

**BEFORE THE PRESIDING DISCIPLINARY JUDGE**

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

**SCOTT K. HENDERSON,**  
**Bar No. 010002**

Respondent.

**No. PDJ-2016-9089**

**FINAL JUDGMENT AND ORDER**

[State Bar File Nos. 15-3339 & 16-  
0784]

**FILED JULY 3, 2017**

This matter was heard by a Hearing Panel which rendered its decision under Rule 58, Ariz. R. Sup. Ct. The State Bar filed a notice of appeal and Mr. Henderson filed a notice of cross-appeal pursuant to Rule 59(a). No request for stay pending appeal has been filed and the time to request for stay has expired, accordingly:

**IT IS ORDERED** Respondent **SCOTT K. HENDERSON, Bar No. 010002**, is reprimanded effective the date of this order.

**DATED** this July 3, 2017.

*William J. O'Neil*

**William J. O'Neil, Presiding Disciplinary Judge**

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COPY of the foregoing e-mailed  
this 3<sup>rd</sup> day of July, 2017, and  
mailed July 5, 2017, to:

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**BEFORE THE PRESIDING DISCIPLINARY JUDGE**

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

**SCOTT K. HENDERSON,**  
**Bar No. 010002**

Respondent.

**PDJ 2016-9089**

**DECISION AND ORDER  
IMPOSING SANCTIONS**

[State Bar Nos. 15-3339 and 16-  
0784]

**FILED JUNE 9, 2017**

**I. PROCEDURAL HISTORY**

On September 12, 2016 the State Bar filed a formal complaint alleging in Count I, violations of ERs 1.5(e) (fees), 1.15 (safekeeping property), 8.4(d) (conduct prejudicial to the administration of justice), Rule 43(a) (trust account) and Rule 54(d) (failure to refuse to cooperate/furnish information); and ERs 1.15 (safekeeping property), 5.5 (unauthorized practice of law), 8.4(c) (conduct involving dishonesty, deceit, fraud or misrepresentation), 8.4(d) (conduct prejudicial to the administration of justice), Rule 31(b) (authority to practice), and Rule 43(a) (trust accounts) in Count Two. On September 14, 2016, the complaint was served on Mr. Henderson by certified, delivery restricted mail, as well as by regular first class mail, pursuant to Rules 47(c) and 58(a)(2), Ariz. R. Sup. Ct.

The Presiding Disciplinary Judge (“PDJ”) was assigned to the matter. Mr. Henderson timely answered the complaint and on December 7, 2016, the State Bar filed an amended complaint. Mr. Henderson timely answered the amended complaint. By Order of the PDJ filed December 21, 2016, the hearing in this matter was set for February 21 and 22, 2017. The parties filed their prehearing memorandum on February 17, 2017.

On February 21 and 22, 2017, the Hearing Panel (Panel), compromised of, Sandra E. Hunter, attorney member, Marilyn Schmidlin, public member, and Presiding Disciplinary Judge (“PDJ”) William J. O’Neil heard this case. Hunter F. Perlmeter appeared on behalf of the State Bar of Arizona. Mr. Henderson appeared with his attorneys, Mark Harrison and Joshua Bendor, *Osborn Maledon, P.A.* The Hearing Panel considered the testimony of Scott Kevin Henderson, Blair Moses, Brian Loiselle, Randy Dean Haddock, Kristina Keating, Lawrence Lynde, and Steven Turner.

Mr. Henderson stated he would file transcripts [“Tr.”] and the parties agreed to written closing arguments based upon a timeline beginning with the filing of the certified transcript. The State Bar timely filed its closing argument on March 30, 2017. The State Bar requested Mr. Henderson be disbarred from the practice of law and ordered to disgorge any fees collected from the Robbs family for legal work performed during his period of suspension.

Mr. Henderson filed a notice of filing of accountings on March 2, 2017 and timely filed his closing argument on April 13, 2017. He submits his conduct “arguably” falls within the definition of the practice of law, and regrets performing the work. However, he submits his action at worst was negligent, caused no injury and was isolated. He submits the presumptive sanction is admonition.

## II. FINDINGS OF FACT

1. Mr. Henderson is a lawyer licensed to practice law in the State of Arizona having been first admitted to practice in Arizona on May 18, 1985. [Joint Prehearing Statement, Stipulated Fact 1.]

2. On February 6, 2016, Mr. Henderson began serving a ninety (90) day suspension from the practice of law. [Joint Prehearing Statement, Stipulated Fact 2.]

3. While partial facts of the prior suspension of Mr. Henderson are stated in the State Bar’s closing argument, the disciplinary matter for which Mr. Henderson was suspended did not arise from his practice of law. His violation of ER 8.4, was as a result of his committing a criminal act that “reflects adversely on the lawyer’s trustworthiness or fitness as a lawyer in other respects.”

4. The hearing panel erred in recommending diversion as the presumptive form of discipline appeared likely to be greater than a reprimand. On appeal, the Supreme Court ordered a three month suspension followed by one-and-one-half years of probation.

5. Donna Kent, the Chief Operating Officer of Mr. Henderson's law firm testified Mr. Henderson was "devastated" by this decision, but quickly "got down to work," "dogged[ly]" working to ensure that he complied with the suspension Order. [Tr. 254:7-25.] He started by meeting with his lawyer, Scott Rhodes, to discuss a letter from the Bar which described the parameters of the suspension. [Tr. 334:3-15; Ex. 72. The Bar's letter did not mention negotiations.

