

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

KENT M. NICHOLAS,
Bar No. 015220

Respondent.

PDJ- 2017-9010

**FINAL JUDGMENT AND
ORDER**

[State Bar File No. 16-0804]

FILED APRIL 4, 2017

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on January 26, 2017, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS ORDERED Respondent, **Kent M. Nicholas, Bar No. 015220**, is reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective the date of this order.

IT IS FURTHER ORDERED Mr. Nicholas shall be placed on Probation for a period of two (2) years.

IT IS FURTHER ORDERED Mr. Nicholas shall participate in the State Bar Member Assistance Program (MAP) to address the issue of Anger Management,

including monthly individual and/or group counseling in that area for the period of one year, unless the treatment provider recommends an additional treatment period: Mr. Nicholas shall contact the State Bar Compliance Monitor at (602) 340-7258, within ten (10) days from the date of this order to schedule an assessment. The Compliance Monitor shall develop terms and conditions of participation if the results of the assessment so indicate and the terms, including reporting requirements, shall be incorporated herein. Mr. Nicholas shall be responsible for any costs associated with participation with compliance.

IT IS FURTHER ORDERED Mr. Nicholas shall complete an additional (i.e., in addition to the yearly mandated fifteen hours of CLE) nine (9) hours of Continuing Legal Education in the areas of dealing with difficult clients and professionalism.

NON-COMPLIANCE LANGUAGE

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

shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.

IT IS FURTHER ORDERED Mr. Nicholas shall pay the costs and expenses of the State Bar of Arizona in the amount of \$1,200.00 within thirty (30) days from the date of this order. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 4th day of April, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/e-mailed
this 4th day of April, 2017, to:

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BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

KENT M. NICHOLAS,
Bar No. 015220

Respondent.

PDJ-2017-9010

**DECISION AND ORDER
ACCEPTING DISCIPLINE
BY CONSENT**

[State Bar File No. 16-10804]

FILED APRIL 4, 2017

The Probable Cause Order was filed on September 29, 2016. No formal complaint has been filed. The parties filed their Agreement for Discipline by Consent (Agreement), pursuant to Rule 57(a), Ariz. R. Sup. Ct.¹ on January 26, 2017.

Rule 57(a)(2)(A), mandates the agreement include “the facts necessary to support” the alleged violation and conditional admission. The Agreement states that Mr. Nicholas “conditionally admits that his conduct, as set forth below” violates the stated ethical rules. [Agreement, page 2.] The parties state in bold capitalized print the “FACTS” are the General Allegations which follow. Rule 57 requires admissions be tendered solely “...in exchange for the stated form of discipline....”

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

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. Mr. Nicholas voluntarily waives the right to an adjudicatory hearing, and waives all motions, defenses, objections or requests that could be asserted upon approval of the proposed form of discipline.

As required by Rule 53(b)(3), Ariz. R. Sup. Ct., notice of the Agreement and notice of the opportunity to object within five (5) business days was sent by letter to the complainant on January 24, 2017. On February 6, 2017, the State Bar filed a notice of filing an objection dated January 31, 2017. Two objections are within the notice of objection. One is from the client, Mr. Moore, (“client”). The other is from the cousin of the client, Mr. Mirochnick, (“cousin”).

The Agreement details a factual basis to support the conditional admissions. Mr. Nicholas knowingly violated Rule 41(g), Ariz. R. Sup. Ct., (engaging in unprofessional conduct), and ER 8.4(b), Misconduct (by the commission of a criminal act that reflects adversely on the lawyer’s trustworthiness or fitness as a lawyer in other respects), and ER 8.4(d) Misconduct (by engaging in conduct that is prejudicial to the administration of justice). The agreed upon sanctions are

reprimand, with two (2) years of probation, and the payment of costs totaling \$1,200.00 within thirty (30) days).

Because of the extraordinary facts, time for consideration of the Agreement is expanded under Rule 51. A hearing on the Agreement was conducted on March 27, 2017.

