

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

**GARRETT L SMITH,
Bar No. 015307**

Respondent.

PDJ 2016-9062

FINAL JUDGMENT AND ORDER

[State Bar No. 15-2773]

FILED JUNE 27, 2016

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on June 20, 2016, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS ORDERED Respondent, **Garrett L. Smith**, 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. Smith 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 27th day of June 2016.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

///

Copies of the foregoing mailed/e-mailed
this 27th day of June, 2016, to:

Geoffrey M. T. Sturr
Osborn Maledon, P.A.
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Respondent's Counsel

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by: AMcQueen

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

GARRETT L. SMITH,
Bar No. 015307

Respondent.

No. PDJ-2016-9062

**DECISION AND ORDER
ACCEPTING DISCIPLINE BY
CONSENT**

[State Bar File No. 15-2773]

FILED JUNE 27, 2016

An Agreement for Discipline by Consent (Agreement) was filed on June 20, 2016, and submitted under Rule 57(a)(3) of the Rules of the Arizona Supreme Court. The Agreement was reached before an Order of Probable Cause was entered and before the authorization to file a formal complaint. Upon filing such Agreement, the Presiding Disciplinary Judge (PDJ), "shall accept, reject or recommend modification of the agreement as appropriate".

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 If the agreement is not accepted, those conditional admissions are automatically withdrawn and shall not be used against the parties in any subsequent proceeding.

Under Rule 53(b)(3), notice of this Agreement was provided to Complainant by email on May 17, 2016 notifying complainant of the opportunity to file a written objection within five days. No objection was received.

The Agreement details a factual basis for the conditional admissions. Mr. Smith failed to diligently monitor the status of his client's civil suit, failed to adequately communicate with the client about the status of the civil suit resulting in a default judgement, and failed to identify the civil action in his fee agreement.

Mr. Smith conditionally admits he violated Rule 42, Ariz. R. Sup. Ct., ERs 1.3 (diligence), 1.4 (communication) and 1.5 (fees). The parties stipulate to a sanction of reprimand and the payment of costs and expenses of the disciplinary proceeding for \$1,200.00 within thirty (30) days from the date of the final judgment and order.

The parties agree that *Standard 4.33, Lack of Diligence*, of the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* is most applicable to Mr. Smith's violation of ERs 1.3, 1.4 and 1.5 and provides:.

Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

Mr. Smith conditionally admits he negligently violated his duty to his client and his misconduct caused potential injury to the client.

The parties agree the following aggravating factors are present: 9.22(a) prior disciplinary offenses and 9.22(i) substantial experience in the practice of law. The parties further agree that the following mitigating factors are present: 9.32(b) absence of dishonest or selfish motive, 9.32(e) full and free disclosure to State bar and cooperative attitude during screening process, and 9.32(m) remoteness of prior offenses.

The PDJ Judge finds the proposed sanctions of reprimand and the imposition of costs and expenses meet the objectives of attorney discipline and fall within the

presumptive sanctions as outlined in the *Standards*. The Agreement is therefore accepted and incorporated herein by reference.

IT IS ORDERED Respondent, Garrett L. Smith, is hereby 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. Smith 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 27th day of June, 2016.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
this 27th day of June, 2016 to:

Hunter Perlmeter
Bar Counsel
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Respondent's Counsel

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

GARRETT L. SMITH,
Bar No. 015307,

Respondent.

PDJ 2016

State Bar File Nos. 15-2773

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Garrett L. Smith, through counsel, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. 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. This matter has not been submitted to the Attorney Discipline Probable Cause Committee for review.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.3, 1.4, and 1.5. 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. Pursuant to Rule 53(b)(3) notice of this agreement was provided to the Complainant by letter and e-mail on May 17, 2016, giving him five (5) business days to file a written objection to the agreement should he so choose. Complainant has indicated that he has no objection.

