BEFORE THE PRESIDING DISCIPLINARY JUDGE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER OF THE STATE BAR OF ARIZONA, **HARLAN W. GREEN,** **Bar No. 006688,** Respondent.	**PDJ-2012-9060** **REPORT AND ORDER** State Bar No. 11-0112, 11-0319, 11-1631, 11-1650, and 11-3466

PROCEDURAL HISTORY

The State Bar of Arizona ("SBA") filed its complaint on June 22, 2012. On June 26, 2012, the complaint was served on Respondent by certified, delivery restricted mail as well as by regular first class mail pursuant to Rules 47(c) and 58(a) (2), Ariz. R. Sup. Ct.[1] The Presiding Disciplinary Judge ("PDJ") was assigned to the matter. A notice of default was properly issued on July 23, 2012, given Respondent's failure to file an answer or otherwise defend. On July 26, 2012, a telephonic initial case management conference took place and Respondent failed to appear after receiving proper notice. Respondent did not file an answer or otherwise defend against the complainants' allegations and default was properly entered on August 7, 2012. Also on August 7, 2012, a notice of aggravation and mitigation hearing was sent to all parties notifying them the aggravation/mitigation hearing was scheduled for August 20, 2012 at 9:00 a.m., at 1501 West Washington, Court of Appeals, CR 2, Phoenix, Arizona 85007-3231. On August 13, 2012, the SBA filed a Motion for Telephonic Testimony by Witnesses, which the PDJ

[1] All references herein to rules are to the Arizona Rules of the Supreme Court, unless otherwise specifically designated.

granted on August 15, 2012. Also on August 13, 2012, the SBA filed its Initial List of Witnesses. In addition to utilizing required modes of service of documents upon Respondent, either the SBA or the Disciplinary Clerk also sent to Respondent by email copies of all of the filed items in this case. This matter proceeded to an Aggravation/Mitigation Hearing as scheduled on August 20, 2012. Respondent did not appear for the hearing.

FINDINGS OF FACT

The facts listed below are those set forth in the SBA's complaint and were deemed admitted by Respondent's default.

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 May 16, 1981.

2. By final judgment and order of the Acting Presiding Disciplinary Judge of the Supreme Court of Arizona dated March 8, 2012, Respondent was suspended from the practice of law for six months and one day, effective March 15, 2012.

COUNT ONE (File No. 11-0112/Winters)

3. Tanya Winters's dog was attacked by another dog which put her to some expense. Ms. Winters sued the other dog's owners, fiancées Anthony Puskaric and Brandi Morris, and obtained a judgment for approximately $500.00.

4. Ms. Winters was unable to collect from the defendants so she retained Respondent in July 2010 to represent her in connection with garnishment proceedings.

5. Ms. Winters paid Respondent a flat fee of $825.00. Respondent successfully collected some payments toward the judgment.

6. Mr. Puskaric claimed he made a voluntary payment of $130.00 while garnishment activity was in progress. Ms. Winters denied receiving that payment. A dispute arose as to how this discrepancy affected the overall accounting of credits toward the judgment.

7. Respondent wrote a letter to Mr. Puskaric's employer and asked that he temporarily suspend the garnishment until the accounting could be clarified.

8. Without Ms. Winters's knowledge or consent, Respondent acceded to Mr. Puskaric's request that Respondent forego garnishment of one paycheck since Mr. Puskaric was trying to buy a house.

9. In October of 2010, Respondent filed an Application on Ms. Winters's behalf for post judgment costs ($222.00) and attorney fees ($1,007.00). Payson Justice Court Justice of the Peace ("JP") Dorothy Little awarded $162.00 in costs and no attorney fees.

10. In November 2010, Respondent filed a Motion to Alter or Amend Judgment claiming that JP Little neglected to include the filing fee and costs of issuing and serving the writs or garnishment, and erroneously excluded attorney's fees. JP Little set a hearing to determine those issues, and also ordered "Plaintiff to show cause why a garnishment was necessary when defendant attempted to pay debt to plaintiff."

11. In December 2010, *pro tem* JP John Huffman entered judgment adding $12.00 in costs and attorneys fees of $441.00.

12. With interest, costs, and attorneys fees, the judgments (original and amended) exceeded $1,000.00.

13. Ms. Winters did not receive all amounts due to her on the judgment.

14. On February 1, 2011, Respondent filed a "Partial Satisfaction of Judgment" acknowledging that he collected $1,074.51 in garnishment payments and reimbursed an overpayment of $107.55 to one of the defendants.

15. Respondent submitted billing statements in which he claimed $3,600.00 in fees.

16. In early January 2011, Ms. Winters contacted the State Bar's Attorney/Consumer Assistance Program regarding Respondent.

17. On or about February 11, 2011, Ms. Winters provided additional information in support of her charges against Respondent.

18. By letter dated April 28, 2011, Respondent was asked to address and respond to the charges submitted by Ms. Winters within 20 days of the letter.

19. Respondent failed to respond.

20. By letter dated May 23, 2011, Respondent was again asked to address and respond to the charges submitted by Ms. Winters, and was reminded of his duty to respond to the State Bar's investigation.

21. Respondent again failed to respond.

22. Respondent's charitable act toward his client's adversary in foregoing a garnishment collection was outside the scope of his representation of Complainant and a violation of ER 1.2.

23. By foregoing collection on a garnishment Respondent delayed his own client's ability to collect on her judgment in violation of ER 1.3.

24. Respondent did not communicate with or obtain consent from Complainant in advance about foregoing one of the garnishment collections, in violation of ER 1.4.

25. Respondent did not seek or obtain Complainant's consent to incur attorney fees of nearly $3,600.00 to collect a $500.00 judgment and, therefore, the attorney fees were not justified and constitute a violation of ER 1.5(a).

26. Respondent failed to provide an ER 1.5(b)-compliant writing, creating a reasonable inference that he did not communicate to Complainant in writing the required information, in violation of ER 1.5(b).

27. By foregoing collection on a garnishment Respondent delayed his own client's litigation to an extent inconsistent with her interests, in violation of ER 3.2.