6. Once suspended Mr. Henderson met with Donna Kent, and Brooke Watton, Esq., one of the law firm attorneys. They made a "master checklist" of everything that he and the firm were required to do, should do, and could not do. Mr. Henderson then took the steps necessary to comply with the suspension and the master checklist. [Tr. 334:16:17.]

7. Mr. Henderson did not send an impersonal mass email to the personnel at NewLaw. Instead, he attempted to personally notify them. Kristina Keating, an attorney with NewLaw did not receive immediate notice of the suspension. [Tr. 196:12-20.] Ms. Keating testified this was because she was in the third trimester of a pregnancy when the suspension came down and was not working on any NewLaw projects. [Tr. 198:14-21.]

8. Mr. Henderson reviewed all existing matters with Mr. Watton to make sure Mr. Henderson did no legal work. As required under Rule 70, Mr. Henderson promptly notified his clients of the suspension orally and in writing. [Tr. 274:21,

335:11; Exhibits 88, 90-97.] Mr. Watton and a client, William Kostrivas, testified as to these notification steps taken by Mr. Henderson. [Tr. 275:10-19, 320:11-24.]

9. Out of an abundance of caution, Mr. Henderson turned away clients, [Tr. 253:15-254:6], stopped handing out business cards, [Tr. 274:18-19], and informed each attorney and staff member at the firm of the suspension. [Tr. 271:20, 335:5-6]. He also informed attorneys who were interviewing for positions with the firm of his suspension. All pending matters being handled by him were transferred to other attorneys. [Tr. 337:16-20.] Mr. Henderson also provided notice of his suspension to opposing counsel, his clients' new counsel, and any court or mediator overseeing his cases. [Tr. 336:11-337:10; Exhibits 89 & 95.]

10. While Mr. Henderson was not certain he was required to remove all electronic references to his being a lawyer he was cautious and "scoured the [firm's] website for any [such] reference." [Tr. 334:22-335:2.] Henderson also removed statements indicating that he was an attorney from his letterhead and email signature and other firm materials. [Tr. 252:13-253:14 (Kent), 274:1-18 (Watton), 334:24-335:3, 337:21-3, 360:23-361:9.] He also provided notice to people with whom he had business, civic, or board relationships, so that it was clear that he was not trying to hide anything. [Tr. 335:11-22.]

11. While testimony was offered that such a cautionary approach came at a high financial cost to Mr. Henderson, the amount is not relevant. Whether it cost

little or much does not make more or less likely that he violated any ethical rules. However, despite the cost, his continued cautionary approach aids us in determining his mental state.

**COUNT ONE (File no. 15-3339/Rand Haddock)**

12. On May 1, 2015, Rand Haddock, an attorney, entered into an Independent Contractor Agreement with the law firm founded by Mr. Henderson, NewLAW.u.s. (“NewLAW”). The Agreement (“Contract”), under paragraph 3.1, included a Client Services Agreement. It was not included with the State Bar exhibit. [Exhibit 38, Bates SBA000229-241.]

13. Under Paragraph 3.6, Mr. Haddock was required to keep NewLAW informed of the progress of his work on matters. Under Paragraph 5.2, Mr. Haddock was required on the 1st and 15th day of each calendar month to complete, sign, and certify the accuracy of and deliver to NewLAW a timesheet regarding his services. Under Paragraph 5.3, Mr. Haddock would be paid not less than two weeks later unless that time sheet was not fully completed or there were concerns or questions about the services reflected. Under Paragraph 13.2, NewLAW agreed to indemnify Mr. Haddock against any professional liability and Mr. Haddock was not required as a result to provide professional liability insurance for the services provided under the Contract. Mr. Haddock was required under Paragraph 12 to pay NewLAW, \$2,359,

which Mr. Haddock testified he paid. [Exhibit 38, Bates SBA229-241, Tr. 158:12-19.]

14. It is clear from the exhibits and testimony, there was a reasonable dispute regarding Mr. Haddock not following the terms of the contract. On July 27, 2015, Mr. Henderson pointed out his efforts to work with his then friend, Mr. Haddock, who was trying to rebuild his legal practice. Mr. Henderson wrote he understood the stresses of that rebuilding: “And that is why I have not once questioned a payment request or mandated the documentary support for it in advance of the payment. Last month I paid without regard to receipt-based solely on your word.” [Exhibit 49, Bates SBA000324.]

15. The complaint alleges Mr. Henderson breached the contract by failing to pay Mr. Haddock the appropriate percentage of invoices collected and by failing to provide a fully functioning software platform. However, at the hearing it was unclear that Mr. Haddock complied with the contract requirements for time sheets. The State Bar’s argument appears to be that Mr. Henderson failed to safeguard the fees that he collected on Mr. Haddock’s behalf. The State Bar alleges misconduct as the funds were not placed in a trust account. [Complaint, Allegation 17.]

16. Mr. Haddock wrote Bar Counsel on April 26, 2016, stating the billing and payment protocols “came well after I began work as an independent contractor. At first, there were virtually no procedures.” [Exhibit 43, Bates SBA000256.] This

is untrue and conflicts with the written contract between the parties. He later states, “In a sense, I helped establish the procedures that Mr. Henderson now claims that I did not follow.” [Id., Bates SBA000257.] It is unclear to us how such inconsistencies, in light of the provisions of the contract and exhibits, form a reasonable inquiry into the alleged facts supporting the allegations upon which the complaint is founded.

