



FILED

Dec. 04, 2017

Board of Disciplinary Appeals

**BEFORE THE BOARD OF DISCIPLINARY APPEALS  
APPOINTED BY  
THE SUPREME COURT OF TEXAS**

**IN THE MATTER OF  
BENJAMIN RICHARD HORTON  
STATE BAR CARD NO. 24053273**

§  
§  
§

**CAUSE NO. 59814**

**PETITION FOR RECIPROCAL DISCIPLINE**

**TO THE BOARD OF DISCIPLINARY APPEALS:**

Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), brings this action against Respondent, Benjamin Richard Horton, (hereinafter called "Respondent"), showing as follows:

1. This action is commenced by Petitioner pursuant to Part IX of the Texas Rules of Disciplinary Procedure. Petitioner is also providing Respondent a copy of Section 7 of this Board's Internal Procedural Rules, relating to Reciprocal Discipline Matters.

2. Respondent is a member of the State Bar of Texas and is licensed and authorized to practice law in Texas. Respondent may be served with a true and correct copy of this Petition for Reciprocal Discipline at Benjamin Richard Horton, 2825 E. Cottonwood Pkwy., Ste. 500, Salt Lake City, UT 84121-7060.

3. On or about August 28, 2014, a Complaint was filed in the Third Judicial District Court in and for Salt Lake County, State of Utah, in a matter styled, *In the Matter of the Discipline of: Benjamin R. Horton, #11452, Respondent* (Exhibit 1).

4. On or about September 7, 2016, an Affidavit of Consent was filed in the Third Judicial District Court in and for Salt Lake County, State of Utah, in a matter styled, *In the Matter of the Discipline of: Benjamin R. Horton, #11452, Respondent*, Civil No. 140905954. Judge Paige

Patterson, (Exhibit 2).

5. On or about September 13, 2019, a Discipline by Consent and Settlement Agreement was filed in the Third Judicial District Court in and for Salt Lake County, State of Utah, in a matter styled, *In the Matter of the Discipline of: Benjamin R. Horton, #11452, Respondent*, Civil No. 140905954, Judge Paige Patterson, (Exhibit 3).

6. On or about September 15, 2016, an Order of Discipline: Suspension was filed in the Third Judicial District Court in and for Salt Lake County, State of Utah, in a matter styled, *In the Matter of the Discipline of: Benjamin R. Horton, #11452, Respondent*, Civil No. 140905954, Judge Paige Patterson, that states in pertinent part as follows:

...IT IS HEREBY ORDERED that Mr. Horton's license to practice law be suspended for a period of three years, effective 30 days from the date the order is signed...

(Exhibit 4).

7. In the Discipline by Consent and Settlement Agreement Respondent admitted that, in connection with three complaints filed against him, he violated:

Rule 1.3 (Diligence) of the Rules of Professional Conduct states: A lawyer shall act with reasonable diligence and promptness in representing a client.

- (Chvilicek Matter) By failing to respond to inquiries from Wells Fargo on behalf of Mr. Chvilicek, Mr. Horton failed to act with reasonable diligence in violation of Rule 1.3 (Diligence).

Rule 1.4(a) (Communication) of the Rules of Professional Conduct states: (a) A lawyer shall: (a)(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (a)(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (a)(3) keep the client reasonably informed about the status of the matter; (a)(4) promptly comply with reasonable requests for information; and (a)(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

- (Chvilicek Matter) By failing to respond to requests for information from

his clients, failing to keep his clients informed and failing to promptly comply with requests from his clients, Mr. Horton violated Rule 1.4(a) (Communication).

- (Trager Matter) By failing to respond to requests for information from his clients, failing to keep his clients informed and failing to promptly comply with requests from his clients, Mr. Horton violated Rule 1.4(a) (Communication).

Rule 1.5(a) (Fees) of the Rules of Professional Conduct states: A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation and ability of the lawyer or lawyers performing the services; 8) whether the fee is fixed or contingent.

- (Chvilicek Matter) By failing to provide any meaningful legal services to the Chviliceks in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee, in violation of Rule 1.5(a) (Fees).

- (Dodd Matter) By failing to provide any meaningful legal services to Ms. Dodd in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee and violated Rule 1.5(a) (Fees).

- (Trager Matter) By failing to provide any meaningful legal services to Mr. Trager in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee and violated Rule 1.5(a) (Fees).

Rule 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules) of the Rules of Professional Conduct states: A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

- (Dodd Matter) By not taking adequate steps to ensure Ms. Dodd obtained independent representation in connection with the engagement agreement she entered into with Mr. Horton and by failing to advise Ms. Dodd that she should in fact seek independent legal review of the liability waiver included in his engagement agreement, Mr. Horton violated Rule 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules).

Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct states: With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

- (Chvilicek Matter) By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Mr. Horton's professional obligations, Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants).

- (Dodd Matter) By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Hortons' professional obligations, Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants).

- (Trager Matter) By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Mr. Horton's professional obligations, Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants).

Rule 5.4 (Professional Independence of a Lawyer) of the Rules of Professional Conduct states: (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: (a)(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; (a)(2)(i) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and (a)(2)(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and (a)(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

- (Chvilicek Matter) By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a Lawyer).

- (Dodd Matter) By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a

Lawyer).

- (Trager Matter) By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a Lawyer).

Rule 7.1 (Communications Concerning a Lawyer's Services) of the Rules of Professional Conduct states: A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

- (Dodd Matter) By guaranteeing results, Mr. Horton misled Ms. Dodd and violated Rule 7.1 (Communications Regarding a Lawyer's Services).
- (Trager Matter) By guaranteeing results, Mr. Horton misled Mr. Trager and violated Rule 7.1 (Communications Regarding a Lawyer's Services).

Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct states: An applicant for admission to the Bar, or a lawyer in connection with a Bar admission application or in connection with a disciplinary matter, shall not: (b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority....

- (Chvilicek Matter) By failing to respond to the OPC's NOIC, Mr. Horton Violated Rule 8.1(b) (Bar Admission and Disciplinary Matters).
- (Dodd Matter) By failing to respond to the OPC's NOIC, Mr. Horton Violated Rule 8.1(b) (Bar Admission and Disciplinary Matters).

Rule 8.4(c) of the Rules of Professional Conduct states: It is professional misconduct for a conduct involving dishonesty, misrepresentation lawyer to engage in fraud, deceit or misrepresentation.

- (Dodd Matter) By taking money and doing little or no legal work, by allowing other companies and nonlawyers to provide legal services and by making misrepresentations to clients, Mr. Horton engaged in conduct that was dishonest or deceitful and violated Rule 8.4(c).
- (Trager Matter) By taking money and doing little or no legal work, by allowing other companies and nonlawyers to provide legal services and by making misrepresentations to clients, Mr. Horton engaged in conduct that was dishonest or deceitful and violated Rule 8.4(c).

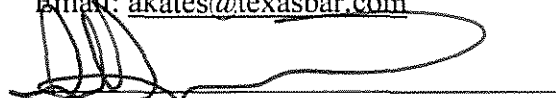
8. Copies of the Complaint, Affidavit of Consent, Discipline by Consent and Settlement Agreement and Order of Discipline: Suspension attached hereto as Petitioner's Exhibits 1 through 4, and made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits 1 through 4 at the time of hearing of this cause.

9. Petitioner prays that, pursuant to Rule 9.02, Texas Rules of Disciplinary Procedure, that this Board issue notice to Respondent, containing a copy of this Petition with exhibits, and an order directing Respondent to show cause within thirty (30) days from the date of the mailing of the notice, why the imposition of the identical discipline in this state would be unwarranted. Petitioner further prays that upon trial of this matter that this Board enters a judgment imposing discipline identical with that imposed by the Third Judicial District Court in and for Salt Lake County, State of Utah, and that Petitioner have such other and further relief to which it may be entitled.

Respectfully submitted,

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Amanda M. Kates  
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that upon receipt of the Order to Show Cause from the Board of Disciplinary Appeals, I will serve a copy of this Petition for Reciprocal Discipline and the Order to Show Cause on Benjamin Richard Horton by personal service.

Benjamin Richard Horton  
2825 E. Cottonwood Pkwy.  
Ste. 500  
Salt Lake City, UT 84121-7060



Amanda M. Kates

# INTERNAL PROCEDURAL RULES

## Board of Disciplinary Appeals

*Effective February 19, 2015 and amended September 20, 2016*

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## **SECTION 1: GENERAL PROVISIONS**

### **Rule 1.01 Definitions**

- (a) “BODA” is the Board of Disciplinary Appeals.
- (b) “Chair” is the member elected by BODA to serve as chair or, in the Chair’s absence, the member elected by BODA to serve as vice-chair.
- (c) “Classification” is the determination by the CDC under TRDP 2.10 or by BODA under TRDP 7.08(C) whether a grievance constitutes a “complaint” or an “inquiry.”
- (d) “BODA Clerk” is the executive director of BODA or other person appointed by BODA to assume all duties normally performed by the clerk of a court.
- (e) “CDC” is the Chief Disciplinary Counsel for the State Bar of Texas and his or her assistants.
- (f) “Commission” is the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.
- (g) “Executive Director” is the executive director of BODA.
- (h) “Panel” is any three-member grouping of BODA under TRDP 7.05.
- (i) “Party” is a Complainant, a Respondent, or the Commission.
- (j) “TDRPC” is the Texas Disciplinary Rules of Professional Conduct.
- (k) “TRAP” is the Texas Rules of Appellate Procedure.
- (l) “TRCP” is the Texas Rules of Civil Procedure.
- (m) “TRDP” is the Texas Rules of Disciplinary Procedure.
- (n) “TRE” is the Texas Rules of Evidence.

### **Rule 1.02 General Powers**

Under TRDP 7.08, BODA has and may exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining

disciplinary proceedings. But TRDP 15.01 applies to the enforcement of a judgment of BODA.

### **Rule 1.03 Additional Rules in Disciplinary Matters**

Except as varied by these rules and to the extent applicable, the TRCP, TRAP, and TRE apply to all disciplinary matters before BODA, except for appeals from classification decisions, which are governed by TRDP 2.10 and by Section 3 of these rules.

### **Rule 1.04 Appointment of Panels**

- (a) BODA may consider any matter or motion by panel, except as specified in (b). The Chair may delegate to the Executive Director the duty to appoint a panel for any BODA action. Decisions are made by a majority vote of the panel; however, any panel member may refer a matter for consideration by BODA sitting en banc. Nothing in these rules gives a party the right to be heard by BODA sitting en banc.
- (b) Any disciplinary matter naming a BODA member as Respondent must be considered by BODA sitting en banc. A disciplinary matter naming a BODA staff member as Respondent need not be heard en banc.

### **Rule 1.05 Filing of Pleadings, Motions, and Other Papers**

- (a) **Electronic Filing.** All documents must be filed electronically. Unrepresented persons or those without the means to file electronically may electronically file documents, but it is not required.
  - (1) **Email Address.** The email address of an attorney or an unrepresented party who electronically files a document must be included on the document.
  - (2) **Timely Filing.** Documents are filed electronically by emailing the document to the BODA Clerk at the email address designated by BODA for that purpose. A document filed by email will be considered filed the day

that the email is sent. The date sent is the date shown for the message in the inbox of the email account designated for receiving filings. If a document is sent after 5:00 p.m. or on a weekend or holiday officially observed by the State of Texas, it is considered filed the next business day.

- (3) It is the responsibility of the party filing a document by email to obtain the correct email address for BODA and to confirm that the document was received by BODA in legible form. Any document that is illegible or that cannot be opened as part of an email attachment will not be considered filed. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from BODA.
- (4) **Exceptions.**
  - (i) An appeal to BODA of a decision by the CDC to classify a grievance as an inquiry is not required to be filed electronically.
  - (ii) The following documents must not be filed electronically:
    - a) documents that are filed under seal or subject to a pending motion to seal; and
    - b) documents to which access is otherwise restricted by court order.
  - (iii) For good cause, BODA may permit a party to file other documents in paper form in a particular case.
- (5) **Format.** An electronically filed document must:
  - (i) be in text-searchable portable document format (PDF);
  - (ii) be directly converted to PDF

rather than scanned, if possible;  
and

(iii) not be locked.

- (b) A paper will not be deemed filed if it is sent to an individual BODA member or to another address other than the address designated by BODA under Rule 1.05(a)(2).
- (c) **Signing.** Each brief, motion, or other paper filed must be signed by at least one attorney for the party or by the party pro se and must give the State Bar of Texas card number, mailing address, telephone number, email address, and fax number, if any, of each attorney whose name is signed or of the party (if applicable). A document is considered signed if the document includes:
  - (1) an “/s/” and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or
  - (2) an electronic image or scanned image of the signature.
- (d) **Paper Copies.** Unless required by BODA, a party need not file a paper copy of an electronically filed document.
- (e) **Service.** Copies of all documents filed by any party other than the record filed by the evidentiary panel clerk or the court reporter must, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

#### Rule 1.06 Service of Petition

In any disciplinary proceeding before BODA initiated by service of a petition on the Respondent, the petition must be served by personal service; by certified mail with return receipt requested; or, if permitted by BODA, in any other manner that is authorized by the TRCP and reasonably calculated under all the circumstances to apprise the Respondent of the proceeding and to give him or her reasonable time to appear and answer. To establish

service by certified mail, the return receipt must contain the Respondent's signature.