28. Respondent did not respond to the State Bar's screening investigation and failed to provide requested information, in violation of ER 8.1, and Rule 54(d), Ariz. R. Sup. Ct.

29. The delay in concluding Complainant's garnishment matter occasioned by Respondent's waiver of a garnishment collection extended the life of the case in court thereby prejudicing the administration of justice, in violation of ER 8.4(d).

COUNT TWO (File No. 11-0319/French)

30. Complainants, James and Peggy French, (Complainants), were involved in a car accident on August 18, 2007.

31. Prior to the accident, both Mr. and Mrs. French received Social Security disability benefits; Peggy due to job-related toxic exposure to her lungs which left her with asthma and chronic obstructive pulmonary disease, and James due to a severe heart attack and strokes.

32. On August 23, 2007, Complainants paid Respondent $175.00 for a consultation and then retained him to represent them on a contingent fee basis. Respondent did not enter into a written fee agreement with Complainants.

33. Through January 2008 Respondent obtained standard documentation of damages, and both received and sent routine cover letters from and to the involved insurers.

34. For reasons unknown, Respondent prepared an invoice for professional services directed to Complainant for $1,117.39 for fees and costs incurred through January 11, 2008.

35. On August 27, 2008, Respondent sent a two-paragraph demand letter to State Farm Ins. Co. demanding an aggregate settlement of $20,000.00 (total) for both Complainants.

36. State Farm rejected the offer in part because Respondent had sent only medical bills but no medical records detailing the diagnoses, treatment, or causation. Respondent requested copies of the medical records in October 2008.

37. On June 16, 2009, Respondent's secretary, Diane, composed a "File Memo" explaining that the two-year limitations period was approaching; the State Farm claim representative wanted to offer a settlement; and that Mrs. French told Diane, in late 2008, that "she just wanted this over" and was willing to settle for $5,000.00.

38. The "File Memo" also noted, "We should make an all out effort to settle this asap. Clients really need the money and case doesn't warrant another 2-3 years of litigation. Please advise or handle."

39. A different secretary at Respondent's Firm took a call from the State Farm representative and wrote that State Farm considered the accident minor. It offered $2,100.00 and $5,500.00 to settle Mrs. and Mr. French's cases, respectively.

40. Respondent did not communicate these offers to the Frenches.

41. Respondent filed suit on Complainants' behalf in Gila County Superior Court in August 2009, and first attempted to serve the suit documents on November 10, 2009.

42. On December 17, 2009, State Farm's defense counsel filed an Answer admitting that the defendant driver was negligent and at fault for the accident. Defense counsel served on Respondent standard initial discovery requests (uniform and non-uniform interrogatories, and a request for production of documents) and medical information release authorizations for Complainants to answer, sign, and provide. Respondent sent all of those documents to Complainants.

43. On December 28, 2009, defense counsel served on Respondent Offers of Judgment in the amounts of $2,500.00 and $7,000.00 for Mrs. and Mr. French, respectively.

44. Respondent's secretary, Diane, relayed this information to Complainants, and Mrs. French told Diane to accept the offers.

45. During the State Bar's screening investigation, Respondent told the State Bar's A/CAP counsel that he did not know why Complainants alleged that there was a nearly $10,000.00 settlement offer since the only offer in the case was $2,400.00.

46. Respondent did not explain to the Frenches the significant ramifications of accepting or rejecting the Offers of Judgment.

47. In January 2010, defense counsel wrote to Respondent informing him that Complainants' discovery responses were overdue.

48. Defense counsel repeated the overdue discovery reminder in February 2010.

49. Respondent obtained signed medical authorizations from Complainants and forwarded them to defense counsel but did not furnish a disclosure statement or discovery responses.

50. Defense counsel wrote another discovery reminder to Respondent on March 25, 2010.

51. On April 5, 2010, Mr. French wrote a letter to Respondent in which he stated:

> This letter is my first written or verbal contact I have had directly with you, since I retained you two years and eight months ago. . . . [Your office staff told us] to arrange a conference call from you to [Peggy] and I. It like other things your staff has told [Peggy] never happened. . . . Lastly in the letter from [defense counsel] to you dated 03-01-10, he clearly noted discovery requests are overdue and requests them within ten days. So what I need to know is, what is the current status of this lawsuit and where is it headed? Please be so kind as to respond to this inquiry by post.

52. Also on April 5, 2010, defense counsel wrote to Respondent again requesting a disclosure statement and discovery responses.

53. Respondent never served the mandatory disclosure statement.

54. On April 13, 2010, defense counsel filed a motion to compel discovery by which he sought from Complainants and Respondent a disclosure statement,

interrogatory responses, a response to a request for production of documents, and attorney fees.

55. In the motion, defense counsel certified that he had received no response from Respondent to his several letters and phone calls regarding the overdue discovery responses.

56. Also on April 13, 2010, Respondent wrote a letter to Complainants enclosing only the non-uniform interrogatories that defense counsel served in December 2009; that still required their answers.

57. In the April 13, 2010, letter Respondent also stated: "I hope we can work together to get this case resolved. You are both my clients, but I cannot deal with conflicts between you."

58. Respondent also wrote to defense counsel on April 13, 2010, claiming that "I am in an awkward position as my clients are separated and feuding." Respondent enclosed copies of the same things he already had sent to State Farm and which defense counsel already obtained through the use of the medical authorizations.

59. Defense counsel e-mailed back to Respondent that he was willing to withdraw the motion to compel if Respondent assured him that Complainants would provide the requested and long-overdue discovery.

60. Complainants returned the interrogatories to Respondent with their handwritten answers on April 20, by FAX. They used Respondent's April 13 cover letter enclosing the interrogatories to them as their FAX cover page and handwrote on it, "Be assured Peggy and I have no conflicts. Please do resolve this case. Thank

you and good day." To some of the interrogatory questions, Complainants answered that they did not understand what was being asked.

61. On May 4, 2010, defense counsel wrote to Respondent reminding him of his willingness to withdraw the pending motion to compel upon being assured that discovery responses and a disclosure statement would be provided in the near future.