17. The complaint certifies Mr. Haddock paid Mr. Henderson \$2,500 for access to NewLAW’s software platform. [Id., Allegation 4.] This is clearly untrue. Mr. Haddock acknowledged in his testimony he paid \$2,350 in accordance with the terms of the contract, not \$2,500. The contract governs why the fee was paid. It states the fee was, “To partially defray significant technology, messaging, and business development expenses.” [Exhibit 38, Paragraph 12, Bates SBA000234.]

18. Similarly under complaint, Allegation 6, the State Bar alleges Mr. Henderson breached his contract with Mr. Haddock by failing to provide a fully functioning software platform. While there was testimony regarding this software platform, the Panel was not pointed to any contractual provision regarding it. Nor did the State Bar in its closing argument make any effort to explain how this contractual dispute is a violation of ER 1.5(e), 1.15, 8.4(d), Rule 43(a) or Rule 54(d).

19. Under complaint, Allegations 6 and 7, it is alleged Mr. Henderson further “breached the agreement” by failing to pay Mr. Haddock the appropriate percentage of invoices collected and that Mr. Haddock requested accounting

information “but Respondent refused to provide it.” Yet, Allegations 10 and 13 state Mr. Henderson and Mr. Haddock entered into a settlement agreement and Mr. Henderson “made full payment to Mr. Haddock.” That full payment was made under their settlement agreement is clear. [Exhibit 40, Bates SBA000245.] The State Bar offered no explanation for these seemingly inconsistent allegations.

20. In the complaint, Allegation 14, the State Bar alleged that during the screening process, an accounting regarding this Contract was requested from Mr. Henderson, but he “was unable to immediately comply with the request.” We note Mr. Haddock played no small part in that inability. Mr. Haddock stated in its letter to the State Bar, “Not only did I provide the assistance necessary to “accord” invoices and payments, I was the *only* one who had the information required to do so.” [Exhibit 43, Bates SBA000257.] (Emphasis added.)]

21. The complaint, Allegation 16, stated that the fee agreement used by Mr. Henderson required clients make a prepayment of fees which would be billed against. We were not pointed to any such signed fee agreement. Exhibit 49, Bates SBA000312-313, is an unsigned form fee agreement. It was not explained how either allegation constituted a violation as alleged.

22. In its written closing argument, the State Bar made no mention of Count I. In response to the closing argument of Mr. Henderson, which pointed out this seeming abandonment of Count I, it was argued on page 8, that Mr. Henderson “failed

to produce an accounting to Mr. Haddock or safeguard funds in dispute.” On page 10, it is argued, “There is a good reason for the Bar’s approach.” *ABA Standards, Theoretical Framework* is quoted that “the standards do not account for multiple charges of misconduct.” It is then explained, “The Bar’s argument in closing focuses on the most serious conduct in this case.” Such minimal argument offers little insight into the allegations of Count I.

23. The Panel read the one hundred and fifty-five pages of exhibits offered by the State Bar and the testimony. We find the State Bar has failed to meet its burden of proof that Mr. Henderson violated ER 1.5(e), 1.15, 8.4(d), Rules 43(a) and 54(d), and find for Mr. Henderson on Count One.

### **COUNT TWO (File no. 16-0784/Loiselle)**

24. As a result of the suspension of Mr. Henderson, the State Bar wrote his attorney, J. Scott Rhodes, *Jennings Strouss & Salmon, PC*, a letter dated January 21, 2015. The letter directed Mr. Henderson could not practice law. It is the State Bar position that the letter “also stated that Respondent must close his trust account.” [State Bar Closing Argument, page 2, ¶ 3.] Mr. Henderson met with Mr. Rhodes and took multiple steps to comply with the terms of his suspension. [See Findings, 5-10.]

25. During the period of his suspension, Mr. Henderson had numerous conversations with a business owner, Brian Loiselle, concerning “the Robbs family,” in a real estate dispute. [Joint Prehearing Statement, Stipulated Fact 11.]

26. In 2014, Loïselle became involved in financing the home of Anne-Merete Robbs. [Tr. 291:20-22.] After a series of complicated transactions, Loïselle tried to evict Mrs. Robbs. [Tr. 291:23-292:23.] Her son, Bruce Robbs, a real estate developer who held a power of attorney for his mother, realized he allowed Loïselle to take advantage of his mother in this transaction. He tried to negotiate with Loïselle, but eventually concluded that he needed outside help. At the recommendation of Frank Ziska, he called Mr. Henderson. [Tr. 292:24-293:24, and 294:15-20.]

27. In 2014, Frank Ziska also had encountered difficulties with Loïselle. Ziska was having trouble paying the note on his house, and Loïselle said he could find an investor to buy the note. [Tr. 309:14-310:12.] Meanwhile, Loïselle helped Ziska find a new home; however, that transaction put Ziska in “a very difficult position.” [Tr. 309:17-24, 310:21-14.] Ziska later came to learn that the investor Loïselle had referred to was a “straw man” for Loïselle, who quickly resold the house for a profit. [Tr. 310:13-20.]

