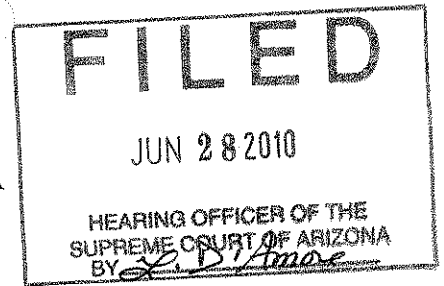


**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**



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

File No. 08-1613

**MARK D. SVEJDA,
Bar No. 011116**

HEARING OFFICER'S REPORT

Respondent.

PROCEDURAL HISTORY

The Complaint in this matter was filed on December 23, 2009. The Hearing Officer was assigned on January 13, 2010. Respondent filed his answer on January 27, 2010. The Initial Case Management Conference was held on January 28, 2010. The parties filed a Notice of Settlement on April 1, 2010. They filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on May 5, 2010. The hearing on the Agreement was held on May 17, 2010.

FINDINGS OF FACT¹

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 25, 1986. (Transcript "TR", page 5, line 8, "5:8")

COUNT ONE (File No. 08-1613)

2. Mr. Hermann Viktor Kell and Mrs. Edeltraud Kell were married German citizens. Mr. Kell spent time in Scottsdale, Arizona, from the 1980's until sometime before his death in 2005. (TR 5:11-19)
3. Mr. and Mrs. Kell were born in Germany and English was their second language. (TR 5:21)

¹ The facts are found in the Tender of Admissions and at the hearing.

4. Beginning in the mid 1980's until he died, Mr. Kell invested in certain limited partnerships in which TDI Terraplan Development, Inc. ("TDI"), was the general partner and Mr. Kell was the limited partner. The purpose of these limited partnerships was to acquire income-producing real property. Mr. Kell contributed 99% of the capital for limited partnerships and TDI contributed the remaining 1% of the capital. (TR 6:1-12)
5. TDI is an Arizona corporation with its principal office in Scottsdale, Arizona. (TR 6:14)
6. In August of 1987, Eva Sperber-Porter ("Sperber-Porter") was hired by TDI to oversee its business affairs in the United States. (TR 6:17-22)
7. In 1987 or early 1988, Sperber-Porter became acquainted with Mr. Kell. Sperber-Porter became one of Mr. Kell's principal business contacts in the United States. (TR 6:23 through 7:2)
8. In 1991, Sperber-Porter introduced Mr. Kell to Respondent, whom Sperber-Porter subsequently married in November of 1993. (TR 7:3-7)
9. In 1999, Sperber-Porter became a minority shareholder in TDI. At some point thereafter, Sperber-Porter acquired an equity interest of 40 percent in TDI. Sperber-Porter is currently the Vice President of TDI. (TR 7:8-13)
10. In 1992 or 1993, Respondent began working as the attorney for TDI. From 1992 until the present time, approximately 5% of Respondent's legal work came from TDI. Respondent, as the attorney for TDI, drafted the Limited Partnership Agreements for Litchfield Road, Baseline and Val Vista and the Amended Partnership Agreement for 12th Street and Washington Associates. In each of the limited partnerships, TDI was the general partner and Mr. Kell was the limited partner. (TR 7:14 through 8:4)
11. TDI, as general partner, owed certain duties to Mr. Kell including but not limited to the duty

- of care, the duty of loyalty, the duty of good faith and the duty to disclose materials relating to the formation and dissolution of the partnerships. (TR 8:5-10)
12. At the time of his death in November of 2005, the estimated value of Mr. Kell's United States estate was substantial. (TR 8:11-14)
 13. Respondent and his wife, Eva Sperber-Porter ("Sperber-Porter") were married before the preparation of the Kell will. (TR 8:15-17)
 14. Sperber-Porter and Mrs. Kell were beneficiaries of the Kell Will and Amendments. Respondent was a contingent beneficiary of the Kell Will and Amendments. (TR 8:18-22)
 15. Respondent and Sperber-Porter are not related to Mr. Kell. (TR 8:25 through 9:2)
 16. Respondent was appointed the Personal Representative of Mr. Kell's estate from December of 2005 until he resigned in January of 2007. (TR 9:3-7)
 17. As Personal Representative of the Kell estate, Respondent owed fiduciary duties to the beneficiaries of the estate. (TR 9:8-11)
 18. In November of 2005, Respondent hired Attorney Bur Raby "Attorney Raby" to represent the Kell estate in the informal probate case PB 2005-003522 and to file the estate taxes. (TR 9:14-18)
 19. On January 12, 2007, a Motion for Order to Show Cause was filed in PB 2005-003522 by Mrs. Kell's attorneys. The Motion alleged that Respondent prepared a will on behalf of Mr. Kell which provided for a significant bequest to Respondent's wife in violation of ER 1.8(c). There was also a dispute between Mrs. Kell and Sperber-Porter regarding how the assets and taxes should be allocated. (TR 9:19 through 10:2)
 20. On January 17, 2007, an Emergency Motion to Freeze Estate Assets was filed by Mrs. Kell's attorneys because they were concerned estate assets could be transferred before Respondent

was removed as Personal Representative. (TR 10:3-8)