62. Defense counsel asked Respondent whether, given his client difficulties, he planned to continue representing them. Respondent responded that he would decide whether he would continue to represent Complainants after he finished typing the discovery responses.

63. On May 17, 2010, Respondent served answers to the non-uniform interrogatories, which defense counsel determined to be incomplete.

64. Respondent did not provide answers to the uniform interrogatories or request for production of documents, and he did not submit a disclosure statement.

65. On June 1, 2010, Judge Cahill, noting that Respondent and Complainants answered the non-uniform interrogatories but did not file a response to the motion to compel, granted the defendant's motion.

66. Defense counsel persisted in his efforts to obtain discovery responses from Respondent and cautioned Respondent that the next step would be to advise the judge that Complainants violated the judge's order.

67. Throughout the spring of 2010, defense counsel asked Respondent several times to contact him regarding composing a mandatory joint Alternative Dispute Resolution statement. Respondent did not respond and defense counsel filed a unilateral statement in July 2010.

68. On July 26, 2010, Respondent served a First Supplemental Disclosure Statement, never having previously served an Initial Disclosure Statement.

69. Not having heard from Respondent or received the long-sought discovery responses, defense counsel filed a motion for sanctions on July 28, 2010, in which he sought dismissal of the claims and an award of attorney's fees.

70. Respondent did not file a response to the motion for sanctions and on September 16, 2010, Judge Cahill granted the defendant's motion.

71. Judge Cahill also dismissed the complaint and on October 5, 2010, awarded defendants $398.00 in attorney's fees and $180.00 in costs.

72. On October 7, 2010, Respondent filed Notices of Service of Complainants' Answers to Uniform Interrogatories.

73. On October 19, 2010, Respondent filed a Motion for New Trial (the appropriate motion to vacate an order of dismissal based on discovery violations). Judge Cahill denied the motion on November 23, 2010.

74. On January 8, 2011, Complainants filed written statements with the court. Termed an appeal, Complainants asserted that only recently did they learn that Respondent failed to inform them of discovery motions and orders, and failed to respond appropriately to defense counsel.

75. Complainants informed the court that Respondent refused to take their phone calls so that they could tell him personally to accept the settlement offers. "We, being victims of an automobile accident, feel that due to Mr. Green's inactions we want to say that we feel sorry for the long and troublesome time that this case has taken to Mrs. Hedgecock [defendant], Mr. Hathaway [defense counsel], and

ourselves. We beg your court to grant our appeal and allow us to find some fairness."

76. Judge Cahill invited defense counsel to respond to what he termed the Complainants' motion for reconsideration, which he did.

77. Respondent filed a motion to withdraw from the representation on February 2, 2011.

78. At a February 9, 2011, hearing regarding the French's "Motion for Reconsideration of the Court's denial of their Motion for a New Trial," the parties informed Judge Cahill that Mrs. French settled her claim.

79. Judge Cahill granted Mr. French's motion to reinstate the case, entered the Order withdrawing Respondent from the case, and referred a copy of his minute entry to the State Bar.

80. In October 2011, Mr. French settled his case and the suit was dismissed. Each case settled for the amount of the respective Offers of Judgment served in December 2009.

81. On January 27, 2011, Mr. and Mrs. French submitted their charge against Respondent to the State Bar.

82. By letter dated April 12, 2011, Respondent was asked to address the charges submitted by Mr. and Mrs. French, and was asked to respond within 20 days.

83. Respondent failed to respond.

84. By letter dated May 9, 2011, Respondent was again asked to address and respond to the charges submitted by Mr. and Mrs. French, and was reminded of his duty to respond to the State Bar's investigation.

85. Respondent again failed to respond.

86. Respondent failed to communicate with Complainants about settlement offers and failed to abide by Complainants' decision to accept settlement offers, of which they learned through Respondent's assistants, in violation of ER 1.2.

87. Respondent failed to follow up with Complainants regarding settlement and discovery, failed to address defense counsel's discovery requests, and failed to respond to motions, in violation of ER 1.3.

88. Respondent failed to communicate with Complainants about settlement, discovery, and case-dispositive motions, in violation of ER 1.4.

89. Respondent provided nothing in writing regarding fees or expenses to be charged, or if the matter was accepted on a contingent fee, in violation of ER 1.5(c). Alternatively, Respondent failed to communicate to Complainants in writing the basis or rate of the fee and expenses to be charged which later appeared on his invoices, in violation of ER 1.5(b).

90. By telling defense counsel, without client consent, that Complainants were feuding, which Complainants deny, Respondent violated ER 1.6.

91. Alternatively, if Complainants were in fact feuding, Respondent had a concurrent conflict of interest representing them simultaneously in the same litigation, in violation of ER 1.7.

92. Respondent was retained in August 2007, did not file the lawsuit for Complainants until August 2009, and did not serve the lawsuit until November 2009. Respondent unreasonably delayed discovery and disclosure, failed to

expedite the selection of modes of alternate dispute resolution, and failed to settle either case by the time of his withdrawal in February 2011, in violation of ER 3.2.

93. Respondent failed to provide mandatory, voluntary disclosures to defense counsel, failed to respond to routine discovery of evidence to which defense counsel was entitled and, being a veteran litigator, knowingly disobeyed discovery and motion practice rules, and a court order compelling discovery, in violation of ER 3.4(c) and Rule 54(c), Ariz. R. Sup. Ct.

94. Respondent did not respond to the State Bar's screening investigation and failed to provide requested information, in violation of ER 8.1, and Rule 54(d), Ariz. R. Sup. Ct.

95. Respondent falsely blamed his dilatory actions on a supposed feud between co-clients, and falsely told the State Bar that the only settlement offer the defense conveyed to Complainants was for $2,400.00, in violation of ER 8.4(c).

96. Due to Respondent's serial violations during the litigation, Complainants' cases were dismissed and resurrected causing substantial delay in the litigation and significant prejudice to the administration of justice, in violation of ER 8.4(d).