28. When in January or February 2015, Ziska’s troubles with Loïselle became worse, he called Mr. Henderson, whom he had known socially since the 1980s. [Tr. 308:18-22, 311:15-312:24, 350:24-351:2.] Ziska testified Henderson told him that “he was suspended and he wasn’t practicing,” but that he could refer Ziska to a practicing attorney. [Tr. 311:15-312:2.] Henderson referred Ziska to

Hilary Barnes, Esq. who then represented him. [Tr. 312:3-8, 312:23-24; Exhibit 23-24.]

29. Mr. Robbs contacted Mr. Henderson who discussed with the Robbs family his suspension and also informed them in writing of his suspension on February 15, 2015. “As we have discussed, the State Bar of Arizona has suspended my license to practice.” [Exhibit 11 & Joint Prehearing Statement, Stipulated Facts, 11, & 15.]

30. That correspondence also explained,

As a result of this suspension, until it is lifted (which I anticipate will be in early May), to the extent legal services or work will be required in connection with our efforts, I personally, will be unable to provide them. I cannot practice law during the suspension and will not. To the extent legal services or work is required, we will, with your consent, bring in lawyers under the NewLawu.s. umbrella or outside of it as necessary.

The work and communications of Mr. Henderson were not supervised by a lawyer during his suspension. [Exhibit 11.]

31. Robbs testified that the letter was consistent with Henderson’s oral disclosures. Robbs understood that Henderson was not representing him as an attorney. [Tr.295:24-296:7-15 & Exhibit 54.]

32. On February 16, 2016, Mr. Henderson wrote an email to Mr. Loiselle which stated, “This law firm has been retained to represent the Robbs in matters

involving the above referenced property. In that capacity I have attached a letter for your review. Please have your attorney contact me with questions and comments.”

[Exhibit 4, Bates SBA000102.]

33. The body of the attached three-page letter set out the understanding of Mr. Henderson of the legal and factual circumstances surrounding the real property dispute between the Robbs and Mr. Loiselle. It threatened if Mr. Loiselle failed to take certain action, “this office will immediately take the steps noted above.” Such steps included litigation. [Id., Bates SBA000103-105 & Joint Prehearing Statement, Stipulated Fact 17.]

34. On February 19, 2015, Mr. Henderson wrote Loiselle an email acknowledging his decision to “forgo legal representation in matters involving the Robbs” but encouraging him to “reconsider this decision as matters move forward...not because you lack the intellectual horsepower to serve as your counsel....” [Exhibit 4, Bates SBA000109.]

35. Mr. Henderson sent multiple other correspondence regarding this matter, including to other entities and individuals involved with the real property in an attempt to negotiate a resolution. [Exhibit 4, Bates SBA000110-141 & Exhibits 22 & 25-36.]

36. We find it never occurred to Mr. Henderson that negotiating with Loiselle on behalf of an elderly widow would constitute the practice of law. [Tr.

354:25-355:3, 357:21-24.] Instead, Mr. Henderson understood the suspension to prohibit him from doing “legal work or things that required legal expertise that lawyers would do,” but not work “that everybody else in the business community does,” such as “negotiating.” [Tr. 355:4-16.]

37. In March 2015, Loïselle brought a forcible detainer action to evict Mrs. Robbs, a widow in her 80s. [Tr. 359:6-9.] Mr. Henderson did not attempt to represent Mrs. Robbs in that action, because he believed that such a representation would have constituted the practice of law. [Tr. 359:25-360:3.] Instead, he arranged for another attorney, Kathy Lunn, to represent Mrs. Robbs. [Tr. 359:10-13.] Mr. Henderson attended the proceedings and sat in the gallery as a spectator. [Tr. 137:17-18.]

38. After negotiations failed, the Robbs decided to sue Loïselle. [Tr. 296:16-18.] They hired another attorney, David Lunn, who initially handled the matter without Henderson because Henderson was still suspended. [Tr. 296:19-22.] Henderson was not named on any pleadings until May 12, 2015, after he had been reinstated. [Exhibit 1.]

39. At the request of the State Bar, Mr. Henderson produced a billing statement describing the services he provided. It stated,

Review and assessment of factual history involving Mr. Loïselle and his companies and Mr. Loïselle’s action vis a vis the Robbs; communications with B, and C, Robbs regarding status and risk and strategic alternatives and relative strengths and weaknesses of same; communications with Mr. Loïselle and his companies to negotiate

resolutions; follow-up with Robbs and Mr. Loiseau regarding same;  
communications with first lien holder.  
[Exhibit 12.]

### **III. CONCLUSIONS OF LAW**

The Hearing Panel finds by clear and convincing evidence Mr. Henderson violated, the following ethical rules:

- a. ER 1.15 [Safekeeping Property]: Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.
- b. ER 5.5 (engage in the unauthorized practice of law)
- c. Rule 43(a) (trust account/deposit of funds)

The State Bar has failed to prove by clear and convincing evidence Mr. Henderson violated ERs 1.5, 8.4(c) and (d), and Rule 54(d). The Panel determined Mr. Henderson's misconduct involving the unauthorized practice of law is addressed under ER 5.5 and therefore, a violation of Rule 31(b) is redundant. Additionally, to violate ER 8.4(d), a lawyer must have engaged in improper conduct "in the course of some judicial proceeding or a matter directly related thereto," and conduct "must have caused or had the potential to cause.... more than minimal harm." *In re Smith*, 848 P.2d 612 (Or. 1993). Here there was no harm, it was not in the course of judicial proceeding, and there was no dishonest conduct. Mr. Henderson did not violate ER 8.4(c). *In In re Dann*, 960 P.2d 416 (Wash. 1998), the Court said in determining

whether a lawyer violated ER 8.4(c), “the question is whether the attorney lied.” Mr. Henderson did not lie and the State Bar did not address violations of ER 8.4(c) or (d) in its closing arguments. Such allegations were abandoned.

