

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

**CHRISTOPHER A. COMBS,
Bar No. 002266**

Respondent.

PDJ 2017-9090

**FINAL JUDGMENT AND
ORDER**

[State Bar No. 16-1113]

FILED NOVEMBER 24, 2017

The Presiding Disciplinary Judge having reviewed the Agreement for Discipline by Consent filed on November 3, 2017, pursuant to Rule 57(a), Ariz. R. Sup. Ct., accepts the parties' Agreement.

Accordingly:

IT IS ORDERED Respondent, **Christopher A. Combs**, is admonished for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective immediately.

IT IS FURTHER ORDERED Mr. Combs shall pay the costs and expenses of the State Bar of Arizona for \$1,200.00, within thirty (30) days from this order. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding

Disciplinary Judge's Office with these disciplinary proceedings.

DATED this 24th day of November, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/mailed
this 24th day of November, 2017, to:

Craig D. Henley
Senior Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

J. Scott Rhodes
Anne McClellan
Jennings Strouss & Salmon, PLC
One E. Washington Street, Suite. 1900
Phoenix, AZ 85004-2554
Email: srhodes@jsslaw.com
amcclellan@jsslaw.com
Respondent's Counsel

by: MSmith

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

CHRISTOPHER A. COMBS,
Bar No. 002266

Respondent.

PDJ-2017-9090

**ORDER ACCEPTING
AGREEMENT**

[State Bar No. 16-1113]

FILED NOVEMBER 24, 2017

The parties filed an Agreement for Discipline by Consent pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct.¹, on November 3, 2017. The Complaint was filed on July 13, 2017, alleging a single violation of ER 1.7. The answer was filed on August 11, 2017. An initial case management conference was held on August 25, 2017. A notice of settlement was filed on October 6, 2017.

Rule 57 requires admissions be tendered solely “...in exchange for the stated form of discipline....” Under that rule, the right to an adjudicatory hearing is waived only if the “...conditional admission and proposed form of discipline is approved....” If the agreement is not accepted, those conditional admissions are automatically withdrawn and shall not be used against the parties in any subsequent proceeding.

¹ Unless otherwise stated, all Rule references are to the Ariz. R. Sup. Ct.

As required under Rule 53(b)(3), notice of this Agreement and of the opportunity to object was provided by letter to the complainant(s) on October 12, 2017. The complainant timely submitted to the State Bar an objection on October 16, 2017. The objection was filed with the Agreement on November 3, 2017.

The PDJ initially considered setting a hearing on the agreement. However, rather than concentrate on the Complaint and the Agreement, the objection focused on the exercise of discretion by the State Bar in its handling of their charge. No authority was cited, nor is this judge aware of any authority, by which the Presiding Disciplinary Judge has supervisory control over the processing of a charge by the State Bar. That discretion is well established under Rule 49.

Rule 49(b) states Bar Counsel shall exercise discretion in discipline proceedings and that oversight of that prosecution is vested pursuant to Rule 49(a) with the Chief Bar Counsel, not the Presiding Disciplinary Judge.

Much of the objection centers on the position that the complainants are unaware of what ethical rules are alleged to have been violated in the Complaint. The objection seems to argue the State Bar had a requirement to forward a copy of the Complaint to the complainant, yet cites no rule authority for that position. It is assumed from their argument that neither complainants nor their counsel requested a copy of the Complaint from either the State Bar or the Disciplinary Clerk. The Complaint has been open to the public under Rule 70(a)(5) since it was filed on July

13, 2017 and available to complainants. Any reasonable inquiry would have disclosed that information. That neither complainants nor their attorney apparently made any such inquiry detracts from, rather than supports their objection.

Agreements for Discipline by Consent are governed by Rule 57(a). The form of the agreement is established by Rule 57(b). The agreement must have “a statement as to the specific disciplinary rule that was violated, or conditionally admitted to having been violated.” It is not relevant what ethical rules were not charged, could have been charged, but weren’t, or might have been violated.

To the extent complainants have concerns with damages or restitution, the Supreme Court held in *Matter of Murphy*, 188. Ariz. 375, 936 P.2d 1269 (1997), that consequences such as monetary damages and restitution are best left to civil courts. While the PDJ regrets that the complainants have broad dissatisfaction, the analysis takes into consideration the objection of complainants and is otherwise limited to the Complaint and the Agreement before the PDJ.

The Agreement details a factual basis to support the conditional admissions. It is incorporated by this reference. Mr. Combs conditionally admits he violated Rule 42, ER 1.7 (conflict of interest/concurrent clients. The agreed upon sanctions include an admonition and costs of these disciplinary proceedings totaling \$1,200.00 within thirty (30) days from the date of this order.

Rule 58(k) provides sanctions shall be determined under the *American Bar Association Standards for Imposing Lawyer Sanctions*, (“Standards”).

The parties agree *Standard 4.34, Failure to Avoid Conflicts of Interest* applies to Mr. Comb’s violation of ER 1.7 and provides that admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer’s own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

As stipulated, Mr. Combs negligently failed to recognize his concurrent conflict of interest in representing both clients and failing to obtain consent in writing to continue the representation. There was no actual harm to clients based on the malpractice settlement and the \$20,000 write-off of legal fees by Mr. Comb’s firm.

The parties agree aggravating factor 9.22(i) substantial experience in the practice of law is present. The factors present in mitigation are *Standard 9.32(a)* absence of prior disciplinary record, 9.32(b) absence of a dishonest or selfish motive, 9.32(d) timely good faith effort to rectify consequences of misconduct, 9.32(e) cooperative attitude toward proceedings, and 9.32(k) imposition of other penalties or sanctions.

After consideration of the aggravating factor and the mitigating factors, the parties stipulate that the presumptive sanction of admonition is an appropriate sanction. Attorney discipline serves to protect the public, the profession and the administration of justice, not to punish the lawyer. The PDJ determined the objective of discipline is met by the admonition.