COUNT THREE (File No. 11-1631/Kirk)

97. Complainant, Sonja Kirk, lived in Louisiana and lost her home to Hurricane Katrina. Complainant moved to Payson, Arizona, after having received federal funds to help her move.

98. While working as a traveling nurse in Phoenix, Complainant met Clifford Metz with whom she developed a romantic relationship and they agreed to marry.

99. Anticipating their marriage, Complainant deeded to Mr. Metz a one-half interest in her home and they held title as joint tenants with right of survivorship.

100. The relationship soured and the engagement ended. Complainant offered Mr. Metz some money for him to convey to her his interest in the Payson property, but he wanted more than what Complainant offered.

101. Complainant hired Respondent to either negotiate a resolution with Mr. Metz or sue him.

102. Respondent's settlement efforts were unsuccessful so he sued Mr. Metz in a partition action in July 2008.

103. Respondent served the summons and complaint on Mr. Metz and in December 2008 served some disclosures.

104. In response to a letter Mr. Metz sent to Respondent staking his claim, Complainant wrote a letter to Respondent on December 15, 2008, and concluded: "Please advise on the next action to take. I look forward to hearing from you and very frankly, am relieved I no longer have to deal with Cliff directly."

105. On September 14, 2009, Complainant wrote to Respondent again and commented that she had not heard from him since December 15, 2008.

106. Complainant authorized Respondent to offer Mr. Metz $5,000.00 and certain furniture in exchange for his interest in the real property.

107. Complainant called Respondent's office on May 5, 2010, to determine if he had received her September 14, 2009, letter.

108. Unable to reach Respondent, she wrote to him on May 6, 2010, and expressed her concern that she had not heard from him. Complainant also

authorized Respondent to offer Mr. Metz $2,000.00 and five acres she owned in St. Johns in exchange for Mr. Metz reconveying to her his interest in the Payson property.

109. Respondent did not respond to Complainant.

110. On November 10, 2010, Complainant wrote to Respondent again reminding him of her previous efforts to reach him. Complainant's letter stated,

> I have attempted to reach you several times by phone and have sent several letters via certified mail. . . . When I call your office I am always told the same thing, that you are unavailable and someone will call me back. Only no one has ever called me to explain what is being done about my case on your end. I have not been provided with an update and no person in your office seems to know the status of my case. Your disinterest is very concerning to me, especially since the property in question has devalued greatly in the past three years since you were retained. I am demanding the return of the fees I have paid you, $2,525.00 minus the consultation fee [$525.00] within 10 business days.

111. Respondent wrote back to Complainant on November 18, 2010:

> I am desiring to finish this litigation and I would need you to bring up to date the pay note, since December 4, 2007 and the taxes and insurance paid up to this time. Please attach all supporting documents that coincide with this up to date accounting. Finally, if you get a new statement of value from a realtor to determine the equity issue of the property, I can proceed to finalize this matter. . . . If this does not meet with your plans, please advise.

112. On November 21, 2010, Complainant reiterated her demand for a refund of $2,000.00 and told Respondent that "despite your initial optimistic assessment followed by a lack of focus and months to years of inattention to my case, I was able to settle the issue on my own."

113. Respondent's property had devalued to such an extent that she is "upside down" on the loan. Had Respondent reasonably diligently pursued her partition claim she would have been able to sell the property two years earlier for a profit.

114. Complainant submitted a charge against Respondent by letter to the State Bar dated July 25, 2011, and added that she had not received an accounting from Respondent.

115. By letter dated November 7, 2011, mailed and emailed to Respondent, he was asked to address the charges submitted by Complainant, and was asked to respond within 20 days.

116. A copy of Complainant's charge, including the letter constituting Complainant's demand for an accounting was included with the State Bar's November 7, 2011, letter mailed to Respondent.

117. Respondent failed to respond.

118. By letter dated December 16, 2011, mailed and e-mailed, Respondent was again asked to respond to the charges and was reminded of his duty to respond to the State Bar's investigation.

119. Respondent again failed to respond.

120. Beginning on November 11, 2009, Respondent was subject to an "Order of Diversion" and "Terms and Conditions of Diversion". The former document incorporated by reference the terms of the latter document. The latter document includes the following term: "Member shall refrain from engaging in any conduct which would violate the Rules of Professional Conduct or other Rules of the Supreme Court of Arizona."

121. Respondent failed to act with reasonable diligence on Complainant's behalf, in violation of ER 1.3

122. Respondent failed to reasonably communicate with or respond to Complainant during the representation, in violation of ER 1.4.

123. Respondent charged or collected an unreasonable fee or an unreasonable amount for expenses, in violation of ER 1.5(a).

124. Respondent failed to communicate to Complainant in writing the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible, in violation of ER 1.5(b).

125. Respondent failed to refund to Complainant all or any portion of her fees and failed to render an accounting of those fees, in violation of ER 1.15(d).

126. Respondent failed to expedite litigation consistent with his client's interests in violation of ER 3.2.

127. Respondent knowingly failed to respond to requests for information in connection with this count and failed to cooperate in a State Bar investigation, in violation of ER 8.1(b) and Rule 54(d), Ariz. R. Sup. Ct.

128. Respondent's conduct herein occurred while he was subject to an Order of Diversion, and Terms and Conditions of Diversion, resulting in his violation of Rule 54(e), Ariz. R. Sup. Ct.

COUNT FOUR (File No. 11-1650/Brummett)

129. Complainant, Tina Brummett, is the natural mother of two minor children. In Navajo County Superior Court, the children's aunt and uncle filed petitions for guardianship and termination of parental rights allegedly warranted by Complainant's various misbehaviors, and her alleged bipolar disorder.

130. Although a motion to consolidate the separately filed cases was denied, the cases (for reasons that are unclear from the record) were tried and appealed together.

131. Complainant retained Respondent and on or about November 2, 2009, paid him $700 for the representation.

132. In January 2010, Judge Michaela Ruechel granted the guardianship petition but denied the petition to terminate Complainant's parental rights. Judge Ruechel was concerned about Complainant's mental health but concluded that "abandonment" in the relevant statute required proof of "an intentional relinquishment" of parental rights. Since that showing was not made, she did not terminate Complainant's parental rights.

