

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

**RICHARD A. SMITH,
Bar No. 014264**

Respondent.

PDJ 2016-9060

FINAL JUDGMENT AND ORDER

[State Bar No. 16-0207]

FILED JUNE 24, 2016

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on June 15, 2016, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS ORDERED Respondent, **Richard A. 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 24th day of June, 2016.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copy of the foregoing mailed/mailed
this 24th day of June, 2016, to:

Richard A. Smith
5122 N. 12th Avenue
Phoenix, Arizona 85013-2121
Email: richard.smith@nlrb.gov
Respondent

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

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

by: AMcQueen

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

RICHARD A. SMITH
Bar No. 014264

Respondent.

No. PDJ-2016-9060

**DECISION AND ORDER
ACCEPTING DISCIPLINE BY
CONSENT**

[State Bar File No. 16-0207]

FILED JUNE 24, 2016

An Agreement for Discipline by Consent (Agreement) was filed on June 15, 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), no notice of this Agreement is necessary as the State Bar is the complainant.

The Agreement details a factual basis for the admissions to the charge in the Agreement. After retiring from the practice of law in 2010, Mr. Smith engaged in the representation of a client in a contract dispute. Mr. Smith met with the State Bar regarding reinstatement requirements and “withdrew” from the representation of that client, but continued to perform services that constitute the “practice of law” as defined by Rule 31, Ariz. R. Sup. Ct. Mr. Smith conditionally admits he violated Rule 42, Ariz. R. Sup. Ct., ER 5.5 unauthorized practice of law and ER 8.4(d) misconduct prejudicial to the administration of justice. The parties stipulate to a sanction of reprimand and payment of costs and expenses of the disciplinary proceeding for \$1,200.00 within thirty (30) days from the final judgment and order.

The parties agree that *Standard 7.3*, negligent violation of a duty owed as a professional, of the American Bar Association’s *Standards for Imposing Lawyer Sanctions (Standards)* is most applicable to Mr. Smith’s violation of ER’s 5.5 and 8.4(d). Under *Standard 7.3*, reprimand is the presumptive sanction and provides:

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.

Mr. Smith conditionally admits he negligently violated his duty to the profession and to the legal system by engaging in the unauthorized practice of law and by engaging in misconduct that was prejudicial to the administration of justice. Furthermore, Mr. Smith conditionally admits that his conduct caused actual harm to the profession and to the legal system.

The parties agree that no aggravating factors are present. The parties further agree that mitigating factor 9.32(a), absence of prior disciplinary record, is present.

The PDJ Judge finds the proposed sanctions of Reprimand and imposition of costs and expenses meet the objectives of attorney discipline. Mr. Smith's negligence in continuing to practice law after retirement supports the sanctions in the Agreement. The sanctions also fall within the presumptive sanctions outlined in the *Standards*. The Agreement is therefore accepted and incorporated by reference.

IT IS ORDERED Respondent, Richard A. Smith, is hereby Reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective as of the date of this order.

IT IS FURTHER ORDERED Respondent 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 service of this Order. There are no costs from the PDJ's office.

DATED this 24th day of June, 2016.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
this 24th day of June, 2016 to:

Stacy L. Shuman
Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, AZ 85016-6266
Email: lro@staff.azbar.org

Richard A. Smith
5122 N. 12th Avenue
Phoenix, Arizona 85013-2121
Email: richard.smith@nlrb.gov
Respondent

Lawyer Regulation Records Manager
State Bar of Arizona
4201 N. 24th Street, Suite 100
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by: AMcQueen

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Email: richard.smith@nlrb.gov
Respondent

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

**RICHARD A. SMITH,
Bar No. 014264,**

Respondent.

PDJ 2016 - _____

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

[State Bar File No. 16-0207]

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Richard A. Smith, who has chosen not to seek the assistance of counsel, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. A probable cause order has not been entered and a formal complaint has not been filed in this matter. Respondent voluntarily waives the right to an adjudicatory hearing, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

Pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct., notice of this agreement was provided to the complainant by phone on June 14, 2016. Complainant 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 and indicates that he does not oppose this Agreement for Discipline by Consent.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, Ariz. R. Sup. Ct., ER 5.5 ~ Unauthorized Practice of Law and ER 8.4(d) ~ Misconduct Prejudicial to the Administration of Justice.

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. On May 23, 1992, Respondent was licensed to practice law in the State of Arizona.
2. On June 30, 2010, Respondent retired from the practice of law.

COUNT ONE (File No. 16-0207/Clementi)

3. Based upon his understanding of the Oath of Admission and mistaken belief that anyone could represent another in small claims/municipal court²,

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.

² In his response to the State Bar, Respondent claims that he undertook the representation pursuant to his oath that "I will never reject, from any consideration personal to myself, the

Respondent indicates that he began assisting his friend, Kathleen Sommer (hereinafter referred to as "Sommer"), who could neither afford to consult with, nor hire, an attorney, *pro bono* regarding a contractual dispute with Leonard Clementi (hereinafter referred to as "Clementi") in December 2013 only after several members of the State Bar, some recommended to Sommer by the State Bar, refused to help her.

