BEFORE A HEARING OFFICER OF
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A NON- MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 08-0766, 08-1999
MARINA N. ALEXANDROVICH, NY Bar No. 154993	)	**HEARING OFFICER'S REPORT**
RESPONDENT.	)	

PROCEDURAL HISTORY

A Complaint was filed on November 3, 2009. The Hearing Officer was assigned on November 10, 2010. The Initial Case Management Conference (ICMC) was set for November 30, 2009. Respondent pro per requested an extension of time to file the Answer, to continue the ICMC and to continue other deadlines in the proceedings because she was suffering the loss of her voice. Her requests were granted in part. Respondent filed her Answer on November 30, 2009. The ICMC was continued to December 7, 2009. The Pre-hearing Conference was set for February 9, 2010 and the Hearing was scheduled for February 16 and 17, 2010. These dates were extended at the request of Respondent so that the hearing occurred on the 146th day from the filing of the Complaint March 29 and 30, 2010. In the interim Respondent filed numerous motions. The Hearing Officer denied Respondent's Motion to Dismiss for Lack of Jurisdiction on February 12, 2010. On March 18, 2010, the Hearing Officer granted the State Bar's Motion to Strike Respondent's Motion for Partial Summary Judgment and denied 1) Respondent's Motion to Dismiss for State Bar of Arizona's Delay in Filing Complaint

and 2) Respondent's Motion to Dismiss for Impossibility of Discovery. At the Hearing on March 29 and 30, 2010, Respondent was represented by counsel.

FINDINGS OF FACT

1. Respondent is a lawyer licensed to practice law in New York. (TR 32:7)
2. Respondent practiced law in Arizona before the United States Immigration Courts pursuant to federal law. (TR 44:10)
3. The State Bar of Arizona has jurisdiction pursuant to Rule 31, Ariz. R. Sup. Ct.

COUNT ONE (Tran; 08-0766)

4. On February 21, 2008, Trang Mong Tran retained Respondent to represent her husband, Yoong Phomhom, in an immigration matter. (TR 85:22)
5. Respondent never provided Ms. Tran with any writing containing the scope of representation and basis for the fee. (TR 88:18-21)
6. On February 22, 2008, Ms. Tran deposited $3000 of a $6000 flat fee directly into Respondent's bank account. (TR 89:19, Exhibit 1)
7. Respondent's office staff then advised Ms. Tran that Respondent had looked at the case and that a criminal attorney would also be needed to deal with Mr. Phonhom's criminal convictions. (TR 98:25 through 99:6). Ms. Tran did not want to pay for two attorneys. (TR 99:10-13) Ms. Tran was able to retain another attorney, Mr. Pope, who was able to address Mr. Phomhom's immigration and criminal conviction issues in the case and to eventually secure his release. (HT 100:16-23; 114:2-5)
8. On or about February 25, 2008, Ms. Tran advised Respondent that she found another attorney and wanted her $3000 refunded. (TR 101:14)

9. Respondent offered to return $2000. (TR 104:1-16) Ms. Tran testified that Cristina who worked for Respondent told her on the telephone that Respondent would retain $1000 for the work she had already done preparing a paper for Mr. Phonhom. (TR 101:17)

10. On March 27, 2008, Ms. Tran sent a fax to Respondent demanding return of the entire $3000. (Exhibit 12, SBA 000034)

11. Afterwards, Ms. Tran called Respondent's office repeatedly demanding the return of her money and gave the office her address for the refund. (TR 101:22, 103:18, Exhibit 10, SBA 000025) Respondent's office had Ms. Tran's cell phone number, at the latest, on March 27, 2008. (Ex. 3, SBA 00009, "incoming call" from (480) 377-1111)

12. Individuals at Respondent's office promised to send her the money. (TR 101:17, 104:1-8)

13. Ms. Tran did not receive the money. (TR 113:7-18) When Ms. Tran did not receive the check, she called Respondent's office several times, and each time she was promised the check would be sent. (HT 103:25 – 104:11)

14. On March 27, 2008, Respondent's office set an appointment for Ms. Tran to pick up her refund on March 28, 2008 at 2:45 PM. (TR 108:3-15, 400:15)

15. On March 27, 2008, Respondent withdrew $2000 from her client trust account in the form of a cashier's check payable to Ms. Tran. (Exhibit 5)