IT IS ORDERED expanding the Rule 57 time limits for the consideration of, and ruling on, the agreement.

Mr. Nicholas has been licensed to practice law in Arizona since October 23, 1993. He moved to be substituted as counsel for client, a defendant in three separate pending felony matters. The Court granted the motion the same day it was filed. Just over a month later, with the representation of Mr. Nicholas, client entered a plea agreement in which he pled guilty to Forgery, a Class 4 Felony and admitted he had one historical prior felony. The plea agreement was silent on whether the mandatory term of incarceration for the felony would run consecutive to or concurrent with any prison time in his two other cases for which Mr. Nicholas also represented him.

One month later at the sentencing hearing, the Court directed counsel to brief that issue and continued the sentencing. Within the week, client on March 2, 2016 filed a *pro se* motion stating unfavorable allegations about the way Mr. Nicholas treated him, that Mr. Nicholas was not responding to phone calls, and that Mr. Nicholas had guaranteed his sentence could not be over five (5) years on all three

cases. Mr. Nicholas disputes those allegations and states he was unaware of the motion until after the next day.

On that next day, Mr. Nicholas went to visit client who remained incarcerated. He was restrained and seated with his hands cuffed together and chained from below the table where he was seated. A video recorded visually, not audibly, what occurred. Within moments, whatever discussion was taking place ended when Mr. Nicholas rose from his seat and swung around slapping his client across his face with what he states was an unbound 33 page document and folder he was holding in his right hand. In one continuous motion Mr. Nicholas slapped his client, and followed through with a full turn and swiftly walked away. Four days later, Mr. Nicholas moved to withdraw, which was granted.

Such conduct violates Rule 41(g). The comment to Rule 41 states, “Lawyers, whether or not engaged in the practice of law, should act honorably and treat others with courtesy and respect.” The slap was an assault, a criminal act implicating, ER 8.4(b) which prohibits a lawyer from engaging in a criminal act that reflects adversely on the lawyers fitness. It also was conduct prejudicial to the administration of justice under ER 8.4(d). The comment to ER 8.4 explains, a lawyer is professionally answerable only for offenses that indicate a lack of any characteristic relevant to the practice of law. ER 8.4(d) applies when conduct manifests bias.

Rule 58(k) provides sanctions shall be determined under the *American Bar Association Standards for Imposing Lawyer Sanctions*, (“Standards”). The parties agree *Standard 5.12* applies and his criminal conduct calls for a suspension. Under Rule 41(g), the parties agree *Standard 7.2* applies as his conduct violated his duty owed as a professional and caused potential harm to his client, and actual harm to the legal system and the profession. The parties stipulate Mr. Nicholas acted “knowingly.”

The parties stipulate there are multiple aggravating factors. The parties stipulate the vulnerability of the client. His client is advanced in years, apparently a heart patient on a pacemaker, had his hands cuffed together, and was chained from beneath the table. He could not avoid the slap or defend himself. The parties stipulate the substantial experience in the practice of law and his criminal conduct are all aggravating factors under *Standards 9.22(h), (i) and (k)*. They stipulate his absence of a prior disciplinary record, absence of a dishonest or selfish motive, cooperative attitude, character or reputation, prosecution for the Class 3 Misdemeanor Assault, and remorse are mitigating factors under *Standards 9.32(a), (b), (e) (g), (k) and (l)*.

Although more than a year has passed since this misconduct, the trial of Mr. Nicholas has yet to occur on the single count of misdemeanor assault. As a result, *Standard 9.32(k)*, “imposition of other sanctions” is not applicable. There has been

no imposition of any sanction. Such unusual circumstance of stipulating to a non-existent mitigation of “imposition of other penalties or sanctions” under the *Standards* has not been helpful in the analysis of the agreement. The effect was to darken the already disquieting stipulated facts. Law utilizes the process of persuasion. While oratory is a part of that process, justice is built upon objective facts when available. There are no objective facts that there has been any imposition of penalties or sanctions. That proposed mitigation is rejected as not factual.