Now therefore,

IT IS ORDERED accepting and incorporating the Agreement and any supporting documents by this reference. The agreed upon sanctions are admonition and the payment of costs within thirty (30) days. There are no costs incurred by the Office of the Presiding Disciplinary Judge. A final judgment and order is signed this date.

DATED this 24th day of November, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

COPY of the foregoing e-mailed/mailed
on this 24th day of November 2017, to:

Craig D. Henley
Senior Bar Counsel
State Bar of Arizona
4201 N 24th Street, Suite 100
Phoenix, Arizona 85016-6266
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Anne McClellan
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Respondent's Counsel

by: MSmith

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OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

NOV 3 2017

FILED
BY 

J. Scott Rhodes, Bar No. 016721
Anne McClellan, Bar No. 025521
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Respondent's Counsel

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

**CHRISTOPHER A. COMBS
Bar No. 002266**

Respondent.

PDJ 2017-9090

**AGREEMENT FOR DISCIPLINE
BY CONSENT**

State Bar File Nos. 16-1113

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Christopher A. Combs, who is represented in this matter by counsel,

J. Scott Rhodes, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct.

A probable cause order was entered on May 4, 2017 and a formal complaint has been filed in this matter. Respondent voluntarily waives the right to an adjudicatory hearing, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

Pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct., notice of this agreement was provided to the complainant by letter dated October 12, 2017. Complainant(s) have been notified of the opportunity to file a written objection to the agreement with the State Bar within five (5) business days of bar counsel's notice. Copies of Complainants' objections, if any, have been or will be provided to the presiding disciplinary judge.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, Ariz. R. Sup. Ct., ER 1.7 ~ Conflicts Current Clients.

Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: **Admonition.**

Respondent also agrees to pay the costs and expenses of the disciplinary proceeding, within 30 days from the date of this order, and if costs are not paid within the 30 days, interest will begin to accrue at the legal rate.¹

The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit A.

FACTS

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona since October 25, 1968.
2. At all times relevant, Respondent was the owner of Combs Law Group, P.C.

COUNT ONE (File no. 16-1113/Gemmell & Grannan)

3. Between October 2000 and February 2008, Homes by Bob Janecek, LLC executed several promissory notes in favor of James Gemmell and Dennis

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

Grannan (hereinafter referred to as “Gemmell and Grannan”) totaling \$930,000.00 for the development of certain parcels of land in Mohave County.

4. The notes were secured by deeds of trust on the parcels of land to be developed, but the deeds did not fully secure the promissory notes.

5. In early 2008, Adam Martinez was licensed to practice law and began his employment with Respondent in April 2008.

6. In 2009, Homes by Janecek and Gemmell and Grannan entered into settlement negotiations regarding repayment of the promissory notes, and Homes by Bob Janecek, LLC offered to deed to Gemmell and Grannan certain parcels of property in order to settle the debt.

7. When it was determined that the value of the offered parcels did not secure the amount of the debt, settlement discussions ceased.

8. On February 26, 2010, Respondent filed the Mohave County Superior Court lawsuit of *Gemmell & Grannan v. Homes by Bob Janecek, LLC, et. al.*, CV 2010-07023 (hereinafter referred to as “the Lawsuit”) by verified complaint signed by Gemmell and Grannan, asserting seven separate causes of action including breach of contract, fraud, misrepresentation, and an alter ego theory.

///

9. Thereafter, Respondent recorded approximately sixty-three (63) *Notices of Lis Pendens* against parcels of land believed to be owned by Homes by Bob Janecek, LLC and/or its owners (hereinafter collectively referred to as “the Defendants”) including, but not limited to, twenty-seven (27) that Respondent later learned were not owned by the Defendants.

10. On November 16, 2010, the Defendants filed a motion in the Lawsuit seeking to add a counterclaim alleging that certain of the *lis pendens* were wrongfully recorded in violation of A.R.S. § 33-420.

11. On January 4, 2011, Martinez explained to Gemmell and Grannan that the firm had mistakenly recorded *lis pendens* on property not owned by Defendants.

12. Martinez also sent Gemmell and Grannan releases of the wrongfully filed notices for Gemmell and Grannan’s signature and notarization, explaining that Gemmell and Grannan would be reimbursed for any and all of the costs associated with the improper filings.

13. On October 10, 2012, following a mediation in the Lawsuit, Grannan sent an e-mail to Respondent instructing him to stop all work on the Lawsuit.

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14. On October 17, 2012, a Notice of Substitution of Counsel was filed allowing Arizona attorney Gary Ansel to continue as sole attorney of record in the Lawsuit.

15. Summary judgment was granted against Gemmell and Grannan on the issue of the wrongfully recorded notices, and a judgment was entered against them in the amount of \$384,699.74.

16. Respondent's malpractice insurance carrier paid the full amount of the judgment entered against Gemmell and Grannan.

17. In 2015, Ansel negotiated a settlement with the Defendants in favor of Gemmell and Grannan in excess of the originally requested relief of \$930,000.

CONDITIONAL ADMISSIONS

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

Respondent conditionally admits that his conduct violated Rule 42, Ariz. R. Sup. Ct., ER 1.7 ~ Conflicts Current Clients.

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CONDITIONAL DISMISSALS

There are no conditional dismissals.

RESTITUTION

Restitution is not an issue in this matter.

SANCTION

Respondent and the State Bar of Arizona agree that based on the facts and circumstances of this matter, as set forth above, the following sanctions are appropriate: Admonition.

LEGAL GROUNDS IN SUPPORT OF SANCTION

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

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

The parties agree that *Standard 4.34* is the appropriate *Standard* given the facts and circumstances of this matter. *Standard 4.34* states, in pertinent part:

Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

Even if *Standard 4.33* were appropriate, the parties believe there is adequate mitigation to reduce the sanction from Reprimand to Admonition. *Standard 4.33* states:

Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Specifically, the parties agree that Respondent's lack of a dishonest motive is sufficient to adjust even a presumptive sanction of Reprimand down to an Admonition.