### **Rule 1.07 Hearing Setting and Notice**

- (a) **Original Petitions.** In any kind of case initiated by the CDC's filing a petition or motion with BODA, the CDC may contact the BODA Clerk for the next regularly available hearing date before filing the original petition. If a hearing is set before the petition is filed, the petition must state the date, time, and place of the hearing. Except in the case of a petition to revoke probation under TRDP 2.23, the hearing date must be at least 30 days from the date that the petition is served on the Respondent.
- (b) **Expedited Settings.** If a party desires a hearing on a matter on a date earlier than the next regularly available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the request. Unless the parties agree otherwise, and except in the case of a petition to revoke probation under TRDP 2.23, the expedited hearing setting must be at least 30 days from the date of service of the petition, motion, or other pleading. BODA has the sole discretion to grant or deny a request for an expedited hearing date.
- (c) **Setting Notices.** BODA must notify the parties of any hearing date that is not noticed in an original petition or motion.
- (d) **Announcement Docket.** Attorneys and parties appearing before BODA must confirm their presence and present any questions regarding procedure to the BODA Clerk in the courtroom immediately prior to the time docket call is scheduled to begin. Each party with a matter on the docket must appear at the docket call to give an announcement of readiness, to give a time estimate for the hearing, and to present any preliminary motions or matters. Immediately following the docket call, the Chair will set and announce the order of cases to be heard.

### **Rule 1.08 Time to Answer**

The Respondent may file an answer at any time, except where expressly provided otherwise by these rules or the TRDP, or when an answer date has been set by prior order of BODA. BODA may, but is not required to, consider an answer filed the day of the hearing.

### **Rule 1.09 Pretrial Procedure**

- (a) **Motions.**
  - (1) **Generally.** To request an order or other relief, a party must file a motion supported by sufficient cause with proof of service on all other parties. The motion must state with particularity the grounds on which it is based and set forth the relief sought. All supporting briefs, affidavits, or other documents must be served and filed with the motion. A party may file a response to a motion at any time before BODA rules on the motion or by any deadline set by BODA. Unless otherwise required by these rules or the TRDP, the form of a motion must comply with the TRCP or the TRAP.
  - (2) **For Extension of Time.** All motions for extension of time in any matter before BODA must be in writing, comply with (a)(1), and specify the following:
    - (i) if applicable, the date of notice of decision of the evidentiary panel, together with the number and style of the case;
    - (ii) if an appeal has been perfected, the date when the appeal was perfected;
    - (iii) the original deadline for filing the item in question;
    - (iv) the length of time requested for the extension;
    - (v) the number of extensions of time that have been granted

previously regarding the item in question; and

- (vi) the facts relied on to reasonably explain the need for an extension.

- (b) **Pretrial Scheduling Conference.** Any party may request a pretrial scheduling conference, or BODA on its own motion may require a pretrial scheduling conference.
- (c) **Trial Briefs.** In any disciplinary proceeding before BODA, except with leave, all trial briefs and memoranda must be filed with the BODA Clerk no later than ten days before the day of the hearing.
- (d) **Hearing Exhibits, Witness Lists, and Exhibits Tendered for Argument.** A party may file a witness list, exhibit, or any other document to be used at a hearing or oral argument before the hearing or argument. A party must bring to the hearing an original and 12 copies of any document that was not filed at least one business day before the hearing. The original and copies must be:
  - (1) marked;
  - (2) indexed with the title or description of the item offered as an exhibit; and
  - (3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

All documents must be marked and provided to the opposing party before the hearing or argument begins.

#### **Rule 1.10 Decisions**

- (a) **Notice of Decisions.** The BODA Clerk must give notice of all decisions and opinions to the parties or their attorneys of record.
- (b) **Publication of Decisions.** BODA must report judgments or orders of public discipline:
  - (1) as required by the TRDP; and

- (2) on its website for a period of at least ten years following the date of the disciplinary judgment or order.

- (c) **Abstracts of Classification Appeals.** BODA may, in its discretion, prepare an abstract of a classification appeal for a public reporting service.

#### **Rule 1.11 Board of Disciplinary Appeals Opinions**

- (a) BODA may render judgment in any disciplinary matter with or without written opinion. In accordance with TRDP 6.06, all written opinions of BODA are open to the public and must be made available to the public reporting services, print or electronic, for publishing. A majority of the members who participate in considering the disciplinary matter must determine if an opinion will be written. The names of the participating members must be noted on all written opinions of BODA.
- (b) Only a BODA member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this rule, in hearings in which evidence is taken, no member may participate in the decision unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.
- (c) A BODA determination in an appeal from a grievance classification decision under TRDP 2.10 is not a judgment for purposes of this rule and may be issued without a written opinion.

### **Rule 1.12 BODA Work Product and Drafts**

A document or record of any nature—regardless of its form, characteristics, or means of transmission—that is created or produced in connection with or related to BODA’s adjudicative decision-making process is not subject to disclosure or discovery. This includes documents prepared by any BODA member, BODA staff, or any other person acting on behalf of or at the direction of BODA.

### **Rule 1.13 Record Retention**

Records of appeals from classification decisions must be retained by the BODA Clerk for a period of at least three years from the date of disposition. Records of other disciplinary matters must be retained for a period of at least five years from the date of final judgment, or for at least one year after the date a suspension or disbarment ends, whichever is later. For purposes of this rule, a record is any document, paper, letter, map, book, tape, photograph, film, recording, or other material filed with BODA, regardless of its form, characteristics, or means of transmission.

### **Rule 1.14 Costs of Reproduction of Records**

The BODA Clerk may charge a reasonable amount for the reproduction of nonconfidential records filed with BODA. The fee must be paid in advance to the BODA Clerk.

### **Rule 1.15 Publication of These Rules**

These rules will be published as part of the TDRPC and TRDP.

## **SECTION 2: ETHICAL CONSIDERATIONS**

### **Rule 2.01 Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases**

- (a) A current member of BODA must not represent a party or testify voluntarily in a disciplinary action or proceeding. Any BODA member who is subpoenaed or otherwise compelled to appear at a disciplinary action or proceeding, including at a deposition, must promptly notify the BODA Chair.

- (b) A current BODA member must not serve as an expert witness on the TDRPC.
- (c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

### **Rule 2.02 Confidentiality**

- (a) BODA deliberations are confidential, must not be disclosed by BODA members or staff, and are not subject to disclosure or discovery.
- (b) Classification appeals, appeals from evidentiary judgments of private reprimand, appeals from an evidentiary judgment dismissing a case, interlocutory appeals or any interim proceedings from an ongoing evidentiary case, and disability cases are confidential under the TRDP. BODA must maintain all records associated with these cases as confidential, subject to disclosure only as provided in the TRDP and these rules.
- (c) If a member of BODA is subpoenaed or otherwise compelled by law to testify in any proceeding, the member must not disclose a matter that was discussed in conference in connection with a disciplinary case unless the member is required to do so by a court of competent jurisdiction.

### **Rule 2.03 Disqualification and Recusal of BODA Members**

- (a) BODA members are subject to disqualification and recusal as provided in TRCP 18b.
- (b) BODA members may, in addition to recusals under (a), voluntarily recuse themselves from any discussion and voting for any reason. The reasons that a BODA member is recused from a case are not subject to discovery.
- (c) These rules do not disqualify a lawyer who is a member of, or associated with, the law firm of a BODA member from serving on

a grievance committee or representing a party in a disciplinary proceeding or legal malpractice case. But a BODA member must recuse him- or herself from any matter in which a lawyer who is a member of, or associated with, the BODA member's firm is a party or represents a party.

## **SECTION 3: CLASSIFICATION APPEALS**

### **Rule 3.01 Notice of Right to Appeal**

- (a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule.
- (b) To facilitate the potential filing of an appeal of a grievance classified as an inquiry, the CDC must send the Complainant an appeal notice form, approved by BODA, with the classification disposition. The form must include the docket number of the matter; the deadline for appealing; and information for mailing, faxing, or emailing the appeal notice form to BODA. The appeal notice form must be available in English and Spanish.

### **Rule 3.02 Record on Appeal**

BODA must only consider documents that were filed with the CDC prior to the classification decision. When a notice of appeal from a classification decision has been filed, the CDC must forward to BODA a copy of the grievance and all supporting documentation. If the appeal challenges the classification of an amended grievance, the CDC must also send BODA a copy of the initial grievance, unless it has been destroyed.

## **SECTION 4: APPEALS FROM EVIDENTIARY PANEL HEARINGS**

### **Rule 4.01 Perfecting Appeal**

- (a) **Appellate Timetable.** The date that the evidentiary judgment is signed starts the appellate timetable under this section. To make TRDP 2.21 consistent with this

requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21.

- (b) **Notification of the Evidentiary Judgment.** The clerk of the evidentiary panel must notify the parties of the judgment as set out in TRDP 2.21.

- (1) The evidentiary panel clerk must notify the Commission and the Respondent in writing of the judgment. The notice must contain a clear statement that any appeal of the judgment must be filed with BODA within 30 days of the date that the judgment was signed. The notice must include a copy of the judgment rendered.

- (2) The evidentiary panel clerk must notify the Complainant that a judgment has been rendered and provide a copy of the judgment, unless the evidentiary panel dismissed the case or imposed a private reprimand. In the case of a dismissal or private reprimand, the evidentiary panel clerk must notify the Complainant of the decision and that the contents of the judgment are confidential. Under TRDP 2.16, no additional information regarding the contents of a judgment of dismissal or private reprimand may be disclosed to the Complainant.

- (c) **Filing Notice of Appeal.** An appeal is perfected when a written notice of appeal is filed with BODA. If a notice of appeal and any other accompanying documents are mistakenly filed with the evidentiary panel clerk, the notice is deemed to have been filed the same day with BODA, and the evidentiary panel clerk must immediately send the BODA Clerk a copy of the notice and any accompanying documents.

- (d) **Time to File.** In accordance with TRDP 2.24, the notice of appeal must be filed within 30 days after the date the judgment

is signed. In the event a motion for new trial or motion to modify the judgment is timely filed with the evidentiary panel, the notice of appeal must be filed with BODA within 90 days from the date the judgment is signed.

- (e) **Extension of Time.** A motion for an extension of time to file the notice of appeal must be filed no later than 15 days after the last day allowed for filing the notice of appeal. The motion must comply with Rule 1.09.

#### **Rule 4.02 Record on Appeal**

- (a) **Contents.** The record on appeal consists of the evidentiary panel clerk's record and, where necessary to the appeal, a reporter's record of the evidentiary panel hearing.
- (b) **Stipulation as to Record.** The parties may designate parts of the clerk's record and the reporter's record to be included in the record on appeal by written stipulation filed with the clerk of the evidentiary panel.
- (c) **Responsibility for Filing Record.**
  - (1) Clerk's Record.
    - (i) After receiving notice that an appeal has been filed, the clerk of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk's record.
    - (ii) Unless the parties stipulate otherwise, the clerk's record on appeal must contain the items listed in TRAP 34.5(a) and any other paper on file with the evidentiary panel, including the election letter, all pleadings on which the hearing was held, the docket sheet, the evidentiary panel's charge, any findings of fact and conclusions of law, all other pleadings, the judgment or other orders appealed from, the notice of decision sent to each

party, any post submission pleadings and briefs, and the notice of appeal.

- (iii) If the clerk of the evidentiary panel is unable for any reason to prepare and transmit the clerk's record by the due date, he or she must promptly notify BODA and the parties, explain why the clerk's record cannot be timely filed, and give the date by which he or she expects the clerk's record to be filed.

#### **(2) Reporter's Record.**

- (i) The court reporter for the evidentiary panel is responsible for timely filing the reporter's record if:
  - a) a notice of appeal has been filed;
  - b) a party has requested that all or part of the reporter's record be prepared; and
  - c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.
- (ii) If the court reporter is unable for any reason to prepare and transmit the reporter's record by the due date, he or she must promptly notify BODA and the parties, explain the reasons why the reporter's record cannot be timely filed, and give the date by which he or she expects the reporter's record to be filed.

#### **(d) Preparation of Clerk's Record.**

- (1) To prepare the clerk's record, the evidentiary panel clerk must:
  - (i) gather the documents



- designated by the parties' written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);
  - (ii) start each document on a new page;
  - (iii) include the date of filing on each document;
  - (iv) arrange the documents in chronological order, either by the date of filing or the date of occurrence;
  - (v) number the pages of the clerk's record in the manner required by (d)(2);
  - (vi) prepare and include, after the front cover of the clerk's record, a detailed table of contents that complies with (d)(3); and
  - (vii) certify the clerk's record.
- (2) The clerk must start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page.
- (3) The table of contents must:
- (i) identify each document in the entire record (including sealed documents); the date each document was filed; and, except for sealed documents, the page on which each document begins;
  - (ii) be double-spaced;
  - (iii) conform to the order in which documents appear in the clerk's record, rather than in alphabetical order;
  - (iv) contain bookmarks linking each description in the table of contents (except for descriptions of sealed documents) to the page on which the document begins; and
  - (v) if the record consists of multiple volumes, indicate the page on which each volume begins.
- (e) **Electronic Filing of the Clerk's Record.** The evidentiary panel clerk must file the record electronically. When filing a clerk's record in electronic form, the evidentiary panel clerk must:
- (1) file each computer file in text-searchable Portable Document Format (PDF);
  - (2) create electronic bookmarks to mark the first page of each document in the clerk's record;
  - (3) limit the size of each computer file to 100 MB or less, if possible; and
  - (4) directly convert, rather than scan, the record to PDF, if possible.
- (f) **Preparation of the Reporter's Record.**
- (1) The appellant, at or before the time prescribed for perfecting the appeal, must make a written request for the reporter's record to the court reporter for the evidentiary panel. The request must designate the portion of the evidence and other proceedings to be included. A copy of the request must be filed with the evidentiary panel and BODA and must be served on the appellee. The reporter's record must be certified by the court reporter for the evidentiary panel.
  - (2) The court reporter or recorder must prepare and file the reporter's record in accordance with TRAP 34.6 and 35 and the Uniform Format Manual

for Texas Reporters' Records.

