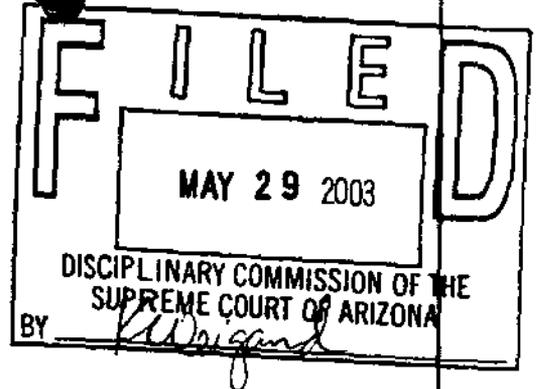


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7 **BEFORE THE DISCIPLINARY COMMISSION**  
8 **OF THE SUPREME COURT OF ARIZONA**

9 IN THE MATTER OF A MEMBER ) Nos. 00-1497, 00-1936, 01-1007,  
10 OF THE STATE BAR OF ARIZONA, ) 02-0055, 02-1611, 02-1763,  
11 ) 02-1825  
12 )  
13 **MICHAEL E. KELLY,** ) **TENDER OF ADMISSIONS**  
14 Bar No. 004993 ) **AND AGREEMENT FOR**  
15 ) **DISCIPLINE BY CONSENT**  
16 Respondent. )  
17 ) (Assigned to Hearing Officer 8H,  
18 ) Harry T. Goss)  
19 )  
20 )

21 This Tender of Admissions and Agreement for Discipline by Consent  
22 ("Agreement") is entered into between the State Bar of Arizona, which is  
23 represented by undersigned bar counsel, and Respondent, who is represented by  
24 Michael D. Kimerer and Holly R. Gieszl. It is submitted pursuant to Rule 56(a),  
25 Ariz.R.S.Ct., and the guidelines for discipline by consent issued by the  
26 Disciplinary Commission of the Supreme Court of Arizona. Subject to review  
27 and acceptance by the Disciplinary Commission and the Arizona Supreme Court,  
28 Respondent agrees to accept imposition of a forty-five (45) day suspension; two

1 (2) years probation (including participation in the Law Office Management  
2 Assistance Program at the State Bar ("LOMAP") and fee arbitration); and  
3 payment of the costs and expenses of the disciplinary proceedings. The terms of  
4 this consent agreement will be provided to all complaining parties prior to oral  
5 argument before the Disciplinary Commission.

6 **FACTS**

7 **General Allegations**

- 8 1. At all times relevant hereto, except as set forth below, Respondent was  
9 an attorney licensed to practice law in the State of Arizona, having been  
10 admitted to practice law in Arizona on October 8, 1977. Respondent  
11 was summarily suspended from the practice of law in Arizona on or  
12 about March 22, 2002, for non-compliance with the requirements of  
13 Mandatory Continuing Legal Education ("MCLE"), and on or about  
14 April 18, 2002, for failure to sign his dues statement and pay late fees  
15 assessed for late payment of his membership dues. Respondent signed  
16 his dues statement and paid the late fees on or about August 7, 2002,  
17 and satisfied the requirements of MCLE on or about September 17,  
18 2002. Respondent was reinstated to the practice of law in Arizona on  
19 September 17, 2002.
- 20 2. During the period covered by this Tender of Admissions, Respondent

1 was a sole practitioner who employed a full-time secretary/legal  
2 assistant, Julie Harlow ("Harlow"), and a part-time paralegal, Terrill  
3 Haugen ("Haugen"). Harlow was responsible for the day-to-day  
4 administration of Respondent's law office.

5 3. During a portion of the time Respondent was summarily suspended,  
6 Respondent engaged in the practice of law in Arizona. Respondent,  
7 however, was unaware of either summary suspension because Harlow  
8 intentionally hid and/or destroyed all correspondence from the State Bar  
9 before Respondent had an opportunity to see it. She also destroyed all  
10 correspondence from the State Bar relating to screening investigations.  
11 Respondent learned of his suspension from another attorney. Before  
12 Respondent spoke to Harlow, she left a voice-mail message for him  
13 stating that she was leaving his employ. Harlow immediately retained  
14 attorney Craig Mehrens ("Mehrens"). Since she left Respondent's  
15 employ, all communications with Harlow have been through Mehrens.  
16 Exhibit 1 attached hereto is Harlow's affidavit in which she explained  
17 her actions in intercepting and destroying mail addressed to  
18 Respondent.

19 4. For an unknown period, Harlow communicated, without Respondent's  
20 knowledge or direction, with Respondent's clients and others who

1 believed they were Respondent's clients. She also accepted funds from  
2 and made "refunds" to various individuals who were ostensibly  
3 Respondent's clients, all without Respondent's knowledge or direction.

4 5. Harlow answered Respondent's telephone and intercepted calls to  
5 Respondent without giving him any message, and erased voice-mail  
6 messages left for Respondent without informing him of their content.

7 6. Harlow misled or lied to Respondent's clients, and others who believed  
8 they were Respondent's clients, about actions taken on their behalf and  
9 the status of court proceedings and their cases.

10 7. Harlow prepared, signed Respondent's name to, and filed various  
11 pleadings on behalf of Respondent's clients and others who believed  
12 they were Respondent's clients, all without Respondent's knowledge or  
13 direction.

14 8. Harlow affixed court file stamps or date stamps to false documents in  
15 order to lead clients to believe that certain matters had been filed. *See*  
16 *Exhibit 2.*

17 9. Harlow affixed judges' "signature stamps" to fictitious "orders" and  
18 sent those "orders" to clients to mislead them into believing that the  
19 court had entered orders in their cases. *See Exhibit 3.*

20 10. Bar counsel and Respondent's counsel were unable to interview

1 Harlow, and Mehrens declined to permit Jack Potts, M.D., a forensic  
2 psychiatrist, to interview Harlow.

3 Count One (Formal File No. 00-1497)

4 11. Respondent represented Julie Weber ("Weber") in a domestic relations  
5 matter between approximately May 1999 and April 2000.

6 12. Weber and/or Kenny and Joan Lytle ("the Lytles"), Weber's parents,  
7 paid a total of \$9,500.00 to Respondent during the course of his  
8 representation of Weber. The last billing statement was received from  
9 Respondent's office in or about November 1999. In or about January  
10 2000, the Lytles sent \$5,000.00 to Respondent, which was to be used to  
11 pay future fees and costs. Weber and the Lytles do not believe  
12 Respondent fully earned or expended all funds they have paid him.

13 13. Respondent filed a number of pleadings and documents with the court  
14 that Harlow never sent to Weber. Furthermore, Harlow never notified  
15 Respondent that they had not been sent, as he had directed.

16 14. Weber refused to take her two minor children to her husband's  
17 residence on or about April 28, 2000, because she had previously made  
18 plans that included her children and believed an Order of Protection had  
19 been re-instated by the court. When Respondent learned about Weber's  
20 refusal, he sent Haugen to Weber's house with a motion to withdraw as

1 Weber's attorney of record because, according to Respondent, she  
2 would not follow his instructions or court orders regarding custody  
3 matters. Weber signed the motion to withdraw, but felt Haugen  
4 pressured her into signing the motion. Respondent did not personally  
5 discuss with Weber the reason he terminated the representation. Weber  
6 claims that Respondent did not provide her with a copy of the motion to  
7 withdraw; however, Haugen claims he left a copy with Weber.

8 15. Respondent met with Weber and/or the Lytles once in his office and  
9 several times in court. Haugen asserts he met with Weber and/or the  
10 Lytles on numerous occasions and that they were excessively  
11 demanding of his time and attention.

12 16. Respondent filed the motion to withdraw on or about June 15, 2000.

13 17. On or about July 11, 2000, Weber and/or the Lytles personally asked  
14 Harlow to provide them with copies of pleadings and documents that  
15 Weber had not previously received, an accounting of all fees and costs  
16 that had been earned or expended, and a refund of all unearned and  
17 unexpended funds. A telephone message containing the same request  
18 was left with Respondent's office on or about July 19, 2000.

19 18. On or about July 21, 2000, Weber and the Lytles filed a complaint  
20 against Respondent with the State Bar of Arizona.

