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OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

JUL 12 2012

BY _____ FILED

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Respondent's Counsel

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

**IN THE MATTER OF AN ACTIVE
MEMBER OF THE STATE BAR OF
ARIZONA,**

**OSMOND A. BURTON
Bar No. 001162**

Respondent.

2012 - 9068
PDJ-~~2011~~
~~2012-XXXX~~

**AGREEMENT FOR DISCIPLINE
BY CONSENT**

State Bar No. (12-0135 and 12-1720)

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent Osmond A Burton, who is represented in this matter by counsel, Thomas A. Zlaket, hereby submit their Tender of Admissions and Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. Respondent voluntarily waives the right to an adjudicatory hearing on the complaint, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ER(s) 1.1, 1.3, 1.4, 1.5, 1.8(a), 3.2 3.4(c) and 8.4(d). Upon acceptance

of this agreement, Respondent agrees to accept imposition of a suspension of three years and agrees to participate in the State Bar's fee arbitration program with Mary Sue Gasho Anderson and John Richard Gasho, who are represented by Complainant Mick Rusing in State Bar file no. 12-0135. Respondent also agrees to pay restitution to Mary Sue Gasho Anderson of \$500.00 for failing to repay a loan during representation in the same case. Respondent also agrees to remedy his probation violation in State Bar file no. 12-1720, by making payment to Complainant William Todd Wolf of \$1,215.00 within sixty days of the effective date of Respondent's suspension. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding.¹ The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit "A."

FACTS

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 29, 1960.

COUNT ONE (State Bar File No. 12-0135)

2. Mary Sue Gasho Anderson and her brother, John Richard Gasho, ("The Gashos") were represented by Respondent and attorney Thomas Mason III, in probate matters related to the estates of their deceased parents. Complainant is an attorney with knowledge of the case.

¹ Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

3. Respondent filed two lawsuits in Pima County Superior Court: case numbers C20061816 and PB20070733.

4. In the first matter, Respondent filed a Petition for Order to Show Cause in April of 2006, for Nancy Gasho Forkum (the Gashos' youngest sister) to appear and show cause "why she should not be ordered to make full disclosure and accounting of all aspects of the estate and/or trusts of Marvin E. Gasho and Alice Cheek Gasho"

5. At the time of filing his Petition for Order to Show Cause, Respondent had not yet filed a Complaint in the matter. Additionally, he had filed his case and petition in the court's civil division rather than the probate division. Nonetheless, the court granted the order.

6. Opposing counsel filed a Motion for Reconsideration or Motion to Dismiss, arguing that Respondent had violated Local Rules 9.1 and 9.5 requiring disputes relating to probate or trust matters to be filed with the court's probate division and pointing out that Respondent had not even filed a Complaint.

7. Respondent failed to respond to the motion and the court vacated the Order to Show Cause and entered a judgment requiring the Gashos to pay taxable costs.

8. In June of 2007, Respondent filed a Complaint in the probate division. Around the same time, Respondent associated with Thomas Mason III, as co-counsel. The Gashos approved the association with Mason.

9. According to the Gashos, Respondent repeatedly referred to their case as a "slam dunk" and reassured them even after they suffered a partial dismissal of their case.

10. On three different occasions, Respondent asked Mary Sue Gasho Anderson for personal loans. He repaid the first two loans of \$2,000.00 and \$1,500.00, respectively. However, he failed to repay the final loan of \$500.00. He did not advise that she seek independent counsel before agreeing to the loans and did not otherwise comply with the requirements of ER 1.8(a).

11. On November 5, 2009, the court ordered that pretrial statements were to be filed no later than December 4, 2009. Respondent and Mr. Mason did not file a pretrial statement or any other document with the court by that date, or at any time during calendar year 2010.

12. In May of 2011, a Motion to Dismiss for Lack of Prosecution was filed by opposing counsel. Respondent did not timely communicate to the Gashos that the motion had been filed and did nothing to address the motion until two days prior to hearing, at which time he acknowledged to the court that he and Mason were responsible for the delay.

13. In a July 29, 2011 minute entry the court stated, "It is clear that plaintiffs have taken no action in almost 2 years since the November, 2009 Order was entered. . . ."

14. The court dismissed the case with prejudice for lack of prosecution on October 5, 2011.

15. When the Gashos requested the return of their file, they learned that Respondent did not have a working file or an accounting of the fees paid to him.

