

ORIGINAL

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OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA
MAR 08 2011
FILED *[Signature]*
BY _____

11-1190

FILED
JUL 08 2011
CLERK OF COURT
SUPREME COURT OF OHIO

David M. Lynch
Attorney at Law
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Respondent

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

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

No. 10-0651

David M. Lynch

**AGREEMENT FOR DISCIPLINE
BY CONSENT**

Bar No.

Respondent.

The State Bar of Arizona (State Bar), through undersigned bar counsel, and Respondent, David M. Lynch, who has chosen not to seek the assistance of counsel, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. 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.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ER 4.1(a), Ariz. R. Sup. Ct. Upon acceptance of this agreement,

Respondent agrees to accept imposition of the following discipline: admonition. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding pursuant to Rule 60(b), Ariz. R. Sup. Ct.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 not a lawyer licensed to practice law in the state of Arizona.
2. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Ohio having been first admitted in 1982.

COUNT ONE

3. At all times relevant, Betty Yoger (Ms. Yoger) was an Ohio resident.
4. At all times relevant, Lamar LaLonde (Mr. LaLonde) resided in Maricopa County, Arizona, was approximately 90 years old, and was Ms. Yoger's brother.
5. Sometime prior to 2009, Ms. Yoger was provided a Power of Attorney and was named as an alternate trustee for Mr. LaLonde.
6. At all times relevant, Mr. LaLonde suffered from dementia and was cared for in Arizona by the Alcalá family.
7. Sometime prior to 2009, Mr. LaLonde created or had created a new Power of Attorney in favor of Gerardo Alcalá (Mr. Alcalá), a member of the Alcalá family, removed Ms. Yoger as a trustee, and conveyed one-half of his home to Mr. Alcalá.

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.

8. Ms. Yoger did not believe the legal documents executed by Mr. LaLonde were reliable given Mr. LaLonde's dementia, and so retained Respondent to challenge the documents in or about fall of 2009.

9. At all times relevant, Dr. Robert Luberto (Dr. Luberto) was Mr. LaLonde's primary care physician.

10. Sometime before December 29, 2009, Respondent called the office of Dr. Luberto and scheduled an appointment for an ankle exam.

11. Dr. Luberto's office is located in Peoria, Arizona.

12. Respondent scheduled the appointment by speaking to one of Dr. Luberto's assistants.

13. Respondent told Dr. Luberto's assistant that Respondent was in Phoenix for a conference, that he suffered from ankle pain in his right foot, that his ankle felt weak, and that his ankle was originally injured in 2007. These statements were false and known by Respondent to be false at the time he made them.

14. On or about December 29, 2009, Respondent appeared for his appointment with Dr. Luberto at Dr. Luberto's office.

15. Upon Dr. Luberto entering the examination room, Respondent identified himself as Ms. Yoger's lawyer, told Dr. Luberto that he was there under false pretenses and that he, in fact, wanted to talk to Dr. Luberto about Mr. LaLonde.

16. Respondent explained to Dr. Luberto that he believed the deception was necessary because he believed Dr. Luberto's staff knew the Alcalas.

17. Dr. Luberto explained that, to the best of his knowledge, none of his staff knew the Alcalas.

18. During the appointment, Respondent asked Dr. Luberto about Mr. LaLonde's mental capacity and wellbeing.

19. Dr. Luberto told Respondent that he was not qualified to render an opinion about Mr. LaLonde's mental capacity and that Mr. LaLonde would have to see a neurologist for a proper diagnosis.

20. Dr. Luberto also told Respondent he believed the Alcala family provided appropriate care for Mr. LaLonde.

21. Dr. Luberto billed Respondent's office directly for the appointment.

22. On or about March 19, 2010, Respondent filed a "Petition for Emergency and Permanent Appointment of Conservator and Guardian of an Adult and Petition for Appointment as Trustee," (Emergency Petition) and also filed for *pro hac vice* admission in Maricopa County Superior Court Case No. PB2010-070222.

23. The Emergency Petition was filed on behalf of Ms. Yoger who signed and verified the Emergency Petition on or about January 28, 2010.

