

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

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

EVELYN LOUISE BENGER,
Bar No. 025920

Respondent.

PDJ 2014-9044

FINAL JUDGMENT AND ORDER

[State Bar No. 13-3331]

FILED SEPTEMBER 10, 2014

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on September 9, 2014, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED that Respondent, **Evelyn Louise Benger**, is hereby placed on Probation for her conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective immediately.

IT IS FURTHER ORDERED that Respondent shall attend 12 step meetings and participate in random drug/ alcohol testing and counseling as part of the terms of probation.

IT IS FURTHER ORDERED that the State Bar shall prepare terms of probation consistent with the consent agreement, and Respondent shall sign the terms within 30 days of receipt. The probation period will run for one (1) year from the date the terms are signed.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$1,200.00. 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 10TH day of September, 2014.

William J. O'Neil

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

Copies of the foregoing mailed/emailed
this 11th day of September, 2014 to:

Jack Levine
Jack Levine, PC
777 E. Thomas Rd., Ste. 210
Phoenix, AZ 85014-5478
Email: levine2005@aol.com
Respondent's Counsel

Shauna R. Miller
Senior Bar Counsel
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Lawyer Regulation Records Manager
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by: MSmith

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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,

**EVELYN LOUISE BENGER,
Bar No. 025920,**

Respondent.

PDJ 2014-9044

State Bar File No. 13-3331

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Evelyn Louise Benger, who is represented in this matter by counsel, Jack Levine, 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 April 18, 2014, and formal complaint in this matter was filed on May 22, 2014. Respondent voluntarily waives the right to an adjudicatory hearing on the complaint, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

The State Bar is the complainant in this matter, therefore no notice of this agreement is required pursuant to Rule 53(b)(3), Ariz.R.Sup.Ct.

Respondent conditionally admits that her conduct, as set forth below, violated Rule 54(e), by failing to comply with the terms and conditions of her diversion. Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Probation for one year. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding.¹ 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 April 4, 2008.

COUNT ONE (File no. 13-3331/State Bar of Arizona)

2. On April 1, 2013, in file no. 11-2117, an agreement to participate in diversion was filed with the Presiding Disciplinary Judge (hereinafter "PDJ").

3. The PDJ accepted the parties' agreement, with stipulated changes, and entered a report on May 8, 2013, and a final judgment and order on May 8, 2013.

4. Respondent was ordered to contact the State Bar's Members Assistance Program (hereinafter "MAP") within 30 days of the final judgment and order.

Respondent shall submit to a MAP assessment. Terms and Conditions of Diversion shall be developed if the results of the assessment so indicate, and

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.

shall include submission of quarterly reports from Respondent's personal physician to MAP.

5. On June 13, 2013, the necessary documents were sent to CorpCare so they could set up Respondent's MAP file.

6. On June 26, 2013, the State Bar was advised by a representative of CorpCare that Respondent had not contacted CorpCare.

7. On July 10, 2013, the State Bar was advised that Respondent had still not contacted CorpCare.

8. On July 11, 2013, the State Bar was advised the Respondent had not contacted the Law Office Management Assistant Program (hereinafter "LOMAP").

9. On August 30, 2013, the State Bar was advised that Respondent's first counseling session for her assessment was scheduled for September 3, 2013.

10. On September 4, 2013, the State Bar was notified that Respondent rescheduled her appointment for September 12, 2013.

11. On September 16, 2013, the State Bar was notified that Respondent showed up late for her appointment so the counselor was unable to complete the assessment.

12. Respondent's next appointment was scheduled for September 25, 2013.

13. On October 18, 2013, the State Bar received the MAP assessment recommendations and prepared the terms for Respondent's MAP diversion.

14. On October 28, 2013, the terms of the MAP diversion were mailed and emailed to Respondent's attorney with a cover letter requesting that Respondent sign the Terms and Conditions and return them no later than November 1, 2013.

15. On November 8, 2013, Respondent's attorney was asked why the signed MAP terms had not been returned.

16. Respondent's attorney replied that Respondent did not agree with the assessment and was going to get a second opinion from someone else.

17. Respondent failed to abide by the PDJ's judgment and order by, among other things, failing to sign and return the MAP terms.