16. Respondent's position is that the fees paid to him were approximately \$30,000.00. The Gashos are of the opinion that they paid a much greater amount.

17. Respondent agrees that the Gashos are entitled to a refund of some amount, but is unsure of what that amount is and has agreed to attend fee arbitration.

18. In an August 2, 2011 letter to the Gashos provided to the Bar, Respondent wrote, ". . . I am prepared to offer up my State Bar membership as a forfeit to take the place of the sanction selected by Judge Harrington (dismissal of the case).

COUNT TWO (State Bar File No. 12-1720)

19. By order of the Presiding Disciplinary Judge dated April 6, 2012 in PDJ 2012-2025, Respondent was reprimanded and ordered to pay \$1,215.00 in restitution to Complainant William Todd Wolf ("Wolf") within thirty days.

20. Respondent, to date, has failed to pay any of the ordered restitution to Wolf and has violated the terms of his probation.

CONDITIONAL ADMISSIONS

Respondent's admissions are being tendered in exchange for the form of discipline stated below and is submitted freely and voluntarily and not as a result of coercion or intimidation.

Respondent conditionally admits that his conduct violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.1, 1.3, 1.4, 1.5, 1.8(a), 3.2, 3.4(c) and 8.4(d) and Rule 54(c).

RESTITUTION

Any restitution due to the Gashos by Respondent will be determined through fee arbitration. Additionally Respondent has not yet satisfied the restitution order of April 6, 2012 of \$1,215.00 due to William Todd Wolf in case no. PDJ 2012-2025.

Respondent agrees to satisfy that order within sixty days of the effective date of this agreement.

SANCTION

Respondent and the State Bar of Arizona agree that based on the facts and circumstances of this matter, as set forth above, the following sanction is appropriate:

1. Suspension of three years
2. Participation in fee arbitration through the State Bar in State Bar file no. 12-0135 with the Gashos.
3. Payment of \$1,215.00 in restitution owed to William Todd Wolf within sixty days of the effective date of this order.
4. Upon reinstatement Respondent shall be placed on probation. Probation shall consist of two years of participation in the State Bar's LOMAP program and any other terms ordered during the reinstatement proceedings.

NON-COMPLIANCE LANGUAGE

In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a notice of noncompliance with the Presiding Disciplinary Judge, pursuant to Rule 60(a)(5), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.

LEGAL GROUNDS IN SUPPORT OF SANCTION

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

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

The parties agree that *Standard* 4.42 is the appropriate *Standard* given the facts and circumstances of this matter. *Standard* 4.42 provides that Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Respondent's failed to take action in the Gashos' case for nearly two years. He did not maintain a file concerning their case and did not maintain an accounting of the fees that he collected.

The duty violated

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

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent knowingly ignored the deadline for filing a joint pre-trial statement and for nearly two years, failed to take any action in the Gashos' case. Respondent was aware that his conduct was in violation of the Rules of Professional Conduct. Respondent also knowingly took multiple personal loans from his client without compliance with ER 1.8(a), and in at least one instant, failed to repay a personal loan.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was actual harm to the client and the profession as a result of Respondent's failure to prosecute the Gashos' case, resulting in its dismissal with prejudice.

Aggravating and mitigating circumstances

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

In aggravation:

Standard 9.22(a) - Prior Disciplinary Offenses:

- Suspension (1 yr): 92-0317, 94-1389, 94-1511, 95-1295, 96-0196, 96-1263: In the first matter, Respondent failed to adequately communicate with his client, failed to provide diligent representation to his client and failed to provide his client with an accounting in a legal malpractice matter.

In the second matter, Respondent committed his clients to positions without express authority, misinformed them about the status and effect of his negotiations and failed to adequately communicate with them. In addition, throughout his representation, Respondent frequently continued or delayed matters and falsely reassured his clients that their interests were being adequately protected.

In the third matter, Respondent failed to timely file a Complaint, resulting in the dismissal of two claims for expiration of statute of limitations. Respondent failed to diligently prosecute the action and maintain adequate communication with his client, and eventually informed her that he had committed malpractice. Thereafter, Respondent entered into a settlement agreement on two occasions, but failed to make all the payments as agreed.

