

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

JUSTIN FERNSTROM,
Bar No. 028082

Respondent.

PDJ 2018-9135

[State Bar File No. 17-3786]

**FINAL JUDGMENT AND
ORDER**

FILED MAY 14, 2019

The Presiding Disciplinary Judge accepted on May 14, 2019, the Agreement for Discipline by Consent filed by the parties.

IT IS ORDERED Respondent, **JUSTIN FERNSTROM, Bar No. 028082**, is admonished and placed under terms of probation as stated in the Agreement for Discipline by Consent for one (1) year for his conduct in violation of the Arizona Rules of Professional Conduct effective immediately.

IT IS FURTHER ORDERED Respondent shall pay the costs and expenses of the State Bar of Arizona of \$1,207.19, not later than June 14, 2019. There are no costs or expenses incurred by the disciplinary clerk.

NON-COMPLIANCE LANGUAGE

If Respondent fails to comply with any of the foregoing terms, and information 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, whether to enter an additional 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.

DATED this 14th day of May 2019.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
this 14th day of May 2019, to:

Kelly J. Flood
State Bar of Arizona
4201 N 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

Donald Wilson Jr.
Broening Oberg Woods & Wilson PC
2800 N. Central Ave, Suite 1600
Phoenix, AZ 85004
Email: dwj@bowwlaw.com
Respondent's Counsel

by: MSmith

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

JUSTIN FERNSTROM,
Bar No. 028082

Respondent.

PDJ-2018-9135

**DECISION ACCEPTING
DISCIPLINE BY CONSENT**

[State Bar Nos. 17-3786]

FILED MAY 14, 2019

Under Rule 57(a), Ariz. R. Sup. Ct.,¹ an Agreement for Discipline by Consent (“Agreement”), was filed on April 19, 2019. A Probable Cause Order issued on October 12, 2018 and a formal complaint has been filed in this matter. The State Bar of Arizona is represented by Bar Counsel Kelly J. Flood. Mr. Fernstrom is represented by Donald Wilson, *Broening Oberg Woods & Wilson PC*.

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. Mr. Fernstrom has voluntarily waived the right to an adjudicatory hearing, and waived all

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

motions, defenses, objections or requests that could be asserted upon approval of the proposed form of discipline. Under Rule 53(b)(3), notice of this Agreement and the opportunity to object was not required as the State Bar is the complainant. The Agreement is accepted.

The Agreement details a factual basis to support the admissions. It is incorporated by this reference. Mr. Fernstrom admits violating Rule 42, ER 3.3 (candor towards tribunal). The State Bar has agreed to dismiss all other allegations of ER violations. The parties stipulate to an Admonition and probation for one year during which Mr. Fernstrom must complete additional specified CLE. Costs totaling \$1,207.19 shall be paid to the State Bar not later than June 14, 2019.

The misconduct is briefly summarized. Children were placed through a dependency action with non-relatives. They desired to adopt those children. The Department of Child Safety recommended non-relatives utilize a different attorney for the adoption as their prior attorney had represented a relative who had sought to adopt those same children. This was unknown to Mr. Fernstrom. That prior attorney recommended Mr. Fernstrom. Mr. Fernstrom was informed by that attorney that he had check with the Ethics Hotline and had no conflict.

In a joint phone call, Mr. Fernstrom learned that a different relative may have also sought adoption of the children. The DCS caseworker told them "not to be concerned." Mr. Fernstrom had received no notice of such a petition under A.R.S. § 8-

106 and no request to intervene had been filed in the dependency by any such relative. Mr. Fernstrom gave it no further thought. He filed the petition for adoption and mentioned no potential competing petition for adoption.

The non-relatives had an adoption of another child already set for hearing. They wanted all the adoptions to occur at the same time. The assigned judge agreed to expedite the petition to accommodate the non-relatives request for an expedited combined adoption hearing. Due to a family vacation, Mr. Fernstrom could not accommodate that request and requested their prior attorney to fill in for him. He did. At that hearing it was not mentioned that the relative had a petition to adopt pending. That relative was not entitled to notice of the non-relative's petition. The adoption was approved. Later, the adoption was set aside through a settlement that Mr. Fernstrom did not participate in.