133. The successful guardians (the children's aunt and uncle) filed an appeal of the denial of their petition to terminate. The Court of Appeals suspended the guardians' appeal for several reasons, among which was that the notice of appeal did not contain certain avowals required by Rule 104(B), Ariz. R. P. Juv. Ct.

134. The Court's Order suspending the appeal was mailed to Respondent. In a subsequent appeal on Complainant's behalf, Respondent failed to include the same avowals.

135. After the defects in the guardians' appeal were corrected, the appeal proceeded. In November 2010, the Court of Appeals reversed and remanded, holding that Judge Ruechel misapplied the law in deciding whether Complainant abandoned her children. The Court's exact concluding language was: "[W]e vacate the portion of the judgment denying the petition to terminate Tina's parental rights and remand the matter for such further or supplemental proceedings as the superior court judge who heard the matter may deem appropriate."

136. Complainant instructed Respondent to offer evidence that she once had been diagnosed with bipolar disorder, which explained the unintentional nature

of her behavior that prompted the guardianship and termination proceedings in the first place.

137. Complainant's psychiatrist wrote a note stating: "In my opinion she does not have bipolar disorder or any other psychiatric disease that would interfere with parenting. She is on no psychiatric medicines since the beginning of 2009 and is doing fine. I see no reason that she is not a fit parent and I have no reservations about her having custody of her children."

138. On January 14, 2011, Judge Ruechel held a telephonic status conference and issued a minute entry stating, "Counsel advised the Court that they are ready for the Court to make its ruling. The Court advised counsel that it will review the file and make a ruling later today."

139. Respondent did not request supplemental proceedings to offer evidence as Complainant requested on the remanded issue.

140. On January 18, 2011, Judge Ruechel issued a new order in which she terminated Complainant's parental rights. Among other findings in her order, she wrote: "Tina Brummage was diagnosed as bi-polar several years ago and placed on medication. She is no longer taking the medication and now claims that the original diagnosis was incorrect, and that in fact she was suffering from post-traumatic stress disorder and post-partum depression. The Court does not have any current psychological or psychiatric assessments or evaluations."

141. On or about February 11, 2011, Complainant paid Respondent $1,500.00 to handle an appeal and Respondent filed the appeal on February 15, 2011.

142. On March 9, 2011, the Court of Appeals issued an order suspending the appeal because Respondent's notice of appeal lacked the same avowals that the guardians' 2010 Notice of Appeal lacked.

143. Respondent was copied on the order suspending the guardians' earlier appeal so in addition to the knowledge of and familiarity with rules of procedure with which he is charged, he also had express notice of the required content of a notice of appeal.

144. The Court of Appeals referred the defective notice of appeal to the Juvenile Court for consideration in accordance with Rule 104(B).

145. On April 12, 2011, Judge Ruechel issued a ruling striking Respondent's notice of appeal and notified the Court of Appeals of her order on April 20, 2011.

146. On May 3, 2011, the Court of Appeals issued an order finding that it lacked jurisdiction over the appeal.

147. Rule 104(A), Ariz. R. P. Juv. Ct., states that a notice of appeal must be filed no later than 15 days after the final order from which an appeal is taken is filed with the clerk. This gave Respondent until February 2, 2011, by which to file the notice of appeal. Because he did not file it until February 15, the court lacked jurisdiction over the appeal and dismissed it.

148. After Judge Ruechel granted the petition to terminate, Respondent did not tell Complainant that she faced a deadline to file a notice of appeal.

149. Respondent also did not tell Complainant that the Court of Appeals had dismissed her appeal.

150. When Complainant was unable to obtain an explanation from Respondent regarding the status of her case, she raised sufficient funds to hire new

counsel. Only then did she learn of the foregoing events. On December 23, 2011, new counsel filed a Motion to Excuse Untimely Filing of Notice of Appeal.

151. Judge Ruechel denied the motion but without prejudice to Complainant's right to refile it with an accompanying affidavit explaining why the untimely filing should be excused given the seven month lapse from May until December.

152. Complainant's new counsel has refiled the motion. If Judge Ruechel denies the refiled motion, Complainant plans to appeal.

153. On August 8, 2011, the State Bar sent a screening investigation letter to Respondent and asked that he respond to the charges by August 29th and to provide a copy of the Complainant's client file.

154. Respondent failed to respond.

155. By letter dated October 5, 2011, mailed and emailed, Respondent was asked to respond to the charges by October 12th and was reminded of his duty to respond to the State Bar's investigation.

156. Respondent again failed to respond.

157. Respondent failed to file a timely notice of appeal or include necessary information in his notice of appeal, in violation of ER 1.1.

158. Respondent failed to comply with Complainant's request that Respondent seek an evidentiary hearing on remand following the guardians' appeal in the termination proceeding, in violation of ER 1.2.

159. Respondent failed to act with reasonable diligence in failing to file an appropriate and timely notice of appeal or seek an evidentiary hearing, in violation of ER 1.3.

160. Respondent failed to inform Complainant of the time requirements for an appeal, or to respond to her efforts to seek a status from him, in violation of ER 1.4.

161. Respondent charged Complainant an unreasonable fee in violation of ER 1.5(a).

162. Respondent failed to communicate in writing to Complainant the scope of representation and the basis or rate of the fee in violation of ER 1.5(b).

163. Respondent failed to make reasonable efforts to expedite litigation by filing an untimely and incomplete notice of appeal, in violation of ER 3.2.

164. Respondent failed to respond to the State Bar's screening investigation, failed to cooperate with the State Bar's investigation, and failed to furnish information requested by the Bar, in violation of ER 8.1 and Rule 54(d), Ariz. R. Sup. Ct.

165. In failing to file a timely and complete notice of appeal, creating the need for Complainant to retain new counsel in an effort to resuscitate her dismissed case, Respondent engaged in conduct prejudicial to the administration of justice, in violation of ER 8.4(d).