- (3) The court reporter or recorder must file the reporter's record in an electronic format by emailing the document to the email address designated by BODA for that purpose.
- (4) The court reporter or recorder must include either a scanned image of any required signature or "/s/" and name typed in the space where the signature would otherwise appear.
- (5) A court reporter or recorder must not lock any document that is part of the record.
- (6) In exhibit volumes, the court reporter or recorder must create bookmarks to mark the first page of each exhibit document.
- (g) **Other Requests.** At any time before the clerk's record is prepared, or within ten days after service of a copy of appellant's request for the reporter's record, any party may file a written designation requesting that additional exhibits and portions of testimony be included in the record. The request must be filed with the evidentiary panel and BODA and must be served on the other party.
- (h) **Inaccuracies or Defects.** If the clerk's record is found to be defective or inaccurate, the BODA Clerk must inform the clerk of the evidentiary panel of the defect or inaccuracy and instruct the clerk to make the correction. Any inaccuracies in the reporter's record may be corrected by agreement of the parties without the court reporter's recertification. Any dispute regarding the reporter's record that the parties are unable to resolve by agreement must be resolved by the evidentiary panel.
- (i) **Appeal from Private Reprimand.** Under TRDP 2.16, in an appeal from a judgment of private reprimand, BODA must mark the record as confidential, remove the

attorney's name from the case style, and take any other steps necessary to preserve the confidentiality of the private reprimand.

#### **Rule 4.03 Time to File Record**

- (a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or apply presumptions against the appellant.
- (b) **If No Record Filed.**
  - (1) If the clerk's record or reporter's record has not been timely filed, the BODA Clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days. The BODA Clerk must send a copy of this notice to all the parties and the clerk of the evidentiary panel.
  - (2) If no reporter's record is filed due to appellant's fault, and if the clerk's record has been filed, BODA may, after first giving the appellant notice and a reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter's record for a decision. BODA may do this if no reporter's record has been filed because:
    - (i) the appellant failed to request a

- reporter's record; or
- (ii) the appellant failed to pay or make arrangements to pay the reporter's fee to prepare the reporter's record, and the appellant is not entitled to proceed without payment of costs.
- (c) **Extension of Time to File the Reporter's Record.** When an extension of time is requested for filing the reporter's record, the facts relied on to reasonably explain the need for an extension must be supported by an affidavit of the court reporter. The affidavit must include the court reporter's estimate of the earliest date when the reporter's record will be available for filing.
- (d) **Supplemental Record.** If anything material to either party is omitted from the clerk's record or reporter's record, BODA may, on written motion of a party or on its own motion, direct a supplemental record to be certified and transmitted by the clerk for the evidentiary panel or the court reporter for the evidentiary panel.

#### Rule 4.04 Copies of the Record

The record may not be withdrawn from the custody of the BODA Clerk. Any party may obtain a copy of the record or any designated part thereof by making a written request to the BODA Clerk and paying any charges for reproduction in advance.

#### Rule 4.05 Requisites of Briefs

- (a) **Appellant's Filing Date.** Appellant's brief must be filed within 30 days after the clerk's record or the reporter's record is filed, whichever is later.
- (b) **Appellee's Filing Date.** Appellee's brief must be filed within 30 days after the appellant's brief is filed.
- (c) **Contents.** Briefs must contain:
  - (1) a complete list of the names and addresses of all parties to the final decision and their counsel;

- (2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;
  - (3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;
  - (4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;
  - (5) a statement, without argument, of the basis of BODA's jurisdiction;
  - (6) a statement of the issues presented for review or points of error on which the appeal is predicated;
  - (7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;
  - (8) the argument and authorities;
  - (9) conclusion and prayer for relief;
  - (10) a certificate of service; and
  - (11) an appendix of record excerpts pertinent to the issues presented for review.
- (d) **Length of Briefs; Contents Included and Excluded.** In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of the jurisdiction, signature, proof of service, certificate of compliance, and appendix. Briefs must not exceed 15,000 words if computer-generated, and 50 pages if not, except on leave of BODA. A reply brief must not exceed 7,500 words if computer-generated, and 25 pages if not, except on

leave of BODA. A computer-generated document must include a certificate by counsel or the unrepresented party stating the number of words in the document. The person who signs the certification may rely on the word count of the computer program used to prepare the document.

- (e) **Amendment or Supplementation.** BODA has discretion to grant leave to amend or supplement briefs.
- (f) **Failure of the Appellant to File a Brief.** If the appellant fails to timely file a brief, BODA may:
  - (1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure, and the appellee is not significantly injured by the appellant's failure to timely file a brief;
  - (2) decline to dismiss the appeal and make further orders within its discretion as it considers proper; or
  - (3) if an appellee's brief is filed, regard that brief as correctly presenting the case and affirm the evidentiary panel's judgment on that brief without examining the record.

#### **Rule 4.06 Oral Argument**

- (a) **Request.** A party desiring oral argument must note the request on the front cover of the party's brief. A party's failure to timely request oral argument waives the party's right to argue. A party who has requested argument may later withdraw the request. But even if a party has waived oral argument, BODA may direct the party to appear and argue. If oral argument is granted, the clerk will notify the parties of the time and place for submission.
- (b) **Right to Oral Argument.** A party who has filed a brief and who has timely requested oral argument may argue the case to BODA unless BODA, after examining the briefs, decides that oral

argument is unnecessary for any of the following reasons:

- (1) the appeal is frivolous;
  - (2) the dispositive issue or issues have been authoritatively decided;
  - (3) the facts and legal arguments are adequately presented in the briefs and record; or
  - (4) the decisional process would not be significantly aided by oral argument.
- (c) **Time Allowed.** Each party will have 20 minutes to argue. BODA may, on the request of a party or on its own, extend or shorten the time allowed for oral argument. The appellant may reserve a portion of his or her allotted time for rebuttal.

#### **Rule 4.07 Decision and Judgment**

- (a) **Decision.** BODA may do any of the following:
  - (1) affirm in whole or in part the decision of the evidentiary panel;
  - (2) modify the panel's findings and affirm the findings as modified;
  - (3) reverse in whole or in part the panel's findings and render the decision that the panel should have rendered; or
  - (4) reverse the panel's findings and remand the cause for further proceedings to be conducted by:
    - (i) the panel that entered the findings; or
    - (ii) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.
- (b) **Mandate.** In every appeal, the BODA Clerk must issue a mandate in accordance with BODA's judgment and send it to the evidentiary panel and to all the parties.

#### **Rule 4.08 Appointment of Statewide Grievance Committee**

If BODA remands a cause for further proceedings before a statewide grievance committee, the BODA Chair will appoint the statewide grievance committee in accordance with TRDP 2.27. The committee must consist of six members: four attorney members and two public members randomly selected from the current pool of grievance committee members. Two alternates, consisting of one attorney and one public member, must also be selected. BODA will appoint the initial chair who will serve until the members of the statewide grievance committee elect a chair of the committee at the first meeting. The BODA Clerk will notify the Respondent and the CDC that a committee has been appointed.

#### **Rule 4.09 Involuntary Dismissal**

Under the following circumstances and on any party's motion or on its own initiative after giving at least ten days' notice to all parties, BODA may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal:

- (a) for want of jurisdiction;
- (b) for want of prosecution; or
- (c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.

### **SECTION 5: PETITIONS TO REVOKE PROBATION**

#### **Rule 5.01 Initiation and Service**

- (a) Before filing a motion to revoke the probation of an attorney who has been sanctioned, the CDC must contact the BODA Clerk to confirm whether the next regularly available hearing date will comply with the 30-day requirement of TRDP. The Chair may designate a three-member panel to hear the motion, if necessary, to meet the 30-day requirement of TRDP 2.23.

- (b) Upon filing the motion, the CDC must serve the Respondent with the motion and any supporting documents in accordance with TRDP 2.23, the TRCP, and these rules. The CDC must notify BODA of the date that service is obtained on the Respondent.

#### **Rule 5.02 Hearing**

Within 30 days of service of the motion on the Respondent, BODA must docket and set the matter for a hearing and notify the parties of the time and place of the hearing. On a showing of good cause by a party or on its own motion, BODA may continue the case to a future hearing date as circumstances require.

### **SECTION 6: COMPULSORY DISCIPLINE**

#### **Rule 6.01 Initiation of Proceeding**

Under TRDP 8.03, the CDC must file a petition for compulsory discipline with BODA and serve the Respondent in accordance with the TRDP and Rule 1.06 of these rules.

#### **Rule 6.02 Interlocutory Suspension**

- (a) **Interlocutory Suspension.** In any compulsory proceeding under TRDP Part VIII in which BODA determines that the Respondent has been convicted of an Intentional Crime and that the criminal conviction is on direct appeal, BODA must suspend the Respondent's license to practice law by interlocutory order. In any compulsory case in which BODA has imposed an interlocutory order of suspension, BODA retains jurisdiction to render final judgment after the direct appeal of the criminal conviction is final. For purposes of rendering final judgment in a compulsory discipline case, the direct appeal of the criminal conviction is final when the appellate court issues its mandate.
- (b) **Criminal Conviction Affirmed.** If the criminal conviction made the basis of a compulsory interlocutory suspension is affirmed and becomes final, the CDC must

file a motion for final judgment that complies with TRDP 8.05.

- (1) If the criminal sentence is fully probated or is an order of deferred adjudication, the motion for final judgment must contain notice of a hearing date. The motion will be set on BODA's next available hearing date.
- (2) If the criminal sentence is not fully probated:
  - (i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or
  - (ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.
- (c) Criminal Conviction Reversed. If an appellate court issues a mandate reversing the criminal conviction while a Respondent is subject to an interlocutory suspension, the Respondent may file a motion to terminate the interlocutory suspension. The motion to terminate the interlocutory suspension must have certified copies of the decision and mandate of the reversing court attached. If the CDC does not file an opposition to the termination within ten days of being served with the motion, BODA may proceed to decide the motion without a hearing or set the matter for a hearing on its own motion. If the CDC timely opposes the motion, BODA must set the motion for a hearing on its next available hearing date. An order terminating an interlocutory order of suspension does not automatically reinstate a Respondent's license.

## **SECTION 7: RECIPROCAL DISCIPLINE**

### **Rule 7.01 Initiation of Proceeding**

To initiate an action for reciprocal discipline under TRDP Part IX, the CDC must file a petition with BODA and request an Order to Show Cause. The petition must request that the Respondent be disciplined in Texas and have attached to it any information concerning the disciplinary matter from the other jurisdiction, including a certified copy of the order or judgment rendered against the Respondent.

### **Rule 7.02 Order to Show Cause**

When a petition is filed, the Chair immediately issues a show cause order and a hearing notice and forwards them to the CDC, who must serve the order and notice on the Respondent. The CDC must notify BODA of the date that service is obtained.

### **Rule 7.03 Attorney's Response**

If the Respondent does not file an answer within 30 days of being served with the order and notice but thereafter appears at the hearing, BODA may, at the discretion of the Chair, receive testimony from the Respondent relating to the merits of the petition.

## **SECTION 8: DISTRICT DISABILITY COMMITTEE HEARINGS**

### **Rule 8.01 Appointment of District Disability Committee**

- (a) If the evidentiary panel of the grievance committee finds under TRDP 2.17(P)(2), or the CDC reasonably believes under TRDP 2.14(C), that a Respondent is suffering from a disability, the rules in this section will apply to the de novo proceeding before the District Disability Committee held under TRDP Part XII.
- (b) Upon receiving an evidentiary panel's finding or the CDC's referral that an attorney is believed to be suffering from a disability, the BODA Chair must appoint a District Disability Committee in compliance with TRDP 12.02 and designate a chair. BODA will reimburse District Disability Committee members for

reasonable expenses directly related to service on the District Disability Committee. The BODA Clerk must notify the CDC and the Respondent that a committee has been appointed and notify the Respondent where to locate the procedural rules governing disability proceedings.

- (c) A Respondent who has been notified that a disability referral will be or has been made to BODA may, at any time, waive in writing the appointment of the District Disability Committee or the hearing before the District Disability Committee and enter into an agreed judgment of indefinite disability suspension, provided that the Respondent is competent to waive the hearing. If the Respondent is not represented, the waiver must include a statement affirming that the Respondent has been advised of the right to appointed counsel and waives that right as well.
- (d) All pleadings, motions, briefs, or other matters to be filed with the District Disability Committee must be filed with the BODA Clerk.
- (e) Should any member of the District Disability Committee become unable to serve, the BODA Chair must appoint a substitute member.

#### **Rule 8.02 Petition and Answer**

- (a) **Petition.** Upon being notified that the District Disability Committee has been appointed by BODA, the CDC must, within 20 days, file with the BODA Clerk and serve on the Respondent a copy of a petition for indefinite disability suspension. Service must comply with Rule 1.06
- (b) **Answer.** The Respondent must, within 30 days after service of the petition for indefinite disability suspension, file an answer with the BODA Clerk and serve a copy of the answer on the CDC.
- (c) **Hearing Setting.** The BODA Clerk must set the final hearing as instructed by the

chair of the District Disability Committee and send notice of the hearing to the parties.

