand consisting of completing the State Bar's CLE program, "Ten Deadly Sins of Conflict." However, Respondent completed that program prior to filing this agreement and furnished proof to the State Bar of having done so. Accordingly, it is unnecessary to add probation to the sanction. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding within 30 days from the date of this order, and if costs are not paid within the 30 days interest will begin to accrue at the legal rate.¹ The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit A.

FACTS

COUNT ONE (File No. 15-1061/Giordano)

1. Respondent was licensed to practice law in Arizona on October 5, 1974.
2. In 1996 Les and Marjorie Hudgens executed a community property agreement and created a family trust. They amended the trust four times through 2007 before retaining Respondent in 2008 to review their estate plan.

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.

3. The Hudgens' family trust created a surviving spouse's trust to take effect when one of them died.
4. To cure inconsistencies between the original trust and four amendments, and to honor the Hudgens' intentions, Respondent created a fifth trust amendment that revoked the first four amendments.
5. Les and Marjorie were named co-trustees and Les' son Jack Hudgens was named successor trustee.
6. The trust was made irrevocable upon the death of either Les or Marjorie.
7. The trustee was given discretion to distribute trust income to Les and Marjorie, contrary to prior versions of the trust and amendments that made certain distributions mandatory.
8. According to wills that accompanied the trust Jack and his brother were to receive the trust remainder after both Les and Marjorie died, except that Marjorie's son Daniel was to receive one bank account and three annuities.
9. The amended estate plan included Jack's power of attorney for Marjorie.
10. Marjorie told Respondent that she had been diagnosed with Alzheimer's disease so Respondent obtained a note from her doctor that she was competent to understand and execute her estate plan.
11. Respondent's notes of his meeting with Les and Marjorie reflect their suspicions over Daniel's intentions.

12. Les and Marjorie insisted that the trust be irrevocable because "W's son is pushing for leverage all the time. W's son Daniel [is] worthless, unlikely to do anything."

13. There was a restraining order against Daniel and Les and Marjorie were concerned that when he thought the time was right he would try to invalidate the trust and gain access to the survivor's money.

14. Respondent made trust disbursements discretionary rather than mandatory in order to preserve Les and Marjorie's eligibility for long term publicly-funded disability benefits.

15. Respondent perceived no conflict of interest between Les and Marjorie. Although he discussed possible conflicts with them, particularly over a potential Jack/Daniel rivalry, he saw no need to obtain written informed consent to the joint representation.

16. In 2011 Les and Marjorie resigned as co-trustees and Jack took over.

17. In October Respondent entered into a written fee agreement with Jack to represent him as the trust administrator.

18. In the written agreement, Respondent recited the fiduciary duties that Jack owed to Respondent's other clients, Les and Marjorie, and included the following purported conflict waiver: "Trustee waives any claim for conflict of interest regarding Attorney's role in representing Trustee and Trustor in that Client is acting in a Fiduciary capacity for and on behalf of Trustor."

19. Jack signed the agreement. Below his signature there appears the legend "APPROVED BY:" followed by Les and Marjorie's signatures.

20. Respondent did not obtain an express, written conflict waiver from Les or Marjorie, and Marjorie was three years further into her Alzheimer's disease.

21. Nothing in the general, open-ended, purported conflict waiver gave Les or Marjorie a reasonable understanding of the material risk inherent in the conflict. For example, at some future date Respondent could advise client Jack that it was in his interest to withhold benefits to clients Les or Marjorie from their own trust, contrary to their interests.

22. Jack lives in Georgia whereas Daniel lives in Tucson, near Les and Marjorie.

23. Unbeknownst to Respondent, Daniel consulted counsel and had Marjorie sign a document giving Daniel a general power of attorney.

24. In early 2012 the Hudgenses moved in with Daniel despite their suspicions about him because Les was no longer able to care for himself and Marjorie.

25. In addition to medical expenses, Jack agreed to pay Daniel a \$4,200 monthly salary to care for them, and \$3,200 to care for one of them if/when the other died.

26. Les died in December 2012. Jack balked at paying Daniel \$3,200 and considered moving Marjorie to a supervised care center.

27. Daniel took Marjorie to two banks and persuaded officials to let them withdraw \$127,000 from family trust accounts even though the accounts were restricted, the trust was irrevocable, and Jack was the sole trustee.