18. On December 3, a hearing was held to determine whether Respondent had failed to comply with the order of diversion.

19. On December 3, 2013, the PDJ filed his ruling re: Notice of Noncompliance with Terms of Diversion. The ruling stated in part:

IT IS ORDERED, finding [Respondent] has violated her terms of diversion and as a result the State Bar may, at its discretion, reinstate the discipline proceed (sic) and go forward with the proceeding as provided in the Supreme Court Rules.

20. Respondent violated Rule 54(e), Ariz. R. Sup. Ct., by failing to comply with the terms and conditions of her diversion.

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 her conduct violated Rule 54(e), Ariz. R. Sup. Ct., specifically by failing to comply with the terms and conditions of her diversion.

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 sanction is appropriate: A period of Probation for one (1) year from the date terms are signed by Respondent. Respondent shall cooperate fully with bar counsel, the compliance monitor, and all other individuals involved in Respondent's treatment plan.

Respondent shall fulfill the following minimum requirements²:

- A. Respondent shall advise the compliance monitor and the state bar resource center, in writing, of any change in the address of record, telephone number, email address, or employment status.
- B. Respondent shall not engage in any conduct that would violate the Rules of Professional Conduct or other Rules of the Supreme Court of Arizona.
- C. The terms of probation includes the following: 12 step meetings, random drug/ alcohol testing and counseling.
- D. Respondent shall make and attend appointments with a health care professional for ongoing mental health counseling for anxiety, depression, and substance abuse once a week for the duration of these terms.
- E. If medications are prescribed by any treating health care professional, Respondent shall continue on the medications as prescribed.
- F. Respondent shall authorize and direct provider or any successor treating health care professional, as outlined below, to provide a written progress report to the compliance monitor every ninety (90) days verifying

² Terms of probation will be prepared if the Presiding Disciplinary Judge accepts the parties agreement. The listed requirements will be part of those terms.

that Respondent has met with and is following recommendations. The first progress report shall be due ninety (90) days after Respondent signs the terms of probation.

G. If, during the terms of probation, Respondent changes treating health care professionals, Respondent shall immediately notify the compliance monitor in writing of such proposed changes and shall within seven (7) days provide the name of a proposed successor treating health care professional of substantially similar credentials. The compliance monitor shall have the discretion of whether to approve such substitution of treating health care professional. If a successor treating health care professional is not designated and approved within fourteen (14) days, the compliance monitor may make a referral or return the matter to bar counsel. Respondent shall be responsible for all costs associated with any interim treatment.

H. Respondent shall not use alcohol, other drugs, or any other mood-altering substances except on prescription from a treating health care professional; provided, however, that said prescription has been fully disclosed to the compliance monitor.

1. All medical except plain aspirin, acetaminophen or ibuprofen must be prescribed by a treating health care professional. Any over-the-counter medications other than those listed above must be specifically approved in advance by the treating health care professional. All medications must be documented in Respondent's medical records and medication log (see below).

2. If a controlled substance is prescribed, dispensed or administered to Respondent, the compliance monitor must be notified in advance or, in the case of an emergency, within forty-eight (48) hours of such medication use.
3. Respondent shall maintain a medication log of all medications taken and shall make the log available to the compliance monitor upon request. The log shall contain, at a minimum, the name and dosage of medication used, date taken or administered, name of prescribing or administering health care professional and the reason the medication was given.
4. Respondent shall not ingest the following substances:
 - a. Alcohol or foodstuffs or beverages or toiletries containing alcohol, including Nyquil or Purell type products;
 - b. Foodstuffs containing poppy seeds;
 - c. Foodstuffs containing hemp products;
 - d. Herbal or health preparations containing derivatives of controlled substances.
5. Respondent is fully responsible for any and all ingested materials and their contents.
 - I. Respondent shall participate in random biological fluid testing and shall be responsible for payment of all charges in connection with such testing. Such charges will include, but not necessarily be limited to, payment to the collection lab, as well as reimbursement of fees billed to the state bar by any

physician designated by the compliance monitor for medical review of the biological fluid screenings.