COUNT FIVE (File No. 11-3466/Judicial Referral)

166. Respondent was counsel of record for a minor in Gila County Superior Court JV2011 00080. In that case, the minor was being prosecuted for drug-related offenses that, if committed by an adult, would be class one misdemeanors.

167. The Juvenile Court case was set for a disposition hearing on October 18, 2011, before the Honorable Peter J. Cahill.

168. On September 22, 2011, in Respondent's then-pending, four-count discipline case, Respondent and the State Bar entered into a consent agreement by which Respondent was to be suspended from the practice of law, effective October 15, 2011.

169. Anticipating that he could not represent the minor at the October 18, 2011, hearing Respondent arranged for substitute counsel to represent the minor.

170. At the hearing, the court accepted a plea agreement and imposed on the minor the standard probationary terms.

171. Judge Cahill learned the following and placed it on the record:

> Mr. Green's client and family were unaware until today that Mr. Green would not attend this hearing due to a suspension; while Mr. Green attempted to have another lawyer cover him for this Juvenile disposition, the family was left unprepared and unrepresented; and Mr. Green prepared legal papers for filing October 18, 2011, over his client's signature.

172. The Presiding Disciplinary Judge (PDJ) did not act on the disciplinary matter consent agreement until October 24, 2011.

173. The PDJ determined that the agreement was reasonable but believed that the agreed-to suspension (six months and one day) was inadequate and gave the parties 15 days to execute a modified agreement calling for a one-year suspension as the principal term.

174. Because Respondent declined to enter into a modified agreement the case proceeded to a disciplinary hearing in December 2011.

175. Respondent was not on suspended status on October 18, 2011, and could (and should) have appeared in court on the juvenile's behalf. In fact, Respondent's suspension did not become effective until March 15, 2012.

176. Judge Cahill submitted a copy of the October 18, 2011, minute entry to the State Bar.

177. By letter dated November 8, 2011, Respondent was asked to respond to the court's submission within 20 days.

178. Respondent failed to respond.

179. By letter dated December 16, 2011, mailed and emailed, Respondent was again asked to respond to Judge Cahill's submission within 10 days, and was reminded of his duty to respond to the State Bar's investigation.

180. Respondent again failed to respond.

181. Respondent failed to notify the client and client's family of his pending suspension, and failed to communicate to the client and client's family the need for substitute counsel to represent the client at the hearing, in violation of ER 1.4.

182. Respondent failed to give the client and client's family the opportunity to employ alternate counsel after failing to notify them of his pending suspension, in violation of ER 1.16.

183. Respondent engaged in conduct prejudicial to the administration of justice by failing to appear at the client's scheduled hearing, in violation of ER 8.4(d).

184. Respondent failed to respond to the State Bar's screening investigation, failed to cooperate with the State Bar's investigation, and failed to furnish information requested by the Bar, in violation of ER 8.1 and Rule 54(d).

CONCLUSIONS OF LAW

Respondent failed to file an answer or otherwise defend against the allegations in the SBA's complaint. Default was properly entered and the allegations

are therefore deemed admitted pursuant to Rule 58(d). Based upon the facts deemed admitted, the Hearing Panel finds by clear and convincing evidence that Respondent violated the following: Rule 42, ERs 1.1, 1.2, 1.3, 1.4, 1.5(a), 1.5(b), 1.6, 1.7, 1.15, 1.16, 3.2, 3.4(c), 8.1, 8.4(c), and 8.4(d); and Rules 54(c), (d), and (e).

DISCUSSION

The issuance of a final order by default in a disciplinary case requires a two step progression. First, default must be formally entered by the disciplinary clerk. Supreme Court Rule 58(d) outlines the default procedure in discipline cases.

> If respondent fails to answer within the prescribed time, the disciplinary clerk shall, within ten (10) days thereafter, file and serve a copy of the notice of default upon respondent and bar counsel. A default shall not be entered if the respondent files an answer or otherwise defends prior to the expiration of ten (10) days from the service of the notice of default. Otherwise, a default shall be entered by the disciplinary clerk eleven (11) days after the notice of default is filed and served and the allegations in the complaint shall be deemed admitted.

This procedure is substantively different from the default process set forth within the Civil Rules of Procedure. Civil Rule 55 has not been incorporated into the discipline rules. See Supreme Court Rule 48(b). Under the civil rule process the clerk is required to enter a party's default "in accordance with the procedures set forth" within that rule. That procedure requires the filing of an application for default. A default entered by the clerk in response to such an application "shall be effective ten (10) days after the filing of the application for entry of default." As a result that ten day period is computed in accordance with civil rule 6(a) so that weekends and holidays are excluded. *Corbet v. Superior Court In and For County*

Maricopa, 165 Ariz. 245, 798 P.2d 383 (Ct. App. Div. 1 1990). As pointed out in *Baker Intern. Associates, Inc. v. Shanwick Intern. Corp.*, 174 Ariz. 580, 851 P.2d 1379 (Ct. App. Div. 1 1993) because that ten day period runs from the filing of the application for entry of default, civil rule 6(e) which grants an additional five days if the application is served by mail does not apply.

However in discipline cases, the disciplinary clerk files and serves a copy of the notice of default upon respondent and bar counsel. A default cannot be entered if the respondent files an answer or otherwise defends prior to the expiration of ten (10) day from the service of the notice of default. Supreme Court Rule 58(d) is clear that "default shall be entered by the disciplinary clerk eleven (11) days after the notice of default is filed and served. As a result civil rule 6(a) is not implicated as a respondent has twenty days to file an answer from the date of notice of default before that default is entered.

Because that eleven day period runs from the filing and service of the default an additional five days is added only if service of the notice of default is done by mail. If service is accomplished by direct delivery, fax or email, the eleven day period runs from that date and an additional five days is not added. As noted above, default was properly entered by the disciplinary clerk and Mr. Green has never appeared. Under rule 58(d) the formal entry of default mandates, "the allegations in the complaint shall be deemed admitted." When a default is properly entered there is a judicial admission of all well-pleaded facts in the complaint.

