

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

**ERIC W. KESSLER,
Bar No. 009158**

Respondent.

PDJ-2015-9042

FINAL JUDGMENT AND ORDER

[State Bar Nos. 13-3206 and 14-0499]

FILED MAY 19, 2015

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on May 12, 2015, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED Respondent, **Eric W. Kessler**, 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.

IT IS FURTHER ORDERED that Respondent shall be placed on probation for a period of one-year effective 30 days from the date of this order.

IT IS FURTHER ORDERED Respondent shall obtain a practice monitor that is acceptable to the State Bar who will ensure that procedures are in place to keep Respondent compliant with E.R. 5.7. The monitor shall provide quarterly reports to the State Bar.

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 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. 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 19th day of May, 2015.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
this 19th day of May, 2015.

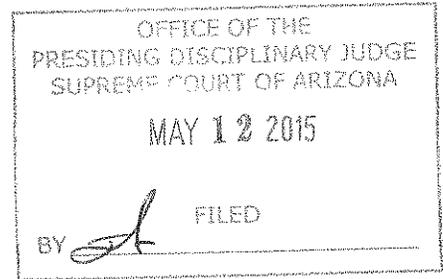
Mark I. Harrison
Sharad H. Desai
Osborn Maledon PA
2929 N Central Ave Ste 2100
Phoenix, AZ 85012-2765
Email: mharrison@omlaw.com
Respondent's Counsel

Shauna R. Miller
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: [JAlbright](#)

Shauna R. Miller, Bar No. 015197
Senior Bar Counsel - Litigation
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Telephone (602)340-7278
Email: LRO@staff.azbar.org



Mark I. Harrison, Bar No. 001226
Sharad H. Desai Bar No. 025255
Osborn Maledon PA
2929 N Central Ave Ste 2100
Phoenix, AZ 85012-2765
Telephone 602-640-9324
Email: mharrison@omlaw.com
Respondent's Counsel

**BEFORE THE
PRESIDING DISCIPLINARY JUDGE**

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

**ERIC W. KESSLER,
Bar No. 009158**

Respondent.

PDJ 2015 -9042
[State Bar File Nos. 13-3206 and 14-0499]

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Eric W. Kessler, who is represented in this matter by counsel, Mark I Harrison and Sharad Desai, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. Respondent wanted to settle this matter before it went to the Attorney Discipline Probable Cause Committee, therefore there are no orders of probable cause. No formal complaint has been filed in this matter. Respondent voluntarily waives the right to an adjudicatory hearing, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised,

or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

Pursuant to Rule 53(b)(3), Ariz.R.Sup.Ct., notice of this agreement was provided to the complainants. Complainants have been notified of the opportunity to file a written objection to the agreement with the State Bar.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ERs 1.5, 5.4(a), 5.7, 8.1(b) and 8.4(d). Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: A reprimand and one-year probation. 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 was licensed to practice law in Arizona on October 15, 1983.

COUNT ONE (File no. 13-3206/ LaWall)

1. On August 31, 2012, Respondent filed a tax lien foreclosure action in Pima County Superior Court on behalf of the Ulan Family Limited Partnership LLP against Merkos Chabad-Lubavitch Organization ("Chabad")², a non-profit religious

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 Rabbi Shemtov says Chabad of Tucson is a 501(c)(3) corporation and Rabbi Zalman Levertov is the owner of the property and Chabad of Arizona. Rabbi Shemtov has a contract with Rabbi Levertov to pay the taxes on the Chabad of Tucson property.

corporation that owned property encumbered by tax liens purchased by Respondent's client.