24. Respondent signed, but did not date, the Emergency Petition.

25. The Emergency Petition stated in part that the appointment of a conservator was necessary because Mr. LaLonde "cannot manage [his assets] due to mental illness, mental deficiency or mental disorder and physical illness or disability and [the Alcalas] cannot be trusted because of their interest in taking over [Mr. LaLonde's] assets for themselves."

26. The Emergency Petition also stated in part:

[Mr. LaLonde] has been seen over the last few years by a Dr. Robert Luberto who has treated [Mr. LaLonde] for various ailments. Dr. Luberto, upon [Mr. LaLonde's] arrival in Arizona became [Mr. LaLonde's] treating physician.... *Dr. Luberto is the one who notified [Ms. Yoger] that he suspected that [the Alcalas] were manipulating [Mr. LaLonde's] assets and indicates that [Mr. LaLonde] has suffered*

from dementia for a substantial period of time and is incapable of understanding documents such as those that transferred authority to the Alcala family. [emphasis added]

27. The statements in the Emergency Petition about Dr. Luberto's purported statements were based on information provided to Respondent by Ms. Yoger.

28. Ms. Yoger read, verified, and signed the Emergency Petition prior to its filing.

29. The State Bar conditionally agrees that there was no information provided to Respondent by Dr. Luberto during their meeting that directly refuted Ms. Yoger's claims as stated in the Emergency Petition.

30. On or about March 24, 2010, Dr. Luberto spoke to court staff about his concerns regarding statements within the Emergency Petition and faxed a statement of his concerns to the Court.

31. On or about March 25, 2010, an Emergency Hearing was held in PB2010-070222.

32. The Court denied Respondent's *pro hac vice* motion on the grounds that Respondent might have to testify in the matter during the Emergency Hearing.

33. Ms. Yoger testified and verified the information provided in the Emergency Petition during her testimony.

34. Respondent's opposing counsel called Dr. Luberto as a witness who testified about Respondent's fake ankle exam.

35. Respondent did not testify during the Emergency Hearing.

36. The Court did not find Ms. Yoger credible, dismissed part of the Emergency Petition, and sanctioned Ms. Yoger based on her testimony.

37. Ms. Yoger's sanction was not joint and several with Respondent.

38. During the Emergency Hearing, Respondent did not notify or otherwise discuss with the Court the context of his meeting with Dr. Luberto.

39. If this matter were to go to a Hearing on the Merits, Respondent would testify that he was not afforded the opportunity to discuss the meeting with Dr. Luberto because his *pro hac vice* motion was denied and he could not therefore speak on behalf of his client during the proceedings.

CONDITIONAL ADMISSIONS

Respondent's admissions are being tendered in exchange for the form of discipline stated below and is submitted freely and voluntarily and not as a result of coercion or intimidation.

Respondent conditionally admits that his conduct as referenced in paragraphs 1 through 39, above, violated Rule 42, ER 4.1(a), Ariz. R. Sup. Ct.

CONDITIONAL DISMISSALS

The State Bar has conditionally agreed to dismiss Rule 42, ERs 3.3(a)(1), 8.4(c), and 8.4(d), Ariz. R. Sup. Ct. The State Bar conditionally agrees that the evidence supports Respondent relied on information provided to him by his client in submitting the Emergency Petition to the Maricopa County Superior Court. The State Bar conditionally agrees that Respondent's conversation with Dr. Luberto did not reveal any information that directly contradicted Ms. Yoger's verified statements as reflected in the Emergency Petition.

RESTITUTION

Because Respondent was not held jointly and severally liable for the sanctions ordered against Ms. Yoger, there is no restitution at issue in this matter. Further, Respondent has paid Dr. Luberto for the false ankle exam.

SANCTION

Respondent and the State Bar agree that based on the facts and circumstances of this matter, as set forth above, the following sanction is appropriate: admonition.

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

The parties agree that *Standard* 6.14 is the appropriate *Standard* given the facts and circumstances of this matter. *Standard* 6.14 provides that "admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements...are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or

potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.”