28. Upon learning of this in February 2013, Jack called the police and within a few months attorney John Dorris (co-Complainant), representing Daniel, contacted Respondent to arrange for the return of the money.

29. Meanwhile, Respondent instructed Jack in writing to pay only such part of the income from the trust assets to or for Marjorie as in his "absolute and sole discretion" (quoting from the trust) may be necessary for her care.

30. The relationship between Jack and Daniel deteriorated. In November 2013 Daniel was appointed guardian and conservator for Marjorie. Respondent referred Jack to William Langen, an attorney who officed with Respondent but was not in Respondent's firm.

31. Complainants and Mr. Langen were unable to resolve financial issues relating to Marjorie's support so in April 2014 Daniel and Complainants filed a petition to remove Jack as trustee.

32. In early court proceedings Complainants accused Respondent of having a conflict of interest in representing Jack (trustee) and the Hudgenses (settlers).

33. Phoebe Harris, Respondent's law partner (and daughter) wrote to Complainants in June 2014 denying that the firm had a disqualifying conflict of interest because Jack and the Hudgenses all signed the October 2011 fee agreement, and Marjorie never expressed unhappiness with Respondent or a desire to terminate the representation.

34. Ms. Harris filed a substitution of counsel by which she succeeded Mr. Langen as counsel of record for Jack in the trust litigation.

35. Two weeks later Daniel, as guardian and conservator, terminated Respondent's firm's representation of Marjorie.

36. Daniel became ill and was hospitalized so the litigation was on hold from June-October 2014. In the interim, Respondent and Ms. Harris tried to resolve the financial issues with Complainants. Among the issues were a professed need for Daniel to produce certain documents and disclosures.

37. In October, Complainants filed a motion to disqualify Ms. Harris as Jack's counsel on the ground that Respondent had an unwaived conflict of interest.

38. Complainants alleged that Respondent amended the trust in a way that benefitted Jack and was contrary to Marjorie's interests; and advised Jack to withhold payments to Marjorie in order to protect Jack's remainderman interest in the trust property.

39. Ms. Harris wrote to Complainants that she had thought all parties were committed to resolving the financial issues but since they chose "to proceed in an antagonistic and contentious manner, we have no choice but to instruct our client to stop any and all payments coming from the Trust estate monies for Mrs. Hudgens' continued care and benefit until we receive the requisite documentation and disclosures from your office and confirm your client's compliance with all applicable Conservatorship statutes and practices."

40. Ms. Harris claimed that to do otherwise would create the appearance that Jack was complicit in Daniel's fraud.

41. In so advising Jack, Ms. Harris took a position in favor of a current client (Jack) and against a former client (Marjorie), whose interests were materially adverse to each other, in the same or a substantially related matter, without obtaining written, informed consent from Marjorie, in violation of ER 1.9(a).

42. In October 2014 Daniel, as guardian and conservator, filed a legal malpractice suit against Respondent and his firm.

43. In November Pima County Superior Court Judge Kyle Bryson ordered Jack to distribute funds from the trust necessary to meet Marjorie's monthly needs.

44. In December 2014, Judge Bryson ruled that Respondent and Ms. Harris did not obtain a written waiver from Marjorie regarding the alleged conflict. He held in particular that the October 2011 fee agreement with Jack in which Jack waived any conflict due to Respondent's simultaneous representation of Marjorie and "approved by" Marjorie did not constitute a written conflict waiver.

45. By December 2014 Marjorie was a former client of the firm, so Respondent and Ms. Harris were disqualified by ERs 1.9 and 1.10.

46. Attorney Ron Zack took over Jack's representation. He filed a petition to remove Daniel as guardian and conservator, and represented Jack in the attorney's fees litigation incident to the trust case, the guardian/conservatorship case, and the malpractice case.

47. In April 2015, all cases except the malpractice case settled. The court appointed attorney Denice Shepherd as trustee of the trust and as Marjorie's guardian. Daniel remains conservator exclusively to manage the malpractice case.

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 1.7, 1.9, 1.10, and 8.4(d).

RESTITUTION

Restitution is not an issue in this matter.