1 19. On or about August 10, 2000, Weber and the Lytles wrote to the State  
2 Bar to advise that they had received copies of the requested documents,  
3 but had not received an accounting or a refund of any unearned or  
4 unused funds.

5 20. Respondent violated the Rules of Professional Conduct as follows: (a)  
6 Respondent failed to make reasonable efforts to ensure that his firm had  
7 in effect measures giving reasonable assurance that his non-lawyer  
8 employees' conduct was compatible with his professional obligations  
9 (for example, requests for information and a full accounting of legal  
10 fees went unanswered, and papers and property to which Weber and/or  
11 the Lytles were entitled to receive were not returned to them at the  
12 conclusion of the representation).

13 21. Respondent's conduct, as set forth above, violated Rule 42,  
14 Ariz.R.S.Ct., specifically ER 5.3.

15 Count Two  
16 (failure to respond to bar counsel in Formal File No. 00-1497)

17 22. This count is being dismissed because Harlow stated in a notarized  
18 affidavit that she disposed of all correspondence from the State Bar  
19 before Respondent could see it, and that Respondent, therefore, did not  
20 know about any of the screening investigations or formal complaints.

Count Three (Formal File No. 00-1936)

1  
2 23. Respondent represented Dorothy Beeson ("Beeson") in her dissolution  
3 of marriage proceeding.

4 24. On or about February 12, 2000, Beeson paid \$1,500.00 to Respondent  
5 to respond to allegations that she failed to comply with certain  
6 provisions of her decree of dissolution of marriage.

7 25. Respondent prepared correspondence to opposing counsel in an attempt  
8 to resolve Beeson's matter, but Harlow never sent the correspondence,  
9 as directed.

10 26. Beeson frequently called Respondent's office and spoke with Harlow,  
11 who Beeson claims told her that Respondent had not performed any  
12 work on her case.

13 27. Beeson asked Respondent to return the fees she had paid. On or about  
14 July 28, 2000, Harlow told Beeson that she had mailed her a check for  
15 the refund. Approximately one month later, Harlow told Beeson to be  
16 patient because the check was in the mail.

17 28. Some time later, Harlow sent another refund check to Beeson, but  
18 Harlow failed to give the check to Respondent to sign prior to mailing.

19 29. On or about September 6, 2000, Harlow called Beeson and informed  
20 her that Respondent would proceed quickly on her case and that she

1 would receive a partial refund. Respondent subsequently failed to  
2 perform any work on Beeson's case.

3 30. On or about October 16, 2000, Beeson called Respondent's office and  
4 spoke with Harlow, who told her that she needed to speak with  
5 Respondent before he could take any action. At that time, Harlow  
6 scheduled an appointment for a teleconference on October 18, 2000.

7 31. Beeson called Respondent's office on October 18, 2000, as previously  
8 directed, and was told that Respondent was unavailable. However,  
9 Harlow never told Respondent about the teleconference.

10 32. Beeson received no further communication from Respondent's office.

11 33. Respondent violated the Rules of Professional Conduct as follows: (a)  
12 Respondent failed to make reasonable efforts to ensure that his firm had  
13 in effect measures giving reasonable assurance that his non-lawyer  
14 employees' conduct was compatible with his professional obligations  
15 (for example, Beeson's objectives were not diligently and promptly  
16 completed, and communication between Beeson and Respondent was  
17 hampered).

18 34. Respondent's conduct, as set forth above, violated Rule 42,  
19 Ariz.R.S.Ct., specifically ER 5.3.  
20



- 1 38. Respondent and the Velascos appeared for a hearing on or about  
2 October 11, 2000. At that time, the judge reduced Albert Velasco's  
3 child support payment from \$1,205.25 per month to \$613.00 per month,  
4 and directed Respondent to prepare an order for his signature.
- 5 39. During the latter part of October or the early part of November 2000, the  
6 Velascos left several telephone messages for Respondent, none of which  
7 were returned.
- 8 40. On or about November 24, 2000, Respondent's office informed Paula  
9 Velasco ("Paula") that Respondent's legal assistant was on his way to  
10 court with the proposed order. When Paula reviewed the proposed  
11 order, she realized that the amount set forth therein was \$100.00 per  
12 month higher than had been stated in court.
- 13 41. In or about November 2000, the Velascos asked Harlow to return their  
14 original documents. Harlow did not return any of the Velascos' original  
15 documents, as requested.
- 16 42. Paula also claims that Haugen told her that he had met with the judge's  
17 judicial assistant on two occasions regarding the proposed order. Paula  
18 subsequently communicated with the judge's judicial assistant, who  
19 informed her that s/he had never met with Haugen.
- 20 43. Respondent lodged a corrected child support order on or about

1 December 5, 2000.

2 44. The judge signed the corrected order on or about January 8, 2001.

3 45. In or about February 2001, the Velascos once again asked that their  
4 original documents be returned. Neither Respondent nor any of his staff  
5 returned the Velascos' original documents to the Velascos, as requested.

6 46. On or about March 12, April 9 and May 11, 2001, Paula Velasco sent  
7 letters to Respondent requesting the return of the Velascos' original  
8 documents. As of the date of this Tender of Admissions, the Velascos  
9 have not received any of their original documents.

10 47. Respondent promised to notify Florida that Arizona re-assumed  
11 jurisdiction of the matter on or about October 1, 2000. Respondent  
12 claims he filed a document with the Florida court. However, a "Motion  
13 for Contempt and Notice of Hearing" was filed in Florida. Florida also  
14 notified the I.R.S. that Velasco was \$4,430.72 in arrears on his child  
15 support, which was the exact amount of child support that Albert  
16 Velasco paid in Arizona between January 8, 2001 and April 16, 2001.

17 48. Respondent violated the Rules of Professional Conduct as follows: (a)  
18 Respondent failed to make reasonable efforts to ensure that his firm had  
19 in effect measures giving reasonable assurance that his non-lawyer  
20 employees' conduct was compatible with his professional obligations

1 (for example, the Velascos' objectives were not diligently and promptly  
2 completed and the Velascos were misled by Respondent's employees).

- 3 49. Respondent's conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct.,  
4 specifically ER 5.3.

5 Count Six  
6 (Failure to respond to bar counsel in Formal File No. 01-1007)

- 7 50. This count is being dismissed because Harlow stated in a notarized  
8 affidavit that she disposed of all correspondence from the State Bar  
9 before Respondent could see it, and that Respondent, therefore, did not  
10 know about any of the screening investigations or formal complaints.

11 Count Seven (Probable Cause File No. 02-0055)

- 12 51. On or about January 10, 2001, Lisa Marie Green (nka Lisa Marie  
13 Gorentz) ("Lisa") retained Respondent to represent her in a dissolution  
14 of marriage proceeding filed by her husband, Michael Green  
15 ("Michael").
- 16 52. Respondent last communicated directly with Lisa on or about September  
17 18, 2001.
- 18 53. In October 2001, the court scheduled the Green dissolution hearing for  
19 November 16, 2001.
- 20 54. In early November, 2001, Lisa requested that respondent seek a change

1 of judge because she believed Judge C. Robert Pursley possibly was  
2 biased in favor of her husband, who ran a school "Teen Court" and had  
3 been in Judge Pursley's court from time to time. Respondent informed  
4 Lisa that this was not a sufficient basis for a motion for change of judge.  
5 On November 15, 2001, and contrary to Respondent's decision  
6 regarding the motion, and without Respondent's knowledge or direction,  
7 Harlow filed a one-page "Notice to the Court," with no memorandum of  
8 points and authorities, requesting that Judge Monica Lynn Stauffer  
9 preside over the matter rather than Judge Pursley because Michael was  
10 "an employee with Honorable R. Douglas Holt and C. Robert Pursley"  
11 and "their [sic] was a possibility of conflict with the Judge assigned."  
12 On that date, Judge Pursley attempted to contact Respondent regarding  
13 the recent filings. Judge Pursley called Respondent's office, at which  
14 time Harlow told him that Respondent would return in fifteen minutes  
15 and that he would immediately call. When the court did not receive a  
16 call from Respondent within a reasonable period of time, Judge Pursley  
17 made at least one additional call to Respondent's office. Harlow told  
18 Judge Pursley that Respondent was not available at that time. Judge  
19 Pursley never received a return telephone call from Respondent. Later  
20 that same date, Judge Pursley informed Haugen that he had denied the

1 motions and that the trial would proceed as scheduled. Respondent  
2 never received any of Judge Pursley's messages.