While Respondent misled Dr. Luberto’s staff in scheduling an ankle exam to meet with Dr. Luberto about Mr. LaLonde, Respondent did so because he relied on information provided to him by his client that individuals on Dr. Luberto’s staff knew the Alcalas. Respondent’s client was concerned that should the Alcalas become aware of Ms. Yoger’s intentions, Mr. LaLonde would be in danger. The parties agree that Respondent’s decision making in this regard was an isolated instance of negligence which could have been handled in a more appropriate manner. Respondent made his true intentions clear to Dr. LaLonde immediately upon meeting him. Additionally, Ms. Yoger was sanctioned during the Emergency Hearing based on her own testimony and not on Respondent’s conduct. Thus, no party to the matter suffered actual injury as a result of Respondent’s conduct, though the parties agree that Respondent should have discussed the matter with the underlying court. The parties further agree that there was only little injury caused to the legal proceedings as some, but only a small portion, of the proceedings addressed Respondent’s meeting with Dr. LaLonde. The majority of the proceedings were spent addressing Ms. Yoger, her testimony, and her claims as stated in the Emergency Petition.

The duty violated

As described above, Respondent’s conduct violated his duties to the legal system and the public.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent acted negligently and that his conduct was in violation of the Rules of Professional Conduct.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was no actual harm to Respondent's client or any other party to the proceedings, and little actual harm was caused to the underlying legal proceedings.

Aggravating and mitigating circumstances

The presumptive sanction in this matter is admonition. The parties conditionally agree that the following aggravating and mitigating factors should be considered.

In aggravation:

Standard 9.22(i) - Substantial Experience in the Practice of Law - Respondent has practiced law in Ohio since 1982.

In mitigation:

Standard 9.23(a) - Absence of a Prior Disciplinary Record - Respondent has no prior disciplinary history in Arizona or Ohio.

Standard 9.23(e) - Cooperative Attitude Toward Proceedings - Respondent has been fully cooperative with the State Bar's investigation and with the formal disciplinary proceedings.

Standard 9.23(l) - Remorse - Respondent fully regrets his decision making in scheduling the appointment with Dr. LaLonde and does not appear likely to repeat this conduct.

Discussion

The parties have conditionally agreed that a greater or lesser sanction than admonition would not be appropriate under the facts and circumstances of this matter.

Respondent agrees that it was inappropriate for him to mislead Dr. Luberto's staff regarding the true purposes of the meeting between Dr. Luberto and Respondent, and agrees that it was not appropriate to take time designated for doctor/patient appointments to discuss legal issues with Dr. Luberto. The State Bar agrees that Respondent came to his conclusion erroneously based on information relayed to him by his client and in an effort to protect his client's brother from potential harm. The State Bar further conditionally agrees that the evidence does not support other additional violations, such as providing misinformation to a tribunal, which would justify a higher sanction as originally alleged in the Complaint. The parties further agree that the aggravating and mitigating factors appropriately balance each other to support the presumptive sanction of admonition.

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

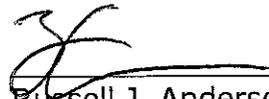
CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at 64, 90

P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent believe that the objectives of discipline will be met by the imposition of the proposed sanction of an admonition and the imposition of costs and expenses.

DATED this 4th day of March, 2011.

STATE BAR OF ARIZONA



Russell J. Anderson
Staff Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation. I acknowledge my duty under the Rules of the Supreme Court of Arizona 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 _____, 2011.

David M. Lynch
Respondent

Approved as to form and content



Maret Vessella
Chief Bar Counsel

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STATE BAR OF ARIZONA



Russell J. Anderson
Staff Bar Counsel

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DATED this 7 day of March, 2011.



David M. Lynch
Respondent

Approved as to form and content



Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
this 8th day of March, 2011.

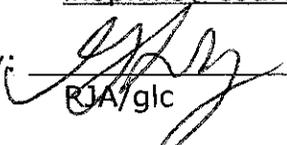
Copies of the foregoing mailed/emailed
this 8th day of March, 2011, to:

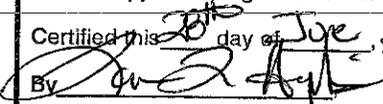
David M. Lynch
Attorney at Law
29311 Euclid Avenue
Wickliffe, Ohio 44092
Email: dmlsq@davidmlynch.net
Respondent

Richard Goldsmith
Settlement Officer
Lewis and Roca, L.L.P.
40 North Central Avenue
Phoenix, Arizona 85004-4429
Email: rgoldsmith@lrlaw.com

Copy of the foregoing emailed this
8th day of March, 2011, to:

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
1501 W. Washington
Phoenix, AZ 85007
Email: officepdj@courts.az.gov
lhopkins@courts.az.gov

By: 
RJA/glc

The foregoing instrument is a full, true, and
correct copy of the original on file in this office.
Certified this 20th day of June, 2011
By: 
Disciplinary Clerk
Supreme Court of Arizona

Statement of Costs and Expenses

In the Matter of a Non-Member of the State Bar of Arizona,
David M Lynch, Bar No. , Respondent

File No(s). 10-0651

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.