SANCTION

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

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

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

The duty violated

As described above, Respondent's conduct violated his duties to his client and the legal system.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent negligently represented one client while having a known conflict of interest with another, former client. He negligently believed that an earlier approval of the joint representation was sufficient to obtain the former client's waiver of the conflict, in violation of the Rules of Professional Conduct.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was actual and potential harm to a client, a former client, and the legal system.

The parties agree that *Standards 4.32, 4.33, and 6.13*, are the appropriate *Standards* to consider given the facts and circumstances of this matter.

Standard 4.32 provides that:

Standard 4.32-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 4.33 provides that:

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.

Standard 6.13 provides that:

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

Aggravating and mitigating circumstances

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

In aggravation:

Aggravating factors include:

- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;

In mitigation:

Mitigating factors include:

- (a) absence of a prior disciplinary record;
- (e) full and free disclosure to a disciplinary board or cooperative attitude toward proceedings;
- (k) imposition of other penalties or sanctions;

Discussion

The parties conditionally agree that upon application of the aggravating and mitigating factors a reprimand is appropriate. Although there is evidence to support both a knowing (suspension) and a negligent (reprimand) mental state, it is evident that Respondent did not act haphazardly. He genuinely (albeit negligently) believed that he had obtained a proper conflict waiver from his co-clients prior to proceeding with the representation at issue. The presumptive sanction should be reprimand, the aggravating and mitigating factors offset, and ordinarily probation in the form of CLE should be added. Respondent completed the State Bar's CLE, "Ten Deadly Sins of Conflict" prior to filing this agreement so probation is unneeded.

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 and the imposition of costs and expenses. A proposed form of order is attached hereto as Exhibit B.

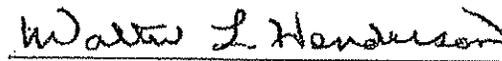
DATED this 20th day of August, 2015.

STATE BAR OF ARIZONA

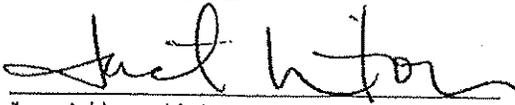
David L. Sandweiss
Senior Bar Counsel

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

DATED this 18th day of August, 2015.


Walter L. Henderson
Respondent

DATED this 19th day of August, 2015.

Udall Law Firm LLP

Janet Hong Linton
Counsel for Respondent

Approved as to form and content

Maret Vessella

Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 21st day of August 2015.

Copies of the foregoing mailed/emailed
this 21st day of August 2015, to:

Janet Hong Linton
Udall Law Firm LLP
4801 E Broadway Blvd., Ste. 400
Tucson, AZ 85711-3638
jlinton@udalllaw.com
Respondent's Counsel

Copy of the foregoing emailed
this 21st day of August, 2015, to:

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

Copy of the foregoing hand-delivered
this 21st day of August, 2015, to:

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

by: Jackie Deventer
DLS: jld

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Walter L. Henderson, Bar No. 003945, Respondent

File No. 15-1061

Administrative Expenses

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

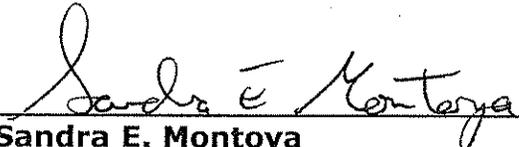
Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative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

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

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

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges	\$ 0.00
<u>TOTAL COSTS AND EXPENSES INCURRED</u>	<u>\$1,200.00</u>



Sandra E. Montoya
Lawyer Regulation Records Manager

8-14-15

Date

EXHIBIT B

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

Walter L. Henderson,
Bar No. 003945,

Respondent.

PDJ

FINAL JUDGMENT AND ORDER

State Bar No. 15-1061

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

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

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

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

DATED this _____ day of August, 2015.

William J. O'Neil, Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this _____ day of August, 2015.

Copies of the foregoing mailed/emailed
this _____ day of August, 2015, to:

Janet Hong Linton
Udall Law Firm LLP
4801 E. Broadway Blvd., Ste. 400
Tucson, AZ 85711-3638
Email: jlinton@udalllaw.com
Respondent's Counsel

Copy of the foregoing emailed/hand-delivered
this _____ day of August, 2015, to:

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

Copy of the foregoing hand-delivered
this _____ day of August, 2015, to:

Lawyer Regulation Records Manager
State Bar of Arizona
4201 N 24th Street, Suite 100
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by: _____