The parties also conditionally agree the presumptive sanction is suspension but that it should be mitigated to reprimand with two years of probation. It is important Mr. Nicholas recognized the conduct as being presumptively suspension. However, the Agreement overstated their argument by stating the video “shows Defendant’s face to slightly move side to side” and that apparently Mr. Moore is claiming a “myriad of physical and other injuries arising from the incident.” Such argument is rejected in its entirety. It is not mitigation under the *Standards*. During the hearing Mr. Nicholas, his attorney, and Bar counsel wisely appeared to have abandoned that argument as it was not raised.

The objection by cousin states there were misleading text messages and affirms client was a heart patient. He also states Mr. Nicholas “punched” client. There is nothing relating to text messaging encompassed within the complaint. The actions recorded on the video are the main body of the complaint. As the video does

not support that client was “punched” but instead slapped, cousin suggests the video “might have been altered to protect the jail.” The video shows no signs of being altered and there appears to be little likelihood of liability to the jail arising from the misbehavior of Mr. Nicholas. The blunt criticism of Mr. Nicholas by cousin is appreciated. Such criticism assists a court in its analysis of the proposed Agreement.

The objection by client is both as a victim and as a client. As a victim, client is entitled to important victim rights in the criminal prosecution of Mr. Nicholas. It appears from his comments he has also stated his positions as a victim in that prosecution. Those comments add additional insight in this proceeding.

Injury and potential injury are considerations for the PDJ. They are defined in Section III of the *Standards*. Injury is “harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct. The level of injury can range from ‘serious’ to ‘little or no injury.’” Potential injury “is a harm that is reasonably foreseeable at the time of the misconduct and which, but for some intervening factor would probably have resulted from a lawyer’s misconduct.”

By definition, the actual physical harm imposed is a factor. The parties correctly reference that the actual physical harm was “little.” That does not excuse the conduct, but balances the disciplinary response to the misconduct. The potential harm analyzes what could have occurred. By example, if an individual fired a revolver at an individual but missed, the potential for injury would have been

“serious.” Here, the review of the video demonstrates the misconduct was a slap. The video does not support the contention of cousin that Mr. Nicholas “punched” client. Nor does the video support there was a missed attempt to use a fist or hand to directly inflict a damaging blow to client. None of this excuses the conduct, but furthers the analysis of which sanction is appropriate.

Half of the stated criticism of Mr. Nicholas in the objection to the Agreement by client is that he should have been prosecuted for a felony. It appears from the objection, client has raised those concerns in the criminal proceeding. He has victim rights that apply to him in that prosecution. This judge has no jurisdiction to issue criminal sanctions. However, the stated protestation demonstrates the effect upon client by the misconduct of Mr. Nicholas. While there appears to be little physical injury, the slap was insulting and not excusable. Client argues for a one year suspension if Mr. Nicholas is convicted of a misdemeanor and “indefinitely” if convicted of a felony.

The demand by client demonstrates that lawyers hold a unique position in the law. Their actions and inactions impact the public’s view, not only of the profession, but of justice, the need for law or even an orderly society. In that perspective, the misconduct of an attorney can damage not only the relationship with the client, but injure the profession and the public’s perception of the profession.

The Arizona Supreme Court has stated attorney discipline is regulatory and “is not intended to punish the offending attorney.” Notwithstanding, there remains the potential that imposed sanctions may, to the disciplined attorney, have that incidental effect. *See In re Swartz*, 141 Ariz. 266, 686 P.2d 1236 (1984).

There is wisdom in that viewpoint. By example, the criticism by client is there should be a suspension for one year if convicted of a misdemeanor, and indefinite suspension if convicted of a felony. Such argument logically embraces a potentially unintended consequence that if Mr. Nicholas is not convicted, lesser or no sanction should be imposed. Such argument ignores that attorney discipline is unique or *sui generis*. See Rule 48(a). There are differing burdens of proof, different rules and different purposes differentiating attorney regulation from criminal law or civil law. The comments from client and cousin are recognized and considered. They carry a balancing weight for consideration.