The second step of the progression is to acquire "an order regarding discipline" under Supreme Court Rule 58(k). After default is entered and the allegations in the complaint are necessarily "deemed admitted," an

aggravation/mitigation hearing is set before a hearing panel. The purpose of that hearing is not merely to weigh the mitigating and aggravating factors. The hearing also serves to assure there is a nexus between the respondent's judicially admitted actions and the merits of the case. A respondent against whom a default has been entered no longer has the right to litigate the merits of the factual allegations, but retains the right to appear and participate in the hearing concerning that nexus and the sanctions sought. Included with that right to appear is the right to cross-examine witnesses but not for the purpose of disputing the factual allegations.

Due process requires the hearing panel to independently determine whether under the facts deemed admitted ethical violations have been proven by clear and convincing evidence. The hearing panel must also exercise discretion in deciding whether sanctions should issue for the conduct. It is not the function of a hearing panel to simply endorse or "rubber stamp" any request for sanctions. Here, there has been an independent determination by the hearing panel that the State Bar has, by clear and convincing evidence proven that the actions of Mr. Green are in violation of the ethical rules.

Sanction and ABA *Standards*

Because Respondent defaulted and all allegations of his misconduct are deemed true and there is clear and convincing proof of misconduct, the only issue for this hearing panel to decide is what sanctions to impose.

Pursuant to Rule 58(k), a panel must consult the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* in determining an appropriate sanction. In determining an appropriate sanction consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused

Standard 3.0; *In re Peasley,* 208 Ariz. 27, at 35, 90 P.3d 764 at 772 (2004). A hearing panel also may conduct a proportionality analysis "if appropriate." Rule 58(k).

The duty violated

Respondent's conduct violated all four of the duties that the *Standards* define--his duties to his clients, the profession, the legal system, and the public. The most important ethical duties are those obligations which a lawyer owes to his clients. *Standards,* II. Theoretical Framework.

The lawyer's mental state

Given Respondent's experience as a lawyer and the additional knowledge he acquired by virtue of his disciplinary history, one can conclude only that his mental state was "knowing" and "intentional". He abandoned his practice and clients, knowingly failed to perform services for which he was retained, and even deliberately refused to assist his abandoned clients after the fact by failing to return their files (Count Four, Brummett), account for fees (Count One, Winters) or participate in SBA-sponsored fee arbitration (Count Three, Kirk).

The extent of the actual or potential injury

The admitted facts and evidence show that Respondent wreaked havoc on his clients and caused actual harm to them, the legal profession, the legal system, and the public. Examples include the actual and potential serious harm he caused to the Frenches (Count Two, French), both of whom suffered from serious preexisting health problems, in allowing their routine bodily injury case to get dismissed; Tina Brummett (Count Four, Brummett) in causing her to lose her parental rights with her minor children; and the court system (Count Five, Judicial Referral) by

jeopardizing the validity of a plea agreement that was in his minor client's best interests.

The following *Standards* are appropriate to consider given the facts and circumstances of this matter:

ER 1.15
Standard 4.12--Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

ER 1.6
Standard 4.21--Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

ER 1.7
Standard 4.31--Disbarment is generally appropriate when a lawyer, without the informed consent of client(s): (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client.

ERs 1.2 and 1.4
Standard 4.41--Disbarment is generally appropriate when: (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client.

ER 1.1
Standard 4.51--Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

ERs 1.5 and 8.4(c)
Standard 4.61--Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

ERs 8.1 and 8.4(c)
Standard 5.11--Disbarment is generally appropriate when . . . (b) a lawyer engages in any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ERs 3.2 and 3.4(c)

Standard 6.21--Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

ERs 1.5, 1.16, and 8.1
Standard 7.1--Disbarment is generally appropriate when a layer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

The foregoing *Standards* generally provide that disbarment is appropriate when a lawyer intentionally or knowingly engages in conduct that violates all lawyerly duties, and causes injury to a client, the profession, the legal system, or the public. Respondent's conduct fits within these *Standards.* The underlying client matters involve a plethora of knowing and intentional failures to perform services resulting in client injury. Together with Respondent's disdain for Supreme Court rules demonstrated by his deliberate refusal to respond to State Bar screening, and his failure to appear even for a hearing at which his very license to practice law was at stake, disbarment is the appropriate sanction.

Aggravating and mitigating circumstances

The presumptive sanction in this matter is disbarment. The following aggravating factors should be considered.

In aggravation:

(a) prior disciplinary offenses:

- 2002, 01-2186, Order of Informal Reprimand (presently, Admonition) and Probation for violating Rule 42, ER 3.1 (failure to bring or defend a proceeding only with a good faith basis for doing so that is not frivolous), and ER 8.1 and then-Rule 51 (failure to cooperate in a State Bar investigation);

- 2009, 09-0228, Order of Diversion for violating ERs 1.2 (failing to abide by client's decisions concerning the objectives of representation), 1.4 (failure to reasonably consult with client about the means by which the client's objectives

are to be accomplished) and 1.7 (conflict of interest). Mr. Green violated his terms of diversion that obligated him to furnish quarterly reports to the State Bar's Law Office Management Assistance Program ("LOMAP").[2]

•2012, 10-0732, 10-1817, 10-1859, 11-0448, suspension for six months and one day following a contested hearing, for violating Rule 42, ERs 1.3 (failure to exercise reasonable diligence), ER 1.4 (communication), 1.5(a) (unreasonable fees), ER 1.5(b) (failure to communicate the fee to client in writing), ER 1.5(d)(3) (failure to explain nonrefundable fees in writing), ER 1.7 (conflict of interests), ER 1.15 (failure to safekeep client property), ER 1.16 (violation of duties upon termination of representation), ER 3.3 (failure to be candid with the court), ER 3.4(c) and former Rule 53 (knowing violation of court orders), ER 4.4 (embarrassing, delaying, or burdening third persons with no substantial purpose), ER 5.3 (failure to supervise nonlawyer assistants), ER 7.5(a) (prohibition against using trade names), ER 8.1(b) and Rule 54(d)(2) (failure to furnish information to the State Bar during an investigation), ER 8.4(c) (misconduct involving dishonesty, fraud, deceit or misrepresentation), ER 8.4(d) (engaging in conduct prejudicial to the administration of justice), and Rule 43(a) (trust account commingling).