2. Deputy County Attorney Dan Jurkowitz (Mr. Jurkowitz) filed an answer on October 15, 2012, noting a deficiency in the required thirty-day pre-filing notice. Respondent subsequently requested a default hearing, which was set for December 4, 2012. At the hearing the Court found that the pre-filing notice was deficient and ordered Respondent to re-serve and properly notify Chabad.
3. Respondent complied with the Court's order, sent a new thirty-day notice, and filed a new foreclosure action on January 7, 2013. Mr. Jurkowitz called Rabbi Shemtov, who runs the Chabad operations in Tucson, to determine if Chabad was going to redeem the lien or otherwise defend the complaint. Rabbi Shemtov told Mr. Jurkowitz that he would redeem the tax liens by the end of the week.
4. Ryan Kessler (Ryan), rather than Respondent, telephonically attended the default hearings on December 4, 2012, and February 27, 2013. The court ordered Ryan to submit a fee application on behalf of the firm. The court noted that the fees Respondent told Rabbi Shemtov he owed appeared to be unreasonable given what was in the court's file.
5. On February 27, 2013, Respondent filed the fee application that was supported by his affidavit and a billing statement. The billing statement contains inaccurate information about who performed the work listed. The State Bar of Arizona has identified eight entries that it believes reflect tasks performed by an employee of Respondent and not by Respondent himself.
6. Respondent acknowledged that two entries in his billing statement indicating that he participated in the December and February hearings were erroneous, but

"were unintentional, and the amount requested in fees was unaffected by the errors. In each instance [Respondent] spent significant time preparing Ryan Kessler for those hearings. [Respondent's] time is not otherwise accounted for in the Affidavit, but is accurately reflected by the 0.5 hours for each entry." A review of the notes from his client file does not show any time being spent preparing for the hearing.

7. Respondent charged for 15.3 hours at \$350.00 an hour for a total of \$5,355.00. The court reduced his fees to \$1,500.00. Respondent made misrepresentations to the court and the State Bar about his fees.

COUNT TWO (File no. 14-0449/Holland)

8. Respondent is a member of Regents Park LLC. Regents Park is a tax lien foreclosure servicing company in Arizona. The principle members of Regents Park are Respondent and a nonlawyer.
9. Respondent says if a client acquires title to a property, the LLC will perform additional services that typically out of state investors want, such as rehabbing, securing and marketing the property. The LLC gets paid a fee that consists of 50% of the net proceeds once the property is sold.
10. Although Respondent says the services provided by the LLC are distinct from the legal services he provides through the Kessler Law Office, Respondent acknowledges that his fee agreement and a brochure prepared by the LLC fail to provide the information necessary to enable clients to understand the differences between the two entities and more specifically to understand that the protections afforded the client when legal services are being provided (e.g., confidentiality) are not afforded to the client when LLC non-legal services are being provided.

11. Respondent has since changed how the two entities operate and they now use a separate contract for each entity with appropriate, informative disclosure language.
12. Respondent acknowledges that he failed to maintain Regents Park as a separate and distinct entity from his law firm and that by sharing fees between the two, he violated ER 5.4(a), Ariz.R.SupCt.

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 Rule 42, ERs 1.5, 5.4(a), 5.7, 8.1(b) and 8.4(d).

ER 1.5(a)(fees)(fees shall be reasonable): Respondent charged an unreasonable fee by charging for the time of less experienced personnel at his hourly rate of \$350.00, thereby charging too much.

ER 8.1(b)(failure to correct a misapprehension): Respondent failed to advise the State Bar that his fee application was incorrect.

ER 8.4(d)(conduct prejudicial to the administration of justice): By filing an incorrect affidavit with the court, Respondent's conduct was prejudicial to the administration of justice.

ER 5.4(a)(professional independence for a lawyer; A lawyer shall not share fees with a nonlawyer): Respondent shared fees with a non-lawyer, Regents Park LLC, when he failed to keep that entity sufficiently separate from his law firm.

ER 5.7(Law-related services): Law-related services are services performed in conjunction with and in substance are related to the provisions of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer. In circumstances in which law-related services are provided by a separate entity controlled by the lawyer individually or with others, the lawyer is not subject to the Rules of Professional Conduct if the person knows that the services are not legal services and that there is no attorney-client privilege.

Although Respondent says the services provided by the LLC are distinct from the legal services he provides, the fee agreement, the brochure, and Respondent's responses in this matter, when read together, fail to provide the appropriate division between the two entities to distinguish between when legal services are being provided versus when LLC non-legal services are being provided. As such, Respondent is subject to the Rules of Professional Conduct in running both businesses.

