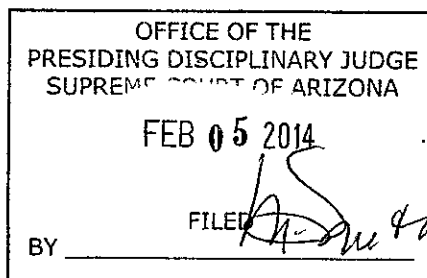


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Respondent's Counsel

**BEFORE THE PRESIDING DISCIPLINARY JUDGE  
OF THE SUPREME COURT OF ARIZONA**

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

**Tim Mackey,**  
**Bar No. 016254,**  
  
Respondent.

**PDJ-2014-9010**

**AGREEMENT FOR DISCIPLINE BY  
CONSENT**

State Bar No. 13-0855, 13-1679

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent Tim Mackey, who is represented in this matter by counsel, J Scott Rhodes, hereby submit their Tender of Admissions and Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. A Probable Cause Order was entered on December 20, 2013, but 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 by letter on January 16, 2014. The Complainants were 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. No objection has been received.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ER(s) 1.3, 1.4 and 8.4(c). Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Suspension of 6 months. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding.<sup>1</sup> The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit "A."

## **FACTS**

### **GENERAL ALLEGATIONS**

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 21, 1995.

#### **COUNT ONE (State Bar File No. 13-0855)**

2. Respondent was the owner of two homes: 3611 N. 47th Street in Phoenix (house one) and 3618 N. 47th Place in Phoenix (house two).

3. House one was encumbered by a first position mortgage with an original principal balance of \$440,000 and a second mortgage loan with a principal balance of \$110,000.

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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.

4. House two's financing structure was identical: a first position mortgage of \$440,000 and a second mortgage loan with a principal balance of \$110,000.

5. In September of 2005, Respondent contacted a lender, Equitable, and requested that it make additional mortgage loans. For house one, Equitable offered two loans totaling \$583,887 upon the following terms:

- a. A loan in the principal amount of \$483,750 to be secured by a first position deed of trust lien on house one.
- b. A loan in the principal amount of \$161,250 to be secured by a second position deed of trust lien on house one.
- c. The commitment provided that the loan proceeds available at close of escrow would be used to satisfy the pre-existing first and second mortgage loans encumbering house one in the combined principal amount of \$550,000.

6. Respondent executed two separate notes in favor of Equitable dated October 17, 2005: one for \$483,750 (note one) and another for \$161,250 (note two).

7. Respondent accepted the loan terms, and also executed a deed of trust dated October 17, 2005, in favor of Equitable to secure note one with a first position lien on house one and a deed of trust in favor of Equitable to secure note two with a second position lien on house one.

8. The escrow agent mistakenly made two disbursements, one for \$444,120.98 and the other for \$111,626, which were used to pay off the two loans encumbering house two, instead of paying off the two loans encumbering house one.

9. Due to the mistake, Equitable had a lien third in priority of \$483,750 and fourth in priority of \$161,250 for house one, instead of the liens being first and second in priority.

10. If not for the mistake, house two would have been encumbered by a first lien of \$440,000 and a second lien of \$110,000. Instead, no liens remained on house two.

11. Upon discovering that house two had mistakenly been paid off, Equitable requested that Respondent cooperate in resolving the error. However, a resolution was not reached.

12. Respondent then applied for a new loan from another lender, which was to be secured by a first position lien on the now unencumbered house two.

13. Specifically, Respondent opened escrow with Wilmington Mortgage to obtain a \$350,000 loan to be secured by house two. As part of that transaction, Respondent, in a December 1, 2005, letter to Wilmington Loan indicated that house two was ". . . paid off with funds derived from real estate investments." No mention was made of the disbursement mistake or Equitable's repeated communications with Respondent about resolving the mistake.

14. On December 5, 2005, Equitable recorded two separate documents entitled Notice of Equitable Substitution of Encumbrance, which encumbered house two.

15. In an affidavit signed December 6, 2005, Respondent indicated to Wilmington that there were no mortgages against house two.

16. Equitable's counsel wrote a letter to Respondent on December 9, 2005, notifying him that it claimed an equitable mortgage on house two as a result of the erroneous payoff of house two.