(b) dishonest or selfish motive – In Count Two (French), Respondent was dishonestly and selfishly motivated to blame his clients for a concocted "feud" in order to draw attention away from his own failures to represent them diligently. In Count Three (Kirk), Respondent was dishonestly and selfishly motivated by the desire to keep $2,000 in unearned fees and refuse to account to Ms. Kirk for them;

(c) a pattern of misconduct – Respondent violated many of the same ERs and rules (ERs 1.2, 1.3, 1.4, 1.5(a), 1.5(b), 3.2, 8.1, 8.4(d); and Rule 54(d)) multiple times, evidencing a conspicuous pattern of misconduct;

(d) multiple offenses – Respondent violated 19 different ERs and rules, in multiple separate cases;

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency – Respondent failed to respond to screening, file an answer to the complaint, or even appear at his aggravation/mitigation hearing;

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[2] "Diversion is not considered prior discipline but if diversion meets the criteria and is pursued, it serves to 'remedy the immediate problem and likely prevent any recurrence of it.' Rule 56(b), Ariz.R.Sup.Ct." *In re Rosval A. Patterson*, SBA no. 10-1111, PDJ-2011-9084, "Report and Order Imposing Sanctions" filed July 26, 2012, at 23-24. Moreover, even if Diversion is not regarded as discipline history, it may nevertheless be considered in aggravation, as panelists may consider non-ABA-*Standard* aggravating factors. *In re Stevens*, 178 Ariz. 261 (1994); *Matter of Galbasini*, 163 Ariz. 120,126, 786 P.2d 971,977 (1990); *In re Niemeir*, SB-01-0194-D (2002).

(g) refusal to acknowledge wrongful nature of conduct – Respondent has not responded to any of the charges;

(h) vulnerability of victim – Mr. and Mrs. French (Count Two), owing to their physical ailments, and Tina Brummett (Count Four) due to allegations of mental illness that she disputed, were especially vulnerable. Ms. Brummett's minor children, vulnerable due to their youth, also were victimized by Respondent's lapses;

(i) substantial experience in the practice of law – Respondent has been practicing law for 30 years; and

(j) indifference to making restitution - Respondent failed to appear at two SBA-sponsored fee arbitration hearings in connection with Sonja Kirk's matter (Count Three).

In mitigation:

It is Respondent's burden to offer evidence in mitigation.

Proportionality

A hearing panel may conduct a proportionality analysis "if appropriate." Rule 58(k). For proportionality purposes, the State Bar offers the case of *In the Matter of Steven J. A. August*, Bar No. 015612, PDJ No. PDJ-2011-9039, effective September 2, 2011:

> By judgment and order of a disciplinary panel dated September 2, 2011, Steven J.A. August, Flagstaff, was disbarred. Respondent also was assessed $2,141.20 in costs and expenses of the disciplinary proceeding. Respondent virtually abandoned his practice and his clients. He failed to pursue the client's objectives of representation, failed to exercise reasonable diligence, failed to reasonably communicate with the client, failed to charge reasonable fees and execute written fee agreements, and engaged in conduct prejudicial to the administration of justice. Respondent further failed to respond to the State Bar's investigation of this matter and defaulted in the formal proceedings.

See http://azcourts.gov/pdj/Decisions/SEPTEMBER2011.aspx. Mr. August's case is, in many if not most material respects, identical to Respondent's matter.

V. Conclusion

Lawyer discipline has many purposes which are not to punish a lawyer but, rather, to protect the public, the profession, and the administration of justice; deter similar conduct among other lawyers; preserve confidence in the integrity of the bar; foster confidence in the legal profession and the self-regulatory process; maintain the integrity of the profession in the eyes of the public; and assist, if possible, in the rehabilitation of an errant lawyer. *In re Peasley, 208 Ariz. 27, 90 P.3d 764 (2004); In re Scholl*, 200 Ariz. 222, 25 P.3d 710 (2001); *In re Walker*, 200 Ariz. 155, 24 P.3d 602 (2001) (1,4,5); *In re Rivkind*, 164 Ariz. 154, 791 P.2d 1037 (1990); *In re Hoover*, 161 Ariz. 529, 779 P.2d 1268 (1989); and *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Neither the State Bar nor this hearing panel can help those who choose not to be helped, or rehabilitate an errant lawyer such as Mr. Green who has shown that he no longer wishes even to be a lawyer.

The Hearing Panel has made the above findings of fact and conclusions of law. The Hearing Panel has determined the appropriate sanction using the facts deemed admitted, the *Standards*, the aggravating factors, and the goals of the attorney discipline system. Based upon the above, the Hearing Panel orders as follows:

IT IS ORDERED:

1. Respondent shall be disbarred from the practice of law.
2. Respondent shall pay all costs and expenses incurred by the State Bar and the Office of the Presiding Disciplinary Judge in this proceeding.
3. Respondent shall pay the following in restitution:

A. Two Hundred-thirty seven and 40/100 Dollars ($237.40) to Tanya Winters;

B. Two Thousand Dollars ($2,000.00) to Sonja Kirk; and

C. Eight Thousand Dollars ($8,000.00) to Tina Brummett.

4. A Final Judgment and Order will be issued.

DATED this 5 day of September, 2012.

The Honorable William J. O'Neil
Presiding Disciplinary Judge

CONCURRING:

James M Marovich /mps
James M. Marovich
Volunteer Attorney Member

Mark Salem /mps
Mark Salem
Volunteer Public Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 5 day of September, 2012.

Copies of the foregoing mailed
this 5 day of September, 2012, to:

Harlan W. Green
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Respondent

Copy of the foregoing hand-delivered/emailed
this 5 day of September, 2012, to:

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by: _____