1. Respondent will be required to follow the testing procedures, including scheduling and frequency of testing, at whichever testing facility Respondent is approved to use. The compliance monitor must approve all testing facilities. A collection site list and the relevant telephone numbers shall be provided to Respondent.

2. Respondent shall provide a specimen at an approved collection site prior to the close of business the day on the day Respondent is selected to test. If Respondent is unable to provide a specimen prior to the close of business on the testing day, an explanation shall be faxed by Respondent to the compliance monitor no later than 5:00 p.m. of the day of the missed test. Respondent shall within twenty-four (24) hours of missing a test, complete a make-up test. If Respondent misses more than two (2) tests per year, Respondent will be in violation of the terms of probation. Failure to test on the required day and to complete a make-up test within twenty-four (24) hours will be considered a missed test. A diluted or abnormal specimen will also be considered a missed test if, Respondent fails to complete a make-up test within 24 hours.

3. If Respondent moves from Arizona, fulfilling the testing requirements is solely the responsibility of Respondent, including but not limited to finding a collection site that must be approved by the compliance monitor.

4. Respondent shall notify the compliance monitor in advance of any travel plans and may be asked to test during the travel or immediately upon return.
 5. Additional biological fluid specimens (including hair testing) may be requested by bar counsel or the compliance monitor at any time.
 6. Respondent shall cooperate with collection personnel at all times and shall provide any waivers requested by the state bar.
- J. Respondent shall participate in Alcoholics Anonymous and Narcotics Anonymous. Respondent shall attend no fewer than 45 meetings within 45 days, then three (3) meetings per week for the following 45 days. Thereafter, if Respondent's therapist approves, the meetings will be reduced to two (2) meetings a week for the duration of the terms. Respondent shall provide a signature of the person in charge of the meeting to document her attendance every month. Her sponsor may sign, if the sponsor is in attendance.
- K. Respondent shall attend evaluation appointments with the compliance monitor. Such appointments will be scheduled by the compliance monitor throughout the terms of Probation by the compliance monitor. Respondent's first meeting with the compliance monitor shall be scheduled within thirty (30) days of Respondent signing the terms of probation.
- L. An exit interview shall be held within 30 days before the date the probation is set to expire. Respondent will not be considered to have successfully completed probation until this requirement has been met.
- M. Respondent shall, within twenty (20) days of signing the terms of probation, or within twenty (20) days of the date said authorization is mailed

to Respondent, provide the compliance monitor with properly executed written authorizations as may be necessary to verify Respondent's compliance with the terms of probation, including, but not limited to:

1. Respondent shall execute all necessary releases for communication between the compliance monitor, bar counsel, or any other assigned staff bar member regarding this matter.
2. Respondent shall authorize the compliance monitor to receive a copy of all evaluation reports and records relevant to Respondent's treatment plan and treatment.
3. Respondent shall authorize Respondent's personal treating health care professional, treatment counselor, therapist, or any other treating professional, to discuss with the compliance monitor the Respondent's evaluation, medical history, treatment plan (including all prescription and over-the-counter drugs and medications), and Respondent's participation and compliance with the recommended treatment plan.
4. Respondent shall authorize the compliance monitor to provide copies of all records and test results of the Respondent and discuss them with such other persons, agencies, members, or institutions as deemed necessary for implementing and monitoring compliance with the treatment program and/or the terms of probation.

N. If Respondent resides outside of Arizona, fulfilling all requirements listed above shall be the sole responsibility of the Respondent. Any changes need the approval of bar counsel monitor.

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 duty violated

As described above, Respondent's conduct violated her duty to the profession.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent negligently violated the terms of diversion in PDJ2013-9101 [State Bar file no. 11-2117] and that her conduct was in violation of Rule 54(c) Ariz.R.Sup.Ct.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was no actual harm to the profession.

Aggravating and mitigating circumstances

The parties conditionally agree that the following aggravating factor should be considered.

In aggravation:

- *Standard 9.22(e)*(failing to comply with orders of the PDJ).

In mitigation:

- *Standard 9.32(e)*(cooperative attitude toward these proceedings).