21. On January 19, 2007, the Court ordered \$500,000 to be placed in Attorney Raby's trust account for payment of estate taxes and ordered that the remaining assets remain restricted pending further order of the Court. (TR 10:9-14) If this matter had been a contested hearing, Respondent would have testified that, as of the date of the Order and thereafter, the only assets held by the estate were a parcel of real property in Scottsdale owned by Mr. Kell at the time of his death, cash and bank accounts, and various items of personal property, including limited partnership interests in various limited partnerships. (TR 10:14-23)
22. At the January 19, 2007 hearing, Respondent resigned as Personal Representative. The Court appointed Southwest Fiduciary as the Temporary Successor Personal Representative and they were ultimately made the Permanent Successor Personal Representative. (TR 10:24 through 11:5)
23. On June 8, 2007, Southwest Fiduciary filed a Petition for Surcharge of Former Personal Representative alleging that Respondent improperly used approximately \$226,000 of estate funds to pay a non-estate debt regarding the 12th Street and Washington Associates Limited Partnership, which owned the real property leased to the Winn Dixie in Spartanburg, South Carolina. (TR 11:6-14) If this matter had been a contested hearing, the State Bar would have presented evidence that Respondent improperly used estate funds to pay a debt to BB&T Bank. But since Respondent paid the money back when he agreed to settle the underlying probate lawsuit, these claims are being dismissed as part of the parties' agreement. Respondent denies that he improperly used estate funds. (TR 11:15-25)
24. On June 26, 2007, an Order to Show Cause As To Why Defendant Eva Sperber-Porter Should Not Be Held In Contempt of Court For Liquidating Estate Assets In Violation of

Court Order was filed by Southwest Fiduciary. In such pleading, Southwest Fiduciary claimed that Sperber-Porter sold the assets of the Baseline and Val Vista and Litchfield Road Limited Partnerships in violation of the Court Order entered on January 19, 2007.² (TR 12:2-18) If this matter had been a contested hearing, Respondent would have testified that he believed at the time the property owned by Baseline and Val Vista and Litchfield Road Associates Limited Partnerships was not sold in violation of the Court Order entered on January 19, 2007. The sale of Litchfield Road Associates Limited Partnerships closed before the date of the Court Order. The Purchase and Sale Agreement of the Baseline and Val Vista Limited Partnership was executed on or about July 17, 2006, which was over six months before the entry of the January 19, 2007 Order. Respondent would have further testified that he did not believe that the sale of the property owned by Baseline & Val Vista and Litchfield Road Associates Limited Partnerships violated the January 19, 2007 Court Order, because the property was not part of the Kell estate. Only the limited partnership interests were part of the estate and therefore, the Probate Court did not have jurisdiction over the property. (TR 12:21 through 13:15) The State Bar contends that Respondent was negligent in his analysis and had a duty to at least provide notice of the pending sales with respect to the January 19, 2007 Order, such that the Court, the replacement Personal Representative and his attorney, and Mrs. Kell and her attorneys, and the attorney for the estate, Mr. Raby, had knowledge of the transactions. For purposes of this Tender of Admissions, Respondent admits that, out of an abundance of caution, and in order to assure that all parties to the estate believed they were being treated fairly, he should have provided such notice and therefore, he violated Rule 53 (c). (TR 13:16 through 14:8) Due to Respondent's admission to conduct in violation of

² In the Tender of Admissions at paragraph 24, line 10 the parties erroneously stated that the Court Order was entered on June 19, 2007. (TR 12:8-20)

Rule 53(c), the State Bar will dismiss ERs 3.3(a)(1) and 3.4(c), because the same conduct was the basis for these other alleged Ethical Rule violations. Although the record contains the agreement of the parties that Respondent's state of mind was negligent as to conflict of interest issues, Rule 53 (c) cannot be violated without a knowing mental state. Respondent's counsel explained the state of the evidence on this point as follows: "And it is a subtle point, but Mr. Svejda is admitting today that he made a knowing decision not to request a clarification of that order, and not to take the more conservative path and give notice to all parties so that if there were a question as to the application of the order there would be an opportunity both for the parties and the court to rule on that." (TR 15:2-8) Respondent clarified, "... I knowingly made a decision not to seek further involvement of the court in order to clarify that order." (TR 15:17-19)

25. On June 30, 2007, a mediation conference was held regarding all of the outstanding issues in PB 2005-003522, including all claims of fraud, breach of fiduciary duty and improper use of the power of attorney. (TR 15:20 through 16:2)

26. At the mediation, Respondent agreed to pay Mrs. Kell a significant sum of money that was identified as relating to the Spartanburg deficiency payment. Respondent and Sperber-Porter also agreed to execute a Promissory Note to settle the other allegations raised in the will contest lawsuit. (TR 15:24 through 16:20)

The Kell Will and Amendments

27. In 1991, Mr. Kell asked Respondent to prepare a will for him that would dispose of his United States estate. Mr. Kell explained that he intended to make a bequest to Sperber-Porter (who was not Respondent's wife at the time) and also intended to make Respondent a

contingent beneficiary and his Personal Representative for the U.S. estate.³ (TR 17:6 through 18:5) For the purposes of this Tender of Admissions, Respondent contends and the State Bar does not dispute that he declined Mr. Kell's request, explaining that he could not prepare such a will because of his interest in the estate. Respondent further contends and the State Bar does not dispute that he referred Mr. Kell to another law firm for purposes of the preparation of his United States will and that Mr. Kell, in fact, consulted with such law firm, but he decided not to retain the firm. (TR 18:6-15)

28. In December 1993 or early 1994, Mr. Kell again asked Respondent to prepare his will. (TR 18:16-18) At the hearing Respondent testified that he married Ms. Sperber-Porter on November 20, 1993. (TR 18:19-24)

29. Sometime between December 1993 through February 1994, in response to Mr. Kell's repeated requests for Respondent to assist him with the preparation of his will, Respondent agreed to find and provide him with an English language form of will that Mr. Kell would be able to use to prepare his own will. For the purposes of the Tender of Admissions, Respondent contends and the State Bar does not dispute that, at that time, he again explained to Mr. Kell that he could not prepare the will for him. (TR 18:25 through 19:9)

30. For the purposes of the Tender of Admissions, the Respondent contends and the State Bar does not dispute that he found a form of will at the ASU Law Library, copied it, and provided it to Mr. Kell but provided no additional assistance in the preparation of his will. Mr. Kell prepared the will on his own by filling in the pertinent information to reflect his testamentary intent at the time. The State Bar contends that the act of seeking, selecting, and providing a form of will to Mr. Kell, while knowing that he would be a contingent beneficiary of such