The duty violated

As described above, Respondent's conduct violated his duty to his clients.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent negligently violated ER 1.7 of the Rules of Professional Conduct by representing Gemmell and Grannan when having a concurrent conflict of interest and failing to obtain informed consent in writing to continue the representation, as stated in ER 1.7(b).

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was no actual harm to the clients Respondent's clients received a substantial settlement through Respondent's malpractice insurance company.² The parties also agree that Respondent has completed the State Bar Continuing Legal Educational (CLE) class "Ten Deadly Sins of Conflict of Interest".

² Complainants contend that they should receive, in addition to the settlement of the malpractice suit, a refund of legal fees they paid to Respondent. Respondent contends, and for purposes of this agreement the State Bar does not dispute, that Respondent was compensated for legal services beyond the *lis pendens* issue, and that the firm later wrote-off approximately \$20,000 to the Complainants, both of which combined indicate that legal fees are not part of the injury in this case. On information and belief, Complainants received a settlement from Homes by Janecek, LLC in the amount of \$1,300,000 plus attorneys' fees to be submitted to the Court. The Court subsequently awarded Complainants attorneys' fees and costs in the amount of \$145,618.53, giving Complainants a total recovery of \$1,445,618.53 for the claims arising from Homes by Janecek's failure to pay the promissory notes totaling \$930,000. Therefore, on information and belief the amount Complainants received from Homes by Janecek was sufficient to cover the fees Complainants paid to Respondent (\$149,441.60), as well as pay for the fees charged by Ansel (\$151,319.62).

Aggravating and mitigating circumstances

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

In aggravation:

Standard 9.22 (i) – substantial experience in the practice of law.

In mitigation:

Standard 9.32 (a) – absence of prior disciplinary record;

Standard 9.32 (b) – absence of a dishonest or selfish motive;

Standard 9.32(d) – timely good faith effort to ... rectify the consequences of misconduct: Although Respondent negligently failed to recognize his conflict of interest, he did so while attempting to rectify the firm's mistake with respect to the *lis pendens*

Standard 9.32(e) – full and free disclosure to the disciplinary board or cooperative attitude toward proceedings: Respondent has fully cooperated and, in addition, took the CLE “The Ten Deadly Sins of Conflict”;

Standard (k) – imposition of other penalties or sanctions: While Respondent did not personally pay the malpractice judgment, settlement of an insured malpractice claim negatively impacts a lawyer's insurance premiums. In addition, Respondent's firm wrote-off Complainants' approximately \$20,000 in legal fees.

Discussion

The parties have conditionally agreed that, upon application of the aggravating and mitigating factors to the facts of this case, the presumptive sanction is appropriate.

The parties have conditionally agreed that a greater or lesser sanction would not be appropriate under the facts and circumstances of this matter.

This agreement was based on the following:

In this case, Respondent negligently violated ER 1.7 of the Rules of Professional Conduct by representing Gemmell and Grannan when having a concurrent conflict of interest and failing to obtain informed consent in writing to continue the representation, as stated in ER 1.7(b).

Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

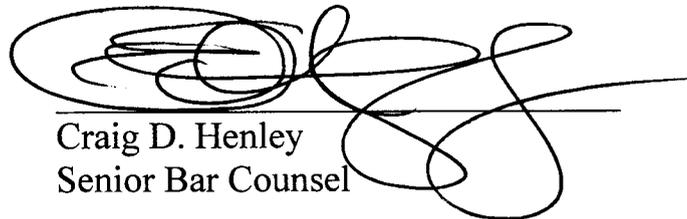
CONCLUSION

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

A proposed form order is attached hereto as Exhibit B.

DATED this 3rd day of November, 2017.

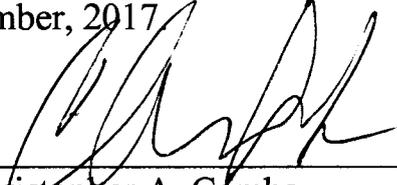
STATE BAR OF ARIZONA



Craig D. Henley
Senior Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

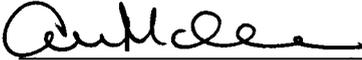
DATED this 2nd day of November, 2017



Christopher A. Combs
Respondent

DATED this 2nd day of November, 2017.

Jennings Strouss & Salmon, PLC



J. Scott Rhodes
Anne McClellan
Counsel for Respondent

Approved as to form and content

Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this ___ day of November, 2017.

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

DATED this _____ day of November, 2017.

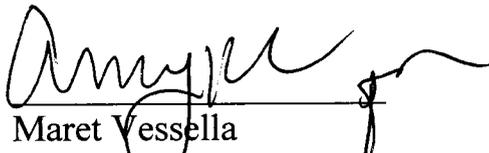
Christopher A. Combs
Respondent

DATED this _____ day of November, 2017.

Jennings Strouss & Salmon, PLC

J. Scott Rhodes
Anne McClellan
Counsel for Respondent

Approved as to form and content



Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 3rd day of November, 2017.

Copy of the foregoing emailed
this 3rd day of November, 2017, to:

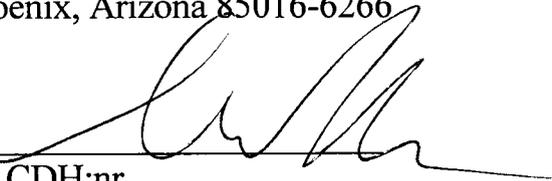
The Honorable William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
1501 West Washington Street, Suite 102
Phoenix, Arizona 85007
E-mail: officepdj@courts.az.gov

Copy of the foregoing mailed/emailed
this 3rd day of November, 2017, to:

J. Scott Rhodes
Anne McClellan
Jennings Strouss & Salmon, PLC
One E. Washington Street, Suite 1900
Phoenix, AZ 85004-2554
Email: srhodes@jsslaw.com
Respondent's Counsel

Copy of the foregoing hand-delivered
this 3rd day of November, 2017, to:

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

by: 

CDH:nr

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Christopher A. Combs, Bar No. 002266, Respondent

File No. 16-1113

Administrative Expenses

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

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

General Administrative Expenses for above-numbered proceedings

\$1,200.00

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

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges \$ 0.00

TOTAL COSTS AND EXPENSES INCURRED \$1,200.00

EXHIBIT B

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

**CHRISTOPHER A. COMBS,
Bar No. 002266,**

Respondent.

