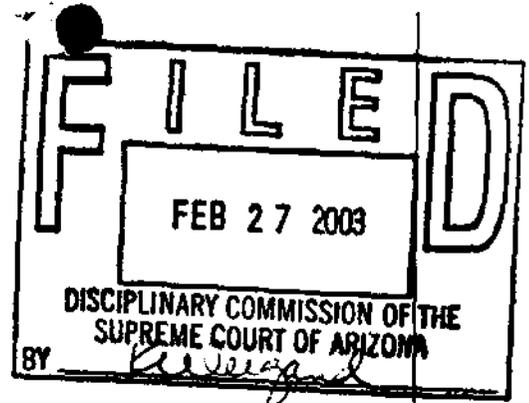


1 James D. Lee, Bar No. 011586  
2 Senior Bar Counsel  
3 State Bar of Arizona  
4 111 West Monroe, Suite 1800  
5 Phoenix, Arizona 85003-1742  
6 Telephone (602) 340-7247



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

10 IN THE MATTER OF A MEMBER ) Nos. 01-1161, 01-1428  
11 OF THE STATE BAR OF ARIZONA, )  
12 **RAND MacDONALD,** ) **TENDER OF ADMISSIONS AND**  
13 Bar No. 004489 ) **AGREEMENT FOR DISCIPLINE**  
14 ) **BY CONSENT**  
15 Respondent. ) (Assigned to Hearing Officer 9Y,  
16 Anne H. Phillips)

17 This agreement is entered into between the State Bar of Arizona, which is  
18 represented by undersigned bar counsel, and respondent, who is not represented  
19 by counsel. It is submitted pursuant to Rule 56(a), Ariz.R.S.Ct., and the  
20 guidelines for discipline by consent issued by the Disciplinary Commission of  
21 the Supreme Court of Arizona. Subject to review and acceptance by the  
22 Disciplinary Commission and the Arizona Supreme Court, respondent agrees to  
23 accept imposition of a thirty (30) day suspension; two (2) years probation  
24 (including LOMAP for a period of six months after all parties have signed the  
25 Memorandum of Understanding and MAP for a period of two years); and  
payment of the costs and expenses of the disciplinary proceedings. Restitution is

1 not appropriate because in one instance, respondent earned the fee, and in the  
2 other instance, respondent returned the entire fee he received. The terms of this  
3 consent agreement will be provided to both complaining parties, De La Garza  
4 and Sawant, prior to oral argument before the Commission.  
5

6 **FACTS**

7 **General Allegations**

- 8
- 9 1. At all times relevant hereto, respondent was an attorney licensed to practice  
10 law in the State of Arizona, having been admitted to practice law in  
11 Arizona on June 15, 1976.

12 **Count One (File No. 01-1161)**

- 13 2. In or about September 2000, Debbie De La Garza ("De La Garza") met  
14 with respondent to discuss legal paternity for her child, current and back  
15 child support, and custody and visitation issues she wanted him to address  
16 on her behalf. Although respondent quoted a \$2,000.00 fee to De La  
17 Garza, she informed him that she did not have that much money but would  
18 make an initial payment of \$1,000.00. At the time of De La Garza's initial  
19 meeting with respondent, the child's father was voluntarily paying child  
20 support and had always done so; the appropriate amount of support,  
21 however, was in question. In addition, there was no dispute over custody  
22 or visitation.  
23  
24  
25

- 1 3. On or about October 7, 2000, De La Garza paid \$1,000.00 (in cash) to  
2 respondent, and set up a payment plan with respondent to pay the  
3 remaining \$1,000.00.  
4
- 5 4. De La Garza sent the following payments to respondent: (a) \$210.00 on or  
6 about November 7, 2000, with check #1041; (b) \$134.00 on or about  
7 November 20, 2000, with check #1042; (c) \$200.00 on or about December  
8 2, 2000, with check #1048; (d) \$133.00 on or about December 9, 2000,  
9 with check #1049; (e) \$200.00 on or about January 15, 2001, with check  
10 #1050; and (f) \$133.00 on or about January 19, 2001, with check #1052.  
11
- 12 5. De La Garza made six telephone calls to respondent's office between  
13 December 2000 and April 13, 2001. On three occasions, De La Garza left  
14 messages for respondent on his answering machine, but respondent failed  
15 to return any of those calls. During the other three calls, respondent  
16 indicated to De La Garza that he would begin working on her case in the  
17 near future.  
18
- 19 6. As of June 2, 2001, De La Garza was unaware of any work performed on  
20 her case. In addition, respondent did not keep De La Garza informed about  
21 the status of her case.  
22
- 23 7. On or about June 2, 2001, De La Garza wrote a letter to respondent in  
24 which she expressed her concerns about his lack of communication and  
25

1 lack of action on her case. De La Garza also asked respondent for a full  
2 refund of the fees she had paid.

3  
4 8. On or about July 9, 2001, respondent sent De La Garza a cashier's check  
5 for the full amount she had paid him.

6 9. Respondent violated one or more of the Rules of Professional Conduct  
7 and/or the Rules of the Supreme Court as follows: (a) respondent failed to  
8 abide by De La Garza's decisions concerning the objectives of  
9 representation, and failed to consult with De La Garza as to the means by  
10 which they were to be pursued; (b) respondent failed to act with reasonable  
11 diligence and promptness in representing De La Garza; (c) respondent  
12 failed to keep De La Garza reasonably informed about the status of her  
13 matter and failed to promptly comply with reasonable requests for  
14 information; and/or respondent failed to explain a matter to the extent  
15 reasonably necessary to permit De La Garza to make informed decisions  
16 regarding the representation; (d) respondent failed to make reasonable  
17 efforts to expedite litigation consistent with De La Garza's interests, in part  
18 because he believed that De La Garza had asked him to do things that may  
19 not have been in her best interests; and (e) respondent engaged in conduct  
20 that was prejudicial to the administration of justice, at least insofar as  
21  
22  
23  
24  
25

1 respondent failed to adequately communicate with De La Garza so she  
2 could make necessary decisions.