³ Paragraph 27, line 5 of the Tender of Admissions incorrectly stated that Sperber-Porter was Respondent's wife in 1991. The parties agreed at the hearing that the matter in parenthesis should be changed to read that in 1991 Sperber-Porter was not Respondent's wife. (TR 17:6-24)

will and Mr. Kell's Personal Representative, is sufficient conduct to violate ER 1.8(c). Respondent contends and the State Bar does not dispute that he did not intentionally violate ER 1.8(c) but, to the contrary, that he attempted to explain to Mr. Kell the limitations on his ability to participate in the preparation of the will. For purposes of this Tender of Admissions, however, Respondent admits that even the act of researching and providing a form of will to Mr. Kell could be perceived as assisting Mr. Kell in the preparation of his will. Respondent contends that his acts were negligent and constituted only a technical violation of ER 1.8(c), but he recognizes that the ultimate effect of his negligence was to create a basis for challenging the will, that such a challenge in fact occurred, and it resulted in extensive civil litigation. (TR 19:10 through 20:24)

31. Following preparation of the original Last Will and Testament, Mr. Kell prepared and executed a First Amendment to the Will on December 17, 1996. In such First Amendment, Sperber-Porter was a beneficiary and Respondent was a contingent beneficiary and Personal Representative, but Sperber-Porter's interest in the estate was reduced from the interest established in the original will. For the purposes of the Tender of Admissions, Respondent contends and the State Bar does not dispute that he had no role of any kind in regard to the First Amendment. (TR 20:25 through 21:12)
32. Mr. Kell prepared and executed another Last Will and Testament on March 2, 1999, which replaced the original Last Will and Testament. In this second Last Will and Testament, Sperber-Porter was a beneficiary and Respondent was a contingent beneficiary and Personal Representative, but Sperber-Porter's interest in the estate was reduced from the interest established in the original will. For the purposes of this Tender of Admissions, Respondent contends and the State Bar does not dispute that he played no role of any kind with respect to

- the preparation and execution of the Second Last Will and Testament. (TR 21:13-23)
33. On October 15, 2002, Sperber-Porter received an e-mail from Mr. Kell written in German. The e-mail was subsequently translated into English. The e-mail stated the following: “Dear Eva, Please advise Mark to add the following matters to Exhibit “A”: Kan Am Baltimore/Atlanta Triple Outlet World, Orlando (Estein) Preston Ridge Centre, Frisco, Texas. If it is necessary to certify this (notarial) please let me know by e-mail. Kind regards, Viktor.” (TR 21:24 through 22:5)
34. On the e-mail from Mr. Kell, Sperber-Porter handwrote a note to Respondent in English. The note stated the following: “Mark, Viktor wants you to add to Exhibit “A” the following exhibits Kan Am Baltimore/Atlanta, Triple World Orlando (Estein), Preston Ridge Centre, Frisco, Texas.” Sperber-Porter also handwrote the following message to Respondent on Mr. Kell’s e-mail, “Do you need notarizing of this addendum/addition yes/no”. (TR 22:6-13)
35. Respondent denies that he made the above-referenced changes to the Kell will. For purposes of this Tender of Admissions, the State Bar accepts Respondent’s contention. (TR 22:14-18)
36. On January 28, 2003, a First Amendment to the Last Will and Testament of Hermann Viktor Kell was executed. Sperber-Porter was a beneficiary and Respondent was a contingent beneficiary and Personal Representative but Sperber-Porter’s interest in the estate was reduced from the interest established in the original will. (TR 22:19-25)
37. On August 26, 2004, a Second Amendment to the Last Will and Testament of Hermann Kell was executed before the U. S. Consulate in Munich, Germany. (TR 23:1-4)
38. On September 5, 2005, Mr. Kell executed a Third Amendment to his Last Will and Testament. It was notarized before Notary Hofling in Munich, Germany. For the purposes of this Tender of Admissions, Respondent contends and the State Bar does not dispute that

Respondent had no role in the preparation of the First, Second, or Third Amendments. Further, it is important to note that Ms. Sperber-Porter's interest in the Kell estate diminished with the execution of each such amendment. (TR 23:5-12)

39. On December 13, 2006, Mrs. Kell attended a meeting with Respondent, Attorney Raby, and Mrs. DeNeverlee, a friend of Mrs. Kell, at Respondent's office. The State Bar alleges that Respondent answered a question asked by Mrs. Kell or Mrs. DeNeverlee by stating that Respondent had drafted and/or prepared Mr. Kell's will. If the case had proceeded as a contested hearing, the State Bar would have called two witnesses, Mr. Raby and Mrs. Kell, who would testify that Respondent stated that he drafted or prepared Mr. Kell's will. Respondent denies this allegation. If the case had proceeded as a contested hearing, Respondent would have called Ms. De Neverlee to testify that she was at the same meeting and did not hear Respondent admit that he drafted and/or prepared the will. However, Respondent acknowledges that Mr. Kell had requested a form will, which form will Respondent had provided, and which form will became the basis of Mr. Kell's original will. Respondent's description of these facts could have created an impression that he had prepared the will. (TR 23:13 through 24:12)

40. At a hearing on the Emergency Motion to Freeze Assets, John Everroad, counsel for Mrs. Kell, argued that Respondent had drafted Mr. Kell's will.⁴ Respondent did not dispute that allegation at the hearing, but he did dispute it in other contexts related to the civil litigation. Respondent later voluntarily resigned as Personal Representative of the Kell estate and was replaced in that capacity by Southwest Fiduciary. Respondent thereafter assisted with the transition to Southwest Fiduciary by meeting with its President and CEO, Mr. Greg DeVico,