DISCUSSION

“Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust or serious interference with the administration of justice are in that category.” [*Standards*, 5.12.] *See also* E.R. 8.4 Comment as amended effective Dec. 1, 2001 and Comment [2] effective Dec. 1, 2003.

The misconduct of Mr. Nicholas was entirely relevant to his practicing law. His action was done in spite of and in the presence of law enforcement officers within the jail. They knew he was the lawyer for the defendant-client. Viewing the video of Mr. Nicholas slapping a client whose hands were bound can bring a ready and reasonable criticism that such action was cowardly. That the slap was a breach of the most fundamental trust relationship between client and attorney is unassailable.

In *The Republic*, Plato held up ethics as essential to society. As Plato put it, “the community suffers nothing very terrible if its cobblers are bad and become degenerate and pretentious; but if the Guardians of the laws and state, who alone have the opportunity to bring it good government and prosperity become a mere shame, then clearly it is completely ruined.”² It is an important recognition of the seriousness of the facts that the parties stipulate there was actual harm to the legal system and to the profession.

At the heart of the purpose of a lawyer practicing criminal law, whether an attorney be for the State or the defense, is to facilitate the resolution of conflicting positions without recourse to violence. Law is the alternative to violence. Engaging in violent conduct towards a client who cannot defend or even avoid the assault is

² Plato, *The Republic*, trans. Desmond Lee (Lone: Penguin, 1987), pp. 127.

antithetical to the privilege of practicing law, and such conduct generally warrants suspension from the practice of law.

“Our government...teaches the whole people by its example. If the government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” ~Louis Brandeis. To the credit of Mr. Nicholas, that has been recognized, admitted, and his conduct regretted by him from the beginning.

It is critical in any administrative proceeding to sift away from criticism that which is true and focus on the facts. In Section III, the purpose of the *Standards* are stated. They “are not intended to create grounds for determining culpability independent of the...Rules.” Whether civil litigation is filed against Mr. Nicholas or criminal sanctions issued is not a factor as this court has no jurisdiction to resolve those issues. They are left respectively for civil court and criminal court. A hearing was held to measure the parties and their Agreement. The hearing clarified that the State Bar methodically and comprehensively analyzed and debated its resolution. It also granted an opportunity for the court to measure Mr. Nicholas.

Being committed to justice in this proceeding does not mean turning a deaf ear to the reality of the *applicable* mitigation. Based upon the hearing, it is apparent Mr. Nicholas is both regretful and remorseful for his misconduct. Regret is too often an underappreciated word and action. While regret is not a mitigating factor, it

remains important and telling as remorse has no foundation without it. The remorse of Mr. Nicholas has been consistent throughout the proceedings and is a noteworthy factor for the State Bar.

Mr. Nicholas has a complete absence of any disciplinary history despite his substantial experience in the practice of law for over twenty years. He has fully and freely cooperated with the State Bar and had a cooperative attitude. The State Bar agrees “there has been no lack of cooperation” from Mr. Nicholas. This is likely because of the otherwise well-established character of Mr. Nicholas. His reputation is recognized and proven by the multiple individuals who wrote character reference letters on his behalf.

Mitigation and aggravation are analyzed in determining sanctions. *Standard* 9.1. But both are also utilized in the important analysis of predictive behaviors. Aggravating factors create a historical credibility gap. The aggravating factors and objections from client and cousin have also been appropriately analyzed.

Mitigation aids in determining whether ethical misconduct is driven by an absence in character or a lapse in judgment. When an offered mitigation, as in this proceeding, represents a lengthy, consistent behavior measured by years, the mitigation becomes increasingly weightier with each passing year.

Mitigation formed over years, demonstrates a higher probability of accepting responsibility with a present ability to bring a steady application of diligence to the

resolution of the misconduct. Mitigation, as with aggravation, holds a component of calculating probabilities of self-control; from the neck up. The lengthy mitigating history of Mr. Nicholas does not excuse his conduct. However, the mitigation of Mr. Nicholas significantly outweighs the aggravation.

