

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 SUSPENDED  
MEMBER OF THE STATE BAR OF ARIZONA,

**KEVIN B. SWEENEY,**  
**Bar No. 011737**

Respondent.

**PDJ-2014-9058**

[State Bar Nos. 13-0384, 13-1833]

**FINAL JUDGMENT AND ORDER**

**FILED OCTOBER 17, 2014**

This matter having come before the Hearing Panel of the Supreme Court of Arizona, it having duly rendered its decision; and no appeal having been filed and the time for appeal having passed, accordingly,

**IT IS HEREBY ORDERED** that Respondent, **KEVIN B. SWEENEY**, is suspended from the practice of law for a period of six (6) months and one (1) day effective **September 25, 2014**, for conduct in violation of his duties and obligations as a lawyer, as disclosed in the Hearing Panel's Report.

**IT IS FURTHER ORDERED** that Respondent shall immediately comply with the requirements relating to notification of clients and others, and provide and/or file all notices and affidavits required by Rule 72, Ariz. R. Sup. Ct.

**IT IS FURTHER ORDERED** that upon reinstatement, Respondent shall be placed on probation for a period of two (2) years with the State Bar's Law Office

Management Assistance Program and Member Assistance Program. Specific terms and conditions of probation shall be determined at the time of reinstatement.

**IT IS FURTHER ORDERED** that Respondent pay those costs and expenses awarded to the State Bar of Arizona in the amount of \$4,085.00, within 30 days of the date of this order. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

**DATED** this 17<sup>th</sup> day of October, 2014.

*William J. O'Neil*

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

COPY of the foregoing e-mailed/mailed  
this 17<sup>th</sup> day of October, 2014, to:

Ariel I. Worth  
Senior Bar Counsel  
State Bar of Arizona  
4201 N. 24th Street, Suite 100  
Phoenix, AZ 85016-6266  
Email: lro@staff.azbar.org

Kevin B. Sweeney  
886 North Cofco Center Court, unit 1101  
Phoenix, AZ 85008-6437  
Email: ksweeney@cox.net  
Respondent

Sandra Montoya  
Lawyer Regulation Records Manager  
State Bar of Arizona  
4201 North 24<sup>th</sup> Street, Suite 100  
Phoenix, Arizona 85016-6288

by: JAlbright

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

**KEVIN B. SWEENEY,  
Bar No. 011737**

Respondent.

**PDJ 2014-9058**

**REPORT AND ORDER IMPOSING  
SANCTIONS**

[State Bar Nos. 13-0384 and 13-1833]

**FILED SEPTEMBER 25, 2014**

**PROCEDURAL HISTORY**

The State Bar of Arizona ("SBA") filed its complaint on July, 8 2014. On July 9, 2014, 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. The Presiding Disciplinary Judge ("PDJ") was assigned to the matter. A notice of default was properly issued on August 5, 2014, given Respondent's failure to file an answer or otherwise defend. That notice cautioned him that "[a]n effective entry of default shall not be set aside except in cases where such relief would be warranted under Rule 60(c) of the Arizona Rules of Civil Procedure." Despite that notice, Respondent did not file an answer or otherwise defend against the complaint's allegations and default was effective on August 25, 2014. On August 26, 2014 an Effective Entry of Default and Notice of Aggravation/Mitigation Hearing was sent to all parties notifying them the aggravation mitigating hearing was set for September

29, 2014 at 3:00 p.m., at the State Courts Building, 1501 West Washington Street, Phoenix, Arizona 85007-3231. That notice again cautioned Respondent that “[d]efault shall not be set aside except in cases where such relief would be warranted under Rule 60(c) of the Arizona Rules of Civil Procedure.” Respondent’s failure to answer is deemed an admission to the allegations contained within the complaint pursuant to Rule 58(d), Ariz. R. Sup. Ct. On August 29, 2014, a Notice of Change of hearing was sent to the parties informing them of the re-scheduled hearing date of September 25, 2014 at 10:30 am. Notice was sent to Respondent at his address of record and by email at kseeney@cox.net.

On September 25, 2014 at 10:30 am, the Hearing Panel, composed of Scott Palumbo, attorney member, Linda Smith, public member and William J. O’Neill, Presiding Disciplinary Judge, heard this matter. Ariel I. Worth, Senior Bar Counsel, appeared on behalf of the SBA. Respondent did not appear.