PDJ 2017-9090

**FINAL JUDGMENT AND
ORDER**

[State Bar No. 16-1113]

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

Accordingly:

IT IS HEREBY ORDERED that Respondent, **Christopher A. Combs**, is hereby admonished for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective immediately.

IT IS FURTHER ORDERED that Respondent shall be subject to any additional terms imposed by the Presiding Disciplinary Judge.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$ _____, within 30 days from the date of service of this Order.

IT IS FURTHER ORDERED that Respondent shall pay the costs and expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings in the amount of _____, within 30 days from the date of service of this Order.

DATED this _____ day of November, 2017.

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

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this _____ day of November, 2017.

Copies of the foregoing mailed/mailed
this _____ day of November, 2017, to:

J. Scott Rhodes
Anne McClellan
Jennings Strouss & Salmon, PLC
One E. Washington Street, Suite. 1900
Phoenix, AZ 85004-2554
Email: srhodes@jsslaw.com
Respondent's Counsel

Copy of the foregoing emailed/hand-delivered
this ____ day of November, 2017, to:

Craig D. Henley
Senior Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

Copy of the foregoing hand-delivered
this ____ day of November, 2017 to:

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

by: _____



A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

Geoffrey M. T. Sturr

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October 19, 2017

Via U.S. and Electronic Mail

Craig D. Henley, Esq.
Senior Bar Counsel - Litigation
State Bar of Arizona
4201 N. 24th St., Suite 100
Phoenix, AZ 85016-6266

Re: Christopher Combs (16-1113)

Dear Craig:

Enclosed please find Complainants' objection to the proposed consent agreement.

Yours very truly,

A handwritten signature in black ink that reads "Geoffrey M. T. Sturr".

Geoffrey M. T. Sturr

GMTS:dh
Enclosure
7325218

Geoffrey M. T. Sturr, No. 014063
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(602) 640-9000
gsturr@omlaw.com

Attorney for Complainants

BEFORE THE PRESIDING DISCIPLINARY JUDGE

In the Matter of a Member of the
State Bar of Arizona,

Christopher A. Combs,
Bar No. 002266

Respondent.

PDJ 2017-9090

**COMPLAINANTS' OBJECTION
TO DISCIPLINE BY CONSENT**

[State Bar No. 16-1113]

Pursuant to Rule 53(b)(3), Ariz. R. S. Ct., Complainants James Gemmell and Dennis Grannan, through their counsel, submit the following objection to the terms of an agreement for discipline by consent between the State Bar and Respondent Christopher Combs, and ask to be heard at any hearing concerning the agreement.

I. Summary of Grounds for Objection.

Through an October 13, 2017 e-mail, the State Bar told Mr. Gemmell and Mr. Grannan that it will enter into a consent agreement under which Respondent would, if the agreement is accepted by the Presiding Disciplinary Judge, receive an admonition for violating ER 1.7.

Mr. Gemmell and Mr. Grannan respectfully ask the Presiding Disciplinary Judge to reject the agreement. Their faith in the legal system was shattered by Mr.

Combs. They are dumbfounded, angry and disillusioned by the State Bar's handling and proposed disposition of their charge.

Mr. Gemmell and Mr. Grannan are former clients of Mr. Combs. They submitted a charge on April 6, 2016, expecting that the State Bar would meaningfully investigate the charge and hold Mr. Combs accountable for clear violations of his ethical duties (primarily ERs 1.4, 1.7 and 1.5) that had caused them substantial harm and were of public importance.

After approximately one year (during which the State Bar took no apparent steps to competently investigate their charge), Mr. Gemmell and Mr. Grannan received a March 2, 2017 letter from the State Bar which stated, in material part, "[a]fter our investigation, we have decided to recommend to the Attorney Discipline Probable Cause Committee . . . the following disposition of the matter: Order of Admonition with Probation." The State Bar did not, as Rule 55(b)(2)(B) requires, "provide to [Mr. Gemmell and Mr. Grannan] a written explanation of the recommendation," or otherwise identify which of the ERs identified in the charge the State Bar found Respondent to have violated.

Mr. Gemmell and Mr. Grannan were stunned by the letter and submitted a written objection, pursuant to Rule 55(b)(2)(B). They asked the Attorney Discipline Probable Cause Committee (the "ADPCC") to reject the State Bar's recommendation "because: (1) reprimand is the presumptive sanction under the undisputed facts and the applicable ABA Standards for Imposing Lawyer Sanctions for Mr. Combs's violations of ERs 1.4 and 1.7; and (2) Mr. Gemmell and Mr. Grannan presented sufficient evidence for the State Bar to find that Mr. Combs violated ER 1.5 by charging an unreasonable fee."

Approximately six weeks later, the State Bar sent Mr. Gemmell and Mr. Grannan a letter dated May 5, 2017 which stated, in part, that the ADPCC had "determined that probable cause exists for the filing of a formal complaint against

Mr. Combs. You will be kept informed of the case as it progresses.” The State Bar did not tell Mr. Gemmell and Mr. Grannan in that letter the specific ERs for which probable cause had been found. It was nevertheless clear, given the terms of Rule 55(c)(2)(D) and (E), that the ADPCC had expressly rejected the State Bar’s recommendation that Respondent receive an admonition and probation, and directed the State Bar to file and pursue a formal complaint.