- 3  
4 10. Respondent's conduct, as set forth in this count, violated Rule 42,  
5 Ariz.R.S.Ct., specifically ER 1.2, ER 1.3, ER 1.4, ER 3.2 and ER 8.4(d).  
6 For purposes of this consent agreement, the State Bar agrees that it cannot  
7 prove a violation of ER 1.5 and ER 1.16(b) & (d) by clear and convincing  
8 evidence. ER 1.5 is being dismissed because the fee respondent accepted  
9 in the De La Garza matter was reasonable at the time he accepted it and he  
10 returned the entire amount shortly after De La Garza asked him to do so.  
11 ERs 1.16(b) & (d) are being dismissed because De La Garza asked him to  
12 discontinue the representation and De La Garza suffered no adverse effect  
13 from the termination of representation (the father of De La Garza's child  
14 continued to voluntarily make child support payments to De La Garza and  
15 there was no dispute regarding custody or visitation).  
16  
17

18  
19 Count Two (failure to respond to bar counsel in File No. 01-1161)

- 20 11. On or about June 8, 2001, the State Bar received correspondence from De  
21 La Garza dated June 4, 2001, indicating she had concerns about  
22 respondent's conduct relating to his representation of her.  
23  
24 12. On or about July 6, 2001, bar counsel sent a copy of De La Garza's  
25 correspondence and an initial transmittal letter to respondent, directing him

1 to submit a written response to De La Garza's concerns and allegations  
2 within twenty (20) days of that letter. That letter stated, in part, "Pursuant  
3 to Rule 51(h) and (i), Ariz.R.S.Ct., you have a duty to cooperate with  
4 disciplinary investigations." Respondent failed to respond to that letter.  
5

6 13. On or about August 31, 2001, the State Bar sent a second letter to  
7 respondent, directing him to submit a response to De La Garza's concerns  
8 and allegations. That letter stated, "I again refer you to Rule 51(h) and (i),  
9 and caution you that failure to cooperate with a disciplinary investigation is  
10 grounds, in itself, for discipline." Respondent failed to submit a written  
11 response to bar counsel concerning De La Garza's charges.  
12

13  
14 14. Respondent violated one or more of the Rules of Professional Conduct  
15 and/or the Rules of the Supreme Court as follows: (a) respondent  
16 knowingly failed to respond to a lawful demand for information from bar  
17 counsel; (b) respondent failed to furnish information to or respond  
18 promptly to an inquiry or request from bar counsel, made pursuant to the  
19 Rules of the Arizona Supreme Court, seeking information relevant to a  
20 complaint, grievance or matter under investigation concerning his conduct,  
21 and failed to assert a ground for refusing to do so; and (c) respondent  
22 refused to cooperate with officials and staff of the State Bar, who were  
23 acting in the course of their duties.  
24  
25

1 15. Respondent's conduct, as set forth in this count, violated Rule 42,  
2 Ariz.R.S.Ct., specifically ER 8.1(b), and Rule 51(h) & (i), Ariz.R.S.Ct.

3 Count Three (No. 01-1428)  
4

5 16. This count is being dismissed as part of this consent agreement.  
6 Respondent would testify that he filed the necessary documents to obtain  
7 an annulment, but Ashraf Sawant ("Sawant") directed respondent not to  
8 give notice of the proceeding to her husband, even though respondent had  
9 located him living near Dallas, Texas. Both respondent and Sawant knew  
10 there was very little possibility that Sawant's husband would see service by  
11 publication and, therefore, would not have actual notice. Respondent  
12 informed Sawant that he would not falsely inform the court that her  
13 husband could not be located. Sawant wanted to have her name changed  
14 by annulment or divorce before leaving the United States and returning to  
15 India. That was not possible without serving Sawant's husband.  
16 Respondent would also testify that he returned all of Sawant's calls and  
17 never told Sawant that a hearing date had been set. Based upon  
18 respondent's expected testimony, undersigned bar counsel does not believe  
19 he could prove the allegations of misconduct by clear and convincing  
20 evidence.  
21  
22  
23  
24  
25

Count Four (failure to respond to bar counsel in File No. 01-1428)

17. On or about July 17, 2001, the State Bar received correspondence from Ashraf Sawant dated July 11, 2001, indicating she had some concerns about respondent's conduct relating to his representation of her.
18. On or about August 23, 2001, bar counsel sent a copy of Sawant's correspondence and an initial transmittal letter to respondent, directing him to submit a written response to Sawant's concerns and allegations within twenty (20) days of that letter. That letter stated, "Pursuant to Rule 51(h) and (i), Ariz.R.S.Ct., you have a duty to cooperate with disciplinary investigations."
19. On or about October 3, 2001, the State Bar sent a second letter to respondent, directing him to submit a response to Sawant's concerns and allegations. That letter stated, "I again refer you to Rule 51(h) and (i), and caution you that failure to cooperate with a disciplinary investigation is grounds, in itself, for discipline." Respondent failed to submit a written response to bar counsel concerning Sawant's concerns and allegations.
20. On or about March 14, 2002, following entry of an Order of Probable Cause, respondent submitted a written response to the concerns and charges submitted to the State Bar by Sawant.