#### **Rule 8.03 Discovery**

- (a) **Limited Discovery.** The District Disability Committee may permit limited discovery. The party seeking discovery must file with the BODA Clerk a written request that makes a clear showing of good cause and substantial need and a proposed order. If the District Disability Committee authorizes discovery in a case, it must issue a written order. The order may impose limitations or deadlines on the discovery.
- (b) **Physical or Mental Examinations.** On written motion by the Commission or on its own motion, the District Disability Committee may order the Respondent to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. Nothing in this rule limits the Respondent's right to an examination by a professional of his or her choice in addition to any exam ordered by the District Disability Committee.
  - (1) **Motion.** The Respondent must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.
  - (2) **Report.** The examining professional must file with the BODA Clerk a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the CDC and the Respondent.
- (c) **Objections.** A party must make any objection to a request for discovery within 15 days of receiving the motion by filing a written objection with the BODA Clerk. BODA may decide any objection or contest to a discovery motion.

#### **Rule 8.04 Ability to Compel Attendance**

The Respondent and the CDC may confront and cross-examine witnesses at the hearing. Compulsory process to compel the attendance of witnesses by subpoena, enforceable by an order of a district court of proper jurisdiction, is available to the Respondent and the CDC as provided in TRCP 176.

#### **Rule 8.05 Respondent's Right to Counsel**

- (a) The notice to the Respondent that a District Disability Committee has been appointed and the petition for indefinite disability suspension must state that the Respondent may request appointment of counsel by BODA to represent him or her at the disability hearing. BODA will reimburse appointed counsel for reasonable expenses directly related to representation of the Respondent.
- (b) To receive appointed counsel under TRDP 12.02, the Respondent must file a written request with the BODA Clerk within 30 days of the date that Respondent is served with the petition for indefinite disability suspension. A late request must demonstrate good cause for the Respondent's failure to file a timely request.

#### **Rule 8.06 Hearing**

The party seeking to establish the disability must prove by a preponderance of the evidence that the Respondent is suffering from a disability as defined in the TRDP. The chair of the District Disability Committee must admit all relevant evidence that is necessary for a fair and complete hearing. The TRE are advisory but not binding on the chair.

#### **Rule 8.07 Notice of Decision**

The District Disability Committee must certify its finding regarding disability to BODA, which will issue the final judgment in the matter.

#### **Rule 8.08 Confidentiality**

All proceedings before the District Disability Committee and BODA, if necessary, are closed to the public. All matters before the District

Disability Committee are confidential and are not subject to disclosure or discovery, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court of Texas.

### **SECTION 9: DISABILITY REINSTATEMENTS**

#### **Rule 9.01 Petition for Reinstatement**

- (a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. The petitioner must serve a copy of the petition on the CDC in the manner required by TRDP 12.06. The TRCP apply to a reinstatement proceeding unless they conflict with these rules.
- (b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.
- (c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may make all or any part of the record of the proceeding confidential.

#### **Rule 9.02 Discovery**

The discovery period is 60 days from the date that the petition for reinstatement is filed. The BODA Clerk will set the petition for a hearing on the first date available after the close of the discovery period and must notify the parties of the time and place of the hearing. BODA may continue the hearing for good cause shown.



### **Rule 9.03 Physical or Mental Examinations**

- (a) On written motion by the Commission or on its own, BODA may order the petitioner seeking reinstatement to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. The petitioner must be served with a copy of the motion and given at least seven days to respond. BODA may hold a hearing before ruling on the motion but is not required to do so.
- (b) The petitioner must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.
- (c) The examining professional must file a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the parties.
- (d) If the petitioner fails to submit to an examination as ordered, BODA may dismiss the petition without notice.
- (e) Nothing in this rule limits the petitioner's right to an examination by a professional of his or her choice in addition to any exam ordered by BODA.

### **Rule 9.04 Judgment**

If, after hearing all the evidence, BODA determines that the petitioner is not eligible for reinstatement, BODA may, in its discretion, either enter an order denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the petitioner provides additional proof as directed by BODA. The judgment may include other orders necessary to protect the public and the petitioner's potential clients.

## **SECTION 10: APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS**

### **Rule 10.01 Appeals to the Supreme Court**

- (a) A final decision by BODA, except a determination that a statement constitutes an inquiry or a complaint under TRDP 2.10, may be appealed to the Supreme Court of Texas. The clerk of the Supreme Court of Texas must docket an appeal from a decision by BODA in the same manner as a petition for review without fee.
- (b) The appealing party must file the notice of appeal directly with the clerk of the Supreme Court of Texas within 14 days of receiving notice of a final determination by BODA. The record must be filed within 60 days after BODA's determination. The appealing party's brief is due 30 days after the record is filed, and the responding party's brief is due 30 days thereafter. The BODA Clerk must send the parties a notice of BODA's final decision that includes the information in this paragraph.
- (c) An appeal to the Supreme Court is governed by TRDP 7.11 and the TRAP.

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: 08/24/2017

C. Batten  
DEPUTY COURT CLERK



Barbara L. Townsend, #5568  
Assistant Counsel  
OFFICE OF PROFESSIONAL CONDUCT  
Utah State Bar  
645 South 200 East  
Salt Lake City, Utah 84111  
Telephone: 801 531-9110  
[opcfileing@utahbar.org](mailto:opcfileing@utahbar.org)

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of:	)	COMPLAINT
BENJAMIN R. HORTON, #11452	)	
Respondent.	)	Civil No.
	)	Judge

The Utah State Bar's Office of Professional Conduct ("OPC"), by and through Barbara L. Townsend, Assistant Counsel, complains against the Respondent, Benjamin R. Horton, as follows:

I  
PARTIES

1. Benjamin R. Horton is an attorney licensed to practice law in the State of Utah and a member of the Utah State Bar. His address according to the records of the Executive Director of the Utah State Bar is 2825 East Cottonwood Parkway, Suite 500, Salt Lake City, Utah 84121.

Exhibit

2. According to Utah State Bar records, Mr. Horton has been a member of the Utah State Bar since May 23, 2007.

3. This Complaint is brought pursuant to a directive of a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court, and is based upon an Informal Complaints submitted against Mr. Horton by Eric Trager, Diann Dodd and Stacie Chvilicek.

## II JURISDICTION AND VENUE

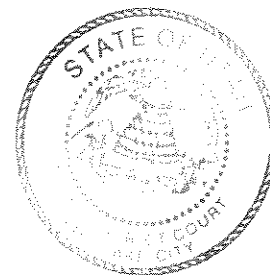
4. The OPC served a Notice of Informal Complaint ("NOIC") in the Chvilicek matter on Mr. Horton on October 10, 2013.

5. The OPC served a Notice of Informal Complaint ("NOIC") in the Dodd matter on Mr. Horton on October 28, 2013.

6. The OPC served a Notice of Informal Complaint ("NOIC") in the Trager matter on Mr. Horton on December 6, 2013.

7. On March 13, 2014, a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court ("the Screening Panel") heard the Chvilicek, Dodd and Trager matters. At the conclusion of the hearing on March 13, 2014, the Screening Panel directed the OPC to file a formal Complaint against Mr. Horton with respect to each of the matters.

8. Jurisdiction is proper in this Court pursuant to Rule 14-511(a), Rules of Lawyer Discipline and Disability ("RLDD").



9. Venue is proper in this Court pursuant to Rule 14-511(b) of the RLDD, in that at all relevant times, Mr. Horton practiced law in Salt Lake County.

**III**  
**FACTUAL ALLEGATIONS**  
(Chvilicek Matter)

10. Stacie and Dean Chvilicek are residents of Wisconsin.

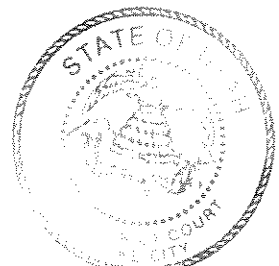
11. On August 31, 2011, Mr. Chvilicek submitted a request for legal representation to Compass Law for a modification of their home mortgage loan with Wells Fargo Bank.

12. The Chviliceks made payments to Compass Law as follows: on September 13, 2011- \$974.00; on October 18, 2011 - \$974.00; and, on November 18, 2011 - \$974.00.

13. In a letter to Mr. Chvilicek dated December 14, 2011, Compass Law stated that the business had recently undergone an organization alteration due to a change in lead attorney representation. The letter stated that all terms of Mr. Chvilicek's previous contract with Compass Law would remain the same, that the file was being transferred to a different law firm, Preferred Law, and that all remaining payments should be made directly to Preferred Law.

14. Mr. Horton is the owner of Preferred Law and is the only attorney employed by Preferred Law.

15. On December 28, 2011, the Chviliceks made a \$974.00 payment to Preferred Law.



16. On January 9, 2012, Wells Fargo sent a letter to Mr. Chvilicek indicating that a letter had been sent to his attorney's office acknowledging their representation but no response was received from the firm.

17. The Chviliceks made payments to Preferred Law as follows: on January 30, 2012 - \$297.00; on February 29, 2012 - \$297.00; on March 30, 2012 - \$297.00; and, on April 30, 2012 - \$297.00.

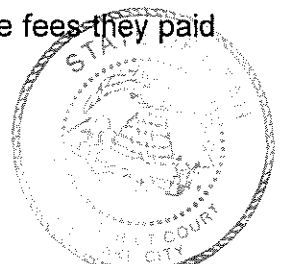
18. Mr. Horton did not deposit the fees paid by the Chviliceks into his client trust account.

19. In a letter to Mr. Chvilicek dated June 14, 2012, Wells Fargo stated that it was unable to process his request for a loan modification because it had not received any input from Mr. Chvilicek or his attorney.

20. On October 18, 2012, the Chviliceks submitted a request for a refund of the \$5,084.00 paid to Compass Law and Preferred Law based on their dissatisfaction with the firms' legal representation.

21. In response to several email inquiries regarding the status of the refund request, Preferred Law employee, Tyla Carroll, informed Ms. Chvilicek that Phil Hanley had been assigned to handle the request. Ms. Carroll's email instructed Ms. Chvilicek to contact Mr. Hanley and stated that she had no other information regarding the Chvilicek's refund request.

22. On February 12, 2013, after not receiving a response from Mr. Hanley to their request, the Chviliceks resubmitted their request for a refund of the fees they paid



to Compass Law and Preferred Law via certified mail, which was received by Preferred Law on February 19, 2012.

23. On October 10, 2013, the OPC served by regular mail to Mr. Horton's preferred address of record an NOIC concerning Ms. Chvilicek's informal complaint, requiring his response within 20 days.

24. Mr. Horton did not provide a response to the NOIC.

(Diann Dodd)

25. Diann Dodd resides in Huntingdon, Tennessee.

26. Ms. Dodd hired Preferred Law, a law office owned and operated by Benjamin R. Horton, for purposes of obtaining a mortgage modification with a reduced interest rate.

27. On December 18, 2012, a fax was sent to Ms. Dodd and her husband from Modification Review Board – Preferred Law, PLLC. Attached to the fax were "testimonials" of other clients who had hired the firm and received loan modifications.

28. On December 19, 2012, a fax was sent to Ms. Dodd from Modification Review Board – Preferred Law, PLLC which stated that although the agreement addresses a "no guarantee" policy, Ms. Dodd's guarantee letter "is binding . . . the guarantee you have been given is binding and supercedes the verbage in the agreement . . ."

29. In a letter to Ms. Dodd dated December 18, 2012, Preferred Law guaranteed that a modification could be secured for Ms. Dodd conditioned upon several



requirements. Included with the letter was a payment schedule for payments totaling \$4,900.00, to be made over six months.

30. Ms. Dodd made payments to Preferred Law as follows: on December 20, 2012 - \$1,000.00; on January 24, 2013 - \$780.00; on February 22, 2013 - \$780.00; on March 21, 2013 - \$780.00; and, on April 23, 2013 - \$780.00.

31. Mr. Horton did not deposit any of the fees paid by Ms. Dodd into his client trust account.

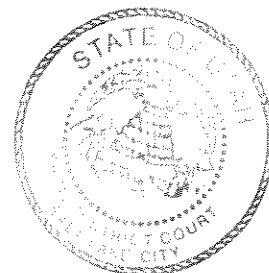
32. The fee and representation agreement was sent to Ms. Dodd dated January 4, 2013, thanking her for choosing the law firm, Preferred Law, PLLC.

33. The representation agreement contains a Limitation of Liability clause.

34. Ms. Dodd signed Addendum A to the Limited Services Agreement on January 15, 2013. The Addendum laid out the legal services to be provided to Ms. Dodd.

35. The Addendum also states "Funds paid to Preferred Law may in its discretion be disbursed immediately or be held in a trust account governed by Utah law until such fees are earned by and disbursed to Preferred Law . . ."

36. In an email to Ms. Dodd dated July 1, 2013, a negotiations manager for Preferred Law indicated that Ms. Dodd needed to sign and return a Continuity Fee Form for payment of an additional required \$297.00 monthly fee until a decision was rendered on her file.



37. At some point, Ms. Dodd contacted the Tennessee Attorney General's Office which implements the National Mortgage Settlement and helps persons like Ms. Dodd facing foreclosure.