Plato would likely observe Mr. Nicholas suffered from a grave lack of the Greek term, *enkrateia*. Or the lack of strength *not* to indulge, *not* to act on impulse. The multi-year historical mitigation of Mr. Nicholas is over twenty years in the making and strongly suggests a demonstrable resource is existent within him to bring such a lack of *enkrateia* under control. The issue becomes how to protect the public in the interim and what steps are needed to identify and resolve such weakness.

The *Standards* are designed for “flexibility and creativity in assigning sanctions.” [*Standards*, Section III, A. Purpose, 1.3.] The Agreement requires Mr. Nicholas to complete two years of probation. He must undergo a full assessment. He must participate in the State Bar Member Assistance Program to address Anger Management, including monthly individual and/or counseling for one year unless the treatment provider recommends a *lengthier* term. He must complete nine additional hours of continuing legal education in dealing with difficult clients and professionalism.

The presumptive sanction is suspension. However, the substantive mitigation offered by the consistent professional life of Mr. Nicholas mitigate his sanction to

reprimand with creative, thoughtful and critical terms of probation. Reprimand is not a token sanction. It is a public censure with remains permanently on his record. The proposed and lengthy two years of probation include weighty requirements.

The PDJ finds the proposed sanctions of reprimand and probation meets the overall objectives of attorney discipline. The Agreement is therefore accepted; accordingly:

IT IS ORDERED incorporating the Agreement and any supporting documents by this reference. The agreed upon sanctions are: reprimand, two (2) years of probation under the stated terms and the payment of costs and expenses of the disciplinary proceeding totaling \$1,200.00 to be paid within thirty (30) days from this date. There are no costs incurred by the Office of the Presiding Disciplinary Judge.

IT IS FURTHER ORDERED the Agreement is accepted. Costs as submitted are approved for \$1,200.00. A final judgment and order is signed this date.

DATED this April 4, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

///

COPY of the foregoing e-mailed/mailed
on April 4, 2017, to:

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**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

**KENT M. NICHOLAS
Bar No. 015220**

Respondent.

PDJ 2017

State Bar File Nos. **16-0804**

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Kent M. Nicholas, who is represented in this matter by counsel, James J. Belanger, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. A probable cause order was entered on September 29, 2016, but no 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(s) by letter on January 24, 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 the following: Rule 41(g), Ariz. R. Sup. Ct.; and Rule 42, Ariz. R. Sup. Ct., specifically, ER 8.4(b), and ER 8.4(d). Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Reprimand with Two Years of Probation. 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. Respondent was licensed to practice law in Arizona on October, 23, 1993.

COUNT ONE (File No. 16-0804/ Mirochnick, More, and Marshall)

2. On November 16, 2015, Respondent filed a Motion for Substitution of Counsel to represent Michael More ("Defendant," hereinafter) in three separate

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.

pending felony matters, each of which arose out of and were actively pending in Maricopa County Superior Court.

3. The Court granted Respondent's Motion for Substitution on the same date of November 16, 2015.

4. Respondent represented Defendant in the following matters: CR2015-115327-001, a pre-trial felony matter in which Defendant was charged with Forgery, a Class 4 Felony offense; CR2011-007890-001, a felony probation violation matter; and CR2011-007887-001, a second felony probation violation matter.

5. On January 25, 2016, Defendant signed, and the Court accepted of record, a plea agreement in CR2015-115327-001 in which Defendant pled guilty to Forgery, a Class 4 Felony, and admitted that he had One Historical Prior Felony Conviction as part of that guilty plea.

6. The written plea agreement that Defendant signed was silent on the issue of whether the mandatory term of incarceration in the Arizona Department of Corrections for the Forgery charge would run consecutive to or concurrent with any prison time imposed in the two probation violation matters.