#### **IV. DISCUSSION**

The State Bar states in its closing argument that Mr. Henderson filed a false affidavit of reinstatement because he practiced law. [Closing Argument, Paragraph 45, Page 10.] It argues Mr. Henderson should be disbarred because of his intentional unethical actions, citing *Standards* 6.21 and 8.1(a). *Standard* 8.1(a) states that disbarment is generally appropriate when a lawyer intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession.

It appears the thrust of its argument under this *Standard* is: Mr. Henderson “dishonestly concealed his suspension from the recipients of numerous demand letters and emailed threats made on behalf of a client from whom he collected \$10,000.” [Id., Page 18.] Apparently, under its argument, if Mr. Henderson *had* disclosed he was a suspended lawyer, there would not have been a violation.

The State Bar also centers on this same argument concluding, “All recipients of Respondent’s unauthorized correspondence spent time worrying about and responding to Respondent, who falsely held himself out as a licensed lawyer.” [Id.]

It is unclear to us what is being argued. It appears from the argument if they had not spent time worrying, there would have been no violation.

Under *Standard* 6.1, the Bar also seeks disbarment. We fail to see how the actions of Mr. Henderson constituted “threats and intimidation” which “caused potentially serious interfere[ance] with the legal proceeding between the Robbs family and Loiselle.” After this unsupported conclusory allegation the State Bar specifies the actions of Mr. Henderson that caused the interference. “Specifically, the Loiselle matter resulted in a lawsuit filed by the Robbs against Loiselle.” [Id.]

The final concluding sentence of its *Standard* 6.1 argument is unsupported by the record and contains speculation that is contradictory. The State Bar concludes, “Had a licensed lawyer been involved in negotiations on the Robbs behalf, rather than a suspended lawyer engaging in unethical conduct, the lawsuit may have been avoided all together.” [Id. 18-19.] But under the Bar’s argument, Loiselle believed Henderson *was* a lawyer (although we find no occasion within the record where Mr. Henderson stated to Loiselle or others that he was) and did not settle. Mr. Henderson ultimately referred the Robbs to a licensed lawyer and the matter still did not settle.

Lawyers who are suspended or disbarred may not practice law or hold themselves out as eligible to practice. In Arizona, Rule 31 defines the practice of law. Mr. Henderson testified that he regretted sending the communications and in retrospect understood how a reasonable person might believe they came from a lawyer. [Tr.

360:4-22, 375:12-376:10.] However ill-advised those communications were, nothing about them indicates that Henderson intended, knew or believed they violated his suspension.

To the contrary – Henderson’s open pattern of communications indicates that he did not believe he was violating his suspension. Henderson did not communicate in a secretive manner indicating consciousness of guilt. He sent numerous emails and letters, not only to Loiselle, *See* Exhibit 4 at Bates SBA102-134, Exhibits 29-34; but to third parties, including a real estate agent, Exhibit 17, and numerous officers of companies affiliated with Loiselle, Exhibit 27. Mr. Henderson did not take actions consistent with a person who was conscious that he was violating the Order and trying to “cover his tracks.” We find his actions were negligent.

While much testimony was presented seeming to raise new allegations, the complaint was not amended. We decline to consider allegations not alleged in the complaint. Nor are we convinced the unsupported conclusory opinion of the State Bar that Mr. Henderson was obligated to close his trust account is accurate.

We agree with the State Bar that the prepayment of the \$10,000 should have been placed in a trust account, despite the fee agreement statement to the contrary. A prepaid fee that is earned upon receipt should not be placed in trust. ER 1.5 cmt. 7; ER 1.15(a); Ariz. Ethics Op. 99-02 (1999). But because the Robbs’ payment was

billed against and eligible for refund, it was not earned upon receipt. We find Henderson's failure to understand this finer point of trust account rules negligent.

## V. ABA STANDARDS ANALYSIS

The sanctions to be imposed in lawyer discipline cases are determined in accordance with the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*"). Rule 58(k), Ariz. R. Sup. Ct. In imposing a sanction, the court should consider: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. *Standard 3.0*.

*Standard 8.3(a) Prior Discipline Orders* is applicable to Mr. Henderson's violation of ER 5.5 and provides reprimand is generally appropriate when a lawyer: negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession.

Mr. Henderson negligently engaged in the unauthorized practice of law while suspended.

*Standard 8.4* provides an admonition is generally not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past. Mr. Henderson negligently violated his prior discipline order, therefore application of this *Standard* is not appropriate.

*Standard 4.1 Failure to Preserve the Client's Property* is applicable to Mr. Henderson's violation of ER 1.15 and provides that reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

*Standard 7.3 Violations of Other Duties Owed as A Professional* is also applicable to Mr. Henderson's violation of ER 5.5 and Rule 43(a) and provides reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Mr. Henderson's conduct was negligent and the Panel determined the presumptive sanction is reprimand.