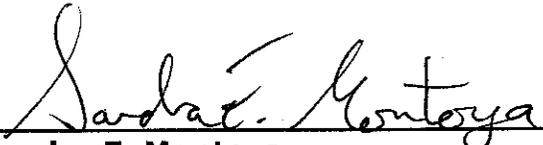
General Administrative Expenses for above-numbered proceedings \$1200.00

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

3-4-11

Date

OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA
MAR 11 2011
BY _____ FILED 

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

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

DAVID M. LYNCH,

Respondent.

NO. 10-0651

**ORDER RE AGREEMENT FOR
DISCIPLINE BY CONSENT**

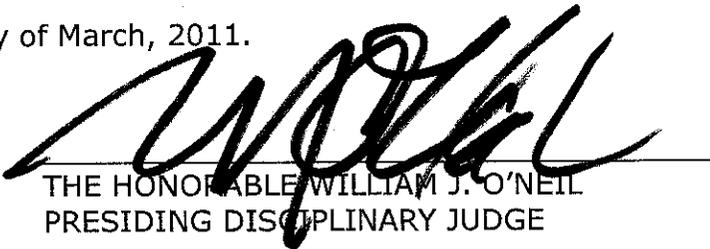
An Agreement for Discipline by Consent ("Agreement") was filed by the parties on March 8, 2011. Rule 57(a), of the Rules of the Supreme Court of Arizona governs agreements for discipline by consent. The Court having reviewed the Agreement and finds that it complies with the Rule. The Agreement is incorporated herein by this reference. This Judge is troubled by the statements drafted by the Respondent in the Emergency Petition filed with the Court. The Respondent met with Dr. Luberto under false pretenses. More importantly, there is conversation with that doctor, Respondent was informed that the doctor believed family providing care is doing so appropriately. The information received from the doctor was contrary to that which Respondent's client presented to him. Notwithstanding, Respondent prepared an Emergency Petition generally stating the doctor was the one who notified Respondent's client that he suspected there was a manipulating of assets of an individual who suffered from dementia for a substantial period of time and was incapable of understanding documents. It is so his transferring authority to that family.

1 In Arizona, candor towards the tribunal is fundamental. Misleading the
2 tribunal through pleadings or otherwise is serious and not to be tolerated.
3 Notwithstanding, it is noted that the State Bar of Arizona has conditionally
4 agreed that there is no information provided to the Respondent by Dr. Luberto
5 directly refuting Ms. Yoger's claim stating in the Emergency Petition. The Court
6 also notes the absence of a prior disciplinary record of Respondent and his
7 cooperative attitudes towards proceedings and the Bar agrees is genuine
8 remorse.

9 Now, therefore, the Agreement is accepted by the Presiding Disciplinary
10 Judge. The costs are submitted with the Agreement are approved.

11 IT IS THEREFORE ORDERED directing the parties to submit a form of
12 Judgment in accordance herewith.

13 DATED this 11 day of March, 2011.

14
15 
16 THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE

17 Original filed with the Disciplinary Clerk
18 this 11 day of March, 2011.

19 COPY of the foregoing e-mailed this
20 11 day of March, 2011, to:

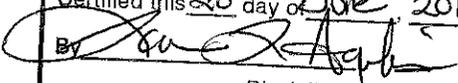
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David M. Lynch
29311 Euclid Avenue, Suite 200
Wickliffe, Ohio 44092
Respondent
dmlesq@davidmlynch.net



The foregoing instrument is a full, true, and correct copy of the original on file in this office.
Certified this 20th day of June, 2011
By 
Disciplinary Clerk
Supreme Court of Arizona