### **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 relevant times, Respondent was a lawyer licensed to practice law in the State of Arizona having been first admitted to practice in Arizona on January 5, 1988.

### **COUNT ONE (File no.13-084/Farrington-Lorch)**

2. Arizona Storage Inns (“ASI”) is an Arizona business. ASI provides storage facilities.

3. Respondent contracted with ASI for use of a storage unit. Respondent placed client files in the storage unit.

4. As of January 2013, Respondent was five months delinquent in payments to ASI.

5. In January 2013, ASI hired an attorney, Complainant Mary K. Farrington-Lorch, to assist in collecting delinquent payments from Respondent and to re-take possession of the storage unit rented by Respondent.

6. In February 2013, Complainant made numerous attempts to contact Respondent, including sending letters by certified mail. On February 26, 2013 Respondent signed a receipt for a letter from Complainant February 19, 2013.

7. Following receipt of Complainant's February 19, 2013, letter, Respondent made an agreement with Complainant to pay the delinquent payments.

8. Respondent failed to make the agreed upon payments to Complainant, and failed to respond to additional communications from Complainant. Complainant then submitted a charge to the State Bar.

9. On May 6, 2013, the State Bar sent Respondent notification of the bar charge received from Complainant along with a request for a written response within twenty days. Respondent failed to respond to the State Bar.

10. On June 12, 2013, the State Bar obtained a conservatorship over Respondent's files contained in storage. State Bar staff retrieved all files from the storage unit in order to prevent destruction of the files. Respondent did not respond to the conservatorship proceedings.

11. On August 5, and 6, 2013, State Bar Staff Investigator Marlene Cartusciello made contact with Respondent by telephone. Respondent acknowledged receiving payment notices from ASI, and further acknowledged making a payment arrangement with Complainant. Respondent informed Ms. Cartusciello he did not

have sufficient money to make to the agreed upon payments. Respondent further acknowledged receiving a letter from bar counsel requesting a written response to the bar charge.

12. By engaging in the misconduct described above, Respondent violated several ethical rules including, but not limited to:

- a. E.R. 1.15(a), Respondent failed to safeguard client properly by failing to make proper arrangements for the storage of client files;
- b. E.R. 1.16(d) Respondent failed to protect client interests upon termination of representation when he failed to make arrangements for either retaining or returning client files;
- c. E.R. 8.1(b), Respondent failed to respond to the lawful requests of the State Bar;
- d. Rule 54(d), Respondent failed to respond or furnish information requested by the State Bar as part of this investigation.

**COUNT TWO (File no. 13-1833/Shew)**

13. Joseph and Brenda Lorenzo ("Lorenzos") hired Respondent in May or June 2012 to represent them in a motor vehicle personal injury claim.

14. Respondent filed a complaint on behalf of the Lorenzos on December 12, 2012, *Joseph R. Lorenzo and Brenda L. Lorenzo v. Justin R. Davis and Jane Doe Davis*, CV2012-018245, Maricopa County Superior Court.

15. On January 18, 2013, the trial court issued a Notice of Appointment of Arbitrator, appointing attorney Complainant Michael J. Shew as the arbitrator in the Lorenzos' personal injury lawsuit. The trial court ordered the arbitration to commence on or before May 20, 2013.

16. On February 22, 2013, Respondent's license to practice law was administratively suspended for failure to comply with mandatory continuing legal education ("MCLE") requirements.

17. Respondent failed to notify Complainant, the Lorenzos, or opposing counsel of his suspension.

18. After the lawsuit was filed, Joseph Lorenzo regularly sent emails or made telephone calls to Respondent. Respondent failed to respond to most of these communications.

19. Respondent performed very little legal work on the Lorenzos' case from December to May 2013. The Lorenzos' client file shows Respondent began drafting some disclosures and discovery responses, but failed to complete those tasks.

20. On May 1, 2013, Complainant mailed a notice of hearing to Respondent and the opposing counsel. The notice of hearing scheduled the arbitration hearing for May 20, 2013.

21. The notice of hearing was returned to Complainant on May 9, 2013. That same day, Complainant's secretary contacted Respondent by telephone about the returned notice. Respondent provided a different mailing address to Complainant's secretary and a duplicate notice of hearing was mailed to Respondent later on May 9, 2013.

