

**BEFORE THE PRESIDING DISCIPLINARY JUDGE**

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

**JAMES M. MACK,  
Bar No. 016728**

Respondent.

**PDJ 2019-9056**

**FINAL JUDGMENT AND  
ORDER**

**[State Bar No. 17-1221]**

**FILED DECEMBER 27, 2019**

The Presiding Disciplinary Judge accepted the parties' Agreement for Discipline by Consent filed on December 6, 2019, pursuant to Rule 57(a), Ariz. R. Sup. Ct.

Accordingly:

**IT IS ORDERED** Respondent, **JAMES M. MACK**, is reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

**IT IS FURTHER ORDERED** Respondent shall pay the costs and expenses of the State Bar of Arizona in the amount of \$ 1,242.80 within thirty (30) days from

the date of this order. There are no costs or expensed incurred by the Office of the Presiding Disciplinary Judge in these disciplinary proceedings.

**DATED** this 27<sup>th</sup> day of December, 2019.

*William J. O'Neil*

**William J. O'Neil, Presiding Disciplinary Judge**

Copies of the foregoing mailed/mailed  
this 27<sup>th</sup> day of December, 2019, to:

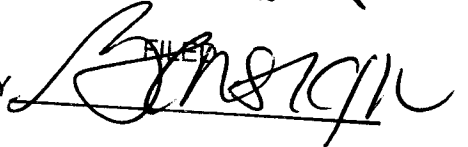
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by: MSmith

OFFICE OF THE  
PRESIDING DISCIPLINARY JUDGE  
SUPREME COURT OF ARIZONA

DEC 06 2019

BY  FILED

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Respondent's Counsel

**BEFORE THE PRESIDING DISCIPLINARY JUDGE**

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

**JAMES M. MACK**  
**Bar No. 009505,**

Respondent.

**PDJ 2019-9056**

State Bar File No. **17-1221**

**AGREEMENT FOR DISCIPLINE  
BY CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, James M. Mack, who is represented in this matter by counsel, Geoffrey M. T. Sturr and William D. Furnish, hereby submit their Agreement for

Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. A probable cause order was entered on July 31, 2019. A complaint was filed on August 20, 2019, to which Respondent filed an answer on September 18, 2019. 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, notice is therefore not required under Rule 53(b)(3), Ariz.R.Sup.Ct.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ERs 1.7(a)(2) (conflict of interest) and 1.8(a)(1) (business transaction with a client), 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.<sup>1</sup> The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit A.

## FACTS

### GENERAL ALLEGATIONS

1. Respondent was licensed to practice law in Arizona on May 12, 1984.
2. In April 2015, Respondent was retained by Gary Soucy to represent him in attempting to recover \$275,000.00 Soucy had advanced to Ronald Kearney, who had died on November 4, 2014.
3. Respondent made a claim on Ronald Kearney's estate in May 2015 and later pursued claims against the estate in a probate court proceeding, Maricopa County Case No. PB2015-005064, and a related probate court proceeding, Maricopa County Case No. PB2016-000424, involving the estate of Ronald Kearney's wife, Donna Kearney, Trustee of the Kearney Family Trust.
4. The initial payments Soucy made to Respondent for attorney's fees and costs were in cash.

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<sup>1</sup> 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.

5. A settlement was reached during a settlement conference held on September 15, 2016. The Court's minute entry stated, in part, that "the Estate of Ronald Kearney will pay to Gary Soucy \$100,000 plus delivery of three vehicles to him. Payment will be made as follows: the first \$50,000.00 will be paid by October 7, 2016 by cashier's check made payable to the James M. Mack PLC IOLTA Trust Account. The second payment of \$50,000.00 will be made on or before January 7, 2017 by cashier's check made payable to the James M. Mack PLC IOLTA Trust Account."

6. If the matter were to go to hearing, Respondent would testify that he had a discussion with Soucy immediately after the settlement conference during which he told Soucy that his representation had ended, and that when the settlement checks were received, he would meet Soucy at his bank and remit the funds to Soucy, less unpaid attorney's fees and costs. Soucy acknowledged to Respondent that Respondent's representation of him had concluded. Respondent did not send Soucy a writing stating that the representation had ended. At this time, Soucy owed Respondent attorney's fees and costs of \$23,320.07.

7. Although Respondent told Soucy his representation had ended after the settlement conference, settlement payments had not yet been received in or

processed via Respondent's IOLTA account, and the Court retained jurisdiction over the settlement.