⁴ Paragraph 40, line 5 of the Tender of Admissions incorrectly stated that Mr. Everroad said that Respondent prepared Mrs. Kell's will. The paragraph should have stated that Mr. Everroad said that Respondent prepared Mr. Kell's will. (TR 24:18-21)

and Mr. Paul Harter, attorney for Southwest Fiduciary. Mr. DeVico and Mr. Harter have contended that Respondent stated during one such meeting that he had drafted and/or prepared Mr. Kell's will. Respondent denies this allegation; however, he acknowledges that he informed Mr. Harter and Mr. DeVico that Mr. Kell had requested a form will, which form will Respondent had provided, and which form will became the basis of Mr. Kell's original will. Respondent's description of these facts could have created an impression that he had prepared the will. (TR 24:23 through 26:1)

41. Based on Respondent's involvement in the preparation of Mr. Kell's U.S. will, and because of the complications that such involvement later created for the administration of Mr. Kell's U.S. estate, Respondent admits to a violation of ERs 1.8(c) and 8.4(d). For purposes of this Tender of Admissions, the parties agree that Respondent's role was in drafting and or preparing the will and was limited to providing the form will to Mr. Kell from which Mr. Kell created the original will. The original will was later supplanted by a series of subsequent testamentary instruments, each of which reduced Sperber- Porter's interest in the U.S. estate and, therefore, also reduced Respondent's interest as a contingent beneficiary. (TR 26:2-24)

Respondent's Service as Personal Representative and as TDI's Attorney

42. While Respondent was Personal Representative of the U.S. estate, he also acted as the attorney for TDI. (TR 26:25 through 27:5)
43. Sperber-Porter managed and owned a minority interest in TDI. In such capacities, she gave Respondent his instructions as TDI's attorney. (TR 27:6-9)
44. Anticipating that his role as Personal Representative of the estate and as TDI's counsel might create an appearance of impropriety, Respondent retained a lawyer, Bur Raby, to represent

the U.S. estate. However, Respondent did not discuss the ramifications of his dual role with Mrs. Kell or Mr. Raby. Respondent also failed to discuss with Mrs. Kell or Mr. Raby that he assisted Mr. Kell in the preparation and/or drafting of Mr. Kell's will by providing him a form will, until the December 13, 2006 meeting. Respondent also failed to discuss with Mrs. Kell or Mr. Raby the potential conflict of preparing and/or drafting the will by providing Mr. Kell a form will and his wife being named a beneficiary and Respondent being named as a contingent beneficiary. Respondent also failed to obtain Mrs. Kell's consent in writing so her interests would be adequately protected. (TR 27:10 through 28:5)

45. After Mr. Kell died, the estate stepped into Mr. Kell's role as the limited partner of various limited partnerships of which TDI was the general partner.
46. The combination of Respondent's contingent beneficiary interest, his role as TDI's counsel, and the size of the estate, created a situation that required Respondent to take greater precautionary measures to assure that Mrs. Kell's interests both were fairly protected and that she perceived them to be fairly protected. Respondent, therefore, admits to a violation of ERs 1.7(a)(1). Because of the litigation that resulted from Mrs. Kell's concerns about the administration of the U.S. estate, Respondent also admits to a violation of ER 8.4(d). (TR 28:6-23)
47. Respondent argues that his mental state was negligent, because he believed that retaining separate counsel for the estate and informing Mrs. Kell of her right to independent counsel were acts sufficient to eliminate any actual or potential conflict. He negligently failed to explain his various roles under the clear context of an actual or potential conflict of interest and to obtain either her waiver or her agreement to be separately represented. Respondent therefore admits to a violation of ER 1.7(b). For purposes of this Tender of Admissions, the

State Bar does not contest Respondent's state of mind. (TR 28:24 through 29:18)

Use of Estate Funds to a Limited Partnership Debt in Spartanburg, South Carolina

48. For purposes of this Tender of Admissions, the State Bar conditionally dismisses the allegations of Paragraphs 54-78 of the Complaint. Although the State Bar believes Respondent improperly used estate funds to pay a deficiency owed to BB&T Bank by TDI, Respondent paid the money back to Mrs. Kell in the settlement of the underlying probate action and, therefore, the State Bar has agreed to dismiss this allegation. Respondent contends that the events alleged therein involve Respondent's legal interpretation of the proper treatment of certain debts related to a property in Spartanburg, South Carolina. Such property was an asset of 12th Street and Washington Associates Limited Partnership, of which Mr. Kell had been the sole limited partner, and therefore, the property was part of Mr. Kell's U.S. estate. (TR 29:19 through 30:4)

Sale of Real Property Owned by Litchfield Road Limited Partnership

49. On July 12, 2006, a real estate sale closed in which TDI, as general partner of Litchfield Road Limited Partnership, sold the real estate owned by that limited partnership by special warranty deed for more than \$5 million. Mr. Kell had been the sole limited partner in the Litchfield Road Limited Partnership. (TR 30:6-15)
50. Respondent at the time of the closing was both the Personal Representative of the estate and the attorney for TDI. He reviewed and prepared documents as the attorney for TDI in anticipation of the sale. (TR 30:16-20)
51. Respondent did not notify Mrs. Kell or her attorneys, Mr. Raby, the estate's attorney of the sale after it occurred. Respondent contends that he believed, as Personal Representative, that the estate's interest in the limited partnership was the same, whether the underlying asset was

real estate, the cash proceeds of the sale of the real estate, or investments made by the general partner with such cash proceeds. As a result, no change had occurred that required notice to the estate or to Mrs. Kell. For purposes of this Tender of Admissions, Respondent admits that he should have notified Mrs. Kell and Mr. Raby, the estate's attorney. (TR (TR 30:21 through 31:10)

52. Under the terms of the Limited Partnership Agreement, the General Partner was required to dissolve the limited partnership following the real estate sale and distribute the assets of the partnership. Respondent did not initiate dissolution of the partnership on behalf of the General Partner. He contends that his failure to do so was the result of negligence. Respondent further contends that he did not believe he had any additional obligations with respect to the sale as Personal Representative, and that he had not been asked for any additional services or advice by TDI. For purposes of this Tender of Admissions, the State Bar accepts Respondent's contentions. (TR 31:11 through 32:2)