22. Respondent failed to advise the Lorenzos of the scheduled arbitration hearing date of May 20, 2013.

23. On May 6, 2013, opposing counsel filed a motion to compel. The motion alleged Respondent had failed to provide an initial disclosure statement and had also failed to respond to interrogatories despite multiple requests.

24. On May 7, 2013, Complainant asked Respondent to respond to the motion to compel by May 10, 2013. Respondent failed to respond to the motion to compel.

25. On May 14, 2013, Complainant learned that Respondent's law license had been suspended since February 22, 2013.

26. On May 14, 2013, Complainant elected to file another notice of hearing to confirm the scheduled arbitration hearing date on May 20, 2013. The amended notice was emailed to Respondent with a request to contact Complainant to schedule a telephone conference. Respondent did not comply with this request.

27. On May 15, 2013, Respondent sent an email to Complainant stating "[my suspension from the practice of law] is true. I hope to have it taken care of by thre [sic] time next week."

28. Respondent did not cure his suspension as indicated in his email to Complainant.

29. Respondent did not file a pre-arbitration hearing memorandum as required by Rule 75, Ariz. R. Civ. Proc.

30. On May 20, 2013, the arbitration hearing proceeded as scheduled. Respondent did not appear and the Lorenzos did not appear.

31. On May 22, 2013, Complainant filed a Notice of Decision of Arbitrator. Complainant found in favor of the defendants and against the Lorenzos.

32. From May 1, 2013 through May 22, 2013, Joseph Lorenzo sent emails to Respondent every few days, or in some cases multiple times per day, requesting an update about the lawsuit. Respondent repeatedly replied that he would later



provide a detailed update about the lawsuit, but in fact Respondent never provided any substantive information about the lawsuit.

33. On May 29, 2013, attorney Joe C. Dolan substituted as counsel of record for the Lorenzos. Mr. Dolan later successfully moved to set aside the arbitration decision in favor of the defendants and against the Lorenzos.

34. Respondent cooperated with Mr. Dolan and provided an affidavit in support of the motion to set aside. Respondent's affidavit confirmed his knowledge of the suspension of his law license, his failure to notify the Lorenzos of the suspension, and his failure to notify the Lorenzos of the arbitration hearing date.

35. A second arbitration hearing was later held and the Lorenzos were awarded \$17,801.00 on September 30, 2013.

36. Complainant submitted a bar charge against Respondent in July 2013. The State Bar wrote to Respondent requesting information on July 25, 2013, August 6, 2013, September 9, 2013 and October 7, 2013. Respondent failed to respond to any of these letters.

37. On August 6, 2013, State Bar Staff Investigator Marlene Cartusciello talked to Respondent by telephone regarding a separate investigation in State Bar File No. 13-0384. At that time Respondent confirmed his telephone number and mailing address of record with the State Bar were valid and accurate.

38. By engaging in the misconduct described above, Respondent violated several ethical rules including, but not limited to:

- a. E.R. 1.3 Respondent failed to diligently represent client during the representation and abandoned the lawsuit while attorney of record;

- b. E.R. 1.4 Respondent failed to keep his clients informed about the status of their legal matter, in particular failing to inform them of the scheduled arbitration hearing;
- c. E.R. 1.16 Respondent failed to make a timely withdrawal from representation after the effective date of the suspension of his license to practice law;
- d. E.R. 5.5 Respondent remained the attorney of record on a pending legal matter after the effective date of the suspension of his license to practice law;
- e. E.R. 3.2 Respondent failed to expedite his clients' litigation;
- f. 8.1(b)<sup>1</sup> Respondent failed to respond to the lawful requests of the State Bar;
- g. E.R. 8.4(d) Respondent engaged in conduct prejudicial to the administration of justice. Additional litigation occurred as a direct result of Respondent's misconduct;
- h. Rule 54(d) Respondent failed to promptly respond or furnish any information requested by the State Bar as part of this investigation.