The parties agree *Standard 6.1, Violations of Duties owed to the Legal System* applies. *Standard 6.13* provides that the presumptive sanction is reprimand. Mr. Fernstrom negligently failed in his duty to determine if material information was being withheld. His misconduct caused actual harm to the legal system.

The parties have stipulated that mitigating factors 9.32(a) (absence of a prior disciplinary record), 9.32(b) (absence of a dishonest or selfish motive), 9.32(e) (full and free disclosure or cooperative attitude toward proceedings), 9.32(g) character or

reputation and 9.32(1) (remorse) apply. There are no aggravating factors. The agreement is in accordance with the *Standards*.

Now Therefore,

IT IS ORDERED accepting the Agreement and incorporating it with all supporting documents by this reference. A final judgment and order is signed this date.

DATED this 14th day of May 2019.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

COPY of the foregoing e-mailed/mailed
on this 14th day of May 2019, to:

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Email: dwj@bowwlaw.com
Respondent's Counsel

by: MSmith

Kelly J. Flood, Bar No. 019772
Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Telephone (602)340-7278
Email: LRO@staff.azbar.org

OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

APR 19 2019

FILED

BY



Donald Wilson Jr., Bar No. 005205
Broening Oberg Woods & Wilson PC
2800 North Central Ave, Suite 1600
Phoenix, AZ 85004
Telephone 602-271-7717
Email: dwj@bowwlaw.com
Respondent's Counsel

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

**JUSTIN FERNSTROM
Bar No. 028082**

Respondent.

PDJ 2018-9135

State Bar File No. 17-3786

**AGREEMENT FOR DISCIPLINE
BY CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Justin Fernstrom, who is represented in this matter by counsel, Donald Wilson Jr, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. A probable cause order was entered on October 12, 2018, 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.

The State Bar is the complainant in this matter, therefore no notice of this agreement is required pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, Ariz. R. Sup. Ct. Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Admonition, and Probation for one (1) year, during which period Respondent must complete the CLE “Ten Deadly Sins of Conflict” and an additional three (3) hours of CLE in the area of adoptions and juvenile law. 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.

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.

FACTS

GENERAL ALLEGATIONS

1. Respondent was licensed to practice law in Arizona on November, 05, 2010.

COUNT ONE (File no. 17-3786/ Judicial Referral)

2. In July of 2016, Ed Johnson represented Maternal Aunt in filing a petition to adopt her two nieces, AE and IF.

3. In October of 2016, AE and IF were removed from Maternal Aunt's home and placed with Johnson's other clients, Kassidy and Christopher B (the "Bs.")²

4. At some point in November of 2016, most likely in the latter half, Johnson's clients Kassidy and Christopher B told him they wanted to adopt AE and IF. They told Johnson that DCS had given them "the go ahead" to adopt the girls, and they asked him for a recommendation for a different attorney, because DCS told them not to use Johnson due to his representation of Maternal Aunt. Johnson recommended his friend, Respondent Justin Fernstrom. This conversation preceded

² Johnson represented the Bs with respect to their adoption of a different child, unrelated to AE and IF.

prior to Respondent Fernstrom's engagement, so he has no personal, firsthand knowledge of it.

5. On an unknown date, but after Respondent Fernstrom's engagement, Johnson, the Bs, and Respondent Fernstrom had a joint phone call. During that call, the Bs revealed to Johnson and Respondent Fernstrom that they were informed by DCS caseworker Momi Howard ("Howard") that Maternal Grandmother had filed a petition to adopt AE and IF, but that Howard told them "not to be concerned" about Maternal Grandmother's petition. The Bs told Johnson and Respondent Fernstrom that DCS has "ruled out" the Maternal Grandmother, and so had Judge Karen O'Connor. Kassidy B. attended the October 2016 hearing at which placement with Maternal Grandmother was discussed.

6. Respondent Fernstrom admits that he heard about Maternal Grandmother's possible petition because it was discussed in the joint phone call with the Bs but, in his experience, family members will sometimes claim an intent to file such petitions, but then will fail to follow through on them. Respondent Fernstrom never received actual notice of a petition pursuant to A.R.S. 8-106.

