

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

CYNTHIA FUTTER,

Respondent.

PDJ-2015-9088

FINAL JUDGMENT AND ORDER

[State Bar No. 14-0719]

FILED OCTOBER 1, 2015

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on September 1, 2015, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED Respondent, **Cynthia Futter**, is hereby reprimanded for her 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 Ms. Futter 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 1st day of October, 2015.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/mailed
this 1st day of October, 2015.

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by: JAlbright

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JUDGE**

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

CYNTHIA FUTTER,

Respondent.

PDJ 2015-9088

State Bar File Nos. **14-0719**

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Cynthia Futter, who is represented in this matter by counsel, J. Scott Rhodes and Kerry A. Hodges, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. The parties reached an agreement for discipline by consent before the matter was submitted to the Attorney Discipline Probable Cause Committee; therefore, there is no order of probable cause. 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 on August 20, 2015. Complainant has 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.

Respondent conditionally admits that her conduct, as set forth below, violated Rule 42, ER 5.5, and Rule 31, Ariz. R. Sup. Ct. Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Reprimand. 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 has been licensed to practice law in California since June of 1984.
2. Respondent is not and has not ever been licensed to practice law in Arizona.

COUNT ONE (File no. 14-0719/Ehinger)

CONDITIONAL ADMISSIONS

3. In early 2009, Respondent met with the board of a homeowner's association in Phoenix, Arizona named Tapestry on Central ("HOA").

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.

4. The HOA manages a mixed-use condominium project that contains 12 commercial units and 280 residential units in Phoenix, Arizona.

5. When she initially met with the HOA in 2009, the HOA informed Respondent of a number of issues that it encountered including bankruptcy threats, construction defects, liens, collections, financing, and management issues.

6. On March 1, 2009, Respondent provided the HOA a retainer agreement pursuant to which she would act as the HOA's general counsel pending retention of local counsel.

7. At this time, the HOA had Arizona counsel but was in the process of interviewing Arizona law firms to replace that counsel and to assist the HOA with a construction defects matter among other matters. Respondent states that it was her intent to associate with Arizona counsel.

8. In March of 2009, the HOA identified the Arizona firm that it wanted to utilize to replace its then-current Arizona counsel and to assist the HOA with its construction defects matter. In May of 2009, the HOA voted to use this firm on an as-needed basis. This firm assisted the HOA on the construction defects matter and other matters. On March 15, 2010, the firm indicated its intent to terminate the attorney-client relationship, then continued to perform legal services until it withdrew as counsel of record in January 2011.

9. On March 16, 2009, Respondent sent a letter to a contractor involved in the HOA's construction defects matter, stating: "This firm has been retained as general counsel to the Board of Directors of Tapestry on Central Condominium Association. . . . I have been asked to respond to your letter dated March 4, 2009. . . . The Board is in the process of retaining construction defects counsel, but in the

meantime, asked me to respond.” In the letter, Respondent proposed a tolling agreement that would toll the statute of limitations so that the HOA and the other parties involved in the construction defects matter could conduct certain inspections.

10. On the same date, Respondent sent a similar letter to the attorney for the developer of the complex, stating: “This firm has been retained as general counsel to Tapestry on Central to shepherd defects and construction issues pending retention of construction defects counsel. . . . In response to your letter regarding an inspection . . . , we would suggest a 90 day tolling agreement with respect to these issues and the statutory requirements in order to coordinate the inspection.” She stated that the HOA was “in the process of retaining construction defects counsel and have narrowed it down to two firms.”

11. On March 24, 2009, Respondent prepared a cause of action matrix for the HOA.

12. In late March of 2009, the HOA terminated Respondent’s legal representation and asked Respondent to act as its business consultant by interfacing with unit owners and working with new Arizona counsel to provide new counsel with factual and historical information and other business consulting services.

13. On April 14, 2009, on behalf of the HOA, Respondent sent a demand letter to Chicago Title Insurance Company relating to unpaid assessments and the possible assertion of a lien.

14. On June 22, 2009, on behalf of the HOA, Respondent sent a letter to the attorney for a relocating owner declining a settlement offer and proposing alternative terms prior to the unit owner relocating.