### **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), Ariz. R. Sup. Ct. The State Bar moved to amend Count Two to including a violation of ER 8.1(b) and Rule 54(d). The Panel granted the motion. Based upon the facts deemed admitted, the Hearing Panel finds by clear and convincing evidence that Respondent violated the following: Rule

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<sup>1</sup> Although Count Two of the Complaint did not include a reference to ER 8.1(b) and Rule 54 (d), the factual allegations contained in Count Two support finding these violations. At the time of hearing, bar counsel moved to amend Count Two to include violations of ER 8.1(b) and Rule 54 (b), consistent with the facts alleged in Count Two. The Hearing Panel granted the motion. These violations are therefore included in the findings as to Count Two.

42, Ariz. R. Sup. Ct., specifically E.R.s 1.3, 1.4, 1.15, 1.16, 3.2, 5.5, 8.1(b), 8.4(d) and Rule 54(d).

### **ABA STANDARDS ANALYSIS**

The American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") are a "useful tool in determining the proper sanction." *In re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990). In imposing a sanction, the following factors should consider: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. *Standard 3.0*.

#### **Duties violated:**

Respondent violated his duty to his clients by violating E.R.s 1.3, 1.4, 1.15 and 1.16. Respondent violated his duty to the legal system by violating E.R.s 3.2. and 8.4(d). Respondent also violated his duty owed as a professional by violating E.R.s 5.5, 8.1(b), and Rule 54(d).

#### **Mental State and Injury:**

The most serious duty violated is Respondent's duty to clients, thereby implicating *Standard 4.42*. Respondent abandoned his clients, the Lorenzos. Respondent knowingly failed to perform services for the Lorenzos and caused serious injury their legal claim.

*Standard 4.42* states:

Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

The following additional standards are also applicable to Respondent's misconduct. For Respondent's violation of E.R.s 3.2 and 8.4(d), *Standard 6.22* states,

6.22 Suspension is generally appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Finally, for Respondent's violations of E.R.s 5.5, 8.1(b) and Rule 54 (d), *Standard 7.2* is applicable.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

#### **AGGRAVATING AND MITIGATING FACTORS**

The Hearing Panel finds the following aggravating factors are present in this matter:

- *Standard 9.22(c)* pattern of misconduct. In File No. 07-1713, Respondent was placed on probation for violation of E.R.s 1.3 and 1.4. In File No. 08-0291, Respondent was issued an Informal Reprimand for failure to respond to the State Bar, thus violating the rule applicable at that time, Rule 53 (f). In File No. 08-1225, SB-09-0066, Respondent was censured for practicing law while on summary suspension and for failing to respond to the State Bar, thus violating E.R.s 8.1, 5.5, 8.4(a) and (d), and the then-applicable Rule 53(f).
- *Standard 9.22 (e)* bad faith obstruction of the disciplinary proceeding by intentionally failing to comply rules or orders of the disciplinary agency.

The Hearing Panel finds the following mitigating factor applies:

- *Standard 9.32 (d)* timely good faith efforts to make restitution or rectify the consequences of misconduct.

The Hearing Panel finds the sole mitigating factor does not outweigh the aggravating factors. Suspension is appropriate.

### **PROPORTIONALITY**

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers*, 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept of proportionality review is “an imperfect process.” *In re Owens*, 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases “are ever alike.” *Id.*

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *See In re Peasley*, 208 Ariz. 27, 35, 90 P.3d 764, 772 (2004). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

In *In Re Zingsheim*, PDJ 2014-9020, Jeanne Zingsheim was suspended for six months and one day. In count one, Ms. Zingsheim failed to comply with her client’s directions and authority, failed to diligently represent her client and failed to respond timely to the lawful requests of the State Bar for information during a disciplinary investigation. Ms. Zingsheim violated E.R.s 1.2, 1.3, and 8.1, and Rule 54(d). Factors found in aggravation were, a pattern of misconduct and bad-faith obstruction of the

disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency and no mitigating factors. Ms. Zingsheim was also ordered to pay costs and expenses of \$2,069.03.

In *In re James*, PDJ-2013-9110, Jeffrey James was suspended for 45 days. Mr. James agreed to assist a client in appealing a criminal conviction and, if necessary, in filing a post-conviction relief petition. After the Arizona Court of Appeals affirmed the conviction and the Arizona Supreme Court declined to accept review, Mr. James filed numerous motions to extend the time to file the post-conviction relief petition and then failed to file the post-conviction relief petition before its due date. Factors found in aggravation were: pattern of misconduct; vulnerability of the victim; and substantial experience in the practice of law. Factors found in mitigation were: absence of a prior disciplinary record; personal or emotional problems; full and free disclosure to disciplinary board or cooperative attitude towards proceedings; and character or reputation. Mr. James violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.2(a), 1.3, 1.4, 1.5(d)(3), 1.16(d), and 8.4(d).