1 21. On or about March 26, 2002, bar counsel wrote a letter to respondent,  
2 directing him to address certain, specific concerns and allegations made by  
3 Sawant. Respondent failed to submit a response to bar counsel.  
4

5 22. Respondent violated one or more of the Rules of Professional Conduct  
6 and/or the Rules of the Supreme Court as follows: (a) respondent  
7 knowingly failed to respond to a lawful demand for information from bar  
8 counsel; (b) respondent failed to furnish information to or respond  
9 promptly to an inquiry or request from bar counsel, made pursuant to the  
10 Rules of the Arizona Supreme Court, seeking information relevant to a  
11 complaint, grievance or matter under investigation concerning his conduct,  
12 and failed to assert a ground for refusing to do so; and (c) respondent  
13 refused to cooperate with officials and staff of the State Bar, who were  
14 acting in the course of their duties.  
15  
16

17 23. Respondent's conduct, as set forth in this count, violated Rule 42,  
18 Ariz.R.S.Ct., specifically ER 8.1(b), and Rule 51(h) & (i), Ariz.R.S.Ct.  
19

20 **Count Five (prior discipline)**

21 24. Respondent has previously been sanctioned for violations of the Rules of  
22 Professional Conduct. Specifically, in file number 90-0077, respondent  
23 received an informal reprimand by order dated December 17, 1990 and  
24 filed on December 18, 1990, for violation of ER 1.4, ER 1.16(d), ER 8.1(b)  
25

1 and Rule 51(h) & (i), Ariz.R.S.Ct.; in file numbers 93-1539, 94-0136 &  
2 94-1480, respondent was censured by the Supreme Court of Arizona by  
3 judgment and order dated November 7, 1996, for violation of ER 1.2, ER  
4 1.3, ER 1.4, ER 1.16(d), ER 8.1(b) and Rule 51(h) & (i), Ariz.R.S.Ct.; and  
5 in file numbers 95-0460, 96-0344 and 96-0609, respondent was censured  
6 by the Supreme Court of Arizona by judgment and order dated September  
7 20, 2000, for violation of ER 1.3, ER 1.4, ER 3.4, ER 8.1(b), and Rule  
8 51(e), (h), (i) & (k), Ariz.R.S.Ct. The entire record in those cases may be  
9 reviewed by the hearing officer, with or without respondent's consent,  
10 following a decision on the merits, pursuant to Rule 53(c)(1) and Rule  
11 54(k)(4), Ariz.R.S.Ct.

### 15 CONDITIONAL ADMISSIONS

16 Respondent conditionally admits that his conduct, as set forth above,  
17 violated the following Rules of Professional Conduct and the Rules of the  
18 Supreme Court:  
19

20 ER 1.2 – 1 violation;

21 ER 1.3 – 1 violation;

22 ER 1.4 – 1 violation;

23 ER 3.2 – 1 violation;

24 ER 8.1(b) – 2 violations;  
25

1 ER 8.4(d) – 1 violation;

2 Rule 51(h), Ariz.R.S.Ct. – 2 violations;

3 Rule 51(i), Ariz.R.S.Ct. – 2 violations.  
4

5 **SANCTIONS**

6 Respondent and the State Bar agree that based upon the conditional  
7 admissions contained herein, the following disciplinary sanctions shall be  
8 imposed:  
9

10 1. Respondent will be suspended for a period of thirty (30) days for  
11 violation of ER 1.2, ER 1.3, ER 1.4, ER 3.2, ER 8.1(b), and ER  
12 8.4(d), and Rule 51(h) & (i), Ariz.R.S.Ct.

13  
14 2. Respondent will be placed on probation for a period of two (2) years,  
15 following his reinstatement to active status. The terms of probation  
16 shall be as follows:

17 a. Respondent will, within thirty (30) days after reinstatement,  
18 contact the director of the Law Office Management Assistance  
19 Program (LOMAP) at the State Bar of Arizona to schedule a  
20 law office audit regarding communication, calendaring and  
21 diligent representation of clients (e.g., a tickler system). The  
22 LOMAP director or her designee will complete an audit of  
23 respondent's law office procedures no later than sixty (60)  
24  
25

1 days after respondent is reinstated. Following the audit,  
2 respondent will enter into a Memorandum of Understanding  
3 that will be effective for a period of six months after all parties  
4 have signed the Memorandum. Respondent will have contact  
5 with the director of LOMAP (or her designee) on a monthly  
6 basis to discuss his compliance with the terms of the  
7 Memorandum of Understanding and will meet with the  
8 director of LOMAP three months and six months after the  
9 date that all parties signed the Memorandum.  
10

11  
12 b. Respondent shall be responsible for the costs and expenses  
13 associated with his participation in the LOMAP program.  
14

15 c. Within sixty (60) days of the date respondent is reinstated,  
16 respondent will contact the director of the Member Assistance  
17 Program (MAP) at the State Bar of Arizona. Respondent will  
18 undergo an assessment and comply with all recommendations  
19 of the evaluator for a period of two (2) years (e.g., counseling,  
20 therapy, subsequent assessments).  
21

22  
23 3. Respondent will pay all costs and expenses incurred in the  
24 disciplinary proceedings in this matter. Attached hereto is a  
25

1 statement of costs and expenses incurred by the State Bar in this  
2 disciplinary proceeding.

3  
4 4. Restitution is not appropriate. Respondent returned the retainer he  
5 received from Debbie De La Garza before the State Bar sent a copy  
6 of the charge to respondent. No restitution should be ordered to  
7 Ashraf Sawant because respondent performed work on her behalf  
8 that exceeded the fee he received.

9  
10 5. In the event respondent fails to comply with any of the foregoing  
11 terms, and information thereof is received by the State Bar, bar  
12 counsel will file a Notice of Non-Compliance with the hearing  
13 officer previously assigned to this matter. The hearing officer will  
14 conduct a hearing at the earliest practical date, but in no event later  
15 than thirty (30) days following receipt of said notice, and will  
16 determine whether the terms of probation have been breached and, if  
17 so, to recommend appropriate action and response to such breach. If  
18 there is an allegation that respondent failed to comply with any of  
19 the foregoing terms, the burden of proof shall be on the State Bar to  
20 prove non-compliance by a preponderance of the evidence.  
21  
22  
23

24 The terms of this consent agreement will be provided to both complaining  
25 parties, De La Garza and Sawant, prior to oral argument before the Commission.