8. If the matter were to go to hearing, Respondent would testify that approximately one week after the settlement conference, he received a telephone call from Soucy, who said he had a business opportunity for which he needed \$15,000.00. Soucy told Respondent that if Respondent advanced him \$15,000.00 Soucy would repay Respondent when the first settlement payment of \$50,000.00 was received on October 7, 2016. Respondent agreed and on September 22, 2016, caused \$15,000.00 to be wired from his operating account to the bank account of Soucy's limited liability company, Lighthouse Ventures, LLC.

9. On October 7, 2016, Respondent received a \$50,000.00 cashier's check from Kearney's Estate, and met with Soucy that day at Respondent's bank.

10. If the matter were to go to hearing, Respondent would testify that he met with Soucy in a conference room at the bank. During that meeting, Soucy thanked Respondent for the \$15,000.00 advance and stated that it had enabled him to successfully complete a business opportunity. Soucy then proposed that if Respondent would permit Soucy to keep the \$15,000.00 advance and advance an additional \$25,000.00, Soucy would sign over to Respondent the second

\$50,000.00 settlement check, which was due to be remitted on January 7, 2017, and pay Respondent \$3,800.00 upon the sale of the goods he planned to purchase with the \$40,000.00 received from Respondent. Soucy stated that he sought the additional funds so that he could continue buying and selling the same type of product but could buy more of the product at a much cheaper price per unit if he bought a greater quantity of the product, resulting in better profits on the resale.

11. If the matter were to go to hearing, Respondent would testify that he told Soucy he was willing to agree to Soucy's request on the following terms: (1) the agreement would be reduced to writing; (2) Soucy would have sufficient time to consult with another lawyer, as Respondent recommended; and (3) the funds would come from, and the assignment of the second settlement payment would be made to, XYZED, LLC, a limited liability company Respondent had established that was separate from his professional corporation.

12. If the matter were to go to hearing, Respondent would testify that he believed, and told Soucy, that although he considered Soucy a former client, he felt more comfortable following the procedures set forth in ER 1.8(a) for business transactions between a lawyer and a current client. Soucy agreed to do so.



13. After this meeting, Respondent deposited the \$50,000.00 settlement check into his trust account and then wrote a check payable to his operating account for \$25,320.07 of attorney's fees and costs, and a second check payable to Soucy for \$24,679.93, which he gave Soucy.

14. Respondent then sent Soucy a written agreement, which stated that it was made as of October 7, 2016, between Soucy and XYZED, LLC ("ZED") and identified Respondent as the sole member of ZED. The agreement referenced the settlement payment due on January 7, 2017 and stated as follows:

1. ZED will lend to Soucy the sum of \$40,000.00 (hereafter the "Funds") on the following terms:
  - a. Soucy will use the Funds to purchase goods for resale. Upon completion of any resale of goods purchased with the Funds, Soucy will remit to ZED the sum of \$3,800.00.
  - b. Soucy will, and by this Agreement does, irrevocably assign to ZED the second installment of the settlement proceeds due on or before January 7, 2017.
2. [Respondent] has advised Soucy that he should seek the advise [sic] of independent counsel regarding the fairness and reasonableness of this transaction and Soucy has had a reasonable opportunity to seek the advice of independent legal counsel.

15. If the matter were to go to hearing, Respondent would testify that he made a mistake in using the term "lend" in Paragraph 1 of the agreement because

he had agreed, at Soucy's request to advance funds to Soucy, which would be returned to Respondent when the second payment of settlement funds was received.

16. If the matter were to go to hearing, Respondent would testify that he spoke to Soucy on October 17, 2016, which was ten days after their meeting at the bank. Soucy told him that he agreed to the terms of the agreement and would sign it, but had not consulted with another lawyer because he did not want to incur the expense. Respondent later received a signed copy of the agreement from Soucy.

17. After speaking with Soucy on October 17, 2016, Respondent went to his bank and, at 3:44 p.m., signed an authorization for \$25,000.00 to be sent by wire transfer from his operating account to the bank account of Soucy's limited liability company, Lighthouse Ventures, LLC. The bank was unable to execute the wire transfer until the following day.

18. During the afternoon of October 18, 2016, a process server served a writ of garnishment on Respondent at his law office, which sought to garnish funds in Respondent's trust account held for Soucy's benefit. The writ was issued in *Carey, et. al. v. K&M Seafood Financial LLC, et al.*, Maricopa County Case No. CV2012-092926, and included a copy of a judgment Dan Carey had obtained

against Soucy and his wife on February 24, 2016 in the principal amount of \$175,000.