Over the next four months, Mr. Gemmell and Mr. Grannan again heard *nothing* from the State Bar. The State Bar eventually filed a complaint, but did not contact Mr. Gemmell and Mr. Grannan before doing so to discuss the facts alleged in the complaint. The State Bar did not tell Mr. Gemmell and Mr. Grannan that a complaint had been filed, and never provided them with a copy of the complaint or told them what it said.

On September 6, 2017, the State Bar sent Mr. Gemmell and Mr. Grannan a letter which began: “As you are aware, the State Bar has filed a formal complaint against attorney Christopher A. Combs alleging violations of the Rules of Professional Conduct.” But as noted above, the State Bar never told Mr. Gemmell and Mr. Grannan that a complaint had been filed against Mr. Combs. They did not know then, and do not know today, which “violations of the Rules of Professional Conduct” are alleged in the complaint.

The letter went on to inform Mr. Gemmell and Mr. Grannan that a hearing had been scheduled for October 31, 2017, and asked Mr. Gemmell and Mr. Grannan to inform the State Bar if they were unable to testify on that date. Mr. Gemmell and Mr. Grannan promptly contacted the State Bar to confirm their availability to appear on October 31. They also expressed their willingness to travel to Phoenix from their home in St. David to meet with Bar Counsel to prepare for the hearing, but heard nothing in response to that offer.

Another month passed. Last Friday, October 13, Mr. Gemmell and Mr. Grannan received an e-mail from the State Bar telling them that the October 31 hearing would not occur because the State Bar was entering into a consent agreement that "will result in Mr. Combs receiving an Admonition for his violation of . . . ER 1.7 as alleged in the Complaint." No other terms of the consent agreement were disclosed.

In short, it appears to Mr. Gemmell and Mr. Grannan that the State Bar has made absolutely no effort over the past five months to pursue the formal complaint the ADPCC directed it to file and now seeks to settle this matter on terms that, incredibly, are more favorable to Respondent than the agreement the ADPCC rejected after receiving Mr. Gemmell's and Mr. Grannan's prior objection.

Mr. Gemmell and Mr. Grannan ask the Presiding Disciplinary Judge to reject the proposed consent agreement because: (1) it is an improper attempt to circumvent and nullify the ADPCC's authority and decision; (2) the presumptive sanction under Standard 4.3 for Respondent's violation of ER 1.7 is a reprimand; (3) any consent agreement should include a conditional admission that Respondent violated ER 1.4, the presumptive sanction for which is a reprimand; (4) aggravating and mitigating factors do not warrant a downward departure from the presumptive sanction of a reprimand; and (5) public discipline is warranted because of the nature of Respondent's misconduct and because one of the stated purposes of discipline is to provide written guidance to Arizona attorneys so that they can avoid similar misconduct in the future.

The Presiding Disciplinary Judge should also reject the consent agreement because, inexplicably, it does not address Respondent's violation of ER 1.5, which should have been alleged in the State Bar's complaint if the State Bar failed to do so. Mr. Gemmell and Mr. Grannan presented evidence with their charge that

Respondent billed them approximately \$170,000, at least \$40,000 of which reflected billings tainted by Respondent's conflict of interest. Respondent refused to participate in a fee arbitration to determine whether his fees were reasonable. If the State Bar did not allege an ER 1.5 violation in its complaint and decided not to seek restitution from Respondent in the consent agreement, it was required by Rule 55(a)(2)(C) to make a good faith effort to inform Mr. Gemmell and Mr. Grannan that the State Bar would not seek restitution on their behalf. The State Bar failed to do so.

The State Bar's abdication of its prosecutorial duties in this case stands in stark contrast to its overly zealous prosecution of other matters in which undersigned counsel has been involved. In one recent case, the State Bar stated at a settlement conference that it would not enter into a consent agreement unless the Respondent agreed to pay restitution to a former client, even though an ER 1.5 violation had not been alleged and none of the charges at issue warranted the demand. In another case, the State Bar demanded at a settlement conference that the Respondent receive a long-term suspension for an isolated act that did not result in any harm to a former client. In other cases, the State Bar has aggressively pursued charges at the hearing and post-hearing stage.

Our disciplinary system should be grounded in consistent, fair application of the Standards and focused on matters that help inform lawyers of their ethical obligations and protect the public. For reasons unknown to Mr. Gemmell and Mr. Grannan, that did not occur in this case. They know the Presiding Disciplinary Judge will give careful consideration to this objection and will accept the Presiding Disciplinary Judge's decision as to how this matter should be resolved.

II. The Factual Basis for the Charge.

Mr. Gemmell and Mr. Grannan have had little experience with lawyers. They moved to St. David from New York in January 2004. Mr. Gemmell is a

retired classical musician and project assistant. Mr. Grannan is a retired designer and had also retired from work as a classical musician.

Mr. Gemmell and Mr. Grannan retained Mr. Combs in December 2009 to recover \$930,000 they had loaned to Robert Janecek, a homebuilder in Mohave County, who did business through Homes by Bob Janecek, L.L.C. To pay the legal fees and costs for that lawsuit, Mr. Gemmell had to liquidate assets and obtain a reverse mortgage on his home. Mr. Grannan was forced out of retirement and has resumed working as a classical musician.

On February 26, 2010, Mr. Combs initiated a lawsuit in Mohave County Superior Court, through which Mr. Gemmell and Mr. Grannan asserted claims against Homes by Bob Janecek, LLC, as well as Robert Janecek and his wife, Catherine, individually and as Trustees of the Janecek Living Trust.