1 Respondent conditionally admits he engaged in the conduct set forth  
2 above, and the rule violations indicated, in exchange for the form of discipline set  
3 forth above.  
4

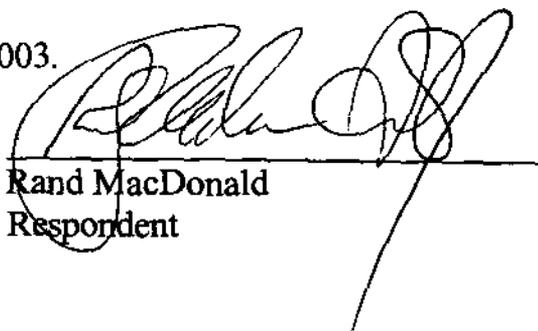
5 Respondent, by entering into this agreement, waives his right to a formal  
6 disciplinary hearing that he would otherwise be entitled to pursuant to Rule  
7 53(c)(6), Ariz.R.S.Ct., and the right to testify and present witnesses on his behalf  
8 at a hearing. Respondent further waives all motions, defenses, objections or  
9 requests that he has made or raised, or could assert hereafter, if the conditional  
10 admissions and stated forms of discipline are approved. Respondent has chosen  
11 not to seek the assistance of counsel in these proceedings, but acknowledges that  
12 he has read this agreement and received a copy of it. Respondent submits this  
13 agreement with conditional admissions freely and voluntarily, and without  
14 coercion or intimidation, and is specifically aware of his need to comply with  
15 Rule 63, Ariz.R.S.Ct., and his need to apply for reinstatement pursuant to Rules  
16 71 and 72, Ariz.R.S.Ct.  
17  
18  
19

20 This tender of admissions and agreement for discipline by consent will be  
21 submitted to the Disciplinary Commission for review and approval. Respondent  
22 realizes that the Disciplinary Commission may request his presence at a hearing  
23 for presentation of evidence and/or oral argument in support of this agreement.  
24 Respondent further recognizes that the Disciplinary Commission may  
25

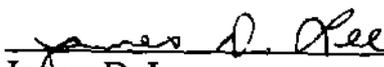
1 recommend rejection of this agreement, and that the Arizona Supreme Court may  
2 accept or reject the Commission's recommendation. Respondent further  
3 understands that if this agreement is rejected at any time, his conditional  
4 admissions are withdrawn.  
5

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

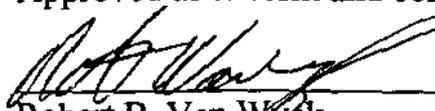
9 DATED this 26<sup>th</sup> day of February, 2003.

10   
11 \_\_\_\_\_  
12 Rand MacDonald  
13 Respondent  
14

15 DATED this 26<sup>th</sup> day of February, 2003.

16   
17 \_\_\_\_\_  
18 James D. Lee  
19 Senior Bar Counsel  
20

21 Approved as to form and content:

22   
23 \_\_\_\_\_  
24 Robert B. Van Wyck  
25 Chief Bar Counsel

1 Original filed with the Disciplinary Clerk  
2 and copies of the foregoing mailed/  
3 \*hand-delivered this 27 day of  
4 February, 2003, to:

5 Anne H. Phillips  
6 Hearing Officer 9Y  
7 10645 North Tatum Blvd., Suite 200  
8 PMB 240  
9 Phoenix, Arizona 85028-3053

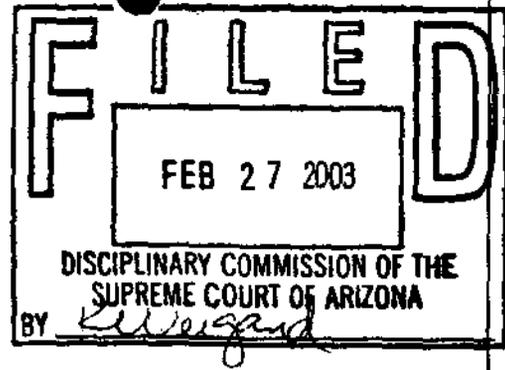
10 Rand MacDonald  
11 Respondent  
12 1002 East Paradise Lane  
13 Phoenix, Arizona 85022-3130

14 and

15 \*Dee Steadman  
16 Lawyer Regulation Records Manager  
17 State Bar of Arizona  
18 111 W. Monroe, Suite 1800  
19 Phoenix, Arizona 85003

20 by: Mona Mamer

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



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

10 IN THE MATTER OF A MEMBER ) Nos. 01-1161, 01-1428  
11 OF THE STATE BAR OF ARIZONA, )  
12 **RAND MacDONALD,** ) **JOINT MEMORANDUM IN**  
13 Bar No. 004489 ) **SUPPORT OF AGREEMENT**  
14 ) **FOR DISCIPLINE BY CONSENT**  
15 )  
16 Respondent. ) (Assigned to Hearing Officer 9Y,  
17 Anne H. Phillips)

18 The State Bar of Arizona, which is represented by undersigned bar counsel,  
19 and respondent, who is not represented by counsel, hereby submit this Joint  
20 Memorandum in support of the Tender of Admissions and Agreement for  
21 Discipline by Consent filed contemporaneously herewith. The conduct which  
22 respondent has conditionally admitted is set forth in the accompanying Tender of  
23 Admissions.

24 **CONDUCT**

25 As reflected in the Tender of Admissions and Agreement for Discipline by  
Consent, respondent's misconduct involved violations of ER 1.2, ER 1.3, ER 1.4,

1 ER 3.2, ER 8.1(b), ER 8.4(d), and Rule 51(h) & (i), Ariz.R.S.Ct. Respondent  
2 conditionally admits the facts as set forth in the Tender of Admissions.

3  
4 SANCTION

5 Respondent agrees to accept the following as the appropriate sanctions in  
6 this matter: thirty (30) day suspension; two (2) years probation (including  
7 LOMAP for a period of six months after all parties have signed the  
8 Memorandum of Understanding and MAP for a period of two years); and  
9 payment of the costs and expenses of the disciplinary proceedings. The State Bar  
10 and respondent believe these sanctions are appropriate under the circumstances.

11  
12 In determining the appropriate sanction, the parties considered both the  
13 American Bar Association's *Standards for Imposing Lawyer Sanctions* and  
14 Arizona case law.