7. On February 25, 2016, at the first scheduled Sentencing Hearing, the Court inquired of both the State and the Defendant if the Court was required to impose consecutive sentences due to Defendant's probation status. The Court continued Sentencing to March 25, 2016, so that the parties could address this issue.

8. On March 2, 2016, Defendant filed a pro se Motion to Change Counsel. Among other allegations, Defendant claimed that Respondent was racist, not responding to phone calls, and guaranteed that his sentence could not be more than 5 years for all three cases. Respondent did not see the pro se Motion to Change

Counsel before March 3, 2016, and does not agree that the allegations in the Motion to Change Counsel are true or accurate.

9. On March 3, 2016, Respondent went to the Durango Jail in Phoenix, Arizona, to visit Defendant, who was housed there while incarcerated,² for the purpose of explaining the best process to receive a concurrent sentence rather than a consecutive sentence, and the likelihood of obtaining a concurrent sentence.

10. Defendant was escorted by a Maricopa County Sherriff's Deputy to the visitation area where Respondent was already waiting, seated at one of the tables in the visitation area. Defendant had his hands cuffed together and located below the table where he was seated.

11. There was a short verbal confrontation between Respondent and Defendant.

12. As Respondent stood up from the table, Respondent had his brief case in his left hand and what appears to be a pad of paper on top of a stack of paper in his right hand. Respondent asserts the stack of paper was an unbound 33 page law review article concerning consecutive and concurrent sentencing in his right hand. Respondent placed the briefcase on the table.

13. As depicted in the video, Respondent struck Defendant with the papers in his right hand.

14. Respondent then backed away, turned, and walked away from the table.

15. On March 7, 2016, Respondent filed a Motion to Withdraw from representing Defendant in all three pending matters.

² A copy of the video of the incident between Respondent and Defendant, as recorded by the Maricopa County Jails, is attached as Exhibit B.

16. On March 11, 2016, the Court granted Respondent's Motion to Withdraw and new defense counsel was appointed.

CONDITIONAL ADMISSIONS

Respondent's admissions are being tendered in this matter in exchange for the form of discipline stated below and are submitted freely and voluntarily and not as a result of coercion or intimidation and are not intended for use in any other proceeding except as specifically allowed by Rule 48(k), Rules of the Supreme Court of Arizona.

Respondent conditionally admits that his conduct violated Rule 41(g) Ariz. R. Sup. Ct., and Rule 42, Ariz. R. Sup. Ct., specifically ER 8.4(b), and ER 8.4(d).

CONDITIONAL DISMISSALS

There are no additional allegations or counts that the State Bar has conditionally agreed to dismiss.

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: Reprimand with Two Years of Probation.

If Respondent violates any of the terms of this agreement, further discipline proceedings may be brought.

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 the following *Standards* are the appropriate *Standards* given the facts and circumstances of this matter:

1. Rule 42, Ariz. R. Sup. Ct., ER 8.4(b), and ER 8.4(d).

Standard 5.12

Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in *Standard* 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

2. Rule 41(g), Ariz. R. Sup. Ct.

Standard 7.2

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

The duty violated:

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

The lawyer's mental state:

For purposes of this agreement the parties agree that Respondent knowingly struck his client and that his conduct was in violation of the Rules of Professional Conduct.

The extent of the actual or potential injury:

For purposes of this agreement, the parties agree that there was potential harm to Respondent's client, but actual harm to the legal system and to the profession.

Aggravating and mitigating circumstances:

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

In aggravation:

Standard 9.22(h) vulnerability of victim [Defendant's hands were cuffed together]

Standard 9.22(i) substantial experience in the practice of law [over 20 years]

Standard 9.22(k) illegal conduct [Respondent's conduct amounts to a criminal assault]

In mitigation:

Standard 9.32(a) absence of prior disciplinary record [Respondent has no history]

Standard 9.32(b) absence of a dishonest or selfish motive [Respondent had no motive to gain anything from this incident]

Standard 9.32(e) cooperative attitude [Respondent has been cooperative in providing multiple responses to the State Bar]

Standard 9.32(g) character or reputation [Respondent submitted multiple character reference letters on his own behalf]

Standard 9.32(k) imposition of other penalties [Respondent is being criminally prosecuted for this incident as well for a Class 3 Misdemeanor Assault that remains pending]

Standard 9.32(l) remorse [In his multiple responses to the State Bar, Respondent has expressed remorse for his conduct]

Discussion:

The parties have conditionally agreed that, upon application of the aggravating and mitigating factors to the facts of this case, the presumptive sanction should be mitigated to Reprimand with Two Years of Probation.