In April 2010, Mr. Combs and his firm made a substantial error. At his direction, an associate and legal assistant prepared 63 *lis pendens* for Mr. Gemmell and Mr. Grannan to sign, and then caused them to be filed with the Mohave County Recorder. ***Although Mr. Combs and his staff intended to impose liens on only those properties owned by Homes by Bob Janacek,¹ L.L.C., lis pendens were also erroneously filed against 26 parcels that Homes by Bob Janecek, L.L.C did not own.***

These erroneous recordings gave the owners of the 26 parcels – Robert and Catherine Janecek; Robert and Julie Day; the Ronald Janecek and Bema Janecek Revocable Living Trust; and Thomas Bressan – grounds to seek statutory damages under A.R.S. § 33-420(A), which provides for a penalty of \$5,000 for a wrongfully recorded lien, or \$130,000 for the 26 parcels. They sought leave to

¹ See, e.g., April 6, 2016 Charge Letter, Appendix 70 (interrogatory answers drafted by associate acting under Mr. Combs's direction and signed by Mr. Gemmell and Mr. Grannan) ("CLG . . . informed us that . . . only those properties owned by Homes by Bob Janacek were to be included in the lis pendens.").

file a counterclaim in November 2010, which was filed the following month. Homes by Bob Janecek, L.L.C. joined in the counterclaim, asserting that the remaining 37 *lis pendens* were improper, for which statutory damages were sought.

Mr. Combs and his firm then made a second error. After receiving the motion for leave to amend, Mr. Combs directed his associate to prepare releases of the 26 improperly recorded liens, but they were not filed within the twenty-day period established by A.R.S. § 33-420. This exposed Mr. Gemmell and Mr. Grannan to an additional statutory penalty of \$26,000 under that statute, which establishes a statutory penalty of \$1,000 per lien whenever a person who has caused an improper lien to be filed fails to release the lien within 20 days of receiving a written request from the property owner.

Rather than (i) notify his insurance carrier of these errors; (ii) tell Mr. Gemmell and Mr. Grannan they would be fully indemnified from the \$156,000 in certain liability they faced from those errors; (iii) seek a resolution of the portion of the counterclaim based on the mistaken filing of the 26 *lis pendens*; and (iv) acknowledge and address the conflict of interest his mistake had created, Mr. Combs pursued a futile litigation strategy.

Mr. Combs took the position that the recording of the *lis pendens* against the 26 parcels was proper, even though he had not intended for the *lis pendens* to be recorded, and even though he had no evidence to establish that the 26 parcels were intended to serve as security for the loans Mr. Gemmell and Mr. Grannan had made to Homes by Bob Janecek, L.L.C. Mr. Combs also claimed Mr. Gemmell and Mr. Grannan were not liable under A.R.S. § 33-420(A) because they allegedly did not have the requisite knowledge and intent, since they were unaware of the mistake made by Mr. Combs and his firm when they signed the 26 *lis pendens*. In violation of both ER 1.4 and ER 1.7, Mr. Combs never discussed

with Mr. Gemmell and Mr. Grannan or otherwise attempted to explain to them the merits of this litigation strategy and why he was pursuing it.

Mr. Combs's arguments were made in a motion for partial summary judgment that he and his associate filed in May 2012.

Mr. Combs and his associate never told Mr. Gemmell and Mr. Grannan that: (i) they faced certain liability of at least \$130,000 under A.R.S. § 33-420(A); (ii) they faced certain liability of \$26,000 under A.R.S. § 33-420(C); (iii) they could be indemnified from the consequences of these mistakes if Mr. Combs were to notify his insurance carrier; and (iv) Mr. Combs's litigation strategy was futile.

They instead told Mr. Gemmell and Mr. Grannan that they had no meaningful exposure from the counterclaim and that it would be disposed of through motion practice. As Mr. Combs's associate stated in a January 4, 2011 e-mail:

I am also sending to you via Fed/Ex about 27 releases to sign and have notarized. These releases are for some of the lis pendens that were filed last year. In reviewing HBBJ's counterclaim I discovered that some of the lis pendens were for properties in which only Bob and Cathy Janecek had an ownership interest in their individual capacities and not HBBJ. The lis pendens that are filed at this point should only be against properties in which HBBJ has an ownership interest. So after we file the release of the lis pendens I am sending you, you will still have 38 lis pendens against HBBJ's properties. *Releasing the ones against non-HBBJ properties should essentially dispose of HBBJ's alleged counterclaim against you and further weaken their position.* (Emphasis added.)

July 7, 2016 Charge Letter Response, Exhibit F.

In March 2012, Mr. Combs directed his associate to send Mr. Gemmell and Mr. Grannan a letter summarizing the status of the case which: (i) failed to provide any legal analysis of the risk posed by the counterclaim; and (ii) erroneously advised Mr. Gemmell and Mr. Grannan that the counterclaim could be disposed of "through filing motions with the court." April 6, 2016 Charge Letter, Appendix 79.

Mr. Gemmell and Mr. Grannan were deposed on July 6, 2012. They gave truthful testimony about the underlying loan transactions which was at odds with the claim made in the motion for partial summary judgment Mr. Combs had filed in May 2012. Mr. Gemmell recalls to this day the tremendous anxiety he felt during the deposition, answering questions directed to Mr. Combs's futile litigation strategy (which had never been explained to him), and believing that in doing so he was undermining the affirmative claims for relief he and Mr. Grannan were pursuing.

Shortly before a scheduled October 8, 2012 mediation, the Defendants/Counterclaimants served a mediation memorandum which highlighted the fatal deficiencies in the arguments Mr. Combs had made in his motion for partial summary judgment. In brief, the memorandum asserted that Mr. Gemmell and Mr. Grannan were liable under A.R.S. § 33-420(A) because they could not establish that the 26 parcels were intended to secure the loans they had made to Homes by Bob Janecek, L.L.C., and could not claim to have been ignorant of the recordings because the knowledge of Mr. Combs and his associate were imputed to them, under well-settled law. The memorandum asserted that the Counterclaimants could, by filing a summary judgment motion, prevail on their claims relating to the 26 parcels. Based on the manner in which the parcels were divided, they claimed their statutory damages would exceed \$130,000, and were in excess of \$800,000, which would nearly offset the \$930,000 Mr. Gemmell and Mr. Grannan sought in their affirmative claim for relief.