15  
16 American Bar Association's *Standards for Imposing Lawyer Sanctions*

17 The A.B.A. *Standards for Imposing Lawyer Sanctions* ("Standards") provide  
18 guidance with respect to an appropriate sanction in this matter. The Supreme Court  
19 and the Disciplinary Commission are consistent in utilizing the *Standards* to  
20 determine appropriate sanctions for attorney discipline. *In re Kaplan*, 179 Ariz.  
21 175, 877 P.2d 274 (1994).

22  
23  
24 In determining the applicable *Standards*, it should be noted that Debbie De  
25 La Garza, the client in Count One, did not suffer any harm, other than delay in the

1 processing of her case. The father of De La Garza's child was already voluntarily  
2 paying child support to De La Garza and there was no dispute regarding custody or  
3 visitation. However, though respondent's client may not have suffered any harm,  
4 the legal system and the profession were harmed by respondent's failure to respond  
5 to bar counsel.  
6

7 *Standards* 4.42, 4.43, 4.63, 7.2, 7.3 and 8.2 apply to respondent's conduct.

8 *Standard* 4.42 states, "Suspension is generally appropriate when: (a) a lawyer  
9 knowingly fails to perform services for a client and causes injury or potential  
10 injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury  
11 or potential injury to a client." *Standard* 4.43 states, "Reprimand [censure in  
12 Arizona] is generally appropriate when a lawyer is negligent and does not act  
13 with reasonable diligence in representing a client, and causes injury or potential  
14 injury to a client."  
15  
16

17 *Standard* 4.63 states, "Reprimand [censure in Arizona] is generally  
18 appropriate when a lawyer negligently fails to provide a client with accurate or  
19 complete information, and causes injury or potential injury to the client."  
20

21 *Standard* 7.2 states, "Suspension is generally appropriate when a lawyer  
22 knowingly engages in conduct that is a violation of a duty owed as a  
23 professional, and causes injury or potential injury to a client, the public, or the  
24 legal system." *Standard* 7.3 states, "Reprimand [censure in Arizona] is generally  
25

1 appropriate when a lawyer negligently engages in conduct that is a violation of a  
2 duty owed to the profession, and causes injury or potential injury to a client, the  
3 public, or the legal system.”  
4

5 Because respondent has previously been censured for similar misconduct,  
6 *Standard 8.2* is relevant. *Standard 8.2* states that suspension is generally  
7 appropriate when a lawyer has been censured for misconduct and thereafter  
8 engages in further misconduct of the same or similar type that causes injury or  
9 potential injury to a client, the public, the legal system, or the profession.  
10

11 Based upon the above *Standards*, the presumptive sanction is suspension.  
12 In order to determine the length of suspension, an analysis of relevant  
13 aggravating and mitigating factors should also be conducted.  
14

15 Present in aggravation are the following:

- 16 (1) *Standard 9.22(a)* – prior disciplinary offenses;<sup>1</sup>  
17  
18 (2) *Standard 9.22(c)* – a pattern of misconduct (respondent failed to  
19 respond to bar counsel in both matters at issue in this consent  
20 agreement and has previously been sanctioned for engaging in the  
21 same type of misconduct);  
22  
23

24 <sup>1</sup> Respondent was informally reprimanded on December 17, 1990, for violation of ER 1.4, ER  
25 1.16(d), ER 8.1(b) and Rule 51(h) & (i), Ariz.R.S.Ct.; censured on November 7, 1996, for  
violation of ER 1.2, ER 1.3, ER 1.4, ER 1.16(d), ER 8.1(b) and Rule 51(h) & (i), Ariz.R.S.Ct.;  
and censured on September 20, 2000, for violation of ER 1.3, ER 1.4, ER 3.4, ER 8.1(b), and  
Rule 51(e), (h), (i) & (k), Ariz.R.S.Ct.

- 1 (3) *Standard 9.22(d)* – multiple offenses (respondent failed to respond to  
2 bar counsel in both matters during the screening investigation); and  
3  
4 (4) *Standard 9.22(i)* – substantial experience in the practice of law  
5 (respondent was licensed to practice law in Arizona on June 15, 1976).

6 Present in mitigation are the following:

- 7 (1) *Standard 9.32(b)* – absence of a dishonest or selfish motive;  
8  
9 (2) *Standard 9.32(c)* – personal or emotional problems (see below for  
10 discussion);  
11  
12 (3) *Standard 9.32(d)* – timely good faith effort to make restitution or to  
13 rectify consequences of misconduct (respondent returned the retainer  
14 he received from Debbie De La Garza before the State Bar sent a copy  
15 of her allegations to him);  
16  
17 (4) *Standard 9.32(e)* – full and free disclosure to the disciplinary board or  
18 cooperative attitude toward the proceedings (respondent avows that he  
19 did not intentionally fail to respond to bar counsel, but was  
20 psychologically unable to respond; once the formal complaint was  
21 filed, respondent cooperated with bar counsel by providing requested  
22 information and entering into this consent agreement);  
23  
24 (5) *Standard 9.32(g)* – character or reputation;  
25

- 1 (6) *Standard 9.32(i)* – mental disability with the following criteria: (1)  
2 there is medical evidence that respondent is affected by a mental  
3 disability; (2) the mental disability caused the misconduct; (3) the  
4 respondent’s recovery from the mental disability is demonstrated by a  
5 meaningful and sustained period of successful rehabilitation; and (4)  
6 the recovery arrested the misconduct and recurrence of that misconduct  
7 is unlikely (see discussion below regarding these four criteria); and  
8  
9 (7) *Standard 9.32(1)* – remorse (in a letter to bar counsel dated January 15,  
10 2003, respondent stated, “I’m sorry for the trouble I’ve caused the bar,  
11 my client’s [sic], and myself.”).

12  
13  
14 Respondent’s personal and emotional problems were dramatically  
15 amplified by his wife’s murder on January 6, 1995.<sup>2</sup> Following that tragic event,  
16 respondent became dysfunctional. Respondent sought the assistance of  
17 psychologists to address the grief he was experiencing as a result of his wife’s  
18 murder. The psychologists diagnosed respondent as having Attention Deficit  
19 Disorder (“ADD”), a genetic condition that respondent did not know he had.  
20 Respondent was then placed on medication and taught how to deal with ADD.  
21

22  
23 In January 2000, respondent began representing Ann Jackson in a simple  
24 divorce that turned into a contentious proceeding lasting two years. Ann  
25

---

<sup>2</sup> Respondent’s wife was killed when she was shot in the head by an unidentified person.