16. On March 28, 2008, at about 2:45 PM Ms. Tran and Mr. Phomhom arrived at Respondent's office. (TR 108:3-25, 110:1-4)

17. Ms. Tran and her husband met with a male staff member. (TR 110:12-25)

18. Ms. Tran asked for copies of all the paperwork prepared by Respondent. (TR 112:2)

19. Ms. Tran demanded the return of her entire $3000. (TR 112:4)

20. The staff member stated that there was no paperwork and asked Ms. Tran to sign some document requiring her to forego interest on the deposit and not file a bar complaint. (TR 112:7-15, 113:7-18)

21. Ms. Tran refused to sign the document. (TR 113:7-18)

22. The staff member then cursed at Ms. Tran and told her to leave. Ms. Tran and Mr. Phonhom testified that the man became enraged when she asked him for a copy of the document for which Respondent was charging $1000. The man who matched the description of Respondent's husband Michael Alexandrovich cursed at Ms. Tran and Mr. Phonhom and told them to "Get the fuck out of the office!" (TR 112:2 through 113:18, 110:12-25, 127:5 through 128:18, Exhibit 108)

23. Respondent deposited the cashier's check into her client trust account on May 1, 2008. (Exhibit 9, SBA 000022)

24. Respondent provided the State Bar a cashier's check for $2000 as a refund to Ms. Tran on Thursday March 25, four days before the first day of the hearing in this matter, March 29, 2010. (TR 14:19)

COUNT TWO – (Diaz; 08-1999)

25. Bernardo Diaz Gomez was detained for deportation due to a criminal conviction in California. (TR 150:4 through 151:22)

26. Bernardo was confined at a facility in Eloy, Arizona. (TR 152:1-7)

27. On or about February 6, 2008, Bernardo's brother Sergio Gomez Diaz retained Respondent to represent Bernardo. (TR 155:7-19)

28. At the time of the representation Respondent had two offices: the Phoenix office at 4019 N. 75th Avenue and the Tempe office at 405 W. Southern Avenue. (TR 152:14, 304:21)

29. Sergio delivered $2000 to Respondent's Phoenix office to pay Respondent for Bernardo's bond hearing. (TR 163:17)

30. Sergio signed a fee agreement and was also required to sign Respondent's *Attorney Release, Waiver, Discharge and Covenant Not to Sue.* (TR 164:24 through 166:2, Exhibit 17)

31. Respondent through her assistant Cristina told Sergio to get a copy of Bernardo's criminal history from California. (TR 152:14 through 153:8)

32. Sergio obtained a copy of the criminal history from California on an expedited basis and delivered it to Respondent's Phoenix office. (TR 153:16-21, 155:7-19, 160:3)

33. The immigration court denied Bernardo's bond request. (TR 163:19, 370:23, Exhibit 26)

34. On or about March 11, 2008, Sergio delivered $2000 of a $4000 flat fee to the Phoenix office for Bernardo's defense in the deportation proceeding. (TR 164:7-23, 183:2-12

35. Sergio later deposited the remaining $2000 directly into Respondent's bank account.

36. After receiving the entire $4000, Respondent, through her staff, advised Sergio that he would need to retain a criminal attorney to deal with Bernardo's criminal convictions. (TR 192:14 through 193:14)

37. Respondent recommended Andrew Fishkin, a California attorney, to assist expunging Bernardo's criminal convictions to strengthen his opposition to deportation. (TR 189:8)

38. Sergio retained Mr. Fishkin to address Bernardo's criminal convictions. (TR 361:12-25)

39. During Respondent's representation of Bernardo, Sergio repeatedly visited and telephoned Respondent's Phoenix office to provide information and learn about the progress of Bernardo's case. (TR 152:14, 156:10-23, 254:18-25)

40. Sergio visited Respondent's Tempe office only twice: once to obtain a document that the staff at Respondent's Tempe office refused to fax to him and the second time near the end of the representation when Sergio picked up Bernardo's file. (TR 254:2-17)

41. When the Department of Homeland Security included an additional criminal conviction in its deportation pleadings, Respondent demanded an additional $2000 to continue the representation. (TR 186:2-13, 266:19 through 268:17)

42. Sergio demanded that Respondent continue the representation because of the $4000 flat fee agreement. (TR 194:13)

43. Respondent refused to do so. Sergio testified that Respondent's paralegal told him that if he did not pay more money, Respondent would stop working. (TR 188:20 through 189:5) Respondent testified that her representation ended when Sergio decided to retain Andrew Fishkin to represent Bernardo in both the deportation and post-conviction proceedings. (TR 361:12-15) Respondent stated that she was not charging Sergio for additional attorney fees when the government added allegations that Bernardo had more convictions, but that she was charging him a total of $2000

for four "application fees". (TR 361:1 through 362:19) Sergio filed his bar charge in November, 2008. (Exhibit 17) Yet at the hearing in this matter on March 30, 2010 was the first time Respondent offered this explanation. (TR 365:11) The Hearing Officer did not believe Respondent's explanation.