3 55. Lisa called Respondent's office a number of times on November 15,  
4 2001, and left messages asking him to contact her about the status of her  
5 case. None of her calls were returned.

6 56. Neither Respondent nor Lisa appeared for the hearing on November 16,  
7 2001. Opposing counsel informed the court that he had spoken with  
8 Respondent the evening before and that he indicated he would appear  
9 telephonically for the hearing. Judge Pursley or his staff attempted to  
10 contact Respondent prior to commencement of the hearing, but was  
11 successful only in reaching Respondent's voice-mail. A message was  
12 left that Respondent should call the court immediately. Approximately  
13 30 to 45 minutes later, the court called Respondent's office and spoke  
14 with Harlow. Harlow advised that she was attempting to contact  
15 Respondent, but that he was in Maricopa County on another matter.  
16 Lisa also attempted to contact Respondent on November 16, 2001, but  
17 was unsuccessful. Because Respondent did not return the court's calls,  
18 the hearing proceeded as scheduled on November 16, 2001.

19 57. Following the hearing on November 16, 2001, Michael called Lisa and  
20 asked why she did not appear at the hearing. After receiving that call,

1 Lisa called Respondent's office and left voice-mail messages for  
2 Respondent. Later, Harlow called Lisa and told her that the court had  
3 granted a continuance.

4 58. On or about November 23, 2001, Lisa called Respondent's office on a  
5 number of occasions and left messages for Respondent. Although  
6 Respondent never communicated with Lisa, Harlow called Lisa and  
7 informed her that Respondent was preparing a Motion to Set Aside the  
8 Decree. Lisa never received any subsequent communication from  
9 Respondent.

10 59. On or about November 30, 2001, Respondent filed a Motion to Set  
11 Aside Entry of Decree of Dissolution of Marriage or Motion for New  
12 Trial. On or about that same date, Lisa filed *pro per* a Motion for  
13 Reconsideration. In the motion, Lisa stated that she attempted to contact  
14 Respondent on November 15, 2001, but was unsuccessful. Lisa said she  
15 spoke with Harlow, who informed her that she did not need to appear in  
16 court on November 16, 2001, because the trial was being continued.

17 60. On December 10, 2001, the court denied the motion to set aside, but  
18 permitted Lisa to submit a "Statement of Issues" within fifteen days.  
19 Lisa submitted a "Statement of Issues," which caused the court set aside  
20 those parts of the decree to which she objected.

1 61. On or about February 2, 2002, Respondent refunded \$2,000.00 of the  
2 \$3,500.00 Lisa had paid him.

3 62. Respondent violated the Rules of Professional Conduct as follows: (a)  
4 Respondent failed to make reasonable efforts to ensure that his firm had  
5 in effect measures giving reasonable assurance that his non-lawyer  
6 employees' conduct was compatible with his professional obligations  
7 (for example, Lisa's objectives were not diligently and promptly  
8 completed, Lisa was unable to communicate with Respondent, a non-  
9 lawyer prepared and filed a motion with the court on Lisa's behalf,  
10 Respondent was unaware that a judge wanted to discuss the motion filed  
11 by Harlow, and neither Respondent nor Lisa appeared at a scheduled  
12 hearing).

13 63. Respondent's conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct.,  
14 specifically ER 5.3.

15 Count Eight (Screening File No. 02-1611)

16 64. Respondent represented Michael Kiel ("Kiel") in a child custody and  
17 support matter in Maricopa County Superior Court (No. DR 1992-  
18 008347).

19 65. On or about March 12, 2002, Harlow faxed to the Superior Court an  
20 Order for Modification of Child Custody and Visitation, dated October

2 order was on pleading paper that included Respondent's  
3 address. Although that order had not been filed by the Clerk's Office  
4 and no original of that order was in the Clerk's file, a copy of it was in  
5 the Clerk's file. The Domestic Relations Division of the Maricopa  
6 County Superior Court reviewed its own computer records, but did not  
7 find a record that it had processed or signed that October 17, 2001,  
8 order.

9 66. On or about March 12, 2002, Harlow faxed to the Superior Court an  
10 Order of Assignment that contained a Clerk's "date stamp" of March 12,  
11 2002. There is no original of the Order of Assignment in the court file.

12 67. The court notified Respondent that the Kiel hearing was set for June 27,  
13 2002.

14 68. Neither Respondent nor Kiel appeared for the June 27, 2002, hearing.  
15 During that hearing, Judge Bethany Hicks vacated and set aside the  
16 Order of Assignment dated March 12, 2002, and the Order for  
17 Modification of Child Custody and Visitation dated October 17, 2001,  
18 after finding they were invalid. Due to Respondent and Kiel's failure to  
19 appear at the June 27, 2002, hearing, Judge Hicks ordered Respondent  
20 and Kiel, individually and jointly, to pay the airfare and travel expenses

1 incurred by Julie Del Rosario ("Del Rosario") to attend the June 27,  
2 2002, hearing.

3 69. Judge Hicks found that Respondent had been properly notified of the  
4 hearing on June 27, 2002, and, by minute entry dated June 27, 2002 (but  
5 filed on July 3, 2002), ordered that Respondent and Kiel appear for a  
6 hearing on August 7, 2002, to show cause why they should not be held  
7 in contempt.

8 70. On August 6, 2002, the court received a Motion to Continue, ostensibly  
9 filed by Respondent, indicating that Respondent would be out of town  
10 on August 7, 2002. The court called Respondent's office and offered to  
11 reset the hearing date. Someone in Respondent's office informed the  
12 court that that would be fine.

13 71. On or about August 8, 2002, another Motion to Continue was filed,  
14 ostensibly by Respondent. The court left a message with Respondent's  
15 office stating that Respondent should appear on August 9, 2002, but  
16 could appear telephonically.

17 72. Neither Respondent nor Kiel appeared at the August 9, 2002, hearing.

18 73. Judge Mark Armstrong found discrepancies in the Order of Visitation,  
19 as evidenced by Judge Baca's April 29, 2002 minute entry order and  
20 Judge Hicks' June 27, 2002 minute entry order.

1 74. Based upon Judge Hicks' minute entry order of June 27, 2002, Judge  
2 Armstrong granted judgment in favor of Del Rosario, and against Kiel  
3 and Respondent, both individually and jointly, in the amount of \$642.00  
4 for Del Rosario's airfare costs. Judge Armstrong reaffirmed that the  
5 parties had joint legal custody of their children, subject to Del Rosario  
6 having parenting time as she requested in her pre-trial conference  
7 statement dated June 26, 2002. Judge Armstrong also entered additional  
8 orders pertaining to child support to be paid by Del Rosario, the  
9 payment of medical and dental expenses, and the cost of the children's  
10 transportation to Del Rosario's home in Michigan every Christmas or  
11 spring break, as applicable, each year.

12 75. During the *Kiel* proceeding, Harlow prepared and filed at least two  
13 pleadings without Respondent's knowledge or direction. In at least one  
14 instance, she misled a lawyer, who was authorized to execute pleadings  
15 in Respondent's absence, so he would sign one of the pleadings. In  
16 another instance, Harlow signed the name of Del Rosario's husband on a  
17 stipulation that was filed with the court. Harlow also failed to send to  
18 Kiel written communications from Respondent.

19 76. Respondent violated the Rules of Professional Conduct as follows: (a)  
20 Respondent failed to make reasonable efforts to ensure that his firm had

1 in effect measures giving reasonable assurance that his non-lawyer  
2 employees' conduct was compatible with his professional obligations  
3 (for example, Kiel's objectives were not diligently or promptly  
4 completed, respondent and Kiel failed to appear at a scheduled hearing,  
5 a false order was faxed to the Superior Court, and sanctions were  
6 imposed against Kiel and respondent because Del Rosario came from  
7 out-of-state to attend a hearing at which neither respondent nor Kiel  
8 appeared).

9 77. Respondent's conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct.,  
10 specifically ER 5.3.

11 Count Nine (Screening File No. 02-1763)

12 78. On or about July 31, 2000, Robert H. McNabb ("McNabb") consulted  
13 with Respondent about a pending dissolution of marriage proceeding  
14 and property settlement agreement. McNabb paid a \$3,500.00 retainer  
15 to Respondent on that date.