FACTS

GENERAL ALLEGATIONS

1. Respondent was licensed to practice law in Arizona on October 23, 1993.

COUNT ONE (File no. 15-2773/Van Tilburg)

2. Complainant, the owner of a single-family residence, had a dispute with two tenants in or about April 2010.
3. During the dispute, Complainant allegedly pushed the tenant and was charged in Mesa Municipal Court with misdemeanor assault.
4. During the dispute, the tenants removed from the residence certain property belonging to Complainant.
5. On July 2, 2010, Complainant retained Respondent pursuant to a written fee agreement for a \$3,000 flat fee.
6. While the engagement letter identified the criminal case as the purpose of the representation, Respondent states that he discussed during his initial meeting with Complainant on July 2, 2010 the filing of a civil action for conversion to recover

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.

the property the tenants had taken from the residence. Respondent's fee agreement did not include information regarding representation in the civil matter.

7. During his July 2, 2010 meeting with Complainant, Respondent prepared a civil complaint against the tenants for conversion of the property removed from the residence.

8. While Respondent did not amend his engagement letter with Complainant to refer to the filing of the civil complaint, within a short time after the July 2, 2010 meeting, Respondent communicated with Complainant by e-mail about the filing and service of the complaint.

9. Respondent made his initial appearance in the criminal case on July 15, 2010.

10. On August 11, 2010, Respondent caused the civil complaint to be filed with the East Mesa Justice Court.

11. A trial of the criminal case took place on August 24, 2010. Complainant was found guilty of criminal damage and assault.

12. Respondent caused the tenants to be served with the civil complaint during the trial of the criminal case.

13. On September 14, 2010, the tenants filed an answer to the civil complaint and asserted counterclaims. Respondent, who then practiced law through Udall and Smith, PLC, 18 E. University Drive in the City of Mesa, received a copy of the answer and counterclaim.

14. A restitution hearing in the criminal case was held on September 14, 2010.

15. A sentencing hearing in the criminal case was held on September 21, 2010, at which Complainant was sentenced and ordered to pay restitution to the tenants.

16. On October 27, 2010, the Justice of the Peace for the East Mesa Justice Court ordered the matter transferred to the Superior Court because the counterclaim sought damages in excess of the Court's jurisdictional limit. Respondent received a copy of the Court's Order.

17. Respondent states that Complainant advised him that he did not wish to pursue the civil conversion claim against the tenants.

18. During November and December 2010, Respondent communicated with Complainant about the status of the civil action, noting that the tenants were required to pay a filing fee, that he was not aware that they had done so, and that if the fee were not paid, the counterclaim would be dismissed.

19. Effective February 1, 2011, Respondent moved to the law firm Udall Shumway PLC and no longer maintained an office at 18 E. University Drive in the City of Mesa.

20. Respondent states that, when he moved to Udall Shumway, he did not include Complainant's civil action on his list of cases, nor did he file a notice of change of address with the Court in that action, because he had concluded that the tenants were satisfied with the restitution award in the criminal case, and had abandoned the counterclaim they had filed in the civil case.

21. Superior Court records reflect that the tenants paid the filing fee for their counterclaim on November 12, 2010.

22. Superior Court records reflect that the tenants' counsel filed an application for entry of default on February 16, 2011 and a Notice of Default Hearing on August 3, 2011. Those documents indicate that they were served on Respondent at his former office address — 18 E. University Drive in the City of Mesa.

23. Respondent states that he did not receive those documents and was unaware of the default proceedings.

24. Superior Court records reflect that on August 19, 2011 default judgments totaling \$46,494.26 were entered in favor of the tenants and against Complainant.

25. On June 29, 2014, Complainant sent an e-mail to Respondent, stating that he had learned of the judgments through a search of the Maricopa County Recorder's website, attaching a default judgment recorded on August 26, 2011, and asking Respondent to call him.

26. On June 29, 2014, Respondent sent an e-mail to Complainant stating that he was out of town, that Complainant could seek to set aside the judgment, and that if Complainant wanted to discuss the matter, he should call him back the following week.

27. On July 10, 2014, Complainant sent Respondent an e-mail and left him a voice-mail message.

28. Respondent states that he recalls speaking with Complainant by telephone during the following week and advising Complainant that Complainant could take no action, since the tenants had not made any attempt to collect the judgments.