44. Sergio retained Mr. Fishkin to defend Bernardo in the deportation proceedings.

45. On or about November 20, 2008, Sergio, pro se, sued Respondent in the Agua Fria Justice Court precinct. (Exhibit 62)

46. Sergio's residence and Respondent's Phoenix office are in the Agua Fria precinct. (Exhibit 62)

47. On or about December 24, 2008, instead of answering the complaint, Respondent filed a *Defendant's Pre-Answer Motion to Dismiss for Improper Venue, Alternatively, Motion to Change Venue for Convenience* ("Venue Motion I") in which she asserted the following:

    a. "The address as shown in the Plaintiff's verified complaint is unrelated to the contract or the dispute arising out of the contract";

    b. "... no events relating to this dispute took place at the address shown in the Plaintiff's verified complaint or anywhere in the West Phoenix, Tolleson, or Agua Fria precinct";

    c. "The events relating to this dispute took place at 405 W. Southern Avenue...";

    d. That she lived and worked in Tempe;

    e. That the proper venue was the University Lakes Justice Court precinct. (Exhibit 64)

48. In Venue Motion I, Respondent did not mention that she had her Phoenix office. (Exhibit 64) Respondent asserted that she was not trying to hide the fact that she had a Phoenix office and that Sergio had listed her Phoenix office address in his Complaint. (Exhibit 62)

49. On or about January 7, 2009, Respondent filed *Defendant's Reply to Plaintiff's Response On Defendant's Pre-Answer Motion to Dismiss for Improper Venue, Alternatively, Motion to Change Venue for Convenience* ("Venue Motion I Reply") in which she:

    a. Alleged that Sergio was using an "assumed name" (Sergio Gomez Diaz rather than Sergio Diaz Gomez)

    b. Claimed that the use of a different name "deprives Defendant of knowing who the Plaintiff really is, and, therefore, deprives Defendant of an opportunity to respond on merits and to properly file a counterclaim";

    c. Accused Sergio of perjury and identity theft;

    d. Asserted that Plaintiff gave a false name to this Court;

    e. Accused Sergio of misleading the Court as to the proper venue. (Exhibit 66)

50. On or about January 21, 2009, the Agua Fria Justice Court denied Venue Motion I. (Exhibit 68)

51. On or about January 28, 2009, Respondent filed *Defendant's Motion for Change of Venue* ("Venue Motion II") in which she:

    a. Stated her address is 405 W. Southern Avenue, Tempe, Arizona;

    b. Stated "The alleged dispute does not arise out of the Agua Fria precinct";

c. Stated "Pursuant to A.R.S. 22-202 and A.R.S. 12-204 the proper venue is University Lakes precinct";

d. Stated "Current venue in Agua Fria precinct is improper, constitutes *forum non convenience* for Defendant, and is prejudicial to Defendant." (Exhibit 71)

52. On or about March 14, 2009, the Court denied Venue Motion II. (Exhibit 75)

53. On or about March 14, 2009, the Court noted that Respondent had not filed an answer to the complaint and stated that any answer to Sergio's complaint should be filed by April 6, 2009. (Exhibit 75)

54. On or about March 17, 2009, Respondent filed *Defendant's Motion to Dismiss Based on the Covenant Not to Sue* in an attempt to enforce the *Attorney Release, Waiver, Discharge and Covenant Not to Sue* Respondent required Sergio and Bernardo to sign. (Exhibit 76)

55. On or about April 7, 2009, the Court denied *Defendant's Motion to Dismiss Based on the Covenant Not to Sue*. (Exhibit 77)

56. On May 4, 2009, Bernardo was released after Mr. Fishkin succeeded in expunging Bernardo's convictions and ending the deportation proceedings. (TR 275:4)