15. In late 2009 or early 2010, the HOA provided Respondent with a consulting services agreement drafted by the HOA.

16. The consulting services agreement stated that the HOA "is currently engaged in a confidential settlement process with certain third parties relating to the construction and management of . . . [the HOA] and it is anticipated that . . . [Respondent] will be the lead negotiator for . . . [the HOA] in this process and will structure any settlement related thereto. In addition, . . . [the HOA] has retained construction defects counsel to assist in the direction and documentation of any settlement agreement or documents related thereto. . . . [Respondent will be working with said counsel in this process and . . . [the HOA agrees that Respondent] shall not render . . . any legal services in connection with the confidential settlement process."

17. The consulting services agreement acknowledges that Respondent is not licensed to practice law in Arizona and states that Respondent is providing the HOA "with technical advice and business recommendations, and is not providing legal advice to" the HOA.

18. Respondent agreed to defer a portion of the fees due to her by the HOA until after the HOA received its recovery on the construction defects matter.

19. On February 1, 2010, on behalf of the HOA, Respondent sent a letter to a unit owner attempting to collect unpaid assessments.

20. On November 15, 2010, Respondent sent separate letters to 14 former unit owners on the letterhead of Respondent's California legal and business consulting firm, Futter-Wells, stating: "This firm represents Tapestry on Central Condominium project located in Phoenix, Arizona."

21. In her November 15, 2010 letter to the unit owners, Respondent further states that the former unit owners owed a certain sum for monthly assessments and that the HOA will waive any late charges and fees if the account is brought current by a certain date.

22. In December of 2010, the HOA retained another Arizona attorney to assist it with its construction defect and other matters, and this attorney remained the HOA's attorney until late 2012.

23. On March 3, 2011, at the request of the HOA to help complete its audit, Respondent sent an audit response letter to the HOA's accountant informing the accountant of the status of two legal matters on which she stated her firm advised the HOA. Respondent further informed the accountant that she represented the HOA along with an Arizona firm on a matter referred to as the "Goettl matter."

24. On September 26, 2011, again at the request of the HOA to help complete its audit, Respondent sent another audit response letter to the same accountant, informing that accountant of the status of two legal matters on which she stated her firm advised the HOA. Respondent further informed the accountant that she represented the HOA along with an Arizona attorney on a matter referred to as the "Goettl matter."

25. In 2013, Respondent terminated her consulting agreement with the HOA.

26. In February of 2014, after the HOA settled the construction defects matter, Respondent requested that the HOA pay her the deferred fees.

27. The HOA did not do so, and Respondent filed a complaint against the HOA in California. The HOA filed a counterclaim against Respondent alleging that she

engaged in the unauthorized practice of law and demanding that she disgorge any fees that the HOA paid her. This matter is still pending in California.

28. Respondent engaged in the unauthorized practice of law in Arizona by sending the above referenced March 16, 2009, April 14, 2009, June 22, 2009, February 1, 2010, November 15, 2010, March 3, 2011, and September 26, 2011 letters, and by preparing the above-referenced cause of action matrix.

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 her conduct violated Rule 42, Ariz. R. Sup. Ct., specifically ER 5.5, and Rule 31, Ariz. R. Sup. Ct.

RESTITUTION

Restitution is not an issue in this matter. In California, Respondent filed a complaint against the HOA for failing to pay her fees. The HOA filed a counterclaim alleging that Respondent engaged in the unauthorized practice of law in Arizona and, therefore, that the HOA is entitled to disgorgement of fees that it paid Respondent. Accordingly, the issue of disgorgement of fees for the above acts of the unauthorized practice of law is included in the issues being litigated in and addressed by the California court.

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 sanction is appropriate:

Reprimand.

By entering this consent agreement, the State Bar is forgoing any relief it could otherwise seek under Rules 75 through 80, Ariz. R. Sup. Ct.

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* 7.3 applies given the facts and circumstances of this matter. *Standard* 7.3 states: "Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system." Respondent believed she was hired to serve as the HOA's business consultant, not its attorney. Respondent further believed that the services she provided to the HOA over the years were business-consulting services, not legal services. In retrospect, however, Respondent recognizes and admits that the discrete

acts identified above could have been misinterpreted by third parties as including the practice of law. Respondent recognizes and admits that the word "represent" can be taken by third parties to mean representation as counsel in the practice of law and not as a business consultant and that the use of the word "represent" in this context was negligent.