The very first time Mr. Gemmell and Mr. Grannan learned of this exposure was not from Mr. Combs, but from the mediator. The mediator expressed his view that they faced certain liability on the counterclaim. Mr. Combs dismissed the mediator's statement without explanation.

Mr. Gemmell and Mr. Grannan were shocked. Shortly after the mediation ended, without a settlement, they terminated Mr. Combs's representation and immediately retained Gary Ansel, a lawyer whom Mr. Combs had fired because he had raised concerns within Mr. Combs's firm about conflicts of interest arising from the *lis pendens* filings. Mr. Ansel demanded that Mr. Combs tender the defense of the counterclaim to his malpractice insurer and Mr. Combs reluctantly did so.²

On November 2, 2012, Mr. Ansel withdrew the motion for partial summary judgment that Mr. Combs had filed. Mr. Ansel then successfully sought leave to file an amended complaint which asserted a veil-piercing theory that Mr. Combs had not pursued.

On January 31, 2013, the Defendants/Counterclaimants moved for partial summary judgment on various claims, including their counterclaim. On May 14, 2013, attorneys retained by Mr. Combs's malpractice insurer filed a response to the motion in which they repeated the arguments made in the motion for partial summary judgment Mr. Combs had filed a year earlier. ***They conceded, however, that Mr. Gemmell and Mr. Grannan were liable for a \$26,000 statutory penalty under A.R.S. § 33-420(C)*** because the 26 *lis pendens* had not been withdrawn within 20 days of the filing of the motion for leave to amend. After oral argument, and based on that concession, the trial court entered an order on

² See July 7, 2016 Charge Letter Response, Exhibit J (post-representation e-mail from Mr. Combs to Mr. Gemmell and Mr. Grannan) ("In light of Gary's concerns expressed in several emails to me (which concerns I am in disagreement, and I am not sure are in your best interests or in Gary's best interests), ***we are now forced to file a claim with our malpractice carrier.***") (Emphasis added.); see also August 22, 2016 Charge Letter Reply, Attachment 1 (Gary Ansel statement at 3) ("[After being retained by Mr. Gemmell and Mr. Grannan] I advised Combs to give me the name of his firm's malpractice carrier and, with some shoving and pushing, tendered the *lis pendens* defense to Combs' carrier.").

July 29, 2013, granting partial summary judgment against Mr. Gemmell and Mr. Grannan for \$26,000.

Through an order issued on March 28, 2014, the trial court granted summary judgment on the counterclaim, in which the court found that all but five of the 63 *lis pendens* were “**groundless or invalid.**” (Emphasis added.) That lengthy order included a discussion of Mr. Combs’s negligence in: (i) improperly causing *lis pendens* to be recorded; (ii) failing to timely remove them; and (iii) failing to allege in the initial complaint a basis for the equitable lien theory he later pursued. On September 19, 2014, a judgment in the amount of \$384,699.74 was entered against Mr. Gemmell and Mr. Grannan on the counterclaim, which Mr. Combs’s insurance carrier subsequently satisfied.

In January 2015, Mr. Ansel successfully negotiated a settlement agreement through which Mr. Gemmell and Mr. Grannan eventually received the \$930,000 they sought to recover from the Janeceks and HBBJ, with interest.

G. Fees Paid to Mr. Combs’ Law Firm

Mr. Combs’s law firm billed Mr. Gemmell and Mr. Grannan approximately \$170,000. The firm gave a \$713 credit in December 2010 for some of the *lis pendens* work and an unspecified \$1,000 professional courtesy credit. But the firm failed to write off or refund all fees and costs attributable to the 26 mistakenly filed *lis pendens*, including fees and costs associated with discovery and motion practice directed to those *lis pendens*. After paying Mr. Combs’s firm approximately \$150,000, Mr. Gemmell and Mr. Grannan declined to pay invoices totaling approximately \$21,000. Eighteen months after the representation ended, Mr. Combs’s firm belatedly stated that it would write off the \$21,000. But even with that belated write off, Mr. Gemmell and Mr. Grannan paid at least \$40,000 for work associated with the futile and baseless motion for summary judgment and other unnecessary charges.

Mr. Combs refused to have the reasonableness of these fees resolved through fee arbitration.

III. An Admonition is Inappropriate Under the Applicable ABA Standards

The State Bar has informed Mr. Gemmell and Mr. Grannan that Mr. Combs will conditionally admit to having violated ER 1.7 in exchange for an admonition. Not having seen the State Bar's complaint, Mr. Gemmell and Mr. Grannan presume that the State Bar also alleged a violation of ER 1.4 (since the two charges are inextricably linked) and intends to state in the consent agreement that it has elected to abandon its contention that Mr. Combs violated ER 1.4.

Mr. Combs has appropriately agreed to admit to a violation of ER 1.7. The substantial exposure Mr. Gemmell and Mr. Grannan faced for the *26 lis pendens*, and Mr. Combs's liability for having caused it, created a conflict of interest under ER 1.7(a)(2), because Mr. Combs's ability to provide competent and diligent representation to Mr. Gemmell and Mr. Grannan was materially limited by his interest in avoiding liability for his negligence. *See Colo. Ethics Op. 113* (discussing application of Colorado's equivalent of ER 1.7 when attorney error may affect attorney's ability to continue representing client). Mr. Combs was obligated, as early as November 2010, to: (i) consider whether he could reasonably provide competent and diligent representation to Mr. Gemmell and Mr. Grannan despite the erroneous recording of the *26 lis pendens*; (ii) determine whether a disinterested lawyer would reach the same conclusion; and (iii) if so, seek to obtain Mr. Gemmell's and Mr. Grannan's informed consent to do so; and (iv) if the conflict is not consentable, seek to withdraw. No disinterested lawyer would have concluded that he could proceed without informing a client of an error that created \$156,000 of liability and seeking their informed consent to continue the representation despite that error. Mr. Combs did neither.