This case is similar to both of the above matters in which the lawyers, in addition to other misconduct, abandoned clients. Respondent's case is most similar to *In re Zingsheim*, which involved a single instance of client abandonment and a failure to respond to the State Bar. Respondent's case is more serious than *In re James* which also involved a single instance of client abandonment but in which Mr. James cooperated with the State Bar and demonstrated substantial mitigation.

### **CONCLUSION**

The Supreme Court "has long held that 'the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice

and not to punish the offender.” *Alcorn*, 202 Ariz. at 74, 41 P.3d at 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). It is also the purpose of lawyer discipline to deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993). It is also a goal of lawyer regulation to protect and instill public confidence in the integrity of individual members of the SBA. *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

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, the mitigating factor, and the goals of the attorney discipline system. Based upon the above, the Hearing Panel orders as follows:

1. Respondent shall be suspended from the practice of law for a period of six months and one day, effective immediately;
2. If reinstated, Respondent shall be placed on probation for a period of two years with terms to include, but not be limited to, participation in the State Bar’s Law Office Management Assistance Program (LOMAP) and Member Assistance Program (MAP);
3. Respondent shall pay all costs and expenses incurred by the SBA and the Office of the Presiding Disciplinary Judge in this proceeding within thirty days of the execution of the Final Judgment and Order.

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**DATED** this 25th day of September 2014.

*William J. O'Neil*

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

*Linda S. Smith*

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**Linda S. Smith, Volunteer Public Member**

*Scott I. Palumbo*

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**Scott I. Palumbo, Volunteer Attorney Member**

Copies of the foregoing mailed/emailed  
this 25th day of September, 2014.

Kevin B Sweeney  
86 North Cofco Center Court,  
Unit 1101  
Phoenix, Arizona 85008-6437  
Email: [ksweeney@cox.net](mailto:ksweeney@cox.net)  
Respondent

Ariel I. Worth  
Senior Bar Counsel  
State Bar of Arizona  
4201 North 24<sup>th</sup> Street, Suite 100  
Phoenix, Arizona 85016-6266  
Email: [LRO@staff.azbar.org](mailto:LRO@staff.azbar.org)

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

by: JAlbright



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**KEVIN B. SWEENEY,**  
**Bar No. 011737,**

Respondent.

**No. PDJ-2014-9058**

**EFFECTIVE ENTRY OF DEFAULT  
AND NOTICE OF AGGRAVATION  
/MITIGATION HEARING**

[State Bar Nos. 13-0384 and  
13-1833]

**FILED: AUGUST 26, 2014**

EFFECTIVE ENTRY OF DEFAULT occurred on August 25, 2014, pursuant to Rule 58(d) of the Rules of the Arizona Supreme Court. The allegations in the complaint are deemed admitted. Default shall not be set aside except in cases where such relief would be warranted under Rule 60(c) of the Arizona Rules of Civil Procedure.

NOTICE IS HEREBY GIVEN by the Presiding Disciplinary Judge that an aggravation/mitigation hearing has been set before the Hearing Panel on **Monday, September 29, 2014, at 3:00 p.m.** The location of hearing is State Courts Building, 1501 West Washington, Hearing Room 109, Phoenix, AZ 85007-3231.

DATED this 26th of August, 2014.

*Jennifer R. Albright*

Jennifer R. Albright, Disciplinary Clerk  
Office of the Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk  
this 26th day of August, 2014.

COPY of the foregoing e-mailed/mailed  
this 26th day of August, 2014, to:

Ariel I. Worth  
State Bar of Arizona  
4201 N. 24<sup>th</sup> Street, Suite 100  
Phoenix, AZ 85016-6266  
Email: lro@staff.azbar.org

Kevin B. Sweeney  
886 North Cofco Center Court, Unit 1101  
Phoenix, AZ 85008-6437  
EMAIL: ksweeney@cox.net  
Respondent

By: JAlbright