38. Matt Pulle, an attorney with the Tennessee AG's Office, initiated an investigation into Ms. Dodd's case.

39. Mr. Pulle concluded that Preferred Law offered nothing of value to Ms. Dodd and that she was in a far worse position as a result of her affiliation with Preferred Law.

40. On October 28 2013, the OPC served by regular mail to Mr. Horton's preferred address of record an NOIC concerning Ms. Dodd's informal complaint, requiring his response within 20 days.

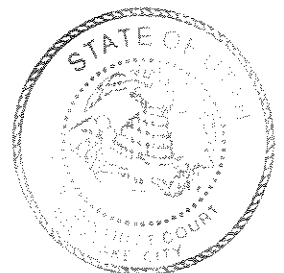
41. Mr. Horton did not provide a response to the NOIC.

(Trager Matter)

42. Eric Trager is a resident of California.

43. Benjamin R. Horton is an attorney licensed to practice law in Utah and Texas.

44. On March 24, 2013, Mr. Trager received notice from his mortgage company, Nationstar Mortgage, that he had been approved to enter a trial period plan under the Home Affordable Modification Program ("HAMP").





45. On April 4, 2013, Mr. Trager emailed Preferred Law, Mr. Horton's law firm, and provided notice that he had been approved for a HAMP trial plan period and provided information stating that he had made the March payment for the modification.

46. On April 5, 2013, Preferred Law sent an email to Mr. Trager with a payment authorization form attached, and which also included a payment schedule.

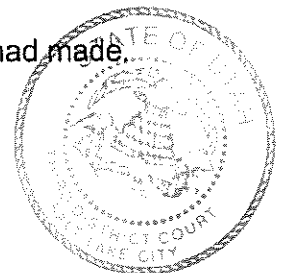
47. On April 9, 2013, Preferred Law sent an email to Mr. Trager with a Guarantee Letter attached. The Guarantee Letter stated that Preferred Law "guarantees" that a modification will be secured for you conditioned upon the following requirements: (1) all documents needed, will be returned when requested by the deadlines given; (2) there will be no changes to your current circumstances; (3) all information that was given is accurate and complete, (4) all payments are made on time per the Payment Schedule.

48. On April 9, 2013, Preferred Law sent an email to Mr. Trager requesting documents.

49. On April 10, 2013, Mr. Trager sent two emails to Preferred Law providing the requested documents.

50. On April 12, 2013, Preferred Law charged \$650 against Mr. Trager's bank account.

51. On April 22, 2013, Mr. Trager sent an email to Preferred Law wherein he again attached the notice from Nationstar Mortgage indicating that he had been approved for a trial period plan under HAMP. Mr. Trager's message also included a letter from Nationstar dated March 7, 2013, notifying him of issues with the payment he had made.



52. On April 22, 2013, Preferred Law sent an email to Mr. Trager which included an attached Fee and Representation Agreement and an Addendum to Limited Services Agreement.

53. On April 25, 2013, Candice Davies, a loan processor employed by Preferred Law, contacted Nationstar and was informed that Mr. Trager had been approved for a Tier II Home Affordable Modification Program with an interest rate of 4.125% and that Mr. Trager had made payments to Nationstar for March and April.

54. On May 1, 2013, Ms. Davies sent an email to Cyndie Morrison, Mr. Trager's representative, and provided her with the information obtained during her April 25, 2013 conversation with Nationstar Mortgage. Ms. Davies stated that it was Preferred Law's position that the current interest rate of 4.125% was the best rate Mr. Trager could obtain.

55. On May 1, 2013, Ms. Morrison responded to Ms. Davies and informed her that Mr. Trager had not made the April payment and inquired as to whether Preferred Law was going to continue to negotiate with Nationstar for better terms.

56. Preferred Law made the following charges against Mr. Trager's bank account, on May 15, 2013 - \$650; on June 12, 2013 - \$450; on July 26, 2013 - \$750; and, on August 15, 2013 - \$650.

57. Mr. Horton did not deposit any of the fees paid by Mr. Trager into his client trust account.

58. On August 23, 2013, Preferred Law wrote Ms. Morrison an email stating that because Mr. Trager had accepted the trial offer and made payments to Nationstar but then



defaulted on his payments, he was no longer eligible for a HAMP modification under his current financial circumstances.

59. On September 12, 2013, Mr. Trager submitted an Audit Request Form to Preferred Law requesting a refund of the \$3,150.00 he had paid.

**COUNT ONE**  
**(Violation of Rule 1.3 (Diligence))**  
**(Chvilicek Matter)**

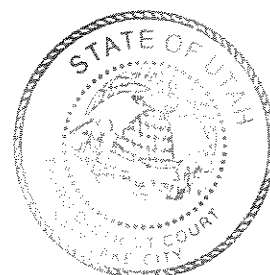
60. Rule 1.3 (Diligence) of the Rules of Professional Conduct states:

A lawyer shall act with reasonable diligence and promptness in representing a client

61. Wells Fargo tried to contact Mr. Horton after receiving a letter acknowledging his representation of Mr. Chvilicek, but no response was received from Mr. Horton.

62. Wells Fargo stated that it was unable to process Mr. Chvilicek's request for a loan modification because it had not received any input from Mr. Chvilicek or his attorney.

63. By failing to act with reasonable diligence on behalf of the Chviliceks, Mr. Horton violated Rule 1.3 (Diligence).



**COUNT TWO**  
**(Violation of Rule 1.4(a) (Communication))**  
**(Chvilicek Matter)**

64. Rule 1.4(a) (Communication) of the Rules of Professional Conduct states:

A lawyer shall 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; 2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; 3) keep the client reasonably informed about the status of the matter; 4) promptly comply with reasonable requests for information; and 5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law

65. Wells Fargo sent letters to Mr. Horton and his firm after receiving a letter acknowledging Mr. Horton's representation.

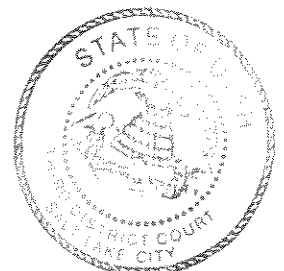
66. Mr. Horton and his firm failed to respond to inquiries from Wells Fargo.

67. The Chviliceks submitted a request for a refund of money paid to Compass Law and Preferred Law based on their dissatisfaction with the firms' legal representation.

68. The Chviliceks sent several email inquiries regarding the status of the refund request.

69. After being told that one person at Preferred Law was handling the account, the Chviliceks contacted that person.

70. Ms. Chvilicek continued to contact the employee but received no response.



71. After not receiving a response from to their request, the Chviliceks resubmitted their request for a refund of the fees via certified mail.

72. By failing to respond to requests for information from his clients, failing to keep his clients informed and failing to promptly comply with requests from his clients, Mr. Horton violated Rule 1.4(a) (Communication).

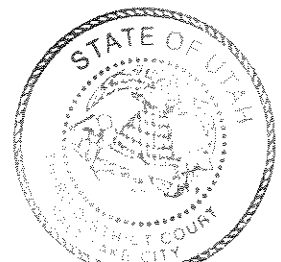
**COUNT THREE**  
**(Violation of Rule 1.4(a) (Communication))**  
**(Trager Matter)**

73. Rule 1.4(a) (Communication) of the Rules of Professional Conduct states:

A lawyer shall 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; 2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; 3) keep the client reasonably informed about the status of the matter; 4) promptly comply with reasonable requests for information; and 5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

74. Mr. Trager emailed Preferred Law and provided notice that he had been approved for a HAMP trial plan period and provided information stating that he had made the March payment for the modification.

75. Mr. Trager sent two emails to Preferred Law providing the requested documents.



76. Mr. Trager later sent an email to Preferred Law wherein he again attached the notice from Nationstar Mortgage indicating that he had been approved for a trial period plan under HAMP.

77. Preferred Law failed to respond to Mr. Trager in any meaningful way.

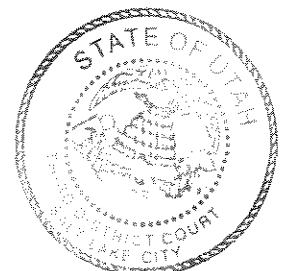
78. By failing to respond to requests for information from his clients, failing to keep his clients informed and failing to promptly comply with requests from his clients, Mr. Horton violated Rule 1.4(a) (Communication).

**COUNT FOUR**  
**(Violation of Rule 1.5(a) (Fees))**  
**(Chvilicek Matter)**

79. Rule 1.5(a) (Fees) of the Rules of Professional Conduct states:

A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

80. The Chviliceks paid Compass Law and Mr. Horton over \$5,000 for services to be rendered.



81. Mr. Horton did not deposit the fees into his client trust account to be taken out as earned.

82. Mr. Horton failed to do any meaningful work to earn the fees paid by the Chviliceks.

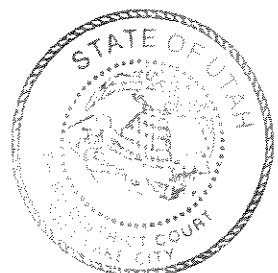
83. By failing to provide any meaningful services to the Chviliceks in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee and violated Rule 1.5(a) (Fees).

**COUNT FIVE**  
**(Violation of Rule 1.5(a) (Fees))**  
**(Dodd Matter)**

84. Rule 1.5(a) (Fees) of the Rules of Professional Conduct states:

A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

85. Ms. Dodd paid Mr. Horton over \$4,000 for services to be rendered.



86. Mr. Horton did not deposit the fees into his client trust account to be taken out as earned.

87. Mr. Horton failed to do any meaningful work to earn the fees paid by Ms. Dodd.

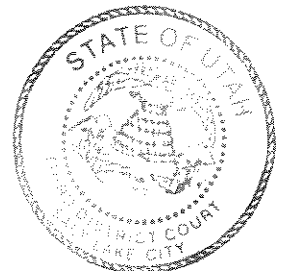
88. By failing to provide any meaningful services to Ms. Dodd in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee and violated Rule 1.5(a) (Fees).

**COUNT SIX**  
**(Violation of Rule 1.5(a) (Fees))**  
**(Trager Matter)**

89. Rule 1.5(a) (Fees) of the Rules of Professional Conduct states:

A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

90. Mr. Trager paid Mr. Horton over \$3,000 for services to be rendered.





91. Mr. Horton did not deposit the fees into his client trust account to be taken out as earned.

92. Mr. Horton failed to do any meaningful work to earn the fees paid by Mr. Trager.

93. By failing to provide any meaningful services to Mr. Trager in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee and violated Rule 1.5(a) (Fees).

#### **COUNT SEVEN**

**(Violation of Rule 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules))**  
**(Dodd Matter)**

94. Rule 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules) of the Rules of Professional Conduct states:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

95. The fee and representation agreement was sent to Ms. Dodd dated January 4, 2013, thanking her for choosing Mr. Horton's law firm.

96. The representation agreement contains a Limitation of Liability clause.

97. By not taking adequate steps to ensure Ms. Dodd obtained independent representation in connection with the engagement agreement she entered into with Mr. Horton and by failing to advise Ms. Dodd that she should in fact seek independent legal review of the liability waiver included in his engagement



agreement, Mr. Horton violated Rule 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules).

**COUNT EIGHT**  
**(Violation of Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants)**  
**(Chvilicek Matter)**

98. Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct states:

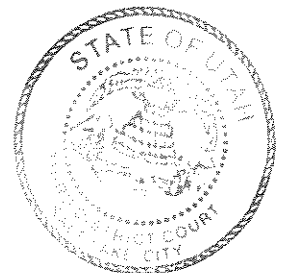
With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

99. Mr. Horton employs and supervises numerous nonlawyers.

100. Nonlawyers work for Mr. Horton at Preferred Law and other companies associated with Preferred Law as loan processors, loan agents and in other nonlawyer capacities.

101. Clients of Mr. Horton, Preferred Law and other companies associated with Preferred Law mainly have contact with nonlawyers who advise them regarding their cases.

102. Mr. Horton does not speak directly to clients of his law firm, but rather allows nonlawyers to speak for him.



103. By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Mr. Horton's professional obligations, Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants),

**COUNT NINE**  
**(Violation of Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants)**  
**(Dodd Matter)**

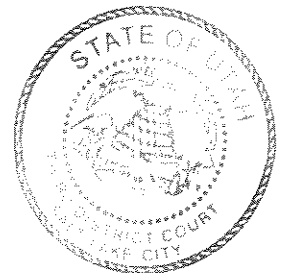
104. Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct states:

With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

105. Mr. Horton employs and supervises numerous nonlawyers.

106. Nonlawyers work for Mr. Horton at Preferred Law and other companies associated with Preferred Law as loan processors, loan agents and in other nonlawyer capacities.

107. Clients of Mr. Horton, Preferred Law and other companies associated with Preferred Law mainly have contact with nonlawyers who advise them regarding their cases.



108. Mr. Horton does not speak directly to clients of his law firm, but rather allows nonlawyers to speak for him.

109. By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Mr. Horton's professional obligations, Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants).

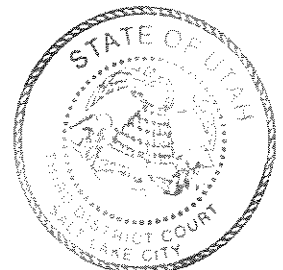
**COUNT TEN**  
**(Violation of Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants)**  
**(Trager Matter)**

110. Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct states:

With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

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113. Clients of Mr. Horton, Preferred Law and other companies associated with Preferred Law mainly have contact with nonlawyers who advise them regarding their cases.