But Mr. Combs also unquestionably violated ER 1.4. He failed to keep Mr. Gemmell and Mr. Grannan “reasonably informed about the status of the matter,” ER 1.4(a)(3), specifically the \$156,000 exposure they faced because of the mistaken filing of the 26 *lis pendens*, so that Mr. Gemmell and Mr. Grannan could make “informed decisions regarding the representation.” See Colo. Ethics Op. 113 (“When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client’s right or claim, the lawyer must [under Colorado’s equivalent of ER 1.4] promptly disclose the error to the client.”).

The State Bar’s decision to stipulate to an ER 1.7 violation without a corresponding ER 1.4 violation is inexplicable and should be rejected by the Presiding Disciplinary Judge.

But even if the Presiding Disciplinary Judge were to accept that decision, and approve a consent agreement resting on a violation of ER 1.7 alone, the proposed sanction of an admonition should be summarily rejected. The Standard for Imposing Lawyer Sanctions applicable to ER 1.7 violations, Standard 4.3, states that “[r]eprimand is generally appropriate when a lawyer . . . causes injury or potential injury to a client,” whereas “[a]dmonition is “generally appropriate when a lawyer . . . causes little or no actual or potential injury to a client.”³

Here, the ER 1.7 violation caused substantial injury or potential injury. As for actual injury, Mr. Gemmell and Mr. Grannan paid \$40,000 or more for legal fees and costs that should not have been charged, experienced a substantial delay in the resolution of their affirmative claim for relief, and exposed Mr. Gemmell and Mr. Grannan to profound emotional distress when they learned, after nearly

³ The applicable Standard for ER 1.4 violations, Standard 4.4, similarly states that “[r]eprimand is generally appropriate when a lawyer . . . causes injury or potential injury to a client,” whereas “[a]dmonition is “generally appropriate when a lawyer . . . causes little or no actual or potential injury to a client.”

two years of litigation, that they faced exposure on a counterclaim that had not been tendered to Mr. Combs's insurance carrier and which posed a significant risk of completely negating their \$930,000 claim. Their exposure under the counterclaim was at the time a substantial potential injury, which cannot be disregarded because Mr. Combs' insurer belatedly assumed the defense of the counterclaim *after the representation ended* and satisfied a \$384,699.74 judgment. Certainly the State Bar and Mr. Combs's counsel cannot in good faith assert that the ER 1.7 violation "cause[d] little or no actual or potential injury to a client," so that an admonition would be the presumptive sanction.

The applicable aggravating and mitigating factors do not support a departure from the presumptive sanction of a reprimand. Aggravating factors include: dishonest or selfish motive, 9.22(b); vulnerability of victim, 9.22(h); substantial experience in the practice of law, 9.22(i); and indifference to making restitution, 9.22(j). The only mitigating factors are absence of a prior disciplinary record, 9.23(a); and full and free disclosure in the disciplinary process, 9.23(e).

Public discipline is especially warranted here, because Arizona, unlike other jurisdictions, has failed to put lawyers on notice that their failure to inform their clients of material errors gives rise to violations of ERs 1.4 and 1.7. *See, e.g.*, California Lawyer, November 2016, "A Lawyer's Duty to Disclosure Mistakes"; Colo. Ethics Op. 113 (2015); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 734 (Nov. 11, 2000).

IV. The State Bar Has Kept Mr. Gemmell and Mr. Grannan in the Dark About Respondent's ER 1.5 Violations.

In addition to presenting evidence that Mr. Combs violated ERs 1.4 and 1.7, Mr. Gemmell and Mr. Grannan presented evidence that the conflict of interest which caused Mr. Combs to pursue a futile litigation strategy resulted in them being charged substantial unnecessary and unreasonable fees and costs. The State

Bar has never told Mr. Gemmell and Mr. Grannan whether it found that Mr. Combs violated ER 1.5 and included an ER 1.5 violation in its complaint. Nor has the State Bar complied with Rule 55(a)(2)(C) by making a good faith effort to inform Mr. Gemmell and Mr. Grannan that the State Bar has not sought restitution on their behalf.

Mr. Combs has caused substantial financial harm to Mr. Gemmell and Mr. Grannan. He refused to participate in the State Bar's Fee Arbitration program, notwithstanding his obligation to "conscientiously consider" doing so. ER 1.5 cmt. 10. He has been anomalously rewarded by the State Bar's astonishing indifference to the evidence Mr. Gemmell and Mr. Grannan presented demonstrating Mr. Combs's violation of ER 1.5. As noted above, the State Bar's conduct in this case is all the more troubling when compared to how it has demanded restitution in a case which does not involve ER 1.5 violations, and how the Bar generally pursues charges involving billing matters and conflicts of interest.

Eighteen months have passed since Mr. Gemmell and Mr. Grannan submitted their charge and they have not heard a single word about ER 1.5 or restitution. The Presiding Disciplinary Judge should conclude that the State Bar has not met its obligation under Rules 55(b)(2)(B) and 53(b)(3). This is an additional ground for the Presiding Disciplinary Judge to reject the consent agreement. Any modified consent agreement should require Mr. Combs to make restitution to Mr. Gemmell and Mr. Grannan.

V. Conclusion

Mr. Gemmell and Mr. Grannan respectfully ask the Presiding Disciplinary Judge to reject the proposed consent agreement. If a modification is recommended, it should include a minimum sanction of reprimand and the

payment of restitution. If a hearing should be held, Mr. Gemmell and Mr. Grannan wish to participate in it, so they can, at last, be heard.

RESPECTFULLY SUBMITTED this 19th day of October, 2017.

OSBORN MALEDON, P.A.

By 
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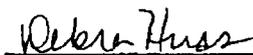
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Original of the foregoing mailed
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