57. On or about June 11, 2009, Respondent filed *Defendant's Motion to Reconsider Previously Denied Motion for Change of Venue Based Upon New York Law* ("Venue Motion III") in which she:

a. argued that New York law should apply to the Court's examination of the venue issue;

b. stated that her Tempe office was the address where the "contracting took place";

c. Offered argument about how the contract was created at the Tempe office, not the Phoenix office. (Exhibit 88)

58. On or about June 17, 2009, Respondent filed the following motions:

a. *Defendant's Motion to Dismiss Complaint as Defective (Exhibit 91)*

b. *Defendant's Motion to Sanction Plaintiff for Procedural Violations (Exhibit 90)*

c. *Defendant's Motion for More Definite Claims (Exhibit 94)*

d. *Defendant's Motion to Dismiss for Failure to Join Indispensable Party (Exhibit 93)*

e. *Defendant's Motion to Reconsider Defendant's Motion for Ruling on Defendant's Motion for Summary Dismissal, Alternatively, Motion to Compel Arbitration and Stay or Dismiss Action (Exhibit 82)*

f. *Defendant's Motion to Compel Arbitration and Stay or Dismiss Action (Exhibit 82)*

59. On or about June 23, 2009, Respondent filed *Defendant's Motion for Holding Plaintiff in Contempt of Court*. (Exhibit 98)

60. On or about June 24, 2009, Respondent filed the following motions:

a. *Defendant's Motion to Dismiss Action for Plaintiff's Ex Parte Communication with Court*; (Exhibit 99)

b. *Defendant's Motion to Dismiss Plaintiff's Modified Complaint for Failure to Join Indispensable Party*. (Exhibit 100)

61. On or about June 26, 2009, Respondent filed *Defendant's Motion to Dismiss Modified Complaint as Defective for Failure to Comply with ARS 12-2602(A) Rule for Claim Against Licensed Professional.* (Exhibit 101)

62. On July 7, 2009, the Court ordered that no further motions be filed until after it had ruled on the pending motions. (Exhibit 107)

63. The Court denied all Respondent's motions, except that it did find that Bernardo was an indispensable party and required Sergio to so join Bernardo to the complaint.

64. Sergio joined Bernardo in the litigation. Sergio testified that an agreement was reached on March 17, 2010 to settle this lawsuit, with Respondent agreeing to pay Sergio $4000 and Respondent and Michael Alexandrovich agreeing to drop lawsuits they filed against Sergio. (TR 203:24 through 204:1)

CONCLUSIONS OF LAW

COUNT ONE (Ms. Tran - 08-0766)

1. The State Bar has not proven by clear and convincing evidence that Respondent violated ER 1.5 (b) by not providing Ms. Tran or Mr. Phonhom with the scope of representation or rate of fee in writing. Ms. Tran was not the client. She was not entitled under the Ethical Rules to a fee agreement or a scope of representation. This is not to say that she was not entitled to a written contract from the lawyer to codify their agreement. But this document would be part of the contracting process. Although the term "client" is not defined in the Attorney Discipline Rules, ER 1.5 (b) states, "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation." The duties

in ER 1.1 through ER 1.18 appear to run to the client. Although the title of these ERs is not dispositive of this issue, it is noted that ERs 1.1 through 1.18 are grouped under **"CLIENT-LAWYER RELATIONSHIP".**

Mr. Phonhom was the person detained who was the subject of the proceedings in Immigration Court. He was the client who Respondent would represent. Respondent did not provide Mr. Phonhom with a written fee agreement, because her services were terminated shortly after she was hired. Respondent testified that Ms. Tran deposited $3000 on February 22, 2008. Mr. Phonhom had a hearing in Florence Immigration Court on Tuesday, February 26, 2008. Respondent stated that she prepared pleadings for Mr. Phonhom and prepared a fee agreement. Respondent was in her car traveling to Florence to see Mr. Phonhom on Monday February 25, 2008, when she received a call from her office staff informing her that her services were no longer necessary. (TR 393:21 through 394:8, 394:24 through 395:7) The dates offered by Respondent correspond to the testimony of Ms. Tran. Therefore, Respondent did not have "a reasonable time after commencing the representation" within which to give Mr. Phonhom a fee agreement with a scope of representation.

2. The State Bar has not proven by clear and convincing evidence that Respondent violated ER 1.15 (d) by not promptly returning Ms. Tran's money to her. ER 1.15 (d) states in part, "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." The Rule also requires the lawyer to "... promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive..." Although the Rule may be broad enough to technically cover the situation of Ms.