16 79. Approximately a week later, McNabb and his wife reconciled, but  
17 according to Respondent, McNabb failed to inform him. McNabb  
18 claims he called Respondent's office on or about August 7, 2000, to  
19 terminate the representation and request a refund of all fees he had paid,  
20 except a fee for the initial consultation. Mrs. McNabb later died.

1 80. On or about August 10, 2000, Respondent's office mailed a written fee  
2 agreement to McNabb to sign and return. McNabb received the written  
3 fee agreement on August 11, 2000, but did not sign or return it because  
4 he had already terminated the representation.

5 81. On or about September 11, 2000, Respondent returned a partial refund  
6 of \$1,500.00 to McNabb. Immediately thereafter, McNabb called  
7 Respondent's office and requested a refund of all funds he had paid,  
8 including his initial consultation fee.

9 82. McNabb states he made a number of calls to Respondent's office after  
10 September 11, 2000. Respondent asserts that McNabb spoke with  
11 Harlow on each occasion.

12 83. On or about October 9, 2000, McNabb received a check from  
13 Respondent's office in the amount of \$556.75. Respondent believed  
14 that his fee agreement permitted him to keep \$2,000.00 he had earned,  
15 so he did not return that sum. McNabb claims that two computer-  
16 generated invoices dated August 8, 2000, were sent to him with the  
17 check for \$556.75. One invoice indicated that McNabb paid an initial  
18 retainer of \$2,000.00, rather than \$3,500.00. Neither invoice reflected  
19 the correct beginning balance of \$3,500.00 or the \$1,500.00 partial  
20 refund. Upon information and belief, the invoices were not created until

1 on or after September 11, 2000. The invoices were then backdated to  
2 August 8, 2000.

3 84. McNabb sent at least two letters and made a number of telephone calls  
4 to Respondent's office in an attempt to recover the unearned fees.  
5 Respondent did not receive any of that communication. On or about  
6 December 15, 2000, McNabb wrote a letter to Respondent at his law  
7 office on Washington Avenue in Phoenix, Arizona, requesting an  
8 additional refund of \$1,356.25.

9 85. McNabb was unsatisfied with the partial refund he was given, so he filed  
10 a lawsuit against Respondent in the Payson Justice Court on or about  
11 April 5, 2001.

12 86. The lawsuit was served on Respondent by certified mail on or about  
13 April 9, 2001. Harlow signed for the certified mail, but never informed  
14 Respondent.

15 87. Respondent failed to file an answer, and on or about May 13, 2001, the  
16 Justice Court entered a default judgment against Respondent and in  
17 favor of McNabb for \$1,444.75.

18 88. After learning about the judgment, which was sometime after August  
19 30, 2002, Respondent satisfied the judgment by paying McNabb.

20 89. Respondent violated the Rules of Professional Conduct as follows: (a)

1 Respondent failed to make reasonable efforts to ensure that his firm had  
2 in effect measures giving reasonable assurance that his non-lawyer  
3 employees' conduct was compatible with his professional obligations  
4 (for example, McNabb did not promptly receive a refund of unearned  
5 and unexpended funds).

6 90. Respondent's conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct.,  
7 specifically ER 5.3.

8 Count Ten (Screening File No. 02-1825, Shook matter)

9 91. Sandra Shook ("Sandra") filed a Petition for Dissolution of Marriage in  
10 Gila County Superior Court (No. DO 2002-0137). Attorney Chuck  
11 Walker ("Walker") represented Sandra.

12 92. On or about June 6, 2002, Sandra and Ronald Shook ("Ronald"), her  
13 husband, settled all issues in the case and placed the settlement terms on  
14 the record (audiotape). Third-party respondents Francis (Leon) and Joan  
15 Shook ("the Shooks"), Ronald's parents, concurred in the terms of the  
16 settlement. Attorney Harlan Green ("Green") represented Ronald and  
17 the Shooks at the time the case was settled.

18 93. On or about July 9, 2002, Walker hand-delivered to Green a proposed  
19 form of Decree of Dissolution of Marriage and a "Bill of Sale"  
20 document pertaining to the "Sugar Shack" business, which Ronald and

1 the Shooks were to execute.

2 94. On or about July 18, 2002, Walker filed a form of Decree of Dissolution  
3 of Marriage with the court. A copy was hand-delivered to Green.

4 95. On or about July 22, 2002, Respondent was retained by the Shooks and  
5 filed a Notice of Substitution of Counsel for the Shooks.

6 96. Pursuant to Rule 58(d)(1) & (2), Ariz.R.Civ.Proc., counsel for Ronald  
7 and the Shooks had five judicial days (until July 25, 2002) to file an  
8 objection to the form of decree that had been lodged with the court.  
9 Respondent did not file an objection to the form of the decree on the  
10 Shooks' behalf. Respondent timely prepared an objection, but Harlow  
11 apparently did not follow Respondent's instructions to file it on or  
12 before July 24, 2002.

13 97. On or about August 6, 2002, Walker received a "Motion Joining in  
14 Motion Objecting to Form of Proposed Decree of Dissolution," which  
15 was filed by Respondent's father, Hubert Kelly, who was then  
16 representing Ronald. Because Walker had not received the initial  
17 "Objection to Form of Proposed Decree of Dissolution" ("Objection"),  
18 he instructed his staff to determine what objection was being referred to  
19 in the motion filed by Respondent's father. Harlow informed Walker's  
20 staff that Respondent had filed the Objection on behalf of the Shooks on

1 August 6, 2002. The mailing certificate on the Objection, however,  
2 stated it was filed and served on July 24, 2002.

3 98. A copy of the Objection was faxed to the Office of Court Administration  
4 in Globe, Arizona for the first time on August 6, 2002.

5 99. The Clerk of Court's Office in Globe, Arizona received the Objection in  
6 the mail on or about August 8, 2002. The envelope bore a postmark  
7 date of August 6, 2002.

8 100. Also on or about August 8, 2002, Walker filed a "Motion to Strike  
9 Objections to Form of Decree; Request for Sanctions" ("Motion to  
10 Strike"). In that motion, Walker asserted that Respondent did not file  
11 the Motion to Strike until August 8, 2002, long after the time Rule  
12 58(d)(1) & (2), Ariz.R.Civ.Proc., permitted objections to be filed.  
13 Walker also asserted that Respondent attempted to perpetrate a fraud on  
14 the court by backdating his Objection to meet the missed filing deadline.  
15 Walker requested sanctions against Respondent, including the payment  
16 of attorney's fees incurred by Sandra in preparing and filing the Motion  
17 to Strike.

18 101. Respondent violated the Rules of Professional Conduct as follows: (a)  
19 Respondent failed to make reasonable efforts to ensure that his firm had  
20 in effect measures giving reasonable assurance that his non-lawyer

1 employees' conduct was compatible with his professional obligations  
2 (for example, an objection to the form of proposed decree of dissolution  
3 of marriage was not timely filed on the Shooks' behalf).

4 102. Respondent's conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct.,  
5 specifically ER 5.3.

6 Count Eleven (Screening File No. 02-1825, Tedford matter)

7 103. Respondent represented Dean Tedford ("Tedford") in a dissolution of  
8 marriage proceeding (No. DO 99-359).

9 104. During Respondent's representation of Tedford, Harlow secreted minute  
10 entries from Respondent, including the minute entry setting the trial  
11 date. Harlow also failed to provide Respondent with information about  
12 Tedford's communication with her, and falsely told Respondent that the  
13 court had entered an order withdrawing him as counsel for Tedford.  
14 Although Respondent had two copies of his "Motion to Withdraw,  
15 Consent and Order," each of which contained a file stamp of the Gila  
16 County Superior Court, it was never actually filed.

17 105. Due to Harlow's misrepresentations to Respondent, Respondent failed to  
18 appear for Tedford's first scheduled hearing.