The parties have conditionally agreed that a lesser sanction would be appropriate under the facts and circumstances of this matter. This agreement was based on the following:

Based on the video evidence, Respondent struck his client with what appears to be some papers after there was a heated verbal exchange from the Defendant to the Respondent. A review of the video also shows Defendant's face to slightly move side to side. Although Defendant has claimed a myriad of physical and other injuries arising from the incident, there is no evidence to support those claims of injuries. In fact, medical personnel at the jail examined Defendant, and law enforcement officers also observed Defendant during their investigation. No injury was noted by anyone.

Respondent does not have any history of lawyer discipline and has expressed remorse for his conduct. There certainly is no history, documented or reported otherwise of which the State Bar is aware, of similar conduct on the part of

Respondent. Respondent will have to answer to the criminal justice system for his conduct, and Defendant has made it clear that he will be suing Respondent civilly as well. Although the State Bar has disagreed with the characterizations of the conduct made by Respondent, there has been no lack of cooperation from the Respondent in providing responses or information.

The parties are well aware that this was an act that involved a client. The parties also recognize that, in Respondent's line of work, dealing with difficult, contentious, and even sometimes aggressive persons, is going to be a repetitive occurrence. However, in consideration of the nature of the incident itself as captured on video, and given the amount of mitigating information and factors that come into play, the parties believe the presumptive sanction is appropriately mitigated down to the proposed sanction.

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 Reprimand with Two Years of Probation and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit C.

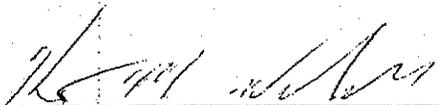
DATED this 25th day of January 2017

STATE BAR OF ARIZONA

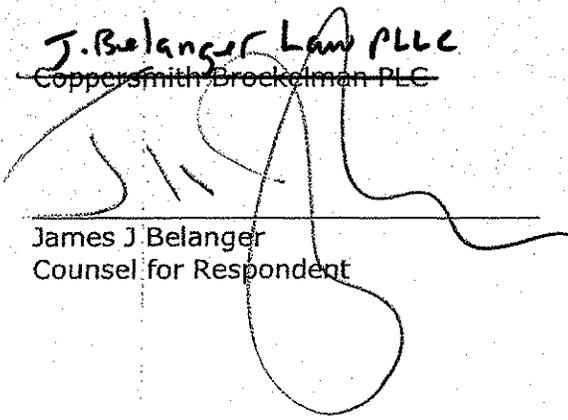

Matthew E McGregor
Staff Bar Counsel

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

DATED this 25th day of January, 2017.


Kent M Nicholas
Respondent

DATED this 25th day of January, 2017.


~~J. Belanger Law PLLC~~
~~CopperSmith Brockelman PLC~~

James J Belanger
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 26th day of January, 2017.

Copy of the foregoing emailed
this 26th day of January, 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 26th day of January, 2017, to:

James J. Belanger
J. Belanger Law PLC
P.O. Box 447
Tempe, Arizona 85280
Telephone 602-888-6072
Email: jjb@jbelangerlaw.com
Respondent's Counsel

Copy of the foregoing hand-delivered
this 26th day of January, 2017, to:

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

by: 
MEM:

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Kent M. Nicholas, Bar No. 015220, Respondent

File No. 16-0804

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.