Tran, it seems intended instead to cover settlements where third party lien holders are entitled to a portion of the funds.[1] The first sentence of the Rule makes no sense when applied to Ms. Tran. Respondent would not need to notify Ms. Tran that Respondent received funds in which Ms. Tran had an interest. Ms. Tran knew what she paid Respondent for providing legal services to Mr. Phonhom. The question remains, what remedy does a third party payer have when a lawyer does not return funds that were not earned? The answer is a breach of contract action against the lawyer.

3. The State Bar has not proven by clear and convincing evidence that Respondent violated ER 1.16 (d) by not returning to Ms. Tran the unused portion of the fee and not providing a copy of the client file after Respondent's representation was terminated. ER 1.16 (d) requires a lawyer to protect a client's interest upon termination of representation. Since Ms. Tran was not the client the obligations in this Rule do not run to her. As to the client file Respondent only represented Mr. Phonhom for a few days so the file would contain very little. Respondent gave the State Bar documents that included form motions she prepared for Mr. Phonhom's case and copies of some case law. (Exhibit 12, SBA 000036 through SBA 000147) Ms. Tran testified that when she and Mr. Phonhom were in Respondent's office on March 28, 2008 she asked the man if she could see a copy of the "documents" Respondent prepared. The man became enraged and did not show her the documents. Since Mr. Phonhom was present when this request was made it was a request by him

[1] For an example of this see *In re Neuheisel*, 05-0107 (2006) where Respondent received an informal reprimand and was found to have violated ER 1.15 (d). He received money that was for both his client and the opposing party but he did not properly handle disbursement of the portion of the funds that was for the opposing party.

for his file. Respondent's representative should have transmitted the documents to Mr. Phonhom. However, there is no written request for Mr. Phonhom's file in the exhibits in this case. There is no evidence that Respondent knew about the March 28, 2008 meeting or the client's request for the file. The Hearing Officer believed Respondent's testimony that her husband (and legal assistant) Michael Alexandrovich told Respondent that the meeting of March 28, 2007 did not occur. (TR 356:16)

4. The State Bar has not proven by clear and convincing evidence that Respondent violated ER 8.1 by making a false statement of material fact in her submissions to the State Bar when she denied that Ms. Tran visited her office on March 28, 2008, or by failing to correct such a misapprehension. The only direct testimony on this point was that Respondent asked her husband if the meeting of March 28, 2008 occurred and he insisted that it did not occur. This was a lie by Michael Alexandrovich. The meeting clearly occurred. Respondent knew that the meeting was scheduled and that Respondent had prepared the cashier's check for the refund. It is troubling to follow the logic. Why would Ms. Tran demand a refund in numerous telephone calls over a month, but fail to show up for the meeting to collect the check that Respondent had prepared? Respondent read Ms. Tran's vivid description of the March 28, 2008 meeting in Ms. Tran's November 4, 2008 submission to the State Bar. (Exhibit 10) Yet Respondent believed her husband's explanation over reason and logic. Although Respondent should have been far more skeptical in this situation, the Hearing Officer concludes that the evidence is not clear and convincing that at the time Respondent asserted to the Bar that the meeting did not occur, she knowingly lied.

5. The State Bar has not proven by clear and convincing evidence that Respondent violated ER 8.4 (c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by denying Ms. Tran's visit to Respondent's office on March 28, 2008. The reasons for this conclusion are set forth in Conclusion of Law #4 above.

COUNT TWO (Diaz; 08-1999)

1. The State Bar has not proven by clear and convincing evidence that Respondent violated ER 1.5 (a) by not completing the scope of representation in Bernardo's deportation proceedings, not refunding any of the flat fee ($4000), and therefore charging an unreasonable fee. The Hearing Officer finds that Respondent did not complete the scope of representation in Bernardo's deportation proceeding and that Respondent did not refund a portion of the flat fee charged for that proceeding. However, the only reason that Respondent's actions do not amount to an ethical violation is that the duties in ER 1.5 (a) run to the client, Bernardo, and not to his brother Sergio who paid the fee. Sergio's remedy was to bring a civil action against Respondent. This is what he did. Sergio testified that after numerous motions by Respondent were denied in Sergio's breach of contract action, Respondent finally agreed in March 2010 to settle by paying Sergio $4000.