19 106. On August 26, 2002, after Respondent cured his failure to sign the  
20 annual dues statement and pay the late fee but before he cured his failure

1 to comply with the requirements of MCLE, Respondent sent a letter to  
2 attorney Walker regarding the Tedford dissolution. That letter was on  
3 Respondent's law office letterhead, which identified Respondent as a  
4 lawyer. A copy of that letter was sent to Tedford. On that same date,  
5 Respondent sent a letter regarding the Tedford dissolution to Walker and  
6 Judge James W. Hazel, Jr. That letter was also on letterhead that  
7 identified Respondent as a lawyer. Respondent did not know he was  
8 still suspended because Harlow had hid or disposed of correspondence  
9 from the State Bar stating that he had been suspended for failure to  
10 comply with the requirements of MCLE.

11 107. Respondent violated the Rules of Professional Conduct as follows: (a)  
12 Respondent failed to make reasonable efforts to ensure that his firm had  
13 in effect measures giving reasonable assurance that his non-lawyer  
14 employees' conduct was compatible with his professional obligations  
15 (for example, Harlow's act of hiding or disposing of correspondence  
16 from the State Bar resulted in Respondent using letterhead that falsely  
17 indicated he could ethically practice law in Arizona). An allegation that  
18 Respondent engaged in the unauthorized practice of law is not  
19 appropriate because Respondent's letters set forth only the history of  
20 various cases, and did not purport to give legal advice of any kind.

1 Furthermore, because of Harlow's actions, Respondent was not aware at  
2 that time that he had been suspended from the practice of law.

3 108. Respondent's conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct.,  
4 specifically ER 5.3.

5 Count Twelve (Screening File No. 02-1825, Coffey matter)

6 109. Respondent represented Katherine Mary Coffey (nka Gorentz)  
7 ("Katherine") in her dissolution of marriage proceeding in Gila County  
8 Superior Court (No. DO 2000-0217).

9 110. Harlow prevented Katherine from communicating with Respondent.

10 111. Respondent failed to appear at the hearing scheduled in the matter, so a  
11 decree of dissolution of marriage was entered that was adverse to  
12 Katherine's best interests.

13 112. Respondent violated the Rules of Professional Conduct as follows: (a)  
14 Respondent failed to make reasonable efforts to ensure that his firm had  
15 in effect measures giving reasonable assurance that his non-lawyer  
16 employees' conduct was compatible with his professional obligations  
17 (for example, Katherine was unable to communicate with Respondent,  
18 Respondent failed to appear at a scheduled hearing, and a decree of  
19 dissolution of marriage was entered that was adverse to Katherine).

20 113. Respondent's conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct.,

1 specifically ER 5.3.

2 Count Thirteen (Screening File No. 02-1825, O'Brien matter)

3 114. Respondent represented Jennifer Linda O'Brien in her dissolution of  
4 marriage proceeding in Gila County Superior Court (No. DO 2001-128).

5 115. During his representation, Respondent prepared a "Decree of  
6 Dissolution of Marriage With Minor Child." Although Judge Robert  
7 Duber never entered that decree, Harlow, without Respondent's  
8 knowledge or direction, affixed a photocopy of Judge Duber's  
9 "signature stamp" on the purported decree.

10 116. Respondent violated the Rules of Professional Conduct as follows: (a)  
11 Respondent failed to make reasonable efforts to ensure that his firm had  
12 in effect measures giving reasonable assurance that his non-lawyer  
13 employees' conduct was compatible with his professional obligations  
14 (Harlow affixed a judge's "signature stamp" to an order that had not  
15 been entered by the court).

16 117. Respondent's conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct.,  
17 specifically ER 5.3.

18 Count Fourteen (prior discipline)

19 118. Respondent has previously been sanctioned for violations of the Rules  
20 of the Supreme Court. Specifically, in file number 84-0991, an informal

1 reprimand was issued on or about October 10, 1984, for violation of DR  
2 7-101(A)(2); and in file number 97-0072, an informal reprimand was  
3 issued on or about December 2, 1997, for violation of ER 1.3.

4 **CONDITIONAL ADMISSIONS**

5 Respondent conditionally admits that his conduct, as set forth above,  
6 violated the following Rules of Professional Conduct:

7 ER 5.3 – 13 violations

8 **SANCTIONS**

9 Respondent and the State Bar agree that based upon the conditional  
10 admissions contained herein, the following disciplinary sanctions will be  
11 imposed:

- 12 1. Respondent will be suspended for a period of forty-five (45) days.
- 13 2. Respondent will be placed on probation for a period of two (2) years,  
14 following his reinstatement to active status. The terms of probation  
15 will be as follows:
  - 16 a. Respondent will, within thirty (30) days after reinstatement,  
17 contact the director of the Law Office Management Assistance  
18 Program at the State Bar of Arizona (LOMAP) to schedule a  
19 law office audit regarding communication, calendaring and  
20 diligent representation of clients (e.g., a tickler system). The

1 LOMAP director or her designee will complete an audit of  
2 Respondent's law office procedures no later than ninety (90)  
3 days after Respondent is reinstated, unless extraordinary  
4 circumstances require additional time. Following the audit,  
5 Respondent will enter into a Memorandum of Understanding  
6 that will be effective for a period of two years after all parties  
7 have signed the Memorandum. Respondent will have contact  
8 with the director of LOMAP (or her designee) on a monthly  
9 basis to discuss his compliance with the terms of the  
10 Memorandum of Understanding and will meet with the  
11 director of LOMAP every three months after the parties have  
12 signed the Memorandum. Respondent understands he may be  
13 required to have a Practice Monitor acceptable to bar counsel,  
14 who will take steps to ensure he complies with the  
15 requirements of the Memorandum of Understanding. Such  
16 steps may include personal meetings with the Practice Monitor  
17 on a monthly basis to review and discuss his compliance with  
18 the terms of the Memorandum of Understanding. Respondent  
19 understands that no attorney/client relationship will exist  
20 between himself and a Practice Monitor, and that the Practice

1 Monitor will be required to report any violation of the  
2 Memorandum of Understanding, the Rules of Professional  
3 Conduct or the Rules of the Supreme Court to bar counsel.

4 b. Restitution issues.<sup>1</sup>

5 (1) Respondent has paid \$1,500.00 to Dorothy Beeson,  
6 which was the entire amount she previously paid to  
7 Respondent or his office.

8 (2) Respondent will participate in fee arbitration through the  
9 State Bar of Arizona with Julie Weber and the Lytles,  
10 and pay any ordered amount within the time set forth in  
11 the fee arbitration award.

12 (3) Albert and Paula Velasco have requested \$3,003.56 in  
13 restitution for excess child support and health insurance  
14 Albert paid allegedly because of Respondent's lack of  
15 diligence. A request for payment of overpaid child  
16 support and health insurance, however, is more in the  
17 nature of malpractice than restitution. Furthermore, that  
18 amount is speculative because it cannot be ascertained

---

19  
20 <sup>1</sup> Unless otherwise stated, each person set forth in this paragraph has agreed to the terms set forth herein.

1 when the court might have entered an order even if  
2 Respondent had timely filed motions to discontinue  
3 payment of child support and health insurance. For  
4 those reasons, restitution to the Velascos is not  
5 appropriate. Respondent will review all files under his  
6 control (including closed, stored or archived files) and  
7 provide the Velascos with all originals or copies, if no  
8 original is found, of all documents pertaining to the  
9 Velascos.

10 (4) Respondent will pay \$2,000.00 to Lisa Marie Prososki  
11 (fka Lisa Marie Green) for attorney's fees the court  
12 ordered her to pay her husband to offset additional legal  
13 work his lawyer had to perform due to delays caused by  
14 Respondent. Respondent will participate in fee  
15 arbitration through the State Bar of Arizona with  
16 Prososki, and pay any ordered amount within the time  
17 set forth in the fee arbitration award.

18 (5) Bar counsel spoke with Michael Kiel, who stated that he  
19 was not requesting any restitution because Respondent's  
20 representation of him was "awesome" and "great for

[him].”

- (6) Respondent has paid Julie Del Rosario the \$642.00 the court ordered him and Kiel to pay for her travel expenses to Arizona for a hearing that did not take place due to the absence of both Respondent and Kiel.
- (7) Respondent has paid the judgment entered against him, and in favor of Robert McNabb, in the amount of \$1,444.75. McNabb informed bar counsel that no further restitution is owed.
- (8) Respondent will participate in fee arbitration through the State Bar of Arizona with Francis (Leon) and Joan Shook, and pay any ordered amount within the time set forth in the fee arbitration award.
- (9) Respondent will participate in fee arbitration through the State Bar of Arizona with Dean Tedford, and pay any ordered amount within the time set forth in the fee arbitration award.
- (10) Respondent will participate in fee arbitration through the State Bar of Arizona with Katherine Gorentz (fka Katherine Coffey), if the issue of Respondent’s fee is

1 not addressed in any legal proceeding Gorentz may  
2 bring against Respondent, and pay any ordered amount  
3 within the time set forth in the fee arbitration award.