53. TDI subsequently invested the proceeds of the sale in Mortgages Ltd. Respondent was aware of this investment but did not believe it was necessary or required to disclose it to the estate attorney or Mrs. Kell. Based on Mortgages Ltd.'s performance at that time, Respondent did not consider TDI's investment to carry a substantial risk. Respondent knew that TDI was required to provide any reserves of the limited partnership to a liquidating trustee, and he knew that Mortgages Ltd. was not a liquidating trustee. For purposes of this Tender of Admissions, Respondent asserts, and the State Bar does not dispute that TDI, not Respondent, had such an obligation and that Respondent received no instructions from TDI as its attorney with respect to TDI's obligation. (TR 32:3 through 33:3)

54. For purposes of this Tender of Admissions, Respondent admits that this transaction resulted

in part from his earlier negligent failure to recognize the potential consequences of not having defined more clearly for Mrs. Kell his dual roles at Personal Representative and as TDI's lawyer, not having discussed a possible conflict waiver with her. Thus, this transaction is part of Respondent's prior admission of violations of ERs 1.7(a), 1.7(b), and 8.4(d). (TR 33:4-10)

Court Order Regarding the Sale of Baseline and Val Vista Limited Partnership

55. On January 17, 2007, the attorneys for Mrs. Kell filed an Emergency Motion to Freeze Estate Assets (the "Emergency Motion"). (TR 33:13-16)
56. On January 19, 2007, at the hearing on the Emergency Motion, Respondent voluntarily agreed to resign as Personal Representative. (TR 33:17-20)
57. The same day, Commissioner Miller signed an Order Appointing Temporary Personal Representative, Setting Bond and Restricting Assets (the "Order"). The Order stated: "All assets ... including all partnerships, limited partnerships, LLC's, and similar entities holding any assets formerly owned by decedent, are hereby restricted. There shall be no sale, encumbrance, or transfer of these assets until further order of this Court." (TR 33:21 through 34:5)
58. Respondent and Sperber-Porter who was represented by Rick Thomas as one of the beneficiaries of the estate, were both present at the January 19, 2007, hearing. (TR 34:6-10)
59. On January 25, 2007, a real estate transaction closed whereby the Baseline and Val Vista Limited Partnership, of which Mr. Kell had been the sole limited partner, sold its real property asset. The Purchase and Sales Agreement had commenced and was effective on or about August 1, 2006. (TR 34:11-17)
60. Respondent, acting as TDI's attorney, knew about the pending sale. Respondent reviewed

and prepared documents related to the sale. Respondent did not inform the Court, Mrs. Kell or her attorneys, the subsequent Personal Representative and his counsel, and Mr. Raby, the attorney for the estate of the pending sale. (TR 34:18-24)

61. Respondent contends that he reasoned that the limited partnership interests were subject to the Court's jurisdiction and the Order, but the underlying real estate was subject to neither and, therefore, TDI had discretion to manage that asset. For purposes of this Tender of Admissions, the State Bar accepts that such was Respondent's reasoning. Respondent admits that he did not inform the Court of the sales transaction or seek clarification of the Order. Respondent admits that he should have sought clarification of the Court's Order. Respondent admits that he violated Rule 53(c), Arizona Rules of the Supreme Court, and ER 8.4(d). Due to Respondent's admission that he violated Rule 53(c) and 8.4 (d), the State Bar will dismiss 8.4 (a) and (c). This admitted conduct was also a basis for charging 8.4 (a) and (c). (TR 34:25 through 36:1)
62. TDI invested the proceeds of the Baseline and Val Vista property in Mortgages Ltd. The conditional admissions stated in paragraphs 49- 62 of this Tender of Admissions apply as well to such investment.

CONDITIONAL DISMISSALS

63. The State Bar conditionally dismisses all allegations of the Complaint not specifically referenced herein. While Respondent committed serious errors in judgment, the State Bar believes they arose from, and are the product of, his failure to recognize the actual and potential conflict of interest (or perception thereof) caused by his roles as Personal Representative of the Kell estate, attorney for TDI, and spouse of a major beneficiary who was also the principal of TDI. From this failure to provide clear guidance to a foreign

national, who was not familiar with our laws, flowed extensive civil litigation resulting in the administration of a complex estate becoming even more complex. Respondent's greatest error in judgment was perhaps failing to recognize after Mr. Kell died that his every action likely would be scrutinized to determine whether his conduct as Personal Representative was honest. Respondent has already paid a heavy price for his miscalculation through a substantial settlement of the underlying civil matter. If this agreement is approved, he now will pay again through Bar discipline. (TR 36:4 through 38:25)

CONDITIONAL ADMISSIONS/CONCLUSIONS OF LAW

Respondent conditionally admits that he engaged in professional misconduct in the following ways: Respondent negligently was involved in the preparation of Mr. Kell's U.S. will while he was a contingent beneficiary and Respondent's wife was a beneficiary, in violation of ER 1.8 (c); after Mr. Kell died, Respondent had an actual or potential conflict of interest, which he failed to explain adequately, while acting as personal representative of the Kell estate because he also represented TDI (a company in which his wife became a 40% minority shareholder and which was the general partner in several limited partnerships in which Mr. Kell and later the estate was the limited partner) while Respondent was a contingent beneficiary and his wife was a beneficiary of the Kell U.S. estate, in violation ERs 1.7(a)(1) and 8.4 (d); Respondent failed to explain fully his actual or potential conflict or to obtain a conflict of interest waiver in violation of ER 1.7 (b); Respondent negligently failed to notify Mrs. Kell or her attorneys, or the estate's attorney of the sale of the real estate underlying the Litchfield Road Limited Partnership or the investment of the proceeds of the sale in Mortgages Ltd. and negligently did not initiate the dissolution of the partnership on behalf of the general partner TDI in violation of ER 1.7(a), 1.7

(b) and ER 8.4 (d); Respondent failed to notify Mrs. Kell or her attorneys, the estate's attorney, the subsequent Personal Representative or his counsel, or the Probate Court about the sale of the real estate underlying the Baseline and Val Vista Limited Partnership, and knowingly failed to seek clarification of the Court's Order restricting the assets, and also negligently failed to notify the above-mentioned individuals about the investment of the proceeds of the sale in Mortgages Ltd. and negligently did not initiate the dissolution of the partnership on behalf of the general partner TDI all of which led to extensive litigation and resulted in a violation of ER 8.4 (d) and Rule 53 (c).