In the 4th matter, Respondent collected a retainer to handle an appeal, which he deposited in his general account rather than his trust account. Before services were completed, the client changed her mind and requested a refund. Respondent had depleted the entire sum and did not make repayment promptly as promised.

In the fifth matter, after Respondent failed to fully satisfy the civil disclosure requirements, he was precluded from presenting crucial testimony, and the case was dismissed with prejudice against his client. When Respondent informed his client of his negligence, the client agreed to a monetary settlement. Respondent failed to pay and the client retained counsel to assist with collection. An agreement was eventually entered into, whereby Respondent sent ten (10) checks to his client to be deposited on a semi-monthly basis. Contrary to Respondent's understanding, the client deposited all of the checks at a time when Respondent did not have sufficient funds to cover the checks. The checks were dishonored. Respondent and the client subsequently entered into another agreement for payment, with which Respondent failed to comply. Respondent then agreed with the client to a modified payment plan, including interest.

In the sixth matter, Respondent was retained for defense in a specific performance and breach of contract action regarding a failed real estate transaction. The client prevailed and the court awarded attorney fees, which Respondent deposited into his own account, believing there was an outstanding balance owed him by the client. Respondent also failed to adequately communicate with his client. Respondent eventually paid the attorney fees to the client to rectify the misunderstanding about the handling of the funds.

Respondent's conduct in the above referenced matters was in violation of ERs 1.1, 1.2, 1.3, 1.4, 1.15, 1.16(d), 4.1, 8.4, ARIZ.R.S.CT and Supreme Court Rule 44.

- Reprimand: 11-1155: Respondent lost numerous documents of Complainants while representing him in a family law matter. Additionally, Respondent filed pleadings late causing contempt sanctions to be entered against

Complainant. Respondent also communicated to Respondent that he had filed documents with the court that, in reality, he never filed.

- Informal Reprimand: 91-1268: Respondent failed to communicate with his client and failed to file the Complaint that he was hired to draft and file. (ERs 1.3, 1.4 and 1.16)
- Informal Reprimand: 98-2184, 98-1749: Respondent failed to respond to a Bar complaint in a timely manner. (ER 8.1 and Rule 51(h) and (I). (ERs 1.2 and 3.5)
- Probation: 07-1091: Trust account violation

Standard 9.22(b) – Dishonest or Selfish Motive: Respondent took personal loans from his client, and in one instance, failed to repay the loan.

Standard 9.22(i) – Substantial Experience in the Practice of Law – Respondent has been practicing in Arizona since 1960.

In mitigation:

Standard 9.22(l): Remorse – Respondent has indicated to the Bar that he regrets his actions.

Discussion

The parties have conditionally agreed that a greater or lesser sanction would not be appropriate under the facts and circumstances of this matter. This agreement was based on the following: Respondent failed to take court action in his client's case for a period of nearly two years and failed to comply with court deadlines, resulting in the dismissal with prejudice of his clients' case. Further, Respondent did not maintain a case file in the matter, and was unable to return relevant paperwork to his clients. He also failed to keep track of the fees that he collected. Finally, Respondent took personal loans from his clients without complying without complying with ER 1.8(a), and in at least one instance, without repaying the loan. Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set

forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent believe that the objectives of discipline will be met by the imposition of the proposed sanction of suspension of three years and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit "B."

DATED this 12th day of July, 2012.

STATE BAR OF ARIZONA



Hunter F. Perlmeter
Staff Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation. [I acknowledge my duty under the Rules of the Supreme Court with respect to discipline and reinstatement. I understand these duties may include notification of clients, return of property and other rules pertaining to suspension.]

DATED this _____ day of _____, 2012.

Osmond A. Burton
Respondent

forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent believe that the objectives of discipline will be met by the imposition of the proposed sanction of suspension of three years and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit "B."

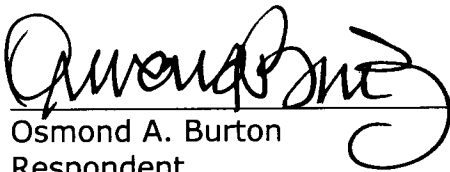
DATED this _____ day of _____, 2012.