4 (11) Bar counsel has been unable to locate or contact Jennifer  
5 Linda O'Brien. Respondent asserts he paid a partial  
6 refund of \$1,462.34 to O'Brien, which was satisfactory  
7 to her. However, because that information cannot be  
8 verified, Respondent will participate in fee arbitration  
9 through the State Bar of Arizona with O'Brien, if  
10 requested by O'Brien, and pay any ordered amount  
11 within the time set forth in the fee arbitration award.

12 c. Respondent will be responsible for the costs and expenses  
13 associated with his participation in LOMAP.

14 3. Respondent will pay all costs and expenses incurred in the  
15 disciplinary proceedings in this matter. Attached hereto as Exhibit 4  
16 is a statement of costs and expenses incurred by the State Bar in this  
17 disciplinary proceeding.

18 If additional information is obtained, a supplemental notice will be  
19 filed with the Disciplinary Commission prior to oral argument.

20 4. In the event Respondent fails to comply with any of the foregoing

1 terms, and information thereof is received by the State Bar, bar  
2 counsel will file a Notice of Non-Compliance with the hearing  
3 officer previously assigned to this matter. The hearing officer will  
4 conduct a hearing at the earliest practical date, but in no event later  
5 than thirty (30) days following receipt of said notice, and will  
6 determine whether the terms of probation have been breached and, if  
7 so, to recommend appropriate action and response to such breach. If  
8 there is an allegation that Respondent failed to comply with any of  
9 the foregoing terms, the burden of proof shall be on the State Bar to  
10 prove non-compliance by a preponderance of the evidence.

11 Respondent conditionally admits he engaged in the conduct set forth  
12 above, and the rule violations indicated, in exchange for the form of discipline set  
13 forth above.

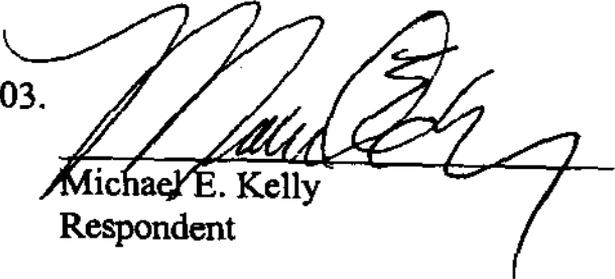
14 Respondent, by entering into this agreement, waives his right to a formal  
15 disciplinary hearing that he would otherwise be entitled to pursuant to Rule  
16 53(c)(6), Ariz.R.S.Ct., and the right to testify and present witnesses on his behalf  
17 at a hearing. Respondent further waives all motions, defenses, objections or  
18 requests that he has made or raised, or could assert hereafter, if the conditional  
19 admissions and stated forms of discipline are approved. Respondent is  
20 represented by counsel in these proceedings, and acknowledges that he has read

1 this agreement and received a copy of it. Respondent submits this agreement  
2 with conditional admissions freely and voluntarily, and without coercion or  
3 intimidation, and is specifically aware of his need to comply with Rule 63,  
4 Ariz.R.S.Ct., and his need to apply for reinstatement pursuant to Rule 71,  
5 Ariz.R.S.Ct., and possibly Rule 72, Ariz.R.S.Ct.

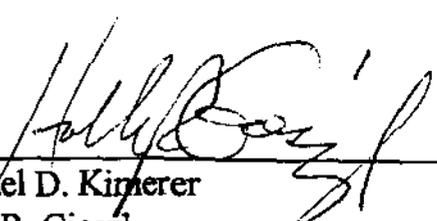
6 This tender of admissions and agreement for discipline by consent will be  
7 submitted to the Disciplinary Commission of the Supreme Court of Arizona for  
8 review and approval. Respondent realizes that the Disciplinary Commission may  
9 request his presence at a hearing for presentation of evidence and/or oral  
10 argument in support of this agreement. Respondent further recognizes that the  
11 Disciplinary Commission may recommend rejection of this agreement, and that  
12 the Arizona Supreme Court may accept or reject the Commission's  
13 recommendation. Respondent further understands that if this agreement is  
14 rejected at any time, his conditional admissions are withdrawn.

15 **This agreement, with conditional admissions, is submitted freely and**  
16 **voluntarily and not under coercion or intimidation. I am aware of the Rules**  
17 **of the Supreme Court with respect to discipline and reinstatement.**

18 DATED this 29<sup>th</sup> day of May, 2003.

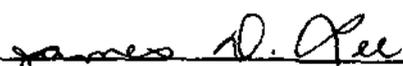
19   
Michael E. Kelly  
Respondent

1 DATED this 29<sup>th</sup> day of May, 2003.

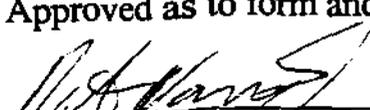
2   
3 \_\_\_\_\_  
4 Michael D. Kimerer  
5 Holly R. Gieszi  
6 Respondent's Counsel

7 DATED this 29<sup>th</sup> day of May, 2003.

8 STATE BAR OF ARIZONA

9   
10 \_\_\_\_\_  
11 James D. Lee  
12 Senior Bar Counsel

13 Approved as to form and content:

14   
15 \_\_\_\_\_  
16 Robert B. Van Wyck  
17 Chief Bar Counsel  
18  
19  
20

1 Original filed with the Disciplinary Clerk  
and copies of the foregoing mailed/  
2 \*hand-delivered this 29 day of  
May, 2003, to:

3  
4 Michael D. Kimerer  
Holly R. Gieszl  
Kimerer & Derrick, P.C.  
5 221 East Indianola Avenue  
Phoenix, Arizona 85012-2002  
6 Respondent's Counsel

7 and

8 \*Dee Steadman  
Lawyer Regulation Records Manager  
9 State Bar of Arizona  
111 West Monroe, Suite 1800  
10 Phoenix, Arizona 85003-1742

11 by: *Maria Jemr*

12

13

14

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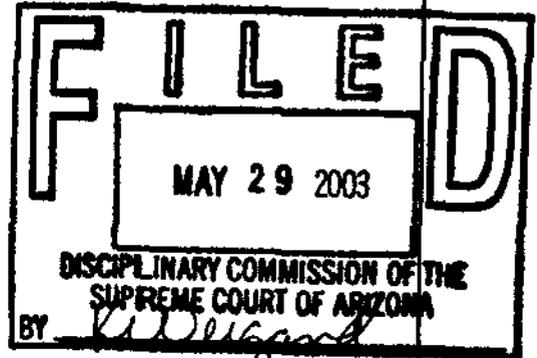
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1 James D. Lee, Bar No. 011586  
2 Senior Bar Counsel  
3 State Bar of Arizona  
4 111 West Monroe, Suite 1800  
5 Phoenix, Arizona 85003-1742  
6 Telephone: (602) 340-7247

7 **BEFORE THE DISCIPLINARY COMMISSION**  
8 **OF THE SUPREME COURT OF ARIZONA**

9 IN THE MATTER OF A MEMBER ) Nos. 00-1497, 00-1936, 01-1007,  
10 OF THE STATE BAR OF ARIZONA, ) 02-0055, 02-1611, 02-1763,  
11 ) 02-1825  
12 **MICHAEL E. KELLY,** )  
13 Bar No. 004993 ) **JOINT MEMORANDUM IN**  
14 ) **SUPPORT OF THE TENDER**  
15 Respondent. ) **OF ADMISSIONS**  
16 )  
17 ) (Assigned to Hearing Officer 8H,  
18 ) Harry T. Goss)

19 The State Bar of Arizona, which is represented by undersigned bar  
20 counsel, and Respondent, who is represented by Michael D. Kimerer and Holly  
R. Gieszl, hereby submit this Joint Memorandum in support of the Tender of  
Admissions and Agreement for Discipline by Consent filed contemporaneously  
herewith.