19. If the matter were to go to hearing, Respondent would testify that he did not know before receiving the writ of garnishment that the *Carey* lawsuit had been filed or that a judgment had been entered against Soucy in that proceeding. He immediately called Soucy, who apologized for not telling him about the judgment. Respondent then filed an answer to the writ of garnishment denying that any funds in which Soucy held an interest were in his trust account.

20. On December 23, 2016, Carey's counsel caused a second writ of garnishment to be served on the personal representative of Ronald Kearney's estate. The writ sought to recover the second \$50,000.00 settlement payment due Soucy.

21. Soucy was served with the writ and asked Respondent to respond to the writ on his behalf.

22. Respondent concluded that his interests and Soucy's interests were aligned and agreed to represent Soucy.

23. The estate had answered the writ of garnishment by stating that it owed Soucy money. Respondent filed on Soucy's behalf an objection to that

answer which stated that the answer was incorrect as a matter of law because Soucy had assigned his interest in the second settlement payment to ZED before the writ had been served.

24. Carey's counsel then asserted that the assignment was a fraudulent conveyance.

25. Because Respondent was a material witness in the garnishment proceeding, he withdrew from representing Soucy, who was thereafter represented by Thomas Baker. Mr. Baker also represented ZED, which had intervened in the action.

26. On February 7, 2017, an evidentiary hearing was conducted by Commissioner Margaret Benny, during which Respondent was called by Carey's counsel and testified. Soucy was present but did not testify.

27. Respondent was questioned by Carey's counsel about the payments he had received from Soucy for his legal representation, the advance he made to Soucy on September 22, 2016, the assignment agreement, the wire transfer instructions he gave on October 17, 2016, and his receipt of a writ of garnishment on October 18, 2016. Respondent denied knowing of Carey's judgment against

Soucy before receiving the writ, or that the assignment was made to avoid that judgment.

28. Mr. Baker called an expert witness to testify whether the \$50,000 to be paid under the assignment agreement was a “reasonable equivalent value” for the \$40,000 advance. The expert applied a 20% discount for uncertainty and opined that \$50,000 would be a “conservative” reasonable equivalent value. When he was cross-examined by Carey’s counsel, the expert denied that the \$40,000 advance should be characterized as a loan but acknowledged that if it were deemed to be a loan, the assignment of the second \$50,000 settlement payment would result in an interest rate of 100% annually.

29. In his closing argument, Carey’s counsel argued that Respondent’s course of dealing with Soucy evidenced “badges of fraud” and that if the assignment of the second settlement payment was deemed a loan it was not reasonable equivalent value for the \$40,000 advance. Mr. Baker made arguments to the contrary.

30. At the conclusion of the hearing Commissioner Benny overruled the objection on the grounds that the assignment of the second settlement payment was

a fraudulent transfer. The ruling was affirmed on appeal. *See Carey v. Soucy, et al*, 431 P.3d 1200, 1202-1203 (2018).<sup>2</sup>

### **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 1.7(a)(2) and ER 1.8(a)(1).

### **CONDITIONAL DISMISSALS**

The State Bar has conditionally agreed to dismiss allegations regarding ERs 1.2(d), 1.8(e), 8.4(c) and 8.4(d).

### **RESTITUTION**

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<sup>2</sup> The State Bar's Complaint restated Commissioner Benny's findings and noted that the burden of proof she used to determine whether a fraudulent conveyance occurred was clear and convincing evidence. *See, e.g., Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 86, 912 P.2d 1309, 1315 (App. 1995). In his Answer, Respondent disputed that Commissioner Benny's findings had any preclusive effect in this proceeding, denied that he knew or had reason to know of Carey's judgment against Soucy, and asserted that the State Bar was required to independently prove by clear and convincing evidence the factual allegations on which the Complaint's allegations of unprofessional conduct rested. *See, e.g., In re Levine*, 174 Ariz. 146, 156 (1993). Bar Counsel and Respondent's Counsel discussed these and other issues during the course of negotiating this agreement.

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 sanction is 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* 4.33 is the appropriate *Standard* given the facts and circumstances of this matter. *Standard* 4.33, applicable to violations of ERs 1.7 and 1.8, provides that a reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests and causes injury or potential injury to a client. Respondent was negligent by concluding that his representation of Soucy had concluded on the day of the settlement conference. Because Soucy was a current client, Respondent should have complied with the requirements of ERs 1.7(a)(2) and 1.8(a)(1) when he advanced \$15,000.00 to Soucy on September 22, 2016 by obtaining Soucy's written consent through a writing meeting the requirements of ER 1.8(a). While Respondent intended for the written agreement he presented to Soucy shortly after their October 7, 2016 meeting to comply with ER 1.8(a)(1), it did not have all of the Rule's required terms; specifically, it failed to clearly identify Respondent's role in the transaction.