STATE BAR OF ARIZONA

Hunter F. Perlmeter
Staff Bar Counsel

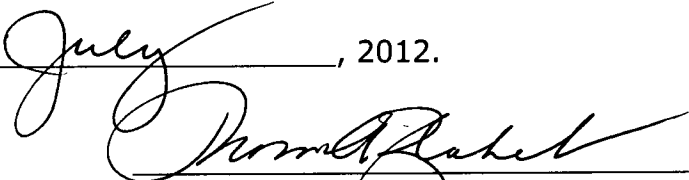
This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation. [I acknowledge my duty under the Rules of the Supreme Court with respect to discipline and reinstatement. I understand these duties may include notification of clients, return of property and other rules pertaining to suspension.]

DATED this 11th day of JULY, 2012.



Osmond A. Burton
Respondent

DATED this 11 day of July, 2012.


Thomas A. Zlaket
Counsel for Respondent

Approved as to form and content

Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
this ____ day of _____, 2012.

Copies of the foregoing mailed/emailed
this ____ day of _____, 2012, to:

Thomas A. Zlaket
310 S. Williams Blvd., Suite 170
Tucson, Arizona 85711-7700
Email: Tom@zlaketlaw.com
Respondent's Counsel

Copy of the foregoing emailed
this ____ day of _____, 2012, to:

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

Copy of the foregoing hand-delivered
this ____ day of _____, 2012, to:

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

By: _____
HFP/lmc

DATED this _____ day of _____, 2012.

Thomas A. Zlaket
Counsel for Respondent

Approved as to form and content

Maret Vessella
Maret Vessella
Chief Bar Counsel

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By: Jose M. Casablanca
HFP/lmc

EXHIBIT "A"

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Osmond A Burton, Bar No. 001162, Respondent

File No(s). 12-0135 and 12-1720

Administrative Expenses

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

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

General Administrative Expenses for above-numbered proceedings

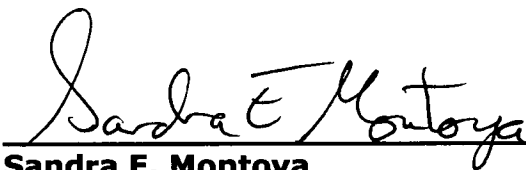
\$1,200.00

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

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges \$ 0.00

TOTAL COSTS AND EXPENSES INCURRED **\$1,200.00**



Sandra E. Montoya
Lawyer Regulation Records Manager

6-28-12
Date

EXHIBIT "B"

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

**IN THE MATTER OF AN ACTIVE
MEMBER OF THE STATE BAR OF
ARIZONA,**

**OSMOND A. BURTON
Bar No. 001162**

Respondent.

**PDJ-2011
2012-XXXX**

FINAL JUDGMENT AND ORDER
[State Bar No. 12-0135]

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

IT IS HEREBY ORDERED that Respondent, **Osmond A. Burton**, is hereby suspended for three years for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective sixty (60) days from this Order so that he may wind down his practice.

IT IS FURTHER ORDER that Respondent will pay restitution of \$500.00 to Mary Gasho within 60 days of the effective date of this order.

IT IS FURTHER ORDERED Respondent will participate in fee arbitration with the Gashos and will pay any arbitration award to the Gashos within one year of the arbitration order.

IT IS FURTHER ORDERED that, upon reinstatement, Respondent shall be placed on probation for a period of two years during which he will participate in the

State Bar's Law Office Management Assistance Program and any other terms ordered during the reinstatement proceedings.

IT IS FURTHER ORDERED that within sixty days of this order Respondent will make payment of \$1,215.00 in restitution owed to William Todd Wolf to come into compliance with this court's order of April 6, 2012 in case no. PDJ 2012-2025.

NON-COMPLIANCE LANGUAGE

In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a notice of noncompliance with the Presiding Disciplinary Judge, pursuant to Rule 60(a)(5), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.

IT IS FURTHER ORDERED that Respondent shall be subject to any additional terms imposed by the Presiding Disciplinary Judge as a result of reinstatement hearings held.

IT IS FURTHER ORDERED that, pursuant to Rule 72 Ariz. R. Sup. Ct., Respondent shall immediately comply with the requirements relating to notification of clients and others.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$ 1,200.00.

IT IS FURTHER ORDERED that Respondent shall pay the costs and expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings in the amount of _____.

DATED this _____ day of _____, 2012.

The Honorable William J. O'Neil
Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this _____ day of _____, 2012.

Copies of the foregoing mailed/emailed
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By: _____