**CONDUCT**

As reflected in the Tender of Admissions and Agreement for Discipline by  
Consent, Respondent's misconduct arose from a failure to supervise Julie Harlow

1 ("Harlow"), Respondent's secretary/legal assistant. Respondent conditionally  
2 admits the facts as set forth in the Tender of Admissions.

3 SANCTIONS

4 Respondent agrees to accept the following as the appropriate sanctions in  
5 this matter: imposition of a forty-five (45) day suspension; two (2) years  
6 probation (including participation in the Law Office Management Assistance  
7 Program at the State Bar ("LOMAP") and fee arbitration); and payment of the  
8 costs and expenses of the disciplinary proceedings. Restitution is not necessary.  
9 Financial disputes between Respondent and his current and former clients have  
10 either been resolved between them or are subject to fee arbitration, where  
11 appropriate. The State Bar and Respondent believe these sanctions are  
12 appropriate under the circumstances.

13 In determining the appropriate sanctions, the State Bar and Respondent  
14 considered both the American Bar Association's *Standards for Imposing Lawyer*  
15 *Sanctions* and Arizona case law.

16 American Bar Association's *Standards for Imposing Lawyer Sanctions*

17 The ABA *Standards for Imposing Lawyer Sanctions* (hereafter "*Standards*")  
18 provide guidance with respect to an appropriate sanction in this matter. The  
19 Supreme Court and the Disciplinary Commission are consistent in utilizing the  
20

1 *Standards* to determine appropriate sanctions for attorney discipline. *In re Kaplan*,  
2 179 Ariz. 175, 877 P.2d 274 (1994).

3 The ABA *Standards* do not specifically address a lawyer's failure to  
4 adequately supervise a non-lawyer employee. *Matter of Miller*, 178 Ariz. 257,  
5 872 P.2d 661 (1994). However, *Standards* 7.2 and 7.3 are useful to a  
6 determination of an appropriate sanction. *Standard* 7.2 states, "Suspension is  
7 generally appropriate when a lawyer knowingly engages in conduct that is a  
8 violation of a duty owed to the profession, and causes injury or potential injury  
9 to a client, the public, or the legal system." *Standard* 7.3 states, "Reprimand  
10 [censure in Arizona] is generally appropriate when a lawyer negligently engages  
11 in conduct that is a violation of a duty owed to the profession, and causes injury  
12 or potential injury to a client, the public, or the legal system." *Standard* 7.1 is  
13 inapplicable because there is no evidence that Respondent intended to obtain a  
14 benefit for himself or another, and *Standard* 7.4 is inapplicable because  
15 Respondent's misconduct was not limited to an isolated instance.

16 *Standard* 7.3 is applicable because Respondent's negligent supervision of  
17 Harlow caused potential harm to several clients. The Commentary to *Standard*  
18 7.3 states that reprimand (censure in Arizona) is generally imposed when there is  
19 little or no injury to a client, the public or the legal profession. In this case,  
20 Respondent's clients were injured because of delays in the processing of their

1 cases and the extra work that had to be performed to mitigate the adverse effects  
2 caused by Harlow's conduct. In addition, the legal profession was injured at  
3 least insofar as court hearings were delayed and previous court rulings were  
4 vacated.

5 A review of the *Standards* also requires an analysis of relevant aggravating  
6 and mitigating factors. The following aggravating factors are present:

- 7 (1) Prior disciplinary offenses (*Standard 9.22(a)*).<sup>1</sup>
- 8 (2) Pattern of misconduct (*Standard 9.22 (c)*).<sup>2</sup>
- 9 (3) Multiple offenses (*Standard 9.22(d)*).<sup>3</sup>
- 10 (4) Vulnerability of the victims (*Standard 9.22(h)*), at least to the extent  
11 that Respondent's clients' legal rights were jeopardized as a result of  
12 misrepresentations made to them by Harlow and their inability to

---

13  
14 <sup>1</sup> On October 10, 1984, Respondent received an informal reprimand in File No.  
15 84-0991 for violation of DR 7-101(A)(2); and on December 2, 1997, Respondent  
received an informal reprimand in File No. 97-0072 for violation of ER 1.3.

16 <sup>2</sup> See *In re Lenaburg*, 177 Ariz. 20, 864 P.2d 1052 (1993) (pattern of misconduct  
17 found where a lawyer's failure to supervise resulted in harm or potential harm to  
18 four firm clients). *But see, In re Rice*, 376, 843 P.2d 1268 (1992) (pattern of  
misconduct not found because all infractions resulted from the lawyer's failure  
to adequately supervise his staff).

19 <sup>3</sup> See *In re Rice*, 173 Ariz. 376, 843 P.2d 1268 (1992) (multiple offenses found  
20 where the lawyer's failure to supervise his lawyer and non-lawyer staff affected  
four clients).

1 readily determine the accuracy of statements made to them by  
2 Harlow.

3 (5) Substantial experience in the practice of law (*Standard 9.22(i)*).<sup>4</sup>

4 Present in mitigation are the following:

5 (1) Absence of a dishonest or selfish motive (*Standard 9.32(b)*).

6 (2) Personal or emotional problems (*Standard 9.32(c)*). Respondent has  
7 on-going responsibility for the care and financial support for a  
8 learning disabled child who must attend a special school.

9 (3) Timely good faith effort to make restitution or to rectify the  
10 consequences of his misconduct (*Standard 9.32(d)*). Respondent  
11 returned funds to his clients when appropriate and took steps when  
12 appropriate to obtain a new hearing and have court orders vacated  
13 when they resulted from his non-appearance at a hearing. In  
14 addition, Respondent has willingly agreed to participate in fee  
15 arbitration in other cases where his clients have expressed concern  
16 about the fee they were charged.

17 (4) Full and free disclosure to a disciplinary board or cooperative  
18 attitude toward the proceedings (*Standard 9.32(e)*).

---

19  
20 <sup>4</sup> Respondent was admitted to practice law in Arizona on October 8, 1977.

1 (5) Character or reputation (*Standard 9.32(g)*). Attached hereto as  
2 Exhibit 1 are letters from individuals attesting to Respondent's good  
3 character and reputation.

4 (6) Imposition of other penalties or sanctions (*Standard 9.32(k)*).  
5 Maricopa County Superior Court Judge Mark Armstrong ordered  
6 Respondent and his client, individually and jointly, to pay the travel  
7 costs of Julie Del Rosario, an opposing client who had traveled to  
8 Phoenix for a hearing that did not take place because neither  
9 Respondent nor his client were present. Both Respondent and his  
10 client were unaware of the hearing because Harlow had not informed  
11 Respondent about it. Respondent has paid \$642.00 to Del Rosario,  
12 as ordered by the court.

13 (7) Remorse (*Standard 9.32(l)*).

14 (8) Remoteness of prior offenses (*Standard 9.32(m)*), at least as to the  
15 1984 informal reprimand.

16 Non-ABA Mitigation

17 Present as non-ABA mitigation are the following:

18 (1) Harlow resigned from Respondent's employment by leaving a voice-  
19 mail message in which she admitted to a pattern of intercepting and  
20 hiding or destroying Respondent's mail, including certified mail

1 from the State Bar, and failing to inform Respondent about other  
2 communications and messages. See Exhibit 2, attached hereto.

3 (2) Investigation into various matters revealed other acts apparently  
4 committed by Harlow, including preparation of "pleadings" to which  
5 she forged Respondent's signature and creation of purported court  
6 "orders" to which she affixed a photocopy of a judge's signature  
7 stamp.

8 (3) Respondent reorganized his office following Harlow's resignation  
9 last July, and has received no bar complaints following those  
10 changes.

11 (4) Until the matters set forth in the Tender of Admissions became  
12 known to Respondent, he trusted that Harlow was acting responsibly  
13 and in his clients' best interests. Respondent employed Harlow in  
14 excess of a year prior to any problems arising and had no reason not  
15 to trust her.

16 (5) Although closer supervision of Harlow would have enabled  
17 Respondent to detect at least some of Harlow's misconduct at a time  
18 when he could have minimized client harm, Harlow's intentional  
19 deception and interception and destruction of mail would have  
20 prevented him from doing so in every instance.