Discussion

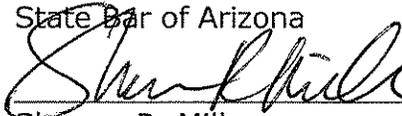
The ABA *Standards* do not specifically address a lawyer's violation of Rule 54(c), Ariz.R.Sup.Ct. The parties have agreed, based on the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors, that probation is the appropriate sanction. Respondent now recognizes that she needed to more proactive in implementing the diversion terms. 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 probation and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit "B."

DATED this 9th day of September, 2014

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. [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 _____ day of September, 2014.

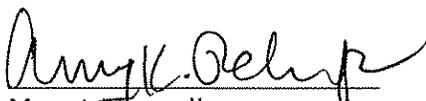
Evelyn Louise Bengner
Respondent

DATED this _____ day of September, 2014.

Jack Levine, PC

Jack Levine
Counsel for Respondent

Approved as to form and content



Maret Vessella
Chief Bar Counsel

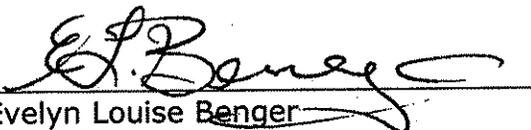
DATED this _____ day of September 2014

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. [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.]

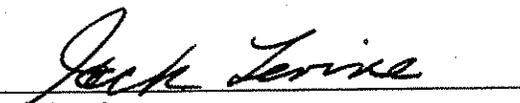
DATED this 6 day of September, 2014.



Evelyn Louise Bengel
Respondent

DATED this 6th day of September, 2014.

Jack Levine, PC



Jack Levine
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 9th day of September, 2014.

Copies of the foregoing mailed/emailed
this 9th day of September, 2014 to:

Jack Levine
Jack Levine, PC
777 E. Thomas Rd., Ste. 210
Phoenix, AZ 85014-5478
Email: levine2005@aol.com
Respondent's Counsel

Copy of the foregoing emailed
this 9th day of September, 2014, to:

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
Email: officepdj@courts.az.gov

Copy of the foregoing hand-delivered
this 9th day of September, 2014, 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 Current Member of the State Bar of Arizona,
Evelyn Louise Bengler, Bar No. 025920, Respondent

File No. 13-3331

Administrative Expenses

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

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

General Administrative Expenses for above-numbered proceedings

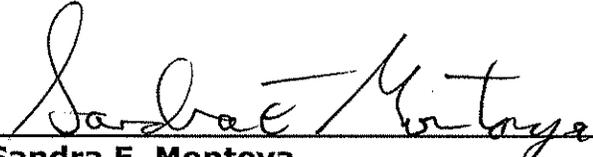
\$1,200.00

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

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges \$ 0.00

TOTAL COSTS AND EXPENSES INCURRED \$ 1,200.00



Sandra E. Montoya

Lawyer Regulation Records Manager

9-4-14

Date

EXHIBIT "B"

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

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

EVELYN LOUISE BENGER,
Bar No. 025920,

Respondent.

PDJ 2014-9044

[State Bar No. 13-3331]

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 September 9, 2014, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED that Respondent, **Evelyn Louise Benger**, is hereby placed on Probation for her conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective immediately.

IT IS FURTHER ORDERED that Respondent shall attend 12 step meetings and participate in random drug/ alcohol testing and counseling as part of the terms of probation.

IT IS FURTHER ORDERED that the State Bar shall prepare terms of probation consistent with the consent agreement, and Respondent shall sign the terms within 30 days of receipt. The probation period will run for one year from the date the terms are signed.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$ _____, within thirty (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 thirty (30) days from the date of service of this Order.

DATED this _____ day of September, 2014

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 September, 2014.

Copies of the foregoing mailed/emailed this _____ day of September, 2014.

Jack Levine
Jack Levine, PC
777 E. Thomas Rd., Ste. 210
Phoenix, AZ 85014-5478
Email: levine2005@aol.com
Respondent's Counsel

Copy of the foregoing emailed/hand-delivered this ____ day of September, 2014, to:

Shauna R. Miller
Senior Bar Counsel
State Bar of Arizona
4201 N 24th Street, Suite 100
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this ____ day of September, 2014 to:

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by: _____