4. On or about March 15, 2014, Respondent wrote Clementi a cease and desist letter on behalf of Sommer containing a header identifying Respondent as "Richard A. Smith Esq. for Kathleen Sommer". The letter outlines Ms. Sommer's position regarding the contractual dispute between Clementi and Sommer by explaining that "[i]t is well settled under contract law that a 'meeting of the minds' is an essential element for the formation of a valid contract". Respondent then set forth the purported facts demonstrating that a 'meeting of the minds' never occurred as well as Sommer's belief that certain documents were unilaterally altered by Clementi.

5. Respondent closed the letter by stating, in pertinent part, "[a]ccordingly, please inform me (in writing) by the close of business on March 24, 2014, that you have ended your pursuit of this meritless and fraudulent claim. If you fail to comply with my request and you continue with your threats, I will refer this matter to the Maricopa County Attorney for criminal prosecution." The letter is signed "Richard A. Smith, Esq. Retired Field Attorney N.L.R.B."

cause of the defenseless or oppressed...". Respondent further states "I consider the Oath a solemn and sacred responsibility...Indeed, I will continue to do so for the rest of my life."

6. In or around April 2014, Arizona attorney Laura Bramnick (hereinafter referred to as "Bramnick") initiated the Moon Valley Justice Court case of *Clementi v. Sommer*, CC 2014060647.

7. While Respondent did not file a Notice of Appearance during the lawsuit, Respondent caused a *pro per* answer to be filed listing Respondent as "Personal Representative/Richard A. Smith Esq." in the "Attorney for Defendant" section of the Court form.

8. On June 17, 2014, Respondent mailed Bramnick a letter containing a header identifying Respondent as "Richard A. Smith Esq." and stating, in pertinent part, that "[p]er our previous phone conversation, this serves as Defendant's Initial Disclosure Statement in the above-captioned matter."

9. On June 24, 2014, the parties attended a mediation and signed a disclosure/confidentiality agreement as part of the mediation. Respondent signed the form agreement "Richard A. Smith Esq." and identified himself as "Representative".

10. On August 27, 2014, Respondent mailed Bramnick a letter containing a header identifying Respondent as "Richard A. Smith Esq." and, stated in pertinent part:

"As You Are Aware I Intend To Call Ms. Housley As An Expert Witness At Trial. Accordingly, I Request That You Consider A Stipulation That Recognizes Ms. Housley's Qualifications As An Expert Witness. If Your Client Declines, I Am Prepared To Keep Ms. Housley On The Witness Stand Until The Judge Finds Her Qualified."

11. By letter dated August 27, 2014, Bramnick wrote Respondent a letter stating, in pertinent part:

"I contacted the Arizona Bar Association earlier this week and was advised that you are not an active member. As a result, you cannot represent Ms. Sommer...If you will not agree to voluntarily withdraw I will file a Motion requesting the court to order you to withdraw both as Ms. Sommer's counsel and as her representative."

12. On August 28, 2014, Respondent met with then-UPL attorney Edward Parker and then-Ethics Counsel Patricia Sallen and discussed the requirements necessary to reinstate his Arizona law license.³

13. When asked what he could do for Sommer as a retired attorney, Respondent recalls being informed that he could answer Sommer's questions.

14. That same day, Respondent mailed the Court, Bramnick and Sommer a letter stating, in pertinent part:

"I hereby withdraw as Defendant's representative in the above-captioned matter. Regrettably, I am compelled to take this action because the time frame it will take to restore my active membership in the State Bar of Arizona is longer than I anticipated."

15. On November 14, 2014, a letter was sent above Sommer's signature which was to serve as "Defendant's Reply to Plaintiff's Response re: Defendant's Motion to Compel". While signed by Sommer, the letter is written in the same style, font and language as previous letters by Respondent.

16. On January 6, 2015, the Court scheduled a February 25, 2015, trial.

17. On February 25, 2015, the Court called the case and asked the parties and counsel to identify themselves for the record. Bramnick identified herself as attorney of record for Clementi and Sommer identified herself as *pro se*.

³ Rule 32(c)(5) states, in pertinent part, "[r]etired members shall not practice law in any state, district, or territory of the United States...Retired members may return to active status subject to the requirements...as set forth in subsection (c)(4) of this rule." Rule 32(c)(4) states, in pertinent part, that "[o]n application and payment of the membership fee and any delinquent fees that may be due under Rule 45(d), they may become active members."

18. As Respondent was seated at the table with Sommer, the Court asked Respondent to identify himself. When Respondent identified himself as "an assistant for Ms. Sommer" and "a retired attorney by the State Bar of Arizona", the Court asked Bramnick for her position. Bramnick immediately objected and explained the Respondent's previous involvement in the case.

19. After the Court explained that his actions were improper, Respondent stated the following:

"When I retired from the - I've been a member of the state bar since 1992. When I took the oath, I swore to uphold the Constitution of the United States and that of the State of Arizona. The oath that I took also says I will never reject for any consideration personal to myself, the cause of the defenseless or oppressed...When I retired from the state bar, I was told - and this was in July of 2010. I was told - the first question I asked them, about how long it will take me to un-retire if I want to come back and practice. They said, "One day. Call us up...However, when Ms. Bramnick filed a complaint with the state bar, I went down - the day after, I went down to the state bar and talked with both the ethics and the unsanctioned - unauthorized practice of law representative from the state bar. I was told that they had changed the rules, that now you had to show that you had 30 hours of continuing education, which of course, I didn't have."