1 Proportionality Analysis

2 “Although there may often be some question of what is a reasonable effort  
3 to ensure proper conduct by non-lawyer employees, at a minimum the lawyer  
4 must screen, instruct, and supervise.” *In re Struthers*, 179 Ariz. 216, 219 877  
5 P.2d 789, 792 (1994) (citation omitted).

6 Attorney Michael A. Miller was suspended for 12 months and ordered to  
7 pay restitution for violating ER 1.15, ER 5.3 and ER 8.1.<sup>5</sup> *In re Miller*, 178 Ariz.  
8 257, 872 P.2d 661 (1994). The Disciplinary Commission found that Miller’s  
9 most serious violation was his failure to adequately supervise a non-lawyer  
10 employee. Miller’s non-lawyer employee settled three cases without his  
11 knowledge, misappropriated settlement funds and destroyed client files. The  
12 misappropriation resulted in three clients not receiving funds they were entitled  
13 to receive. Upon learning that client funds had been misappropriated, Miller  
14 made restitution to two clients, but was unable to determine the amount received  
15 on behalf of the third client. Miller terminated the non-lawyer’s employment  
16 immediately upon learning about his misconduct.

17  
18  
19 <sup>5</sup> Five Commissioners recommended a 12-month suspension, two Commissioners  
20 dissented because they thought a 12-month suspension was excessive, and one  
Commissioner dissented because he did not believe the suspension should run  
concurrently with Miller’s disbarment.

1 In addition to Miller's failure to adequately supervise his non-lawyer  
2 employee, he also failed to timely respond to the State Bar during the course of  
3 its screening investigation. Although it was later determined that Miller's wife  
4 had destroyed all letters received from the State Bar, it appears from the  
5 Disciplinary Commission Report that Miller received notice about two matters  
6 but chose not to respond because he was under investigation and indictment on  
7 criminal charges. When Miller learned about the bar's investigation, he  
8 immediately provided information, as requested. In mitigation, Miller had no  
9 dishonest or selfish motive. In aggravation, were substantial experience in the  
10 practice of law and failure to promptly respond to bar counsel's inquiries. It is  
11 unclear whether the Commission gave any weight to Miller's prior disbarment.  
12 The Commission stated it was concerned that the disbarment was not a true prior  
13 sanction because Miller's failure to supervise occurred prior to his disbarment  
14 for attempted operation of a prostitution enterprise and money laundering.

15 The facts in the instant case are quite similar to those in *Miller*.  
16 Although Respondent's secretary destroyed letters from the State Bar, there is no  
17 evidence she misappropriated client funds. In *Miller*, there were two  
18 aggravating factors and one mitigating factor, whereas in the instant case, there  
19 are five aggravating factors, eight ABA mitigating factors, and five non-ABA  
20

1 mitigating factors. For those reasons, the period of suspension in the instant case  
2 should be shorter than that imposed in *Miller*.

3 In *In re Galbasini*, 163 Ariz. 120, 786 P.2d 971 (1990), attorney Donald  
4 Galbasini was suspended for six months for, among other things, failing to  
5 supervise non-lawyer assistants engaged in debt collection in Galbasini's name.  
6 Galbasini contracted with a company to manage and provide paralegal support  
7 for his collections practice. The Supreme Court found that his supervision of the  
8 company's agents was "minimal at best," and resulted in injury to several  
9 clients. Two non-lawyer assistants placed Galbasini's name on a sign outside  
10 their office and answered the phone by falsely indicating that it was a law office.  
11 They also used Galbasini's letterhead and solicited clients in Galbasini's name  
12 without his knowledge. In addition, Galbasini's non-lawyer assistants  
13 misappropriated funds belonging to his clients. Galbasini did not know who his  
14 clients were and did not receive messages left for him. The Court found that  
15 Galbasini did not know about every instance of misconduct committed by the  
16 non-lawyer assistants until after the fact.

17 The Court found one aggravating factor in *Galbasini*: "the large and  
18 potentially larger numbers of clients and members of the public who could have  
19 been damaged by [Galbasini's] failure to exert control over the nonlawyer  
20 employees." *Galbasini* at 126, 786 P.2d at 977. The Court also found two

1 mitigating factors: timely good faith effort to make restitution or to rectify the  
2 consequences of his misconduct and full and free disclosure to a disciplinary  
3 board or cooperative attitude toward the proceedings

4 The instant case warrants a period of suspension shorter than that in  
5 *Galbasini* because there is no evidence that client funds were misappropriated  
6 and the mitigating factors in the instant case outweigh the aggravating factors.

7 CONCLUSION

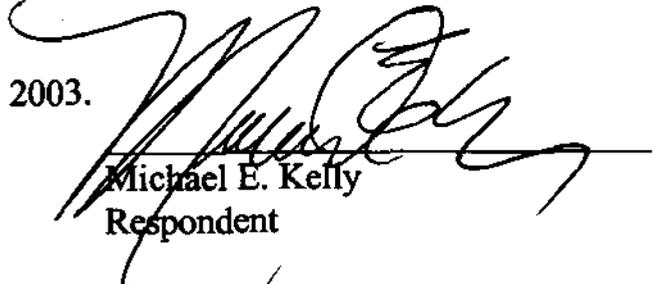
8 Based upon the ABA *Standards* and relevant case law, the State Bar and  
9 Respondent believe that imposition of a 45-day suspension, two (2) years  
10 probation (including participation in the Law Office Management Assistance  
11 Program at the State Bar ("LOMAP") and participation in fee arbitration); and  
12 payment of the costs and expenses of the disciplinary proceedings is appropriate.  
13 Even if the presumptive sanction is found to be a censure, an aggravated  
14 sanction of a 45-day suspension is appropriate given the number of matters that  
15 were neglected due to Respondent's failure to adequately supervise his secretary,  
16 the actual harm suffered by his clients and the legal system, and the potential for  
17 much greater harm.

18 The Court and the Disciplinary Commission have repeatedly stated that the  
19 purpose of lawyer discipline is not to punish the offender but to protect the  
20 public, the profession, and the administration of justice. *In re Neville*, 147 Ariz.

1 106, 708 P.2d 1297 (1988). The imposition of a 45-day suspension, two (2)  
2 years probation (including participation in LOMAP and fee arbitration), and  
3 payment of the costs and expenses of the disciplinary proceedings will  
4 accomplish those goals. Although the Arizona Supreme Court disfavors  
5 suspensions of less than six months, *see In re Alcorn*, SB-01-0075-D (2002)  
6 (citing and quoting the ABA *Standards for Imposing Lawyer Sanctions*), this  
7 Commission has recommended and the Court has imposed a suspension of less  
8 than six months in a number of cases.

9 For all of the above reasons, Respondent and the State Bar respectfully  
10 request the Disciplinary Commission to accept this Agreement for Discipline by  
11 Consent.

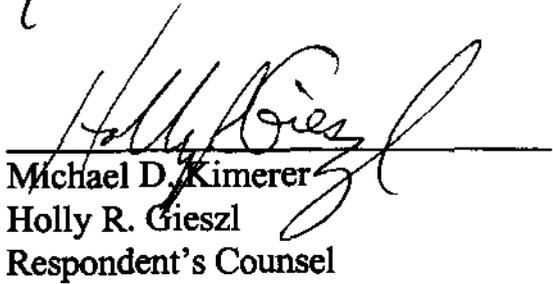
12 DATED this 27<sup>th</sup> day of May, 2003.



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Michael E. Kelly  
Respondent

15 DATED this 28<sup>th</sup> day of May, 2003.

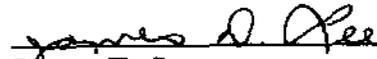


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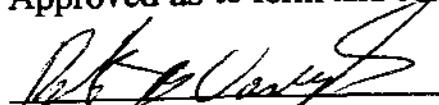
Michael D. Kimerer  
Holly R. Gieszl  
Respondent's Counsel

1 DATED this 29<sup>th</sup> day of May, 2003.

2 STATE BAR OF ARIZONA

3   
4 James D. Lee  
Senior Bar Counsel

5 Approved as to form and content:

6   
7 Robert B. Van Wyck  
Chief Bar Counsel

8  
9  
10 Original filed with the Disciplinary Clerk  
11 and copies of the foregoing mailed/  
12 \*hand-delivered this 29 day of  
13 May, 2003, to:

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