CONDITIONAL DISMISSALS

The State Bar has conditionally agreed to dismiss ERs 3.3(a), 3.4(c), 4.1, 8.1(a), and 8.4(c).

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 and one-year probation.

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 a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system. The commentary to 7.3 notes that reprimands have been imposed in cases where the lawyer charge an excessive or improper fee or when a lawyer improperly split fees with a non-lawyer, which is similar to Respondent's misconduct.

The duty violated

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 filed an incorrect fee application and negligently shared fees with a non-lawyer.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was potential 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 the following aggravating and mitigating factors should be considered.

9.22 Factors which may be considered in aggravation.

- (a) prior disciplinary offenses;
- (i) substantial experience in the practice of law;

9.32 Factors which may be considered in mitigation.

- (b) absence of a dishonest or selfish motive;
- (l) remorse.

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.

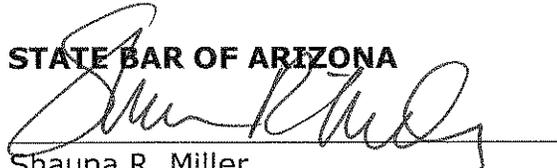
Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

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

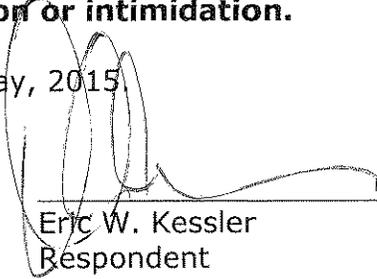
DATED this 12th day of May 2015

STATE BAR OF ARIZONA


Shauna R. Miller
Senior Bar Counsel

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

DATED this 4th day of May, 2015


Eric W. Kessler
Respondent

DATED this 7th day of May, 2015.

Osborn Maledon PA


Mark I. Harrison
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 12th day of May 2015.

Copies of the foregoing mailed/emailed
this 12th day of May 2015 to:

Mark I Harrison
Osborn Maledon PA
2929 N Central Ave Ste 2100
Phoenix, AZ 85012-2765
mharrison@omlaw.com
Respondent's Counsel

Copy of the foregoing emailed
this 12th day of May, 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 12th day of May, 2015, to:

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

by: 
SRM: JAO

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Eric W. Kessler, Bar No. 009158, Respondent

File No(s). 13-3206 and 14-0499

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.

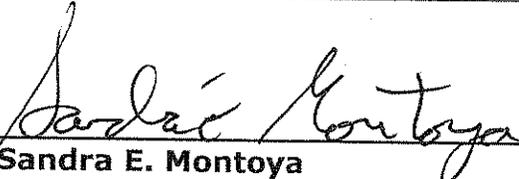
General Administrative Expenses for above-numbered proceedings

\$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
<u>TOTAL COSTS AND EXPENSES INCURRED</u>	<u>\$ 1,200.00</u>



Sandra E. Montoya
Lawyer Regulation Records Manager

4-28-15

Date

EXHIBIT B

**BEFORE THE
PRESIDING DISCIPLINARY JUDGE**

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

**ERIC W KESSLER,
Bar No. 009158,**

Respondent.

PDJ 2015 _____
[State Bar Nos. 13-3206 and 14-0499]

FINAL JUDGMENT AND ORDER

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, **Eric W Kessler**, is hereby reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED that Respondent shall be placed on probation for a period of one-year.

IT IS FURTHER ORDERED that, Respondent shall obtain a practice monitor that is acceptable to the State Bar who will ensure that procedures are in place to keep Respondent compliant with ER 5.7. The monitor shall provide quarterly reports to the State Bar.

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 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 this _____ day of May, 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 May, 2015.

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

Mark I. Harrison
Sharad H. Desai
Osborn Maledon PA
2929 N Central Ave Ste 2100
Phoenix, AZ 85012-2765
Email: mharrison@omlaw.com
Respondent's Counsel

Copy of the foregoing emailed/hand-delivered
this _____ day of May, 2015, to:

Shauna R. Miller
Senior Bar Counsel - Litigation
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 May, 2015 to:

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

by: _____