114. Mr. Horton does not speak directly to clients of his law firm, but rather allows nonlawyers to speak for him.

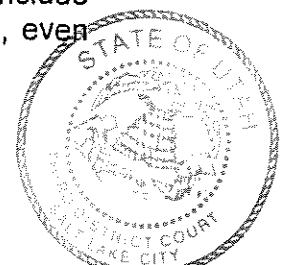
115. By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Mr. Horton's professional obligations, Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants).

#### **COUNT ELEVEN**

##### **(Violation of Rule 5.4) (Professional Independence of a Lawyer) (Chvilicek Matter)**

116. Rule 5.4 (Professional Independence of a Lawyer) of the Rules of Professional Conduct states:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: (a)(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; (a)(2)(i) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and (a)(2)(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and (a)(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even



though the plan is based in whole or in part on a profit-sharing arrangement.

117. Mr. Horton operates his law firm in connection with and by engaging in relationships with other nonlawyer companies.

118. Mr. Horton has created no discernable working distinction between his law firm and the other companies.

119. Employees and agents of Preferred Law are also employed by the other companies.

120. Fees and accounts are shared between companies.

121. By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a Lawyer).

**COUNT TWELVE**  
**(Violation of Rule 5.4) (Professional Independence of a Lawyer)**  
**(Dodd Matter)**

122. Rule 5.4 (Professional Independence of a Lawyer) of the Rules of Professional Conduct states:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: (a)(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; (a)(2)(i) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and (a)(2)(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the



estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and (a)(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

123. Mr. Horton operates his law firm in connection with and by engaging in relationships with other nonlawyer companies.

124. Mr. Horton has created no discernable working distinction between his law firm and the other companies.

125. Employees and agents of Preferred Law are also employed by the other companies.

126. Fees and accounts are shared between companies.

127. By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a Lawyer).

**COUNT THIRTEEN**  
**(Violation of Rule 5.4) (Professional Independence of a Lawyer)**  
**(Trager Matter)**

128. Rule 5.4 (Professional Independence of a Lawyer) of the Rules of Professional Conduct states:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: (a)(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; (a)(2)(i) a lawyer who purchases the practice of a deceased, disabled or disappeared



lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and (a)(2)(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and (a)(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

129. Mr. Horton operates his law firm in connection with and by engaging in relationships with other nonlawyer companies.

130. Mr. Horton has created no discernable working distinction between his law firm and the other companies.

131. Employees and agents of Preferred Law are also employed by the other companies.

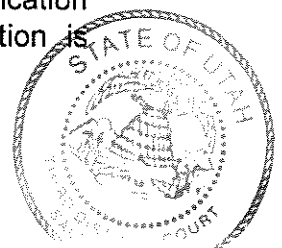
132. Fees and accounts are shared between companies.

133. By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a Lawyer).

**COUNT FOURTEEN**  
**(Violation of Rule 7.1) (Communications Concerning a Lawyer's Practices)**  
**(Dodd Matter)**

134. Rule 7.1 (Communications Concerning a Lawyer's Services) of the Rules of Professional Conduct states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is





false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

135. Mr. Horton, through Preferred Law, guaranteed to his client that a loan modification would be secured.

136. By guaranteeing results, Mr. Horton misled Ms. Dodd and violated Rule 7.1 (Communications Regarding a Lawyer's Services).

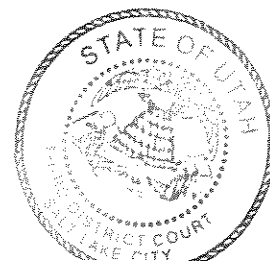
**COUNT FIFTEEN**  
**(Violation of Rule 7.1) (Communications Concerning a Lawyer's Practices)**  
**(Trager Matter)**

137. Rule 7.1 (Communications Concerning a Lawyer's Services) of the Rules of Professional Conduct states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

138. Mr. Horton, through Preferred Law, guaranteed to his client that a loan modification would be secured.

139. By guaranteeing results, Mr. Horton misled Mr. Trager and violated Rule 7.1 (Communications Regarding a Lawyer's Services).



**COUNT SIXTEEN**  
**(Violation of Rule 8.1(b)) (Bar Admission and Disciplinary Matters)**  
**(Chvilicek Matter)**

140. Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct states:

An applicant for admission to the Bar, or a lawyer in connection with a Bar admission application or in connection with a disciplinary matter, shall not: (b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority ....

141. On October 10, 2013, the OPC served by regular mail to Mr. Horton's preferred address of record an NOIC concerning Ms. Chvilicek's informal complaint, requiring his response within 20 days.

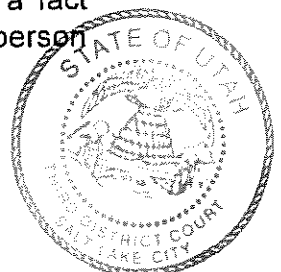
142. Mr. Horton did not provide a response to the NOIC.

143. By failing to respond to the OPC's NOIC, Mr. Horton Violated Rule 8.1(b) (Bar Admission and Disciplinary Matters).

**COUNT SEVETEEN**  
**(Violation of Rule 8.1(b)) (Bar Admission and Disciplinary Matters)**  
**(Dodd Matter)**

144. Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct states:

An applicant for admission to the Bar, or a lawyer in connection with a Bar admission application or in connection with a disciplinary matter, shall not: (b) Fail to disclose a fact necessary to correct a misapprehension known by the person



to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority ....

145. On October 28 2013, the OPC served by regular mail to Mr. Horton's preferred address of record an NOIC concerning Ms. Dodd's informal complaint, requiring his response within 20 days.

146. Mr. Horton did not provide a response to the NOIC.

147. By failing to respond to the OPC's NOIC, Mr. Horton Violated Rule 8.1(b) (Bar Admission and Disciplinary Matters).

**COUNT EIGHTEEN**  
**(Violation of Rule 8.4(c)) (Misconduct)**  
**(Dodd Matter)**

148. Rule 8.4(c) of the Rules of Professional Conduct states:

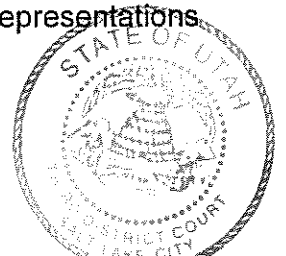
It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation

149. Mr. Horton performed no meaningful legal services for his client, but took money from his client.

150. Mr. Horton allowed legal work that was to be performed to be done by loan processors and other nonlawyers.

151. Mr. Horton and Preferred Law made misrepresentations regarding services to clients.

152. By taking money and doing little or no legal work, by allowing other companies and nonlawyers to provide legal services and by making misrepresentations



to clients, Mr. Horton engaged in conduct that was dishonest or deceitful and violated Rule 8.4(c).

**COUNT NINETEEN**  
**(Violation of Rule 8.4(c)) (Misconduct)**  
**(Trager Matter)**

153. Rule 8.4(c) of the Rules of Professional Conduct states:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation

154. Mr. Horton performed no meaningful legal services for his client, but took money from his client.

155. Mr. Horton allowed legal work that was to be performed to be done by loan processors and other nonlawyers.

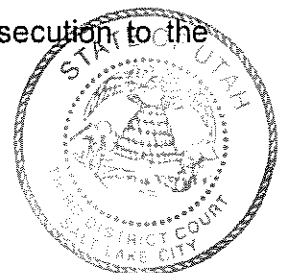
156. Mr. Horton and Preferred Law made misrepresentations regarding services to clients.

157. By taking money and doing little or no legal work, by allowing other companies and nonlawyers to provide legal services and by making misrepresentations to clients, Mr. Horton engaged in conduct that was dishonest or deceitful and violated Rule 8.4(c).

**PRAYER FOR RELIEF**

WHEREFORE, the Office of Professional Conduct requests:

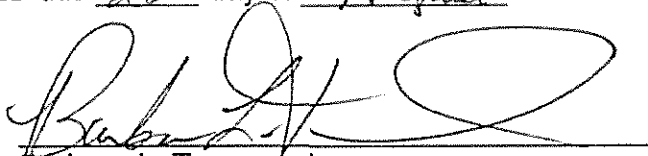
1. That the appropriate disciplinary sanction be imposed against Mr. Horton;
2. That the Court order Mr. Horton to pay the costs of prosecution to the



OPC; and

3. For such other relief as the Court deems just.

DATED this 28<sup>th</sup> day of August 2014.



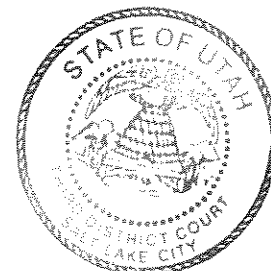
Barbara L. Townsend  
Assistant Counsel  
Office of Professional Conduct

DATED this 26<sup>th</sup> day of August 2014.



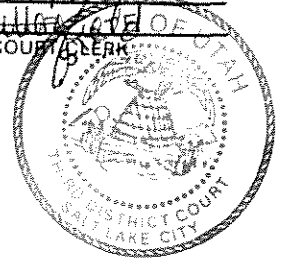
Terrie T. McIntosh, Chair  
Ethics and Discipline Committee

This pleading filed on behalf of the Utah  
State Bar, Office of Professional  
Conduct as directed by the Ethics and  
Discipline Committee of the Utah  
Supreme Court:  
Utah State Bar—Office of Professional Conduct  
645 South 200 East  
Salt Lake City, Utah 84111



I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE 08/24/2017  
C. E. Sullivan  
DEPUTY COURT CLERK



**Barbara L. Townsend, #5568**  
Assistant Counsel  
OFFICE OF PROFESSIONAL CONDUCT  
Utah State Bar  
645 South 200 East  
Salt Lake City, UT 84111  
(801) 531-9110  
[opciling@utahbar.org](mailto:opciling@utahbar.org)

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH	
In the Matter of the Discipline of:  Benjamin R. Horton, #11452  Respondent.	AFFIDAVIT OF CONSENT  Civil No. 140905954 Judge Paige Petersen

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE    )

I, Benjamin R. Horton, being first duly sworn, depose and say:

1. I am the Respondent in this disciplinary action. I am making this Affidavit of Consent for the purposes of Rule 14-520(d) of the Rules of Lawyer Discipline and Disability of the Utah State Bar and for no other purposes. I have personal knowledge of the facts set forth in this affidavit, and state the same to be true.

2. I am aware that this disciplinary action is presently pending against me. I have reviewed the Complaint and the Discipline by Consent and Settlement Agreement filed by the Office of Professional Conduct in this matter. There exist grounds for

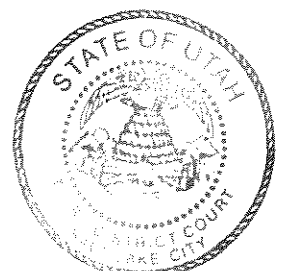
discipline against me for violation of the Rules of Professional Conduct as outlined in the Complaint and in the Discipline by Consent and Settlement Agreement.

3. The allegations made against me in the Complaint in this proceeding could not be successfully resisted, given the facts I have admitted in the Discipline by Consent and Settlement Agreement which I incorporate by reference in this Affidavit. I feel that all terms of the Discipline by Consent and Settlement Agreement are appropriate and are true and correct.

4. I am aware that in addition to three Bar complaints that were consolidated into this formal Complaint, that there are six other open OPC cases pending against me as of the date of this Affidavit: OPC Case Nos. 14-2338, 15-0286, 15-0944, 15-1177, 16-0139, 16-0459. I do not admit to any misconduct in connection with these other OPC cases; however, as part of the settlement of this matter, I acknowledge that these complaints raise allegations for possible further investigation. Therefore, I agree that these OPC cases should be considered and dismissed as part of the resolution of the Complaint filed by the Office of Professional Conduct.

5. I enter into this Discipline by Consent and Settlement Agreement freely and voluntarily, without duress or coercion, fully understanding the implications of my admissions and the misconduct the Office of Professional Conduct of the Utah State Bar has alleged against me.

6. I request that the District Court enter an Order of Discipline: Suspension. The term of the suspension will be three years, consistent with the terms of the Discipline by Consent and Settlement Agreement signed by me.



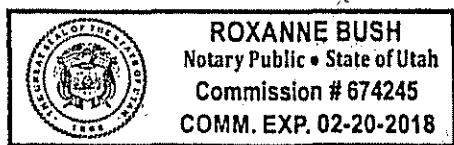
DATED: this 7<sup>th</sup> <sup>September</sup> day of ~~August~~, 2016.



Benjamin R. Horton  
Respondent

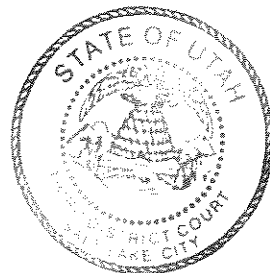
SUBSCRIBED AND SWORN to before me this 7<sup>th</sup> <sup>September</sup> day of ~~August~~, 2016, by

Benjamin R. Horton.