7. During the joint phone call, Respondent Fernstrom agreed to represent the Bs and file a petition to adopt AE and IF. The Bs told Johnson and Respondent

Fernstrom during the call they wanted to have the adoption hearing for AE and IF on the same date as the hearing for a third, unrelated child in the matter for which Johnson represented them. That hearing was set for December 2, 2016. The Bs explained that it was the same date as Cassidy's birthday, and they wanted to have all three adoptions occur on that date so they could have a big celebration.

8. Respondent Fernstorm called Johnson the day after the joint call with the Bs to say he had reviewed his calendar and he would not be able to be present at the December 2 hearing because he had a pre-planned family vacation. Johnson was obviously available, and agreed to cover for Respondent at the hearing. Respondent Fernstrom was informed by Johnson that Johnson had contacted the State Bar Ethics Hotline and was advised that, under the circumstances, he could proceed to cover the adoption hearing.

9. Respondent Fernstrom filed the Bs' petition to adopt AE and IF on December 1, 2016, at 11:13 a.m.

10. The petition did not mention Maternal Grandmother's earlier-filed, competing petition. The Maternal Grandmother had not intervened in the dependency action prior to filing a petition to adopt.

11. On December 1, 2016 when the Bs' petition to adopt AE and IF was filed, Johnson and Respondent Fernstrom approached Judge Duncan's JA to ask if Judge Duncan would expedite the Bs' petition to adopt AE and IF and hold the hearing on December 2, 2016 along with the Bs' hearing for the other, unrelated child. The JA reported that Judge Duncan could accommodate that.

12. On December 2, 2016, Johnson appeared in Judge Duncan's court to handle the Bs' petition to adopt the other, unrelated child as well as AE and IF. In the courtroom, Johnson commented to Howard that he knew of the Maternal Grandmother's petition to adopt AE and IF, and asked if they were nevertheless "good to go" with the Bs' petition. Johnson says Howard said that the Maternal Grandmother's petition was staffed with her supervisor and the AG, who she reported had said that the Bs were free to proceed with the adoption.

13. Johnson did not inform Judge Duncan of the Maternal Grandmother's petition during the hearing.

14. At the time of the hearing, the Bs' petition had been on file for less than 24 hours, and neither Maternal Aunt nor Maternal Grandmother had any knowledge or notice of it, and at this time were not statutorily entitled to notice. Additionally, email exchanges with Judge Duncan's JA, other relevant court staff,

and Respondent Fernstrom and Johnson reveal that because Judge Duncan's JA agreed to expedite the hearing less than 24 hours after a petition was filed, Court personnel were having trouble with the file and were scrambling to complete and assemble it in advance of the hearing.

15. On December 2, 2016 Judge Duncan conducted the hearing, approved the adoptions, and signed the orders without ever having been informed of Maternal Grandmother's prior-filed, competing petition.

16. On February 7-8, 2017, an email exchange occurred, where Maternal Aunt emailed Howard regarding delivering some items to AE and IF. Howard responded that the girls had been adopted and the adoptive placement would prefer not to receive any items. Maternal Aunt expressed surprise because she was aware that Maternal Grandmother had filed a petition to adopt AE and IF in November, and a hearing was set for February 9, 2017 on Maternal Grandmother's petition. This was the first that Maternal Aunt learned that AE and IF had been adopted by someone outside the family.

17. Maternal Grandmother sought to intervene and set aside the Bs' adoption of AE and IF. Various proceedings occurred, the judge who had approved the adoption recused herself, and an evidentiary hearing was held on October 18, 2017.

18. Ultimately, a settlement was reached between Maternal Grandmother, DCS, and the Bs to set aside the Bs' adoption of AE and IF. That settlement was sealed and Respondent was not involved in that settlement.

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., specifically ER 3.3.

CONDITIONAL DISMISSALS

The State Bar has conditionally agreed to dismiss allegations that Respondent Fernstrom violated ERs 3.1, 8.4(c) and 8.4(d).

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 and one (1) year of probation, and a CLE requirement to attend “The Ten Deadly Sins of Conflict,” and an additional three (3) hours of study in the area of adoptions and juvenile law, to be approved by Bar Counsel.