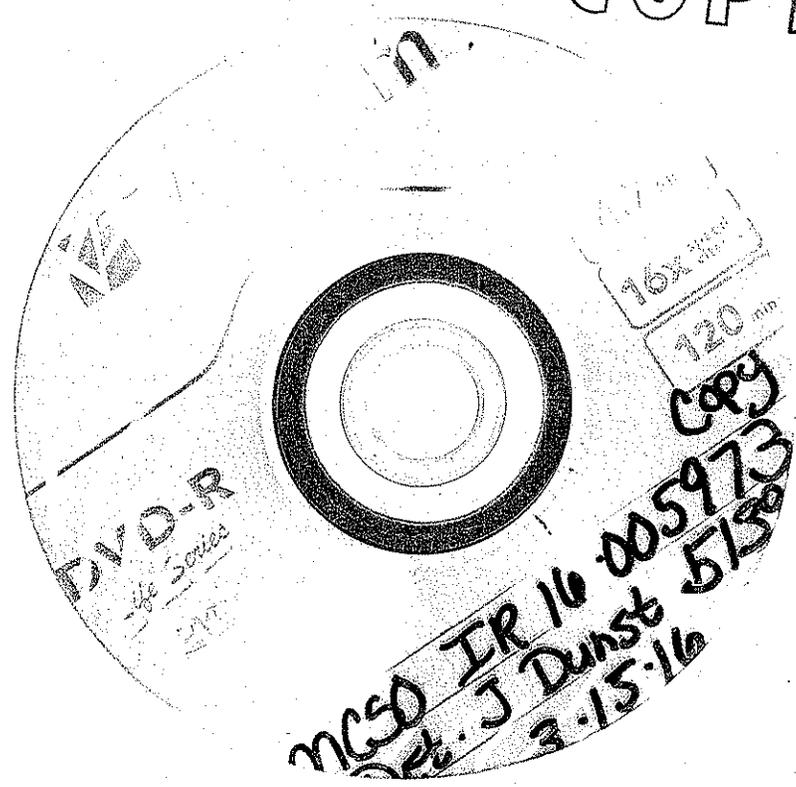
Staff Investigator/Miscellaneous Charges

Total for staff investigator charges \$ 0.00

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

EXHIBIT B

COPY



DVD-R
16x Series

16x DVD-R
120 min

MCSO IR 16-005973
Det. J Dunst
3-15-16
COPY

EXHIBIT C

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

KENT M. NICHOLAS,
Bar No. 015220,

Respondent.

PDJ 2017

FINAL JUDGMENT AND ORDER

[State Bar No. 16-0804]

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, **Kent M. Nicholas**, is hereby Reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective 30 days from the date of this order or _____.

IT IS FURTHER ORDERED that Respondent shall be placed on Probation for a period of two years.

IT IS FURTHER ORDERED that Respondent shall participate in the State Bar Member Assistance Program to address the issue of Anger Management, including monthly individual and/or group counseling in that area for the period of one year, unless the treatment provider recommends an additional treatment period: Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258, within 10 days from the date of service of this Order/Agreement, to schedule an assessment.

The Compliance Monitor shall develop terms and conditions of participation if the results of the assessment so indicate and the terms, including reporting requirements, shall be incorporated herein. Respondent will be responsible for any costs associated with participation with compliance.

IT IS FURTHER ORDERED that Respondent shall complete an additional (i.e., in addition to the yearly mandated fifteen hours of CLE) nine (9) hours of Continuing Legal Education in the areas of dealing with difficult clients and professionalism.

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

NON-COMPLIANCE LANGUAGE

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

IT IS FURTHER ORDERED that Respondent 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 January, 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 January, 2017.

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

James J. Belanger
J. Belanger Law PLC
P.O. Box 447
Tempe, Arizona 85280
Telephone 602-888-6072
Email: jjb@jbelangerlaw.com
Respondent's Counsel

Copy of the foregoing emailed/hand-delivered
this _____ day of January, 2017, to:

Matthew E. McGregor
Bar Counsel - Intake
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 January, 2017 to:

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

by: _____