NOTARY PUBLIC

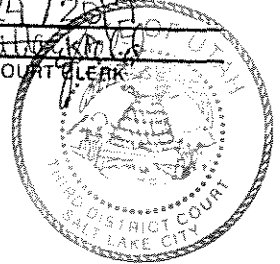
Residing in: Sandy Utah





I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: 08/24/2011  
C. J. Sullivan  
DEPUTY COURT CLERK



**Barbara L. Townsend, #5568**  
Assistant Counsel  
OFFICE OF PROFESSIONAL CONDUCT  
Utah State Bar  
645 South 200 East  
Salt Lake City, UT 84111  
(801) 531-9110  
[opcfilling@utahbar.org](mailto:opcfilling@utahbar.org)

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH	
In the Matter of the Discipline of:  Benjamin R. Horton, #11452  Respondent.	DISCIPLINE BY CONSENT AND SETTLEMENT AGREEMENT  Civil No. 140905954 Judge Paige Petersen

Pursuant to Rule 14-520 of the Rules of Lawyer Discipline and Disability ("RLDD"), Respondent, Benjamin R. Horton, by and through his counsel, Gary G. Sackett, and the Office of Professional Conduct ("OPC"), by and through Barbara L. Townsend, Assistant Counsel, hereby resolve the above-captioned disciplinary matter by consent, based on the following admissions, statements, representations and facts.

#### I. ADMISSIONS

Mr. Horton admits as follows:

1. Mr. Horton enters into this agreement voluntarily, without duress or coercion fully understanding the implications of his admission and the misconduct admitted to, and in exchange for these admissions, the OPC has agreed to recommend

that the Court accept the discipline set forth in this agreement as a fair and just resolution of this matter.

2. Mr. Horton has violated Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules), 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), 5.4 (Professional Independence of a Lawyer), 7.1 (Communications Concerning a Lawyer's Services), 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(c) (Misconduct), of the Rules of Professional Conduct.

3. Mr. Horton specifically admits the factual allegations and legal conclusions stated in this Agreement.

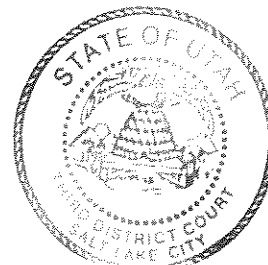
## **II. ADMITTED FINDINGS OF FACT**

4. Benjamin R. Horton is an attorney licensed to practice law in the State of Utah and a member of the Utah State Bar. Mr. Horton's business address, according to the records of the Executive Director of the Utah State Bar, is 2825 East Cottonwood Parkway, Suite 500, Salt Lake City, Utah 84121.

5. According to the records of the Executive Director of the Utah State Bar, Mr. Horton has been a member of the Utah State Bar since May 23, 2007.

6. This Complaint was brought pursuant to the directive of the Chair of the Ethics and Discipline Committee of the Utah Supreme Court, based upon an Informal Complaints submitted against Mr. Horton by Eric Trager, Diann Dodd and Stacie Chvilicek.

7. The OPC served a Notice of Informal Complaint ("NOIC") in the Chvilicek matter on Mr. Horton on October 10, 2013.



8. The OPC served a Notice of Informal Complaint ("NOIC") in the Dodd matter on Mr. Horton on October 28, 2013.

9. The OPC served a Notice of Informal Complaint ("NOIC") in the Trager matter on Mr. Horton on December 6, 2013.

10. On March 13, 2014, a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court ("the Screening Panel") heard the Chvilicek, Dodd and Trager matters.

11. At the conclusion of the hearing on March 13, 2014, the Screening Panel directed the OPC to file a formal Complaint against Mr. Horton with respect to each of the matters. The matters were consolidated and one Complaint filed.

12. Jurisdiction is proper in this Court pursuant to Rule 14-511(a), Rules of Lawyer Discipline and Disability ("RLDD").

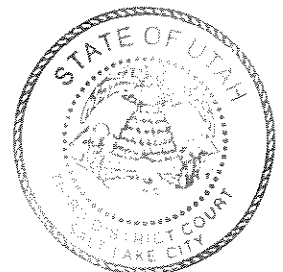
13. Venue is proper in this Court pursuant to Rule 14-511(b) of the RLDD, in that at all relevant times, Mr. Horton practiced law in Salt Lake County.

(Chvilicek Matter)

14. Stacie and Dean Chvilicek are residents of Wisconsin.

15. On August 31, 2011, Mr. Chvilicek submitted a request for legal representation to Compass Law for a modification of their home mortgage loan with Wells Fargo Bank.

16. The Chviliceks made payments to Compass Law as follows: on September 13, 2011 - \$974.00; on October 18, 2011 - \$974.00; and, on November 18, 2011 - \$974.00.



17. In a letter to Mr. Chvilicek dated December 14, 2011, Compass Law stated that the business had recently undergone an organization alteration due to a change in lead attorney representation. The letter stated that all terms of Mr. Chvilicek's previous contract with Compass Law would remain the same, that the file was being transferred to a different law firm, Preferred Law, and that all remaining payments should be made directly to Preferred Law.

18. Mr. Horton is the owner of Preferred Law and is the only attorney employed by Preferred Law.

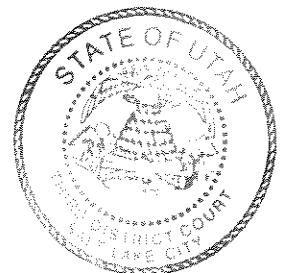
19. On December 28, 2011, the Chviliceks made a \$974.00 payment to Preferred Law.

20. On January 9, 2012, Wells Fargo sent a letter to Mr. Chvilicek indicating that a letter had been sent to Preferred Law acknowledging the representation but no response was received from the firm.

21. The Chviliceks made payments to Preferred Law as follows: on January 30, 2012 - \$297.00; on February 29, 2012 - \$297.00; on March 30, 2012 - \$297.00; and, on April 30, 2012 - \$297.00.

22. Mr. Horton did not deposit the fees paid by the Chviliceks into his client trust account.

23. In a letter to Mr. Chvilicek dated June 14, 2012, Wells Fargo stated that it was unable to process his request for a loan modification because it had not received any input from Mr. Chvilicek's attorney.



24. On October 18, 2012, the Chviliceks submitted a request for a refund of the \$5,084.00 paid to Compass Law and Preferred Law based on their dissatisfaction with the firms' legal representation.

25. In response to several email inquiries regarding the status of the refund request, Preferred Law employee, Tyla Carroll, informed Ms. Chvilicek that Phil Hanley had been assigned to handle the request. Ms. Carroll's email instructed Ms. Chvilicek to contact Mr. Hanley, which they did.

26. On February 12, 2013, after not receiving a response from Mr. Hanley to their request, the Chviliceks resubmitted their request for a refund of the fees they paid to Compass Law and Preferred Law via certified mail, which was received by Preferred Law on February 19, 2012.

27. On October 10, 2013, the OPC served by regular mail to Mr. Horton's preferred address of record an NOIC concerning Ms. Chvilicek's informal complaint, requiring his response within 20 days.

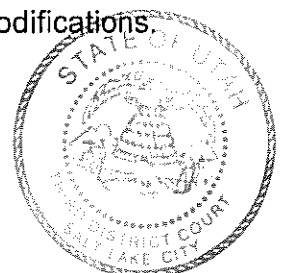
28. Mr. Horton did not provide a response to the NOIC.

(Dodd Matter)

29. Diann Dodd resides in Huntingdon, Tennessee.

30. Ms. Dodd hired Preferred Law, a law office owned and operated by Mr. Horton, for purposes of obtaining a mortgage modification with a reduced interest rate.

31. On December 18, 2012, a fax was sent to Ms. Dodd and her husband from Modification Review Board – Preferred Law, PLLC. Attached to the fax were "testimonials" of other clients who had hired the firm and received loan modifications



32. On December 19, 2012, a fax was sent to Ms. Dodd from Modification Review Board – Preferred Law, PLLC which stated that although the agreement addresses a “no guarantee” policy, Ms. Dodd’s guarantee letter “is binding . . . the guarantee you have been given is binding and supercedes the verbage in the agreement...”

33. In a letter to Ms. Dodd dated December 18, 2012, Preferred Law guaranteed that a modification could be secured for Ms. Dodd conditioned upon several requirements and giving her a payment schedule for payments totaling \$4,900.00, to be made over six months.

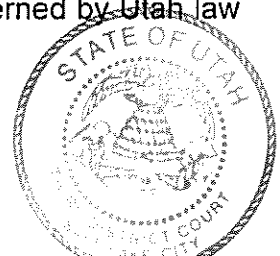
34. The fee and representation agreement was sent to Ms. Dodd dated January 4, 2013, thanking her for choosing the law firm, Preferred Law, PLLC. A Limitation of Liability clause is contained in the agreement.

35. Ms. Dodd made payments to Preferred Law as follows: on December 20, 2012 - \$1,000.00; on January 24, 2013 - \$780.00; on February 22, 2013 - \$780.00; on March 21, 2013 - \$780.00; and, on April 23, 2013 - \$780.00.

36. Mr. Horton did not deposit any of the fees Ms. Dodd paid into his client trust account.

37. Ms. Dodd signed Addendum A to the Limited Services Agreement on January 15, 2013. The Addendum laid out the legal services to be provided to Ms. Dodd.

38. The Addendum also states “Funds paid to Preferred Law may in its discretion be disbursed immediately or be held in a trust account governed by Utah law until such fees are earned by and disbursed to Preferred Law . . .”



39. In an email to Ms. Dodd dated July 1, 2013, a negotiations manager for Preferred Law indicated that Ms. Dodd needed to sign and return a Continuity Fee Form for payment of an additional required \$297.00 monthly fee until a decision was rendered on her file.

40. At some point, Ms. Dodd contacted the Tennessee Attorney General's Office which implements the National Mortgage Settlement and helps persons like Ms. Dodd facing foreclosure.

41. Matt Pulle, an attorney with the Tennessee AG's Office, initiated an investigation into Ms. Dodd's case.

42. Mr. Pulle concluded that Preferred Law offered nothing of value to Ms. Dodd and that she was in a far worse position as a result of her affiliation with Preferred Law.

43. On October 28 2013, the OPC served by regular mail to Mr. Horton's preferred address of record an NOIC concerning Ms. Dodd's informal complaint, requiring his response within 20 days.

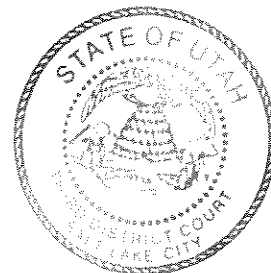
44. Mr. Horton did not provide a response to the NOIC.

(Trager Matter)

45. Eric Trager is a resident of California.

46. Mr. Horton is an attorney licensed to practice law in Utah and Texas.

47. On March 24, 2013, Mr. Trager received notice from his mortgage company, Nationstar Mortgage, that he had been approved to enter a trial period plan under the Home Affordable Modification Program ("HAMP").



48. On April 4, 2013, Mr. Trager emailed Preferred Law, Mr. Horton's law firm, and provided notice that he had been approved for a HAMP trial plan period and provided information stating that he had made the March payment for the modification.

49. On April 5, 2013, Preferred Law sent an email to Mr. Trager with a payment authorization form and a payment schedule.

50. On April 9, 2013, Preferred Law sent an email to Mr. Trager with a Guarantee Letter attached. The Guarantee Letter stated that Preferred Law "guarantees" that a modification will be secured for you conditioned upon some requirements.

51. On April 9, 2013, Preferred Law sent an email to Mr. Trager requesting documents.

52. On April 10, 2013, Mr. Trager sent two emails to Preferred Law providing the requested documents.

53. On April 12, 2013, Preferred Law charged \$650 against Mr. Trager's bank account.

54. On April 22, 2013, Mr. Trager sent an email to Preferred Law wherein he again attached the notice from Nationstar Mortgage indicating that he had been approved for a trial period plan under HAMP. Mr. Trager's message also included a letter from Nationstar dated March 7, 2013, notifying him of issues with the payment he had made.

55. On April 22, 2013, Preferred Law sent an email to Mr. Trager which included an attached Fee and Representation Agreement and an Addendum to Limited Services Agreement.





56. On April 25, 2013, Candice Davies, a loan processor employed by Preferred Law, contacted Nationstar and was informed that Mr. Trager had been approved for a Tier II Home Affordable Modification Program with an interest rate of 4.125% and that Mr. Trager had made payments to Nationstar for March and April.

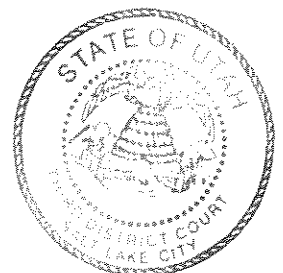
57. On May 1, 2013, Ms. Davies sent an email to Cyndie Morrison, Mr. Trager's representative, and provided her with the information obtained during her April 25, 2013 conversation with Nationstar Mortgage. Ms. Davies stated that it was Preferred Law's position that the current interest rate of 4.125% was the best rate Mr. Trager could obtain.

58. On May 1, 2013, Ms. Morrison responded to Ms. Davies and informed her that Mr. Trager had not made the April payment and inquired as to whether Preferred Law was going to continue to negotiate with Nationstar for better terms.

59. Preferred Law made the following charges against Mr. Trager's bank account: on May 15, 2013 - \$650; on June 12, 2013 - \$450; on July 26, 2013 - \$750; and, on August 15, 2013 - \$650.

60. Mr. Horton did not deposit any of the fees paid by Mr. Trager into his client trust account.

61. On August 23, 2013, Preferred Law wrote Ms. Morrison an email stating that because Mr. Trager had accepted the trial offer and made payments to Nationstar but then defaulted on his payments, he was no longer eligible for a HAMP modification under his current financial circumstances, even though the payments had been made in March and April.



62. On September 12, 2013, Mr. Trager submitted an Audit Request Form to Preferred Law requesting a refund of the \$3,150.00 he had paid.