1 Jackson's husband, Michael Jackson, a purported alcoholic, made repeated  
2 threats to kill himself. On March 1, 2000, the Jackson home burned under  
3 suspicious circumstances while Michael Jackson was in the house and shortly  
4 after. Michael Jackson received a request for production of documents from  
5 respondent. Michael Jackson immediately claimed the requested financial  
6 documents were burned in the fire. Respondent felt responsible for the Jackson  
7 home being burned even though he was fulfilling his responsibility to Ann  
8 Jackson by conducting discovery, including interrogatories and a request for  
9 production of documents. During the divorce proceeding, Michael Jackson was  
10 arrested two times for D.U.I. He was later convicted of felony D.U.I. after police  
11 found him lying drunk next to a loaded .45 caliber pistol on the seat of his pickup  
12 truck, which was stuck in a roadside ditch.

16 Due to his wife's murder, his feelings of indirect responsibility regarding  
17 the burning of the Jackson home, and being upset over the drunken activities of  
18 Michael Jackson (especially with a gun), respondent was afraid the same thing  
19 might happen in the De La Garza case if he followed through by again properly  
20 requesting financial information from the father of De La Garza's child.

23 Respondent's psychologist, Walter E. Fidler, Ph.D., has examined  
24 respondent and provided bar counsel with a letter setting forth his findings. See  
25 Exhibit 1, attached hereto. Dr. Fidler determined that the emotional trauma of

1 respondent's wife's murder resulted in difficulties in respondent's personal and  
2 professional life that were exacerbated by his ADD. According to Dr. Fidler, the  
3 true focus of respondent's disability was Post Traumatic Stress Disorder (PTSD)  
4 with recovery complicated by respondent's ADD. He stated that respondent had  
5 "a right to be concerned about the behavior of Michael Jackson." Exhibit 1, p. 2.  
6

7 Dr. Fidler found that respondent's misconduct in the instant case, including  
8 both his failure to proceed with De La Garza's case and to respond to bar  
9 counsel, was a "temporary dysfunctional response," and an isolated response to  
10 post-traumatic stressors resulting from the Jackson case (e.g., Jackson house fire,  
11 De La Garza's subsequent bankruptcy, the three D.U.I. convictions De La  
12 Garza's husband had acquired). Respondent's delay in removing himself from  
13 the De La Garza case was the result of his struggle between his fearful "feelings"  
14 that something terrible might happen if he pursued the De La Garza case, his  
15 knowledge that his fear probably was not rational, and his desire to represent his  
16 client and earn the fee.  
17  
18  
19

20 Regarding respondent's recovery from his once dysfunctional state, Dr.  
21 Fidler stated that respondent understands the problems that can arise from being  
22 ADD and the nature of the condition. He said respondent "has responded well to  
23 treatment mostly because of his acceptance (lack of denial) and desire." Exhibit  
24 1, p. 2. Dr. Fidler also stated that respondent has "done a good job of avoiding  
25

1 narcissistic or controlling behavior, and is doing well focusing on the feelings  
2 and needs of others." Exhibit 1, p. 2.

3 Dr. Fidler stated that respondent's ADD is under control with medication<sup>3</sup>  
4 and regular counseling, which respondent receives at the Veteran's  
5 Administration Hospital and from Dr. Fidler on an "as needed" basis. Dr. Fidler  
6 stated that respondent has a one-year history of taking the appropriate initiative  
7 in his personal life and in his counseling to effectively manage and prevent  
8 normal life stressors from becoming disabling to him and causing harm to his  
9 clients. He also stated that respondent is now no more likely to engage in  
10 misconduct than other lawyers, given the same stressors. In addition, Dr. Fidler  
11 opined that respondent was not malingering when he met with him, and that  
12 respondent is now a better person and lawyer as a result of what he has gone  
13 through during the last decade.

14  
15  
16  
17 Records obtained from the Veteran's Administration Hospital supports Dr.  
18 Fidler's statements about respondent's condition. See Exhibit 2, attached hereto.  
19 The V.A. Hospital records reflect respondent's general medical condition and  
20 demonstrate that most symptoms had no adverse impact on his ability to practice  
21 law. As can be seen from the documentation in Exhibit 2, respondent has been  
22 prescribed various medications for mood stabilization and ADD. On or about  
23  
24

25  

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<sup>3</sup> Respondent's medication at present consists solely of a low dosage of Ritalin.

1 December 18, 2001, respondent was diagnosed as bipolar II with attention deficit  
2 and residual post-traumatic stress disorder. Exhibit 2, p. 77.

3  
4 Respondent's character is reflected in a letter he received from a former  
5 client. See Exhibit 3, attached hereto.<sup>4</sup> Respondent not only uses his legal skills  
6 to assist his clients, he also attempts to resolve client issues in non-legal ways  
7 when appropriate. In addition, respondent was active in the Lawyers Concerned  
8 for Lawyers ("LCL") program that was an adjunct of the State Bar's Member  
9 Assistance Program. LCL was formed to assist lawyers who needed support or  
10 assistance as a result of personal or psychological problems, drug or alcohol  
11 problems, and other forms of addictive behavior (e.g., gambling). Because of  
12 respondent's experiences with his own dysfunction, which was not related to  
13 substance abuse, respondent wanted to share his recovery experiences and help  
14 lawyers with personal or psychological problems that did not also include drug or  
15 alcohol issues. Respondent has also accepted cases from the Volunteer Lawyers  
16 Program. See Exhibit 4, attached hereto.

17  
18  
19  
20 There are several non-ABA factors in mitigation that should also be  
21 considered. When respondent realized that he was overwhelmed by the Jackson  
22 case, he refused to accept every person who came to him as potential new clients  
23 and transferred some of his paying clients to other lawyers so he could  
24

25  

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<sup>4</sup> Respondent may submit additional letters regarding his character or reputation  
prior to the oral argument in this case.