17. Respondent closed the Wilmington loan on December 12, 2005, and Wilmington assigned the loan to Countrywide Home Mortgage. Respondent failed to disclose the Equitable mortgage claim to Wilmington or Countrywide.

18. In 2006, Countrywide sued Respondent for fraud and negligent misrepresentation in Maricopa County Superior Court case no. CV2006-052343. During the litigation, Respondent filed for personal bankruptcy.

19. On December 29, 2008, Respondent entered into a stipulated judgment with Equitable in Bankruptcy Court, agreeing to pay Equitable \$190,719.62, plus interest. No findings of fact were made in the case.

20. Respondent violated ER 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent indicated to Wilmington Loan in writing that house two was "paid off with funds derived from real estate investments," when Respondent knew that house two had been paid off as a result of a disbursement error by Equitable. Respondent's false statement concerning the source of the funds and his failure to inform Wilmington of Equitable's claim on house one were relied upon by Wilmington in making a loan of \$350,000 to Respondent.

**COUNT TWO (State Bar File No. 13-1679)**

21. Complainant Jean Heck ("Heck") hired Respondent through a legal services plan for assistance with the short sale of an investment property. A fee agreement was executed on November 8, 2012.

22. Heck's realtor received a contract on the home on December 23, 2012.

23. After communication concerns had been raised by Heck, on February 28, 2013, she received an email from Respondent's paralegal indicating that Respondent would provide a status update every Friday, even if no significant developments had arisen. Respondent, however, never provided Friday updates. On March 14, 2013, Respondent's firm communicated with Heck for the last time, despite numerous contact attempts by Heck.

24. Heck's realtor traveled to Respondent's office to meet with Respondent after her phone calls and phone calls from the title company had gone unreturned, but Respondent was not available.

25. Heck then called Nationstar Mortgage directly to inquire as to the status of the short sale. During the call, Heck learned that the matter was no longer being processed as a short sale because Nationstar had tried to reach Respondent with questions several times and never received a response.

26. Heck's realtor also called Nationstar. During the call, Nationstar indicated that the file had been closed because Respondent failed to respond to six communication attempts over a period of two months.

27. According to Heck, the mortgage company, similarly, indicated that Respondent failed to respond to multiple emails concerning the short sale.

28. Heck terminated Respondent's services by email on April 18, 2013.

29. On April 30, 2013, Heck spoke with the legal services provider that had recommended Respondent and explained what had happened. According to Heck, the legal services provider then contacted Respondent, who indicated that he would contact Heck in the next few days. Respondent, however, failed to do so.

30. Without Respondent's assistance, Heck was able to reinstate the short sale process in advance of a foreclosure sale.

31. Respondent's position is that the short-sale process was in order at the time that his representation was terminated.

32. Respondent violated ER 1.3, which requires a lawyer to exercise reasonable diligence and promptness in representing a client. Respondent failed to take action in Heck's case and failed to respond to communications from Nationstar, causing Nationstar to close the client short-sale file and proceed with the matter as a foreclosure. Respondent also failed to respond to communications from the mortgage company.

33. Respondent violated ER 1.4, which requires a lawyer to reasonably communicate with his client. Respondent repeatedly failed to respond to calls and emails from Heck and eventually ceased all communication without notice.

### **CONDITIONAL ADMISSIONS**

Respondent's admissions are being tendered in exchange for the form of discipline stated below and is 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 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, a suspension of 6 months is

appropriate. The Bar would have pursued a suspension of greater length if not for the significant amount of time that has passed since the misconduct that is detailed in Count One.

### **PROBATION (LOMAP)**

Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP), at 602-340-7332, within 30 days of reinstatement. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, compliance with ERs 1.3 and 1.4. The director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be incorporated herein by reference. The probation period will commence upon reinstatement and will conclude 1 (one) year from that date. Respondent shall be responsible for any costs associated with LOMAP.

### **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.



## 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* 5.12 is the appropriate *Standard* given the facts and circumstances of this matter. *Standard* 5.12 provides that Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that reflects on the lawyer's fitness to practice. In light of the aggravating factors listed below, the parties agree that a suspension of six months is warranted.