### III. CONCLUSIONS OF LAW

Mr. Horton specifically admits that he violated the following rules:

63. Rule 1.3 (Diligence) of the Rules of Professional Conduct states:

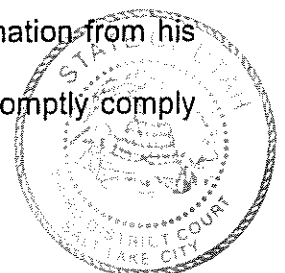
A lawyer shall act with reasonable diligence and promptness in representing a client.

- ❖ (Chvilicek Matter) By failing to respond to inquiries from Wells Fargo on behalf of Mr. Chvilicek, Mr. Horton failed to act with reasonable diligence in violation of Rule 1.3 (Diligence).

64. Rule 1.4(a) (Communication) of the Rules of Professional Conduct states:

(a) A lawyer shall: (a)(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (a)(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (a)(3) keep the client reasonably informed about the status of the matter; (a)(4) promptly comply with reasonable requests for information; and (a)(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

- ❖ (Chvilicek Matter) By failing to respond to requests for information from his clients, failing to keep his clients informed and failing to promptly comply with requests from his clients, Mr. Horton violated Rule 1.4(a) (Communication).
- ❖ (Trager Matter) By failing to respond to requests for information from his clients, failing to keep his clients informed and failing to promptly comply



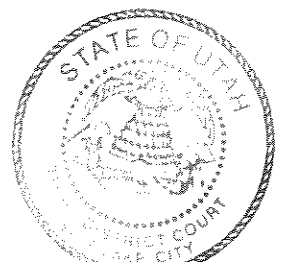
with requests from his clients, Mr. Horton violated Rule 1.4(a) (Communication).

65. Rule 1.5(a) (Fees) of the Rules of Professional Conduct states:

A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

- ❖ (Chvilicek Matter) By failing to provide any meaningful legal services to the Chviliceks in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee, in violation of Rule 1.5(a) (Fees).
- ❖ (Dodd Matter) By failing to provide any meaningful legal services to Ms. Dodd in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee and violated Rule 1.5(a) (Fees).
- ❖ (Trager Matter) By failing to provide any meaningful legal services to Mr. Trager in exchange for fees paid, Mr. Horton charged and collected an unreasonable fee and violated Rule 1.5(a) (Fees).

66. Rule 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules) of the Rules of Professional Conduct states:



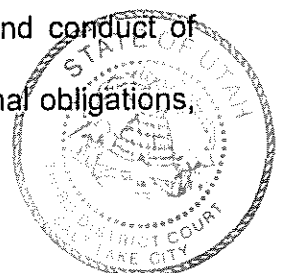
A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

- ❖ (Dodd Matter) By not taking adequate steps to ensure Ms. Dodd obtained independent representation in connection with the engagement agreement she entered into with Mr. Horton and by failing to advise Ms. Dodd that she should in fact seek independent legal review of the liability waiver included in his engagement agreement, Mr. Horton violated Rule 1.8(h)(1) (Conflict of Interest: Current Clients: Specific Rules).

67. Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct states:

With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

- ❖ (Chvilicek Matter) By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Mr. Horton's professional obligations, Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants).
- ❖ (Dodd Matter) By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Mr. Horton's professional obligations,



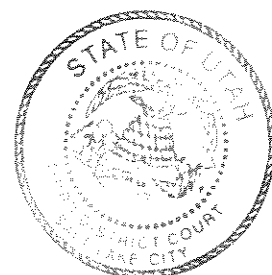
Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants).

- ❖ (Trager Matter) By failing to implement adequate measures to supervise nonlawyer employees and agents to ensure the actions and conduct of these nonlawyers is compatible with Mr. Horton's professional obligations, Mr. Horton violated Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants).

68. Rule 5.4 (Professional Independence of a Lawyer) of the Rules of Professional Conduct states:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: (a)(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; (a)(2)(i) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and (a)(2)(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and (a)(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

- ❖ (Chvilicek Matter) By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a Lawyer).



- ❖ (Dodd Matter) By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a Lawyer).
- ❖ (Trager Matter) By operating Preferred Law by and through other nonlawyer companies and by sharing fees and accounts with his other companies, Mr. Horton violated Rule 5.4 (Professional Independence of a Lawyer).

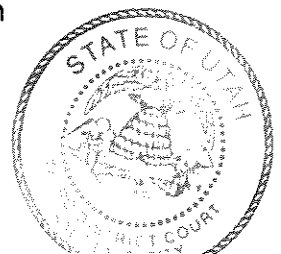
69. Rule 7.1 (Communications Concerning a Lawyer's Services) of the Rules of Professional Conduct states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

- ❖ (Dodd Matter) By guaranteeing results, Mr. Horton misled Ms. Dodd and violated Rule 7.1 (Communications Regarding a Lawyer's Services).
- ❖ (Trager Matter) By guaranteeing results, Mr. Horton misled Mr. Trager and violated Rule 7.1 (Communications Regarding a Lawyer's Services).

70. Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct states:

An applicant for admission to the Bar, or a lawyer in connection with a Bar admission application or in connection with a disciplinary matter, shall not: (b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority....



- ❖ (Chvilicek Matter) By failing to respond to the OPC's NOIC, Mr. Horton Violated Rule 8.1(b) (Bar Admission and Disciplinary Matters).
- ❖ (Dodd Matter) By failing to respond to the OPC's NOIC, Mr. Horton Violated Rule 8.1(b) (Bar Admission and Disciplinary Matters).

71. Rule 8.4(c) of the Rules of Professional Conduct states:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation

- ❖ (Dodd Matter) By taking money and doing little or no legal work, by allowing other companies and nonlawyers to provide legal services and by making misrepresentations to clients, Mr. Horton engaged in conduct that was dishonest or deceitful and violated Rule 8.4(c).
- ❖ (Trager Matter) By taking money and doing little or no legal work, by allowing other companies and nonlawyers to provide legal services and by making misrepresentations to clients, Mr. Horton engaged in conduct that was dishonest or deceitful and violated Rule 8.4(c).

#### **IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES**

72. The OPC and Mr. Horton stipulate that, for purposes of this discipline by consent agreement, there are no aggravating or mitigating circumstances as outlined in Rules 14-607(a) and 14-607(b) of the Standards for Imposing Lawyer Sanctions ("Standards").

#### **V. PENDING CASES**

73. In addition to the three Bar complaints that were consolidated into this formal Complaint, there are six other open OPC cases pending against Mr. Horton as of



this date: OPC Case Nos. 14-2338, 15-0286, 15-0944, 15-1177, 16-0139 and 16-0459. As part of the settlement of this matter, Mr. Horton acknowledges that these complaints raise allegations for possible further investigation. As part of the resolution of this Complaint filed by the OPC, OPC has agreed to dismiss OPC Case Nos. 14-2338, 15-0286, 15-0944, 15-1177, 16-0139, 16-0459.

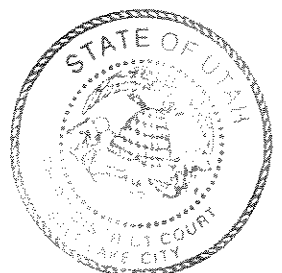
### **RECOMMENDATION OF DISCIPLINE**

74. Pursuant to Rule 14-605(b), Standards, suspension is generally appropriate when a lawyer;

(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding;

75. Subject to the Court's approval, Mr. Horton and the OPC agree that Mr. Horton's license to practice law shall be suspended for a period of three years for his violation of the Rules of Professional Conduct.

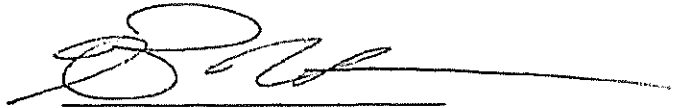
76. During the period of suspension, Mr. Horton is hereby enjoined and prohibited from practicing law in the State of Utah, holding himself out as an attorney at law, performing any legal services for others, giving legal advice to others, accepting any fee directly or indirectly for rendering legal services as an attorney, appearing as counsel or in any representative capacity in any proceeding in any Utah court or before any Utah administrative body as an attorney (whether state, county, municipal, or other), or holding himself out to others or using his name in any manner in conjunction with the words "Attorney at Law", "Counselor at Law", or "Lawyer."





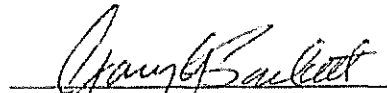
77. To be reinstated to the practice of law from this Order, Mr. Horton must fully comply with the provisions of Rule 14-525, RLDD, including fully reimbursing the Utah State Bar's Lawyers' Fund for Client Protection for any amounts paid on account of his conduct.

Dated this 7<sup>th</sup> day of September, 2016.



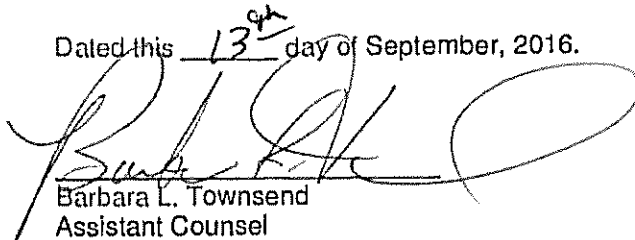
Benjamin R. Horton  
Respondent

Dated this 9<sup>th</sup> day of September, 2016.

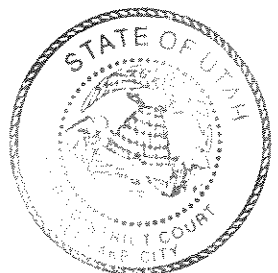


Gary A. Sackett  
Counsel for Respondent

Dated this 13<sup>th</sup> day of September, 2016.



Barbara L. Townsend  
Assistant Counsel  
Office of Professional Conduct

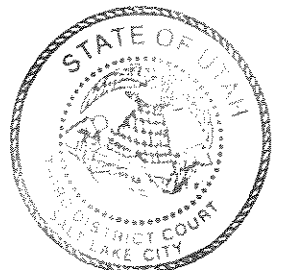


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14<sup>th</sup> day of September, 2016, I sent via U.S. Mail, first-class postage pre-paid, a true and correct copy of the foregoing DISCIPLINE BY CONSENT AND SETTLEMENT AGREEMENT to:

Gary G. Sackett  
J. Angus Edwards  
Jones, Waldo, Holbrook & McDonough, P.C.  
170 South Main St., Suite 1500  
Salt Lake City, UT 84101  
Counsel for Respondent

Eliza Lind



The Order of the Court is stated below:

Dated: September 15, 2016  
04:55:25 PM

/s/ PAIGE PETERSEN  
District Court Judge



Barbara L. Townsend, #5568  
Assistant Counsel  
Utah State Bar  
Office of Professional Conduct  
645 South 200 East  
Salt Lake City, Utah 84111  
(801) 531-9110  
opcfileing@utahbar.org

STATE OF UTAH )  
COUNTY OF SALT LAKE ) ss.

I, THE UNDERSIGNED CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT

THIS 25<sup>th</sup> DAY OF April, 2017  
CLERK OF THE DISTRICT COURT

BY: *[Signature]* DEPUTY

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of  Benjamin R. Horton, #11452  Respondent.	ORDER OF DISCIPLINE: SUSPENSION  Civil No. 140905954 Judge Paige Petersen
---	--

The above-captioned matter having come before the Court upon the pleadings, and the Court having reviewed all pleadings and papers on file herein, including the Affidavit of Consent and the Discipline by Consent and Settlement Agreement entered into between Respondent, Benjamin R. Horton, by and through his counsel, Gary G. Sackett, and the Utah State Bar's Office of Professional Conduct, and the Court having been fully advised in the premises, does now, ORDER, ADJUDGE and DECREE, that for the disciplinary violations set forth in the Discipline by Consent and Settlement Agreement:

IT IS HEREBY ORDERED that Mr. Horton's license to practice law be suspended for a period of three years, effective 30 days from the date the order is signed. Mr. Horton shall comply with all requirements of Rule 14-526 of the Rules of

Exhibit

4

Lawyer Discipline and Disability.

IT IS FURTHER ORDERED THAT during the period of suspension, Mr. Horton is hereby enjoined and prohibited from practicing law in the State of Utah, holding himself out as an attorney at law, performing any legal services for others, giving legal advice to others, accepting any fee directly or indirectly for rendering legal services as an attorney, appearing as counsel or in any representative capacity in any proceeding in any Utah court or before any Utah administrative body as an attorney (whether state, county, municipal, or other), or holding himself out to others or using his name in any manner in conjunction with the words "Attorney at Law", "Counselor at Law", or "Lawyer."

IT IS FURTHER ORDERED that to be reinstated to the practice of law from this Order, Mr. Horton must fully comply with the provisions of Rule 14-525, including fully reimbursing the Utah State Bar's Lawyers' Fund for Client Protection for any amounts paid on account of his conduct.

IT IS FURTHER ORDERED that as part of the resolution of this Complaint filed by the OPC, OPC has agreed to dismiss the six other open OPC cases pending against Mr. Horton: OPC Case Nos. 14-2338, 15-0286, 15-0944, 15-1177, 16-0139, 16-0459.

Approved as to form:

/s/ Gary G. Sackett

Gary G. Sackett

Counsel for Respondent

\*\*\*END OF ORDER\*\*\*

Upon approval of the Court, this becomes an Order when the Judge's signature appears on the top right corner of the first page