### **AGGRAVATING AND MITIGATING FACTORS**

While the State Bar argues multiple aggravating factors are also present, we disagree with their application. As with much of the argument, we find the position of the State Bar that Mr. Robbs was a vulnerable victim unsupported and puzzling. Mr. Robbs is an experienced businessman in real estate who was bluntly told by Mr. Henderson of his suspension which declaration was followed in writing. Mr. Robbs was not injured, and satisfied with the work of Mr. Henderson. Nor on the record before us do we find bad faith obstruction, a dishonest or selfish motive, a pattern of misconduct, nor multiple offenses. Mr. Henderson does however have prior

discipline, *Standard* 9.22(a) and substantial experience in the practice of law, *Standard* 9.22(i).

The Panel determined the following mitigation factors are present in the record:

- **9.32(b) Absence of a dishonest or selfish motive.** Mr. Henderson sought to help Mrs. Robbs, an elderly widow, save the equity in her home. [Tr. 302:23-25.] He received a relatively small payment, which is dwarfed by the fees he has incurred defending himself in this proceeding.
- **9.32(e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings.** Mr. Henderson consistently responded promptly to Moses's investigative requests. Mr. Henderson was also cooperative later on, including by assisting the Bar in arranging witness interviews.
- **9.32(g) Character or reputation.** Numerous witnesses testified to Mr. Henderson's character, including his honesty and ethics [Tr. 287:22-288:2, 320:7-11]; candor about his struggles with alcoholism [Tr. 27:5-13]; work with others dealing with alcoholism [Tr. 255:14-256:7]; mentorship [Tr. 276:24-177:4]; charitable activities [Tr. 243:20-244:9, 361:24-364:1]; and that he has taken care of and had primary custody of his four children, and protected them from his ex-wife's abusive boyfriend. [Tr. 285:15-15, 325:17-326:9.]

- **9.32(l) Remorse.** Mr. Henderson repeatedly expressed remorse. [Tr. 360:4-22, 375:12-376:10.]

The Panel determined the mitigation present does not justify a reduction in the presumptive sanction of reprimand.

## **VI. CONCLUSION**

The Supreme Court “has long held that ‘the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender.’” *Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). It is also the purpose of lawyer discipline to deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993). A purpose of lawyer regulation is to protect and instill public confidence in the integrity of individual members of the State Bar. *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

The Panel has made the above findings of fact and conclusions of law and determined the sanction using the facts, application of the *Standards* including the aggravating and mitigating factors, and the goals of the attorney discipline system. The Panel orders:

**IT IS ORDERED** Respondent, **Scott K. Henderson, Bar No. 010002** is reprimanded.

**IT IS FURTHER ORDERED** Mr. Henderson shall pay all costs and expenses incurred by the State Bar. There are no costs or expenses incurred by the Office of the Presiding Disciplinary Judge in this proceeding.

A final judgment and order shall follow.

**DATED** this 9<sup>th</sup> day of June 2017.

*William J. O'Neil*

**William J. O'Neil, Presiding Disciplinary Judge**

*Marilyn Schmidlin*

**Marilyn Schmidlin, Volunteer Public Member**

*Sandra E. Hunter*

**Sandra E. Hunter, Volunteer Attorney Member**

Copy of the foregoing mailed/mailed  
this 9<sup>th</sup> day of June, 2017 to:

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**BEFORE THE PRESIDING DISCIPLINARY  
JUDGE**

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

**SCOTT K. HENDERSON,  
Bar No. 010002,**

Respondent.

PDJ 2016-\_\_\_\_\_

**COMPLAINT**

State Bar No. 15-3339, 16-0784

Complaint is made against Respondent as follows:

**GENERAL ALLEGATIONS**

1. Respondent was first admitted to practice law in Arizona on May 18, 1985.
2. Beginning February 6, 2016, Respondent was suspended from the practice of law for ninety (90) days for his conduct in State Bar file no. 13-2333. The suspension resulted from Respondent's felony conviction related to driving on a suspended license.

3. Respondent was reinstated to practice law on April 29, 2015.

**COUNT ONE (File no. 15-3339/Haddock)**

4. On May 1, 2015, Rand Haddock, an attorney, entered into an Independent Contractor Agreement with Respondent's company NewLawUS. The agreement entitled Mr. Haddock to obtain clients and perform legal services

through NewLawUS's software platform. Mr. Haddock paid Respondent a fee of \$2,500 for access to the platform.

5. Under the agreement, Respondent approved invoices for work done by Mr. Haddock and Mr. Haddock then delivered the invoices to clients. Respondent retained a percentage of the fees collected.

6. Respondent breached the agreement by failing to pay Mr. Haddock the appropriate percentage of invoices collected and by failing to provide a fully functioning software platform.

7. After the breach, Mr. Haddock requested accounting information from Respondent, but Respondent refused to provide it.

8. On December 30, 2015, Mr. Haddock filed a bar charge against Respondent related to Respondent's actions.

9. Around the same time, Mr. Haddock's access to the CLIO system was cut-off by Respondent.

10. Mr. Haddock and Respondent entered into a settlement agreement concerning their dispute on January 1, 2016. Under the terms of the agreement, Respondent agreed to produce a full accounting by January 11, 2016, or accept a calculation made by Mr. Haddock of the amount Respondent owed him.

11. The settlement agreement also provided that Mr. Haddock would request that his pending bar charge against Respondent be dismissed upon payment of the amount due.

12. Respondent did not provide an accounting by January 11, 2016.

13. On January 26, 2016, Respondent made full payment to Mr. Haddock, and wrote a letter on the same date threatening that any action that Mr. Haddock

might take to further his bar charge would be viewed as a breach of their settlement agreement and would be "vigorously addressed."