### **The duty violated**

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

### **The lawyer's mental state**

For purposes of this agreement the parties agree that Respondent knowingly indicated to a bank in writing that his home had been paid off with "funds derived from real estate investments," when he knew the home had been paid off as a result of a mortgage company disbursement error. Respondent knew that the information that he provided would be relied upon by the bank. The parties agree that Respondent's conduct was in violation of the Rules of Professional Conduct.

### **Aggravating and mitigating circumstances**

The parties conditionally agree that the following aggravating and mitigating factors should be considered.

#### **In aggravation:**

*Standards*

*9.22(b) dishonest or selfish motive*

*9.22(d) multiple offenses*

*9.22(i) substantial experience in the practice of law.*

#### **In mitigation:**

*Standards*

*9.32(a) absence of a prior disciplinary record*

### **Discussion**

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 a suspension of six months and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit "B."

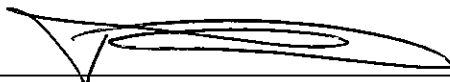
**DATED** this 4<sup>th</sup> day of February, 2014.

**STATE BAR OF ARIZONA**

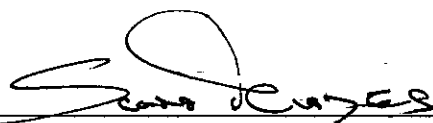
  
\_\_\_\_\_  
Hunter F. Perlmeter  
Staff Bar Counsel

**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.**

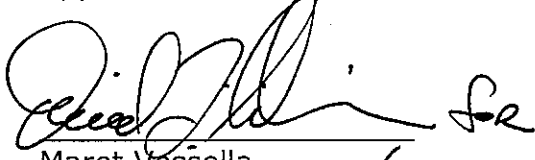
**DATED** this 4 day of February, 2014.

  
\_\_\_\_\_  
Tim Mackey  
Respondent

**DATED** this 4<sup>th</sup> day of February, 2014.

  
\_\_\_\_\_  
J Scott Rhodes  
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  
this 5<sup>th</sup> day of February, 2014.

Copies of the foregoing mailed/emailed  
this 5<sup>th</sup> day of February, 2014, to:

J Scott Rhodes  
*Jennings Strouss & Salmon PLC*  
One East Washington Street, Suite 1900  
Phoenix, AZ 85004-2554  
Email: [srhodes@jsslaw.com](mailto:srhodes@jsslaw.com)  
Respondent's Counsel

Copy of the foregoing emailed  
this 5<sup>th</sup> day of February, 2014, to:

William J. O'Neil  
Presiding Disciplinary Judge  
Supreme Court of Arizona  
Email: [officepdj@courts.az.gov](mailto:officepdj@courts.az.gov)  
[lhopkins@courts.az.gov](mailto:lhopkins@courts.az.gov)

Copy of the foregoing hand-delivered  
this 5<sup>th</sup> day of February, 2014, to:

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

By:



HFP:JO

IN THE  
**SUPREME COURT OF THE STATE OF ARIZONA**  
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE  
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

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

**TIM MACKEY,**  
**Bar No. 016254**

Respondent.

**PDJ-2014-9010**

**FINAL JUDGMENT AND ORDER**

[State Bar No. 13-0855, 13-1679]

**FILED FEBRUARY 21, 2014**

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on February 5, 2014, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

**IT IS HEREBY ORDERED** that Respondent, **Tim Mackey**, is hereby suspended for six (6) months for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective thirty (30) days from this Order.

**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 upon reinstatement, Respondent shall be placed on probation for a period of one (1) year.

**IT IS FURTHER ORDERED** that Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP), at 602-340-7332, within thirty (30) days of reinstatement. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, compliance with ERs 1.3 and 1.4. The director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be incorporated herein by reference. The probation period will commence at the time of reinstatement and will conclude 1 (one) year from that date. Respondent shall be responsible for any costs associated with LOMAP.

#### **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. 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 21<sup>st</sup> day of February, 2014.

*William J. O'Neil*

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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 21<sup>st</sup> day of February, 2014.

Copies of the foregoing mailed/emailed  
this 21<sup>st</sup> day of February, 2014 to:

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by: MSmith