The Hearing Officer finds that based on the conditional admissions the State Bar has proven by clear and convincing evidence that Respondent violated ERs 1.8 (c), 1.7 (a)(1), 1.7 (b) and 8.4 (d) and Rule 53 (c).

RESTITUTION

The parties have not included any order of restitution as Respondent paid \$225,000 for the Spartansburg deficiency and a substantial amount of money jointly with his wife to settle the probate action.

ABA STANDARDS

The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these 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. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994).

In determining an appropriate sanction, both the Court and the Commission consider 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. *In Re Tarletz*, 163 Ariz. 548, 789, P.2d 1049 (1990); *Standard* 3.0.

Duty Violated

Respondent violated his duties to the legal system. He was both personal representative of the estate of Mr. Kell and he was counsel for TDI and he was a contingent beneficiary of the estate and he was married to a beneficiary of the estate. (TR 44:1-11) He did not appropriately analyze actual and potential conflicts so that he could have better explained his multiple roles.

Mental State

The Hearing Officer agrees with the parties that Respondent's mental state underlying the transactions and events at issue in this case was negligent; however, Respondent's failure to seek clarification of a court order was knowingly done.

Injury

Mrs. Kell was actually injured. She was not fully informed of what was going on in the process. As a result she filed a lawsuit. She spent a significant amount of time in the litigation attempting to find out what Respondent did in his various roles. Although Respondent ultimately reached a settlement with Mrs. Kell, she was required to go through a long process. (TR 44:14 through 45:2) Respondent recognizes that although Mrs. Kell may have sued even without Respondent's involvement her litigation would have been less complicated. He admits that his failure to adequately disclose matters caused actual injury to the administration of justice. (TR 45:3 through 46:8)

Given the conduct in this matter, the most applicable Standards are 4.3 “Failure to Avoid Conflicts of Interest” and 6.2 “Abuse of the Legal Process.” Specifically, *Standard* 4.3 provides: “Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. *Standard* 6.2 provides: “Suspension is appropriate when a lawyer knowingly violates a court order or rule and there is injury or potential injury to a client or party, or interference with legal proceedings.”

The Hearing Officer notes that the parties have agreed that Respondent’s conduct was negligent concerning conflicts of interest. Yet *Standard* 4.3 requires knowing conduct. The parties adequately explained in the hearing that sometimes a specific *Standard* does not exactly fit the facts of a case. (TR 41:20 through 42:8) As counsel for Respondent explained, “Meaning that Mr. Svejda had knowledge of the attenuating circumstances. And the final agreement between the parties is that the knowledge he had led to a negligent decision but that he had the requisite knowledge to make a better decision. He didn’t purposefully - - or he didn’t make - - he didn’t decide not to disclose a potential conflict of interest. In fact, there’s questions as to whether it was an actual conflict. But the point here is that he had all of the knowledge, he was a lawyer in the position best - - he was best situated to explain everything thoroughly to all parties to allow the parties then to make their own decisions. And he analyzed it himself. His analysis wasn’t wrong necessarily, but what he didn’t do was ask himself the question of whether he had given all of the facts to all of the interested parties to allow them to make - - themselves to make their own decisions.” (TR 42:14 through 43:6)

The Hearing Officer agrees that both *Standards* 4.3 and 6.2 are applicable in Respondent’s case.

Having determined the presumptive sanction is suspension, the Hearing Officer and the parties next considered the applicable aggravating and mitigating circumstances, as set forth in the *Standards* and agree that the following apply in this matter.

Aggravating Factors:

Standard 9.22(c) Pattern of Misconduct: Respondent made a series of errors in judgment which arose from and are the product of his failure to recognize the actual and potential conflict of interest (or perception thereof) caused by his roles as Personal Representative of the Kell estate, attorney for TDI, and spouse of a major beneficiary who was also the principal of TDI. As a result, Respondent committed several ethical violations.

Standard 9.22(d) Multiple Offenses: See 9.22 (c)

Standard 9.22(h) Vulnerability of Victim: Mrs. Kell is a foreign national who is not familiar with U.S. laws. Although Respondent recommended that Mrs. Kell obtain independent counsel, Respondent failed to explain fully why such independent representation was advisable due to Respondent's own actual or potential conflict of interest. Due to Respondent's conduct, extensive civil litigation resulted.

Standard 9.22(i) Substantial Experience in the Practice of Law: Respondent was admitted to practice law in Arizona on October 25, 1986.

Mitigating Factors:

Standard 9.33(a) Absence of Discipline History: Respondent has no discipline history.

Standard 9.33(b) Absence of Dishonest or Selfish Motive: Respondent believed that he could serve as Personal Representative of the Kell U.S. estate and also represent TDI, because he had obtained separate counsel for the estate and had advised Mrs. Kell of her right to independent counsel. He committed errors of judgment that were neither dishonest nor selfish.

Standard 9.33(d) Timely Good Faith Effort to Make Restitution: Respondent agreed to settle the civil lawsuit filed regarding his handling of the probate estate. Respondent agreed to pay \$225,000 for the Spartansburg debt. Additionally, Respondent and his wife jointly agreed to provide Mrs. Kell with a substantial amount of money to settle the rest of the lawsuit.