**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 acted negligently.

**The extent of the actual or potential injury**

For purposes of this agreement, the parties agree that there was only potential harm to the client. Soucy did not repay Respondent the \$40,000 he received from Respondent and Respondent has not and will not seek to recover those funds from Soucy.

**Aggravating and mitigating circumstances**

Pursuant to *Standard 4.33*, 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.

**In mitigation:**

*Standard 9.22 (a):* Absence of a prior disciplinary record. Respondent does not have a prior disciplinary record.

*Standard 9.22 (e):* Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Respondent has cooperated fully with the State Bar's screening investigation and has acknowledged that he negligently violated ERs 1.7(a)(2) and 1.8(a)(1).

**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. In the course of those discussions, Respondent has agreed to voluntarily complete, in addition to his annual CLE requirement, a CLE entitled "10 Deadly Sins of Conflict." Respondent did so on October 30, 2019 and has submitted written confirmation of his completion of the CLE to Bar Counsel.

Based on the *Standards* and the facts and circumstances of this matter, the parties conditionally agree that reprimand 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 Reprimand and the imposition of costs and expenses. A proposed form of order is attached hereto as Exhibit B.

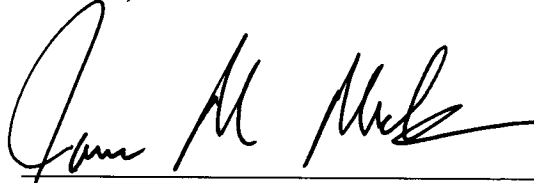
DATED this 6<sup>th</sup> day of December 2019.

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.**

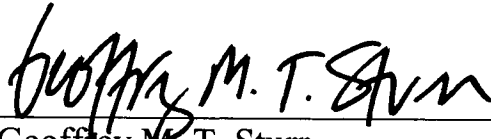
DATED this 6th day of December, 2019.



James M. Mack  
Respondent

DATED this 4th day of December, 2019.

Osborn Maledon PA



Geoffrey M. T. Sturr  
William D. Furnish  
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 6<sup>th</sup> day of December, 2019.

Copy of the foregoing emailed  
this 6<sup>th</sup> day of December, 2019, 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](mailto:officepdj@courts.az.gov)

Copy of the foregoing mailed/emailed  
this 6<sup>th</sup> day of December, 2019, to:

Geoffrey M. T. Sturr  
Osborn Maledon PA  
2929 N Central Avenue, Suite 2100  
Phoenix, AZ 85012-2765  
Email: [gsturr@omlaw.com](mailto:gsturr@omlaw.com)  
Respondent's Counsel

Copy of the foregoing hand-delivered  
this 6<sup>th</sup> day of December, 2019, to:

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

By:   
KJF/js-11/19

**EXHIBIT A**

## Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona  
James M. Mack, Bar No. 009505, Respondent

File No. 17-1221

### 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

05/26/17	Staff investigator mileage-CD pick up	\$ 21.40
07/13/17	Staff investigator mileage-CD pick up	\$ 21.40
Total for staff investigator charges		\$ 42.80

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**TOTAL COSTS AND EXPENSES INCURRED** **\$ 1,242.80**

**EXHIBIT B**



**BEFORE THE PRESIDING DISCIPLINARY JUDGE**

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

**JAMES M. MACK,  
Bar No. 016728,  
  
Respondent.**

**PDJ 2019-9056**

**FINAL JUDGMENT AND  
ORDER**

[State Bar No. 17-1221]

The Presiding Disciplinary Judge, having reviewed the Agreement for Discipline by Consent filed on \_\_\_\_\_, pursuant to Rule 57(a), Ariz. R. Sup. Ct., accepts the parties' proposed agreement. Accordingly:

**IT IS ORDERED** that Respondent, **James M. Mack**, is reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

**NON-COMPLIANCE LANGUAGE**

In the event that Respondent fails to comply with any of the foregoing 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 this Order has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.

**IT IS FURTHER ORDERED** that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$ 1,200.00 within thirty (30) days from the date 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 December, 2019

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**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 December, 2019.

Copies of the foregoing mailed/mailed  
this \_\_\_\_\_ day of December, 2019, to:

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Respondent's Counsel

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By: \_\_\_\_\_  
KJF/mg