20. When the Court asked Respondent to take a seat in the gallery, Respondent requested to make other statements which caused the Court to state "I will ask you to take a seat in the gallery, or we will have security escort you from the courtroom."

21. Respondent continued stating that he had a right to speak which necessitated the Court to again explain that he did not. The Court then took a recess.

22. The trial transcript continues after the recess with the Court thanking Respondent for eventually moving into the gallery.

23. The transcript then continues with the trial including, but not limited to, Sommer making objections based upon Federal Rules of Evidence and Procedure which ultimately required the Court to state:

“Mr. Smith, I’ve been really generous letting you pass notes to her, but that’s pretty much the same as you sitting next to her at the table. I’m going to ask you not to do that anymore, please.”

24. Sommer lost the trial and was ordered to pay the amount in dispute and attorney’s fees and costs.

25. Sommer filed bankruptcy in March of 2016.

CONDITIONAL ADMISSIONS

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

Respondent conditionally admits that his conduct violated Rule 42, Ariz. R. Sup. Ct., ER 5.5 ~ Unauthorized Practice of Law and ER 8.4(d) ~ Misconduct Prejudicial to the Administration of Justice.

CONDITIONAL DISMISSALS

Not applicable.

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.

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* 7.3 is the appropriate *Standard* given the facts and circumstances of this matter. *Standard* 7.3 provides that 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.

The duty violated

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

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent negligently engaged in the unauthorized practice of law and engaged in misconduct which was prejudicial to the administration of justice 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 actual harm to the profession and the legal system.

Aggravating and mitigating circumstances

The presumptive sanction in this matter is reprimand. The parties conditionally agree that there are no aggravating factors and that the following mitigating factors should be considered:

- a. *Standard 9.32(a)* absence of prior disciplinary record.

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:

While Respondent did "withdraw" from the representation after meeting with State Bar staff regarding the requirements to reinstate his license, Respondent continued to perform services which constitute the "practice of law" as defined by Rule 31, Ariz. R. Sup. Ct. after "withdrawing". When considered along with

Respondent absence of a prior discipline record and current retired status, the presumptive sanction of Reprimand is appropriate.

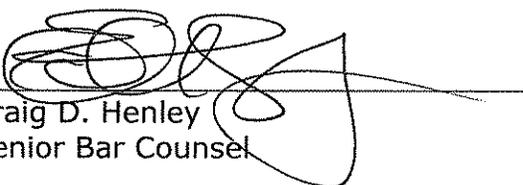
Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

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.

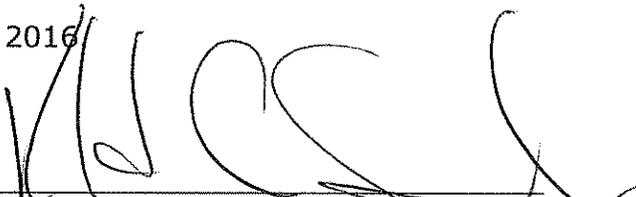
DATED this 15th day of June 2016.

STATE BAR OF ARIZONA


Craig D. Henley
Senior Bar Counsel

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

DATED this 14th day of June, 2016


Richard A. Smith
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 15th day of June, 2016.

Copy of the foregoing emailed
this 15th 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/emailed
this 15th day of June, 2016, to:

Richard A. Smith
5122 N. 12th Avenue
Phoenix, Arizona 85013-2121
Email: richard.smith@nlrb.gov
Respondent

Copy of the foregoing hand-delivered
this 15th day of June, 2016, to:

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

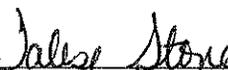
by: 
CDH/ts

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
RICHARD A. SMITH Bar No. 014264, Respondent

File No. 16-0207

Administrative Expenses

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

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

General Administrative Expenses for above-numbered proceedings

\$1,200.00

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

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges \$ 0.00

TOTAL COSTS AND EXPENSES INCURRED \$1,200.00

EXHIBIT B

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

**RICHARD A. SMITH,
Bar No. 014264,**

Respondent.

PDJ 2016- _____

FINAL JUDGMENT AND ORDER

[State Bar No. 16-0207]

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, **Richard A. Smith**, is hereby Reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective as of the date of this order.

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, pursuant to Rule 72 Ariz. R. Sup. Ct., Respondent shall immediately comply with the requirements relating to notification of clients and others.

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 June, 2016.

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.

Copy of the foregoing mailed/mailed
this _____ day of June, 2016, to:

Richard A. Smith
5122 N. 12th Avenue
Phoenix, Arizona 85013-2121
Email: richard.smith@nirb.gov
Respondent

Copy of the foregoing emailed/hand-delivered
this _____ day of June, 2016, to:

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

Copy of the foregoing hand-delivered
this _____ day of June, 2016 to:

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

by: _____