Standard 9.33(e) Full and Free Disclosure to Disciplinary Board

Respondent was cooperative throughout the lengthy investigation by the State Bar in this matter. Respondent was requested to provide information on more than ten occasions.

Standard 9.33(j) Delay in the Proceedings: Although this case took 13 months to investigate before a Complaint was filed, the underlying probate case was complex, numerous witnesses were interviewed, and several thousand pages of records were reviewed.

PROPORTIONALITY ANALYSIS

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994)(quoting *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 615, 691 P.2d 695 (1984).

Although the below cases are not exactly like the present case, they demonstrate that a six month suspension is an appropriate sanction in cases involving similar rule violations.

In re Shannon 179 Ariz. 52, 876 P.2d 548 (1994). Mr. Shannon was suspended for one year for violating 1.4 (a) and (b), 1.7 (b), 1.15, 3.2, 3.3, 8.4 (c) and (d). Among other infractions, Mr. Shannon represented two defendants with conflicting interests in civil litigation with the intent of obtaining an advantage for one client over the other. There was one mitigating factor:

absence of a prior disciplinary record. Mr. Shannon's conduct was found to be dishonest, whereas there is no allegation of dishonesty in this case. Moreover, unlike Mr. Shannon, Respondent did not represent two clients. He represented TDI, a company in which his wife had a 40% minority interest while also acting as Personal Representative of an estate in which his wife had an interest as a beneficiary. Respondent's acts indicate poor judgment, not dishonest intent.

In re Allen, SB 00-0025 (2000). Mr. Allen received a thirty day suspension for violating ERs 1.1, 1.4, 1.6, 1.7, and 1.8. Mr. Allen, while assisting clients with their estate planning, used their detailed net worth information to identify prospective investors for a business relationship he had with investment solicitors offering a timber harvest secure loan program. Mr. Allen invited his clients to attend informational meetings about the loan program without the requisite competence to counsel his clients. Mr. Allen further failed to ensure that his clients' investments were properly secured, failed to disclose his relationship and possible compensation with the investment solicitors and failed to inform clients of the mishandling of their investments and financial losses occurred. There were no aggravating factors and four mitigating factors found: absence of prior disciplinary record, absence of dishonest or selfish motive, full and free disclosure to the disciplinary board or cooperative attitude toward proceedings.

In re Davies, SB-01-0158 (2001). Mr. Davies received a thirty day suspension for violating ERs 1.7 (b), 1.8 (c) and 8.4 (d). Mr. Davies drafted a will for a close personal friend and, on multiple occasions, made amendments to the will that increased Davies' proportionate share in the will's proceeds. Although it appears that these actions were pursuant to the client's wishes, and were without undue influence, Davies failed to advise his client to seek the advice of independent counsel. There were three aggravating factors found: multiple offenses,

vulnerability of the victim, and substantial experience in the practice of law. There were five mitigating factors found: absence of prior disciplinary record, absence of a dishonest or selfish motive, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, and remorse.

In re Riley SB-08-0023 (2008), Mr. Riley received a two-year suspension for violating ERs 8.4 (c) and (d). Mr. Riley was co-personal representative of the Estate of his mother. Mr. Riley and his twelve siblings were the beneficiaries of the estate. Mr. Riley had personally taken funds in the amount of \$156,632.00 from the Estate. Mr. Riley had not obtained authorization from the probate court, nor did he inform or obtain consent from the other Estate beneficiaries to take the funds in violation of A.R.S. Section 14-3715. Mr. Riley reasonably believed that he would stand to inherit at least the amount that he had withdrawn. The duties violated were not those owed to a client but rather occurred during his appointment as personal representative. Riley paid the money back in March 2005. There was one aggravating factor: substantial experience in the practice of law. There were three mitigating factors: absence of a prior disciplinary record, timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Unlike this case, Mr. Riley's conduct was found to be deceitful. Indeed, his misconduct included ER 8.4(c), criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Again, Respondent in this case did not act with dishonest intent but rather failed to recognize that his acts would be subject to intense scrutiny and required an elevated level of care and communication.

RECOMMENDATION

The Hearing Officer agrees with the parties that under the specific facts of this case the agreed upon sanction is proportionate and appropriate. Respondent's conduct caused protracted litigation. Respondent failed to appreciate how his actions would be perceived by Mrs. Kell. (TR 40:4) He did not take steps necessary to apprise everyone involved of his dual roles. If he had disclosed his roles and obtained a conflict of interest waiver from Mrs. Kell she may have better understood her potential need for separate counsel. He should not have assisted Mr. Kell in acquiring a form will when he knew that he was a contingent beneficiary of the will and his wife was a beneficiary. Respondent should have notified Mrs. Kell or her attorneys or the estate's attorneys of the sale of the real estate underlying the Litchfield Road Limited Partnership or the investment of the proceeds of the sale in Mortgages Ltd. Respondent should have initiated the dissolution of the partnership on behalf of the general partner TDI.

He failed to notify Mrs. Kell or her attorneys or the estate's attorney or the subsequent Personal Representative or his counsel or the Probate Court about the sale of the real estate underlying the Baseline and Val Vista Limited Partnership. Respondent knowingly failed to seek clarification of the Court's Order restricting assets, as well as not notifying the above-mentioned individuals about the investment of the proceeds of the sale in Mortgages Ltd.

A six month suspension and probation will serve to protect the public, instill confidence in the public, deter other lawyers from similar misconduct, and maintain the integrity of our self-regulated profession. This agreement provides for a sanction that meets the goals of the disciplinary system.

CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Recognizing it is the prerogative of the Disciplinary Commission and the Supreme Court to determine the appropriate sanction, the Hearing Officer concludes that the objectives of discipline will be met by the discipline as set forth in the Tender of Admissions, the terms of which are incorporated herein by reference including a six month suspension and a one year term of probation as well as the payment of the costs and expenses of these proceedings.