14. During the screening process, State Bar ACAP counsel requested an accounting from Respondent including the invoices that had been submitted to Respondent by Mr. Haddock. Respondent indicated that he was still "truing up" his accounting system and was unable to immediately comply with the request.

15. In later explaining his inability to provide accounting documentation, Respondent informed ACAP counsel that he had waived certain billing protocols during his time working with Mr. Haddock so that payments could be rushed to Mr. Haddock.

16. The fee agreement used by Respondent in NewLawUS cases, including those handled by Mr. Haddock, required that clients make a prepayment of fees to be billed against, but indicated that the prepayment would not be placed in the firm trust account.

17. Respondent did not place any of the money received as a result of Mr. Haddock's work into a trust account.

18. The "Sample Member Contract" between NewLawUS and the independently contracted lawyers working under it, did not indicate that the company would maintain joint responsibility for legal representations, despite the fact that in most cases the company retained 20% of fees collected by its independent contractor lawyers such as Mr. Haddock.

19. Respondent's conduct in Count One violated ERs 1.5(e), 1.15, 8.4(d), Rule 43(a), and Rule 54(d).

**COUNT TWO (File no. 16-0784/Loiselle)**

20. As indicated in paragraph two above, Respondent was suspended from the practice of law for 90 days effective February 6, 2015.

21. During the period of his suspension, Respondent had numerous conversations with a business owner, Brian Loiselle, in which Respondent held himself out as a lawyer representing "the Robbs family," in a real estate dispute. On all letterhead regarding the matter, Respondent identified himself as "Founder" of the law firm NewLawUS.

22. Respondent's work and communications were not supervised by a lawyer during the period of suspension.

23. In his communications with Mr. Loiselle, Respondent never revealed that he was not authorized to practice law.

24. On February 16, 2015, Respondent wrote the following email to Mr. Loiselle "[t]his law firm has been retained to represent the Robbs in matters involving the above referenced property. In that capacity I have attached a letter for your review. Please have your attorney contact me with questions and comments."

25. In the body of the three page letter, Respondent set out his understanding of the legal and factual circumstances surrounding a real property dispute between the Robbs and Mr. Loiselle and threatened that if Mr. Loiselle failed to take certain action, "this office will immediately take the steps noted above." Such steps included litigation.

26. The letter also contained the following language: "[d]emand is hereby made that you take all steps necessary to immediately convey the property to

Branch Holdings, LLC, pursuant to terms and conditions previously discussed with the Robbs modified only to permit your realization of additional fees from the sale in an amount equal to \$10,000."

27. Respondent concluded the letter with: "[p]lease have your lawyer call me with any questions or thoughts he or she may have."

28. On February 19, Respondent wrote an email to Mr. Loiselle in which he stated:

I acknowledge your decision to forego legal representation in matters involving the Robbs, the Property and communications with me about them. I would encourage you to reconsider this decision as matters move forward (and, in fact, if litigation ensues, the courts will require that you have legal counsel) not because you lack the intellectual horsepower to serve as your own counsel but for the reasons underlying the very old, but tried and true, adage we lawyers refer to often, "A lawyer who represents himself has a fool for a client."

29. In a February 20, 2015, email to Mr. Loiselle, Respondent wrote, "I will be talking with the Robbs about your most recent proposal." Respondent closed the email by indicating that the Robbs did not "wish for its litigation with you to stir up any of this. They just want their property back and you out of their lives. Let's close with a \$10,000 kicker to you and be done. That said, I will be discussing your proposal with them later this morning."

30. On March 12, 2014, Respondent wrote a letter to officers of multiple entities that Respondent believed had benefited from the disputed real property transaction. One such letter, addressed to an entity named of "Corgeen" stated:

You may not be aware, but Corgeen was a direct participant and apparent beneficiary of improper and potentially illegal actions with respect to the Property by Strong Financial and its principal, Brian Loiselle. These

actions, and Brian Loisel's refusal to remedy them, have left the Robbs with no alternative but to sue Strong Financial, Mr. Loisel, Corgeen, East West and other individuals and companies that appear to have conspired with Strong Financial and Mr. Loisel to defraud the Robbs.

31. In the same letter, Respondent stated, "[g]iven the gravity and magnitude of the claims that underlie that litigation and the possible civil and criminal implications that stem from them, the Robbs wanted to afford you the courtesy of this letter so that you may have an opportunity to remedy the situations before you become embroiled in this multi-party litigation."

32. Respondent did not advise Corgeen of his suspension.

33. On March 13, 2015, Respondent emailed Mr. Loisel, "I received the Notice addressed to Anne Robbs regarding rent allegedly due with respect to the 25th Street home. This Notice is wholly ineffective and of no force and effect for a host of reasons. First and foremost, you signed this Notice. You are not the landlord."

34. On March 16, 2015, Respondent wrote again to Mr. Loisel:

Arizona laws prohibit lock outs (self help remedies) for residential properties and the sanctions are severe. If you or anyone on your behalf comes to the property again for any reason - much less tries to illegally change the locks - you/they will be arrested and charged with criminal trespass and I can assure you the Robbs will fully press charges." And, "this is no joking matter and I assure you neither the police or the prosecutors view it as such. If you wish to enforce the lease your recourse is through the courts. You are only making matters far, far worse for yourself and this self-destructive behavior will not end well. Please retain a lawyer and have him or her call me. At a minimum cut your losses by getting some decent legal advice - you need it."