   The Hearing Officer believed Sergio's testimony that Respondent told him that the $4000 would be for the completion of the deportation proceedings. However, the e-mail sent by Respondent to her assistant Cristina can be read two ways. (Exhibit 17, SBA 000266) In the message Respondent says in part, "...I can file Motion to Terminate the proceedings (because I belive (sic) attempted robbery does not make him deportable). If the judge is convinced, he will close his case (terminate

deportation). It is a defense separate from bond, $4000. Stronly (sic) encourage family to pay $4000 b/c it is important to act fast (Bernardo has multiple convictions) before Government add more charges of deportability." Sergio interpreted this to mean that $4000 was to complete the deportation proceedings. Respondent's office staff wrote in the fee agreement for Bernardo that the representation was for "Deportation Defense Before the Eloy Immigration Court Including Cancellation of Removal for an LPR if the charge of an Aggravated Felony is not sustained." (Exhibit 17, SBA 000257) LPR means lawful permanent resident. (TR 45:20-25) The printed form in the fee agreement says, "...that Attorney's flat fee shall be $4,000 (four thousand) excluding all applications fees and other miscellaneous expenses ..." This accounts for Respondent's testimony that when the Government added allegations of more felony convictions for Bernardo, Respondent in asking for an additional $2000 (over the $4000 already paid) from Sergio was not asking for additional attorney fees, but was asking for money to pay "application fees". (see paragraph 42 above) The Hearing Officer finds that this was not appropriately explained to Sergio in advance of his $4000 payment.

Respondent has a valid point that her e-mail message implied that the $4000 fee was to get the deportation proceeding dismissed quickly before any more allegations of prior convictions were alleged. This inference was not made clear to Sergio. The e-mail and the fee agreement should have clearly stated the effect of allegations of additional prior felony convictions. Instead, the e-mail showed that Respondent knew of Bernardo's multiple prior convictions. If additional allegations by the government could be made, Respondent should have clarified for Sergio the potential additional

fees or costs to defend against that event. If Bernardo had been paying the fees, the Hearing Officer would have found that the Bar had proven by clear and convincing evidence that Respondent's conduct violated ER 1.5 (a). The fee was called both a "flat fee" and "earned upon receipt" in the fee agreement. ER 1.5 (d) and ER 1.16 (d) are clear that the unearned portion of the fee must be refunded upon termination. Respondent did not establish at the hearing that at her rate of $275 per hour she had earned the $4000 fee just for her work in the deportation proceedings. Sergio had previously paid her $2000 for the bond proceeding.

2. The State Bar has proven by clear and convincing evidence that Respondent violated ER 1.8 (h) (1) when she required Bernardo to sign a fee agreement that contained a covenant not to sue, which would bar a legal malpractice claim. (Exhibit 17 SBA 000260) The offending boilerplate language in a document Respondent attached to Bernardo's fee agreement and which Bernardo was required to sign states, "I hereby release, waive, forever discharge, and covenant not to sue Marina Alexandrovich, her agents, employees, and any persons acting as employees (hereafter called the "Releasees"), from and against any and all liability for any harm, injury, damage, claims, demands, actions, causes of action ...that I may have..." The document requires the client to hold Respondent and her employees harmless from any claim filed by the client or his family "... arising out of my filing for DR (Deportation Relief)". However, Respondent is not in violation of ER 1.8 (h) (1) for requiring Sergio to sign a fee agreement with a covenant not to sue, only because Sergio was not the client and the Hearing Officer has concluded that the duties in ER 1.8 run only to a client.

The covenant not to sue was not harmless in this case. Respondent invoked the covenant to try to get the Justice of the Peace to dismiss Sergio's breach of contract action. (Exhibit 76) The court denied Respondent's motion. Respondent also insisted that Bernardo was a necessary party in Sergio's breach of contract lawsuit in Justice Court. Her motion at add Bernardo as an indispensable party was the only motion she filed that the judge granted. Her action would seem inconsistent with her attempt to use the covenant not to sue against Sergio.