The duty violated

As described above, Respondent's conduct violated her duty to the profession.

The lawyer's mental state

For purposes of this agreement, the parties agree that Respondent negligently engaged in the unauthorized practice of law in Arizona and that her 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 the profession.

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:

Standard 9.22(i): Substantial experience in the practice of law. Respondent has been licensed to practice law in California since 1984.

In mitigation:

Standard 9.32(a): Absence of a prior disciplinary record. Respondent has not been disciplined in California or in Arizona previously.

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

Standard 9.32(e): Full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

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: Because Respondent's conduct was negligent as explained above, a reprimand is the appropriate 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 and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit B.

DATED this 31st day of August, 2015.

STATE BAR OF ARIZONA



Nicole S. Kasetta
Staff Bar Counsel

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

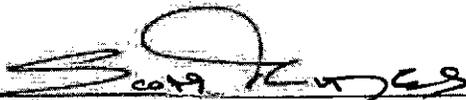
DATED this 27th day of August, 2015



Cynthia Fütter
Respondent

DATED this 27th day of August, 2015

Jennings Strouss & Salmon PLC



J. Scott Rhodes
Kerry A. Hodges
Counsel for Respondent

Approved as to form and content



Marel Vessella
Chief Bar Counsel

DATED this _____ day of August, 2015.

STATE BAR OF ARIZONA

Nicole S. Kaseta
Staff Bar Counsel

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

DATED this 27th day of August, 2015



Cynthia Fütter
Respondent

DATED this _____ day of August, 2015

Jennings Strouss & Salmon PLC

J. Scott Rhodes
Kerry A. Hodges
Counsel for Respondent

Approved as to form and content

Maret Vessella
Chief Bar Counsel

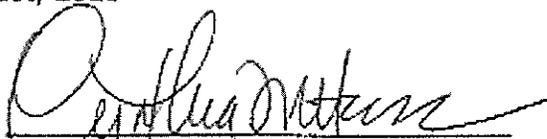
DATED this _____ day of August, 2015.

STATE BAR OF ARIZONA

Nicole S. Kaseta
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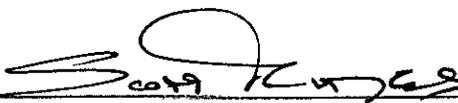
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Cynthia Fütter
Respondent

DATED this 27th day of August, 2015

Jennings Strouss & Salmon PLC



J. Scott Rhodes
Kerry A. Hodges
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 1st day of September, 2015.

Copies of the foregoing mailed/emailed
this 1st day of September, 2015, to:

J. Scott Rhodes
Kerry A. Hodges
Jennings Strouss & Salmon PLC
One E. Washington St., Ste 1900
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Email: srhodes@jsslaw.com
Respondent's Counsel

Copy of the foregoing emailed
this 1st day of September, 2015, to:

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
Email: officepdj@courts.az.gov

Copy of the foregoing hand-delivered
this 1st day of September, 2015 to:

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

by: Jackie Drenter
NSK: jld

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EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Non-Member of the State Bar of Arizona,
Cynthia Futter, Respondent

File No. 14-0719

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.

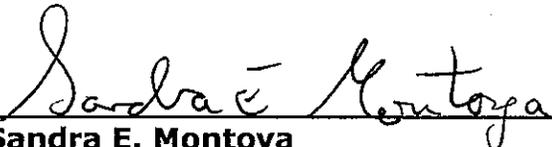
Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative 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**


Sandra E. Montoya
Lawyer Regulation Records Manager

8-14-15
Date

C

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EXHIBIT B

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

Cynthia Futter,

Respondent.

PDJ

FINAL JUDGMENT AND ORDER

State Bar No. 14-0719

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, **Cynthia Futter**, is hereby reprimanded for her conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$1,200.00, 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 August, 2015.

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 August, 2015.

Copies of the foregoing mailed/emailed
this _____ day of August, 2015.

J. Scott Rhodes
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Respondent's Counsel

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this ____ day of August, 2015, to:

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State Bar of Arizona
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by: _____