35. On March 17, 2015, Respondent wrote to Mr. Loiselle, "[Y]our actions today were unfortunate and ill-advised. To be sure, they add additional damages to the civil liability for which you are responsible but they also constitute criminal acts for which the Robbs are seeking to hold you accountable through reports to and investigations by the Phoenix Police Department. .. Please hire a lawyer. You may, in fact, soon need more than one. And if you do, please have him or her call me so that the damages you are stacking up can be minimized to the extent possible."

36. All of the above communications led Mr. Loiselle to believe Respondent was a lawyer authorized to practice law.

37. Respondent engaged in several similar communications with other individuals during the time of his suspension in which he negotiated legal rights related to the real estate dispute.

38. On February 17, 2016, Respondent sent an email to Steve Turner, the principal of an entity named Coyote Capitol. Respondent's communication led Mr. Turner to believe that Respondent was authorized to practice law.

39. Mr. Turner was concerned by the email and engaged attorney David Knapper to review the correspondence.

40. Upon review of the email, Knapper also believed Respondent was acting as an attorney and assumed that he was authorized to do so.

41. The email from Respondent to Mr. Turner stated, "[i]f you have counsel with whom you'd prefer I communicate, let me know. We have been retained by Frank Ziska and his affiliated company.... ."

42. Frank Ziska is a friend of Respondent. Respondent attempted to represent Mr. Ziska during his period of suspension.

43. The email concludes "[i]f cooler heads do not soon prevail, no doubt everyone will look back at this a year from now and wish different decisions were made as the legal complexities, cost, time and messiness of this transaction and the relationships that underlie it will take quite some time and money to work through."

44. Attorney Lawrence Lynde, another attorney who performed work for Coyote Capital during the period of Respondent's suspension, also was led to believe by Respondent that Respondent was authorized to practice law during the period of his suspension.

45. On March 27, 2015, Respondent drafted an email to Mr. Lynde stating:

This law firm represents Anne-Merete Robbs and her trust in connection with various matters including those pertaining to improper and fraudulent lending practices ... . In the course of our investigations in preparation for litigation against Mr. Loiselle, his companies and other co-conspirators, we discovered details of Coyote Capital's involvement with Mr. Loiselle through a loan to Ms. Robbs. It appears that that loan was violative of a host of federal and state lending requirements ... .

46. The correspondence ended with: "[i]f there is information of which we are unaware that you believe we should see or understand before the litigation is filed or if you would like to discuss this, please contact me immediately."

47. In almost all correspondence during his period of suspension detailed in this Complaint, Respondent's salutation includes the following: "Scott K. Henderson, Founder, NewLawU.S. Attorneys at Law."

48. On April 20, 2015, Respondent filed an Affidavit of Reinstatement in which he verified that he had fully complied with Supreme Court Rule 72 during his period of suspension.

49. Respondent was reinstated to practice law on April 29, 2015.

50. After his reinstatement, Respondent and another attorney, David Lunn, filed suit against Mr. Loiselle on behalf of the Robbs.

51. Respondent paid Lund only \$5,000 of the approximately \$17,000 of legal work performed by Lund's firm on the case.

52. The \$5,000 check that Lund received for his work was from an entity named Henderson Law PLC, rather than from the Robbs.

53. On July 12, 2016, upon request, Respondent provided bar counsel with a fee agreement dated February 15, 2015, in which he notified Bruce Robbs of his suspension and requested that Robbs "prepay \$10,000 and agree to pay all amounts invoiced after application of the prepaid fees within 15 days receipt of an invoice."

54. The fee agreement included the following language, "[t]he prepayment of fees contemplated here is a prepayment of fees and, as such, it will not be placed in trust but applied as and when the firm reasonably deems appropriate."

55. Respondent did not place any of the money paid to him by the Robbs into his trust account.

56. In responding to the Bar's request for an accounting, Respondent produced a billing statement for his work between the dates of February 15 and March 31, 2015, indicating that he performed 22.8 hours of work at the "discounted rate" of \$350 per hour. The billing indicated that his "regular rate" is \$595 per hour.

57. The billing statement included the following description of services, "Review and assessment of factual history involving Mr. Loiselle and his companies

and Mr. Loiselle's actions vis a vis the Robbs; communications with B. and C. Robbs regarding status and risks and strategic alternatives and relative strengths and weaknesses of same; communications with Mr. Loiselle and his companies to negotiate resolutions; follow-up with Robbs and Mr. Loiselle regarding same; communications with first lien holder."

58. Mr. Loiselle and Mr. Turner were both financially harmed as a result of Respondent's actions during the period of his suspension.

59. Respondent advised Bruce Robbs and Frank Ziska not to return phone calls from bar counsel during the State Bar's investigation of Mr. Loiselle's complaint against him.

60. Respondent's conduct in Count Two violated ERs 1.15, 5.5, 8.4(c), 8.4(d), Rule 31(b), and Rule 43(a).

**DATED** this 12<sup>th</sup> day of September, 2016.

**STATE BAR OF ARIZONA**



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Hunter F. Perlmeter  
Staff Bar Counsel

Original filed with the Disciplinary Clerk of  
the Office of the Presiding Disciplinary Judge  
of the Supreme Court of Arizona  
this 12<sup>th</sup> day of September, 2016.

by: Joshua Brakaw  
HFP:jlb