3. The State Bar has proven by clear and convincing evidence that Respondent did not have a good faith basis for her motions to change venue in Sergio's lawsuit. Respondent should have known that Sergio had numerous contacts with her Phoenix office. All Respondent would have had to do was find out from her staff where Sergio interacted with them. She knew she maintained an office in Phoenix in the Agua Fria precinct. She advertised in the Yellow Pages both her Tempe and Phoenix offices. (TR 152:7) The location of her office at 75th Avenue in west Phoenix was probably to be more convenient for the population she was trying to serve. If it was in her business interest to have an office on the west side of Phoenix, it was certainly not inconvenient for her to travel to the Agua Fria Justice Court. To argue that the Agua Fria Justice Court was a forum that was not convenient was disingenuous and was interposed to make life more difficult for Sergio.

   The ERs 3.1 through 3.9 are entitled "Advocate" in the Attorney Discipline Rules. The Comment to ER 3.1 refers several times to the duty of an attorney not to abuse legal procedure when representing a client. In the Justice Court proceeding Respondent was representing herself. Is an attorney representing herself representing

a client? Another way to determine if the ERs in the 3.1 through 3.9 series apply to attorneys who are representing themselves is to discern the value that these ethical rules are designed to pursue. It appears that the value is the integrity of the legal system.

The introduction to ABA *Standard* 6.0 "Violations of Duties Owed to the Legal System" states in part, "Lawyers are officers of the court, and the public expects lawyers to abide by the legal rules of substance and procedure which affect the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or make a false statement of material fact (Rules 3.3, 3.4 and 4.1/DR 7-102 (A)). Ethical standards require that a lawyer refrain from filing frivolous suits (Rule 3.1/DR 7-102) ... or otherwise interfering with a legal process (Rules 3.4, 3.6, 4.1, 4.4/DR 7-106 and DR 7-107)." *Standard* 6.2 is entitled "Abuse of the Legal Process". It states: "Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding." In the commentary the following example is used, "In many cases, lawyers are suspended when they knowingly violate court orders. Such knowing violations can occur when a lawyer fails to comply with a court order that applies directly to him or her, as in the case of lawyers who do not comply with a divorce decree ordering spousal maintenance or child support." This is an example of ER 3.4 (c) being applied to a lawyer who is not representing a client in a proceeding, but who in his own divorce is not obeying court orders. The value that the lawyer is expected

to uphold even when he is not representing a client but when he is a litigant is the correct functioning of the legal system.

In another case the court applied ER 3.3 (Candor Toward the Tribunal) to a lawyer in his own garnishment proceeding. The commentary to *Standard* 6.11 states: "In *Office of Disciplinary Counsel v. Grigsby*, 493 Pa. 194, 425 A.2d 730 (1981), a lawyer was disbarred where he filed a false sworn pleading in connection with a pending garnishment proceeding. The pleading stated that the funds in the lawyer's checking account belonged to clients and could not be reached. The lawyer's action to save his money from garnishment was both intentional and damaging to his creditors." The Hearing Officer concludes that ERs 3.1, 3.3 (a) (1) and 4.4 (a) apply to Respondent as a litigant in Sergio's Justice Court lawsuit. Even when attorneys are not representing clients they are officers of the court and are expected to uphold the integrity of the legal system.

4. The State Bar has proven by clear and convincing evidence that Respondent did not file an Answer to Sergio's Complaint by April 6, 2009. On March 14, 2009 the Justice Court stated that an answer had not been filed and that on March 11, 2009 Respondent's Motion to Dismiss and Motion for Change of Venue had been denied. The Court stated, "An answer to the complaint has not been filed and should be filed no later than April 6, 2009." The Hearing Officer does not consider Respondent's decision not to file an answer by April 6, 2009 to be an ethical violation. First, the sanction for failing to answer is default. Second, Respondent filed on March 19, 2009 a Motion to Dismiss Based on the Covenant Not to Sue. She later filed many other motions. Sergio applied for a Default on April 15, 2009. (Exhibit 79) He testified at

the hearing that a default judgment was entered against Respondent. (TR 265:24) The Hearing Officer does not interpret Respondent's choice to pursue dismissal through motion as a direct violation of a court order to answer the complaint by a certain date.

5. The State Bar has proven by clear and convincing evidence that Respondent violated ER 3.1 when Respondent did not have a good faith basis in law and fact for advocating that Sergio used an assumed name, committed perjury, or committed identity theft. Respondent admitted at the hearing that she knew Sergio was suing her. (TR 385:12 through 386:17, 387:13-25) She stated that she was searching a database for Sergio and found a person with prior felony convictions. Actually, Sergio worked for the Arizona Department of Corrections at this time and Respondent knew that. She and her husband Michael Alexandrovich were later to accuse him of abusing