1 concentrate on the Jackson matter. Respondent has continued to carry a reduced  
2 caseload and has taken steps to more carefully screen potential clients. As a  
3 result of those changes, there is less likelihood that respondent will engage in  
4 similar misconduct in the future.

5  
6 Respondent asserts that his failure to respond to the State Bar was a result  
7 of despair and hopelessness he was experiencing, and feeling overwhelmed by  
8 the Jackson case. Respondent also asserts that he felt disabled insofar as he was  
9 emotionally unable to respond to bar counsel's correspondence. When  
10 respondent realized he was dysfunctional, he sought help from his psychologist  
11 and other lawyers, and communicated with bar counsel. Respondent learned how  
12 to ask for help and what to do from his last contact with the State Bar's  
13 disciplinary system and this Commission.

#### 14 Proportionality Analysis of Analogous Cases

15  
16 Several cases are useful in determining an appropriate resolution of the  
17 instant matter. There are a number of cases in which a 30-day suspension was  
18 imposed, but only a limited number involved lawyers who had previously been  
19 censured. Although there certainly are cases that might support a more severe  
20 sanction than a 30-day suspension, the following cases provide some guidance  
21 regarding the acceptability of the proposed discipline. As the Court has  
22 previously stated, "[E]ach situation must be tailored to the individual facts of the  
23  
24  
25

1 case in order to achieve the purposes of discipline.” *In re Bayless*, SB-02-0038-  
2 D (2002) (citing *Matter of Wines*, 135 Ariz. 203, 660 P.2d 454 (1983)).

3  
4 Attorney Dennis Bayless was suspended for thirty days, placed on  
5 probation for two years and ordered to pay restitution for violation of ER 1.1, ER  
6 1.2, ER 1.3, ER 1.4 and ER 8.4(a). *In re Bayless*, SB-02-0038-D (2002).  
7 Bayless failed to adequately communicate with his client and failed to inform his  
8 client of settlement offers made by the opposing party. He also failed to comply  
9 with the requirements of discovery, failed to prepare and submit a settlement  
10 conference memorandum as ordered by the court, and failed to appear at a  
11 settlement conference. As a result of the discovery violations, the court  
12 precluded respondent from using most of his client’s evidence and offering  
13 expert testimony. The court granted the opposing party’s motion for summary  
14 judgment when respondent failed to file a response. In addition, the court  
15 entered an award for attorney’s fees requested by the opposing party because  
16 respondent failed to file a response. Bayless had previously been informally  
17 reprimanded three times and placed on probation twice in conjunction with two  
18 of those informal reprimands. Those prior sanctions were imposed for  
19 misconduct similar in nature to that which resulted in the 30-day suspension,  
20 which was imposed while respondent was still on probation for an earlier  
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22  
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1 violation. The Commission determined there were three factors in aggravation  
2 and three factors in mitigation.

3 Attorney Bayless' misconduct was far more egregious than respondent's  
4 misconduct herein. Although Bayless' client was substantially harmed and had  
5 previously been informally reprimanded for similar misconduct, he was given a  
6 30-day suspension. Respondent's client was not harmed and respondent is not  
7 now on probation.  
8

9  
10 In *In re Ziman*, SB-01-0195-D (2002), the Disciplinary Commission  
11 recommended a 30-day suspension even though attorney Meyer Ziman had  
12 previously received an informal reprimand, a censure (with probation and  
13 restitution) and a 90-day suspension. The 30-day suspension was recommended  
14 despite the fact that the Commission stated that Ziman's "failure to make  
15 restitution and his prior record reflect his unwillingness to comply with numerous  
16 ethical rules."  
17

18  
19 Respondent in the instant case has never been suspended. Furthermore, the  
20 aggravating factors in *Ziman* outweighed the mitigating factors, whereas the  
21 mitigating factors in this case outweigh the aggravating factors.  
22

23 Attorney A. Michael Espino was suspended for four months, placed on  
24 probation for two years and ordered to pay restitution for violating ER 1.1, ER  
25 1.3, ER 1.4, ER 1.15, ER 1.16(d), ER 8.1(b) and ER 8.4(a), and Rule 51(h) & (i),

1 Ariz.R.S.Ct. *In re Espino*, 168 Ariz. 139, 811 P.2d 1076 (1991). In his  
2 representation of one client, Espino failed to make apparently meritorious  
3 objections to a statement of costs filed by the opposing party and failed to collect  
4 the funds awarded to his client for nearly four years. Regarding another client,  
5 Espino failed to diligently investigate the client's claim, failed to return his legal  
6 files despite repeated requests, and refused to return the client's retainer fee. He  
7 also failed to adequately communicate with that client and failed to respond to  
8 the Bar's request for information during its investigation into the investigation  
9 into one of the charges. Furthermore, Espino had a "history of similar  
10 misconduct."  
11

12  
13  
14 A four-month suspension is not warranted in the instant case because  
15 unlike Espino, respondent herein did not harm his client and his conduct was a  
16 result of a mental condition.  
17

18 *In re Allen*, SB-01-0112-D (2001), makes clear that it is not always  
19 necessary to make a "gradual and graded" increase from the sanction imposed in  
20 one case to a more serious sanction in a subsequent proceeding.<sup>5</sup> In *Allen*,  
21 attorney Steven Allen was suspended for thirty days only fifteen months after he  
22 was suspended for thirty days in another matter.  
23  
24  
25

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<sup>5</sup> The concept of gradual and graded imposition of disciplinary sanctions was first discussed by the Arizona Supreme Court in *In re Redondo*, 176 Ariz. 334, 861 P.2d 619 (1993).