29. In October 2015, Respondent left Udall Shumway to practice on his own.

30. On October 26, 2015, Complainant sent an e-mail to Respondent, using Respondent's Udall Shumway e-mail address.

31. On October 28, 2015, Respondent spoke to Complainant by telephone. During that call Respondent advised Complainant that he could continue to wait to see if the tenants took any steps to collect on the judgments. Complainant stated that he wanted to have the judgments set aside and that he hoped to resolve matters with Respondent amicably.

32. On May 13, 2016, Respondent and Complainant entered into a written agreement whereby Respondent refunded to Complainant the \$3,000 fee he had paid

Respondent, and paid Complainant \$10,000 for Complainant "to use in obtaining an agreement from the holders of the Judgments to satisfy the Judgments, which [Complainant] may retain if no such agreement should be reached." Complainant further agreed to release Respondent "from any liability arising from or relating to the Judgments."

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 ERs 1.3, 1.4, and 1.5, in that Respondent failed to diligently monitor the civil action to determine whether the counterclaims against Complainant had been pursued and to communicate with Complainant about the status of the matter, which resulted in a default judgment being entered against Complainant, and failed to identify the civil action in his fee agreement.

RESTITUTION

Restitution is not an issue, given the terms of the May 13, 2016 agreement between Respondent and Complainant.

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.

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* 4.43 is the appropriate *Standard* given the facts and circumstances of this matter. *Standard* 4.43 provides that reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client.

The duty violated

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

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent was negligent 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 the client.

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(a) prior disciplinary offenses

- 06-1634: (informal reprimand) for violating ER 1.5(d) and ER 1.15(a) and (d).
- 07-0600: (informal reprimand) for violating Ariz. R Sup. Ct. 41(c) and (g)
- 08-0086: (informal reprimand) for violating ERs 1.2 and 1.5.

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

In Mitigation

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

Standard 9.32(e) full and free disclosure to State Bar and cooperative attitude during screening investigation

Standard 9.32(m) remoteness of prior offenses

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. 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 sanctions 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 and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit B.

DATED this 20th day of June, 2016.

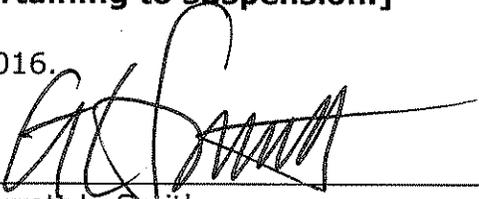
STATE BAR OF ARIZONA



Hunter F. Perlmeter
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.]

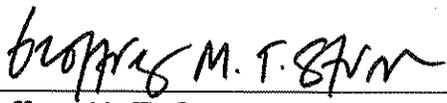
DATED this 15th day of June, 2016.



Garrett L. Smith
Respondent

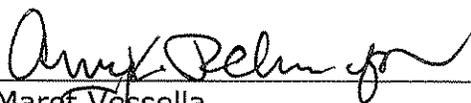
DATED this 15th day of June, 2016.

OSBORN MALEDON, P.A.



Geoffrey M. T. Sturr
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 20th day of June, 2016

Copy of the foregoing e-mailed
this 20th day of June, 2016, to:

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

Copy of the foregoing mailed/e-mailed
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Osborn Maledon, P.A.
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Respondent's Counsel

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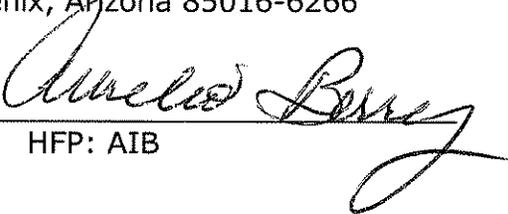
By: 
HFP: AIB

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
GARRETT L. SMITH Bar No. 015307, Respondent

File No. 15-2773

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
CURRENT MEMBER OF
THE STATE BAR OF ARIZONA,

**GARRETT L SMITH,
Bar No. 015307,**

Respondent.

PDJ 2016

FINAL JUDGMENT AND ORDER

[State Bar No. 15-2773]

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, **Garrett L. Smith**, 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 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 _____

The Honorable 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 June, 2016

Copies of the foregoing mailed/e-mailed
this _____ day of June, 2016, to:

Geoffrey M. T. Sturr
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Email: gsturr@omlaw.com
Respondent's Counsel

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By: _____