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 *Standard 6.1* is the appropriate *Standard* given the facts and circumstances of this matter. *Standard 6.13* provides that Reprimand is generally appropriate when a lawyer is negligent in determining whether statements are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party, or an adverse effect on the legal proceedings. *Standard 6.14* provides that an admonition is generally appropriate when a lawyer is negligent in determining whether statements are false or in taking remedial action when material information is being withheld, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceedings. Here, Respondent Fernstrom's conduct in failing to provide material information to Judge Duncan regarding the existence of Maternal Grandmother's petition to adopt AE and IF resulted in actual harm to the

legal system, and to AE and IF, because collateral proceedings have occurred to address the effect of the competing petition on the adoption of AE and IF.

The duty violated

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

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent negligently omitted material information in the petition for the Bs' adoption of AE and IF, 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 harm to the legal system, and to AE and IF, because collateral proceedings have occurred to address the effect of the competing petition on the adoption of AE and IF.

Aggravating and mitigating circumstances

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

In aggravation:

None.

In mitigation:

Standard 9.32(a): absence of a prior disciplinary record.

Standard 9.32(b): absence of a dishonest or selfish motive.

Standard 9.32(e): full and free disclosure to the State Bar and cooperative attitude toward the proceedings.

Standard 9.32(g): character or reputation; two letters in support of Respondent are attached.

Standard 9.32(l): Remorse; Respondent Fernstrom has authored the following in support of this Standard: I have learned a tremendous amount during the year and a half that this matter has been pending. I have had abundant opportunities to reflect and consider how the matter could have been handled better and have come to more clearly understand my duties to my chosen profession. While I certainly wish that I was not in this position, I also accept what my role was in the matter and the impact that it had. The gravity of the situation has not been lost on me. I am committed to continuing to improve and am implementing lessons learned

during this process in my daily practice, as I strive to represent my clients, myself and my profession to the best of my ability.

(Respondent Fernstorm has provided character letters, attached.)

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 Admonition and Probation for one (1) year probation, during which Respondent must take the CLE “Ten Deadly Sins of Conflict,” and an additional three (3) hours of CLE in the area of adoptions and juvenile law, to be approved by Bar Counsel.

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

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.

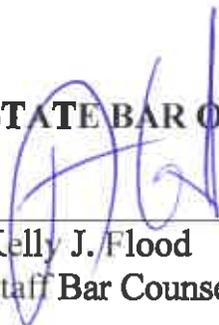
CONCLUSION

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 Probation for one (1) year, during which period Respondent must complete the CLE “Ten Deadly Sins of Conflict” and an additional three (3) hours of CLE in the area of adoptions and juvenile law, and the imposition of costs and expenses. A proposed form of order is attached hereto as Exhibit B.

DATED this 19th day of April 2019.

STATE BAR OF ARIZONA



Kelly J. Flood
Staff Bar Counsel

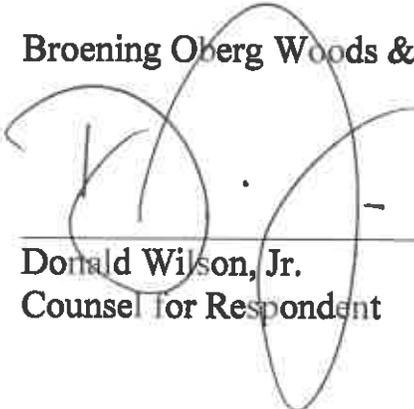
This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation. [I acknowledge my duty under the Rules of the Supreme Court with respect to discipline and reinstatement. I understand these duties may include notification of clients, return of property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

DATED this 18th day of April, 2019.


Justin Fernstrom
Respondent

DATED this 18 day of April, 2019.

Broening Oberg Woods & Wilson PC


Donald Wilson, Jr.
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 10th day of April, 2019.

Copy of the foregoing emailed
this 10th day of April, 2019, 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 10th day of April, 2019, to:

Donald Wilson, Jr.
Broening Oberg Woods & Wilson PC
2800 North Central Ave, Suite 1600
Phoenix, AZ 85004
Email: dwj@bowwlaw.com
Respondent's Counsel

Copy of the foregoing hand-delivered
this 10th day of April, 2019, to:

Lawyer Regulation Records Manager
State Bar of Arizona

4201 N. 24th St., Suite 100
Phoenix, Arizona 85016-6266

by: Marguerite Good
KJF/mg