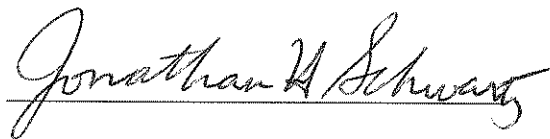
SANCTION

The Hearing Officer recommends that Respondent be sanctioned as follows:

1. Respondent shall be suspended from the practice of law for a period of six months;
2. Respondent shall contact State Bar of Arizona publications at 602-340-7318 to either obtain and listen to the CD or obtain and view the DVD entitled "The Ten Deadly Sins of Conflict" within ninety (90) days of the order of reinstatement. Respondent may alternatively go to the State Bar website (www.myazbar.org <<http://www.myazbar.org>>) and complete the self-study online version. Respondent shall provide Bar Counsel with evidence of completion by providing copies of handwritten notes. Respondent shall be responsible for the cost of the CD, DVD or online self-study.
3. Upon reinstatement, Respondent shall be placed on probation for a period of one year, under the following terms and conditions:
 - a. The probation period will begin to run at the time of the order of reinstatement.
 - b. Respondent shall comply with any terms of probation deemed appropriate and ultimately included in the order of reinstatement.

- c. If Respondent fails to comply with any of the foregoing conditions and the State Bar receives information about non-compliance, bar counsel shall file with the Hearing Officer a Notice of Noncompliance. The Hearing Officer shall conduct a hearing at the earliest applicable date, but in no event later than 30 days after receipt of notice, 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 conditions, the burden of proof shall be on the State Bar to prove noncompliance by a preponderance of the evidence.⁵
4. Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings. An Itemized Statement of Costs and Expenses is attached as Exhibit "A," and incorporated herein. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's Office in this matter.

DATED this 28 day of June, 2010



Jonathan H. Schwartz
Hearing Officer 6S

⁵ The Tender of Admissions at page 24, line 17 incorrectly stated that the burden of proof in a violation of probation proceeding would be by clear and convincing evidence. Rule 60 of the Rules of the Supreme Court was amended effective January 1, 2009 so that the burden of proof in a probation violation matter was changed to by a preponderance of the evidence.

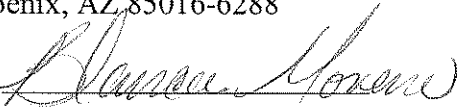
Original filed with the Disciplinary Clerk
this 28th day of June, 2010

A copy of the foregoing was mailed
this 28th day of June, 2010 to:

J. Scott Rhodes
Jennings Strouss & Salmon, PLC
1 E. Washington Street, Ste. 1900
Phoenix, AZ 85004-2554
(Respondent's Counsel)

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Harriet M. Bernick, Esq.
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

By: 

/JS

Exhibit “A”

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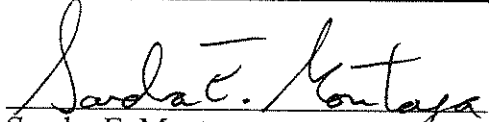
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1	01/30/09	Interview Matt Dana	\$105.00
	02/02/09	Prepare report of Matt Dana interview	\$87.50
2	02/10/09	Interview attorney Paul Harter	\$70.00
	02/11/09	Prepare memo to bar counsel	\$122.50
3	02/12/09	Travel and mileage to serve subpoena	\$51.50
	03/06/09	Atwood Reporting Service for deposition of Respondent	\$1044.80
4	03/17/09	Attend interview w/E. Kell; Prepare summary	\$70.00
	03/26/09	Travel and mileage to serve subpoenas	\$27.50
5	04/10/09	Computer investigation to review court file; Request CD of hearing from Sup. Ct.	\$17.50
6	04/10/09	Travel and mileage for service of subpoenas on Connie Rhomberg, Barbara Schaer and Mary Carvalho; Attempts to serve Mary Lacoco, and Colleen Harrington	\$198.30
7	04/13/09	Attempts to contact Connie Rhomberg; Maria Carvalho, and Colleen Harrington; Computer investigation to locate Harrington and Mary Lou Lacoco.	\$43.75
8	04/14/09	Call from Connie Rhomberg; Computer investigation, attempts to locate Mary Lacoco & Colleen Harrington	\$52.50
9	04/14/09	Travel and mileage for service and attempts of service of subpoena's	\$179.50
10	04/15/09	Prepare memo to bar counsel	\$35.00
11	04/24/09	Travel and mileage to interview of Mary Lacoco; Prepare report	\$153.25
12	04/27/09	Interviews: Irina, Schoop, and Chrissie	\$52.50
13	04/28/09	Pick up CD and DVD from law library	\$26.30
14	05/06/09	Interview Dovico and Harter; Teleconference w/ Marlene Appel	\$122.50
15	05/18/09	Interview Connie Rhomberg	\$52.50
16	06/01/09	Travel and mileage to serve subpoena	\$4.40
17	06/03/09	Atwood Reporting Service: Deposition of Douglas J. Kingston	\$831.85
18	10/06/09	Atwood Reporting Service, Deposition of Eva Sperber-Porter	\$1022.45
19	10/31/09	Marlene Appel, Attorney Certified Specialist: Estate & Trust review of Svejda documents	\$2500.00
20	01/08/10	Prepare reports on Chrissie, Lisa, Marlene, Irina, Connie, Harter and DoVico	\$122.50
21	02/26/10	Computer investigation	\$8.75
22	02/18/10	German Translation of e-mail	\$50.00
23	03/01/10	Computer investigation	\$8.75

21	Total for staff investigator charges	\$7,594.85
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22	<u>TOTAL COSTS AND EXPENSES INCURRED</u>	<u>\$8,794.85</u>
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 Sandra E. Montoya
 Lawyer Regulation Records Manager

5-3-10
 Date