1 In addition to cases that indicate that a suspension is appropriate in the  
2 instant case, there are also cases that indicate that a sanction as low as censure  
3 may be appropriate.  
4

5 Attorney William Loftus received a censure, two years probation and  
6 restitution for one violation each of ER 1.1, ER 1.16(d) and Rule 51(h),  
7 Ariz.R.S.Ct., and two violations each of ER 1.2, ER 1.3, ER 1.4, ER 3.2 and ER  
8 8.4, even though he had previously been suspended for two years and placed on  
9 probation for one year for violation of DR 1-102(A)(4),<sup>6</sup> DR 1-102(A)(5)<sup>7</sup> and  
10 DR 2-106,<sup>8</sup> ER 1.1, ER1.3, ER 1.4, ER 8.1(b), ER 8.4(a), (c) & (d), and Rule  
11 51(h) & (i), Ariz.R.S.Ct.<sup>9</sup> *In re Loftus*, SB-01-0070-D (2001). Regarding one  
12 client, Loftus failed to adequately communicate with his client and failed to act  
13 diligently in his representation of the client. The client's dissolution matter was  
14 dismissed for failure to prosecute. In addition, Loftus failed to respond to bar  
15 counsel's inquires into his conduct. Regarding the second client, Loftus failed to  
16 make any disclosure or conduct discovery, failed to file a response to a motion to  
17  
18  
19

20  
21 <sup>6</sup> DR 1-102(A)(4) stated, "A lawyer shall not: (4) Engage in conduct involving dishonesty,  
fraud, deceit, or misrepresentation."

22 <sup>7</sup> DR 1-102(A)(5) stated, "A lawyer shall not: (5) Engage in conduct that is prejudicial to the  
23 administration of justice."

24 <sup>8</sup> DR 2-106 prohibited illegal and excessive fees, and using a contingent fee in a criminal  
matter.

25 <sup>9</sup> The Disciplinary Commission gave little weight to the prior sanction because of its  
remoteness.

1 dismiss, and failed to expedite litigation consistent with the interests of his client.  
2 The case was dismissed with prejudice. In addition, Loftus failed to adequately  
3 communicate with his client. There were five factors in aggravation, but only  
4 two factors in mitigation.  
5

6 Respondent herein failed to act diligently on his client's behalf and failed to  
7 adequately communicate with the client. Unlike Loftus, however, respondent  
8 herein has never been suspended from the practice of law. He has, however,  
9 received one informal reprimand and two censures. In the instant case, there are  
10 five mitigating factors that outweigh five aggravating factors, whereas Loftus had  
11 five aggravating factors but only two mitigating factors.  
12

13 Also instructive is *In re Mettler*, SB-02-0094-D (2002). Attorney William  
14 Mettler received a censure and two years probation for one violation each of ER  
15 1.16(d), ER 3.2, ER 8.4(d) and Rule 51(e), Ariz.R.S.Ct., and two violations each  
16 of ER 1.3 and ER 1.4. Mettler had previously been suspended for thirty (30)  
17 days and placed on probation for a period of two years for two violations each of  
18 ER 1.15 and Rules 43 & 44, Ariz.R.S.Ct.  
19

20 In *In re Olds*, SB-00-0089-D (2000), the Disciplinary Commission  
21 recommended acceptance of a consent agreement calling for censure and one-  
22 year of probation despite the fact that attorney Russell Olds had previously  
23 received two censures and three informal reprimands. In addition, Olds had been  
24  
25

1 through "several diversionary programs." The Commission stated in a footnote  
2 that the prior matters did not appear directly related to the misconduct at issue  
3 and that the prior sanctions "appear[ed]" to be remote in time." The  
4 Commission, however, failed to include the remoteness of the prior sanctions as  
5 a mitigating factor.  
6

7 Attorney Arnold Sodikoff received a censure and probation for one  
8 violation each of ER 1.2, ER 1.3, ER 1.4, ER 1.15(b) and ER 3.2, and four  
9 violations each of ER 8.1(b) and Rule 51(h), Ariz.R.S.Ct., even though he had  
10 previously received an informal reprimand, a censure and a one-year suspension.  
11 *In re Sodikoff*, SB-01-0109-D (2001).  
12

### 13 CONCLUSION

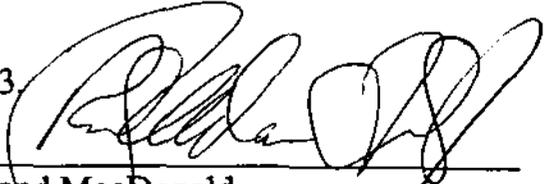
14  
15 Based upon the *Standards* and relevant case law, the State Bar and  
16 respondent believe that imposition of a 30-day suspension, two years probation  
17 and payment of the costs and expenses of the disciplinary proceedings is  
18 appropriate.  
19

20 The Court and the Disciplinary Commission have repeatedly stated that the  
21 purpose of lawyer discipline is not to punish the offender but to protect the public,  
22 the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708  
23 P.2d 1297 (1988). The imposition of a 30-day suspension, two years of probation,  
24 and payment of the costs and expenses of the disciplinary proceedings will  
25

1 accomplish those goals. There was no actual harm to any client and the potential  
2 harm was minimal.

3 For all of the above reasons, respondent and the State Bar respectfully  
4 request the Disciplinary Commission to accept this Agreement for Discipline by  
5 Consent.  
6

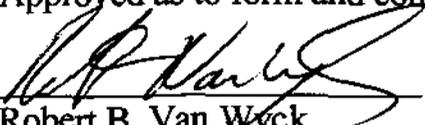
7 DATED this 26<sup>th</sup> day of February, 2003

8   
9 \_\_\_\_\_  
10 Rand MacDonald  
11 Respondent

12 DATED this 26<sup>th</sup> day of February, 2003.

13   
14 \_\_\_\_\_  
15 James D. Lee  
16 Senior Bar Counsel

17  
18  
19 Approved as to form and content:

20   
21 \_\_\_\_\_  
22 Robert B. Van Wyck  
23 Chief Bar Counsel  
24  
25

1 Original filed with the Disciplinary Clerk  
2 and copies of the foregoing mailed/  
3 \*hand-delivered this 27 day of  
4 February, 2003, to:

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10 Rand MacDonald  
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12 1002 East Paradise Lane  
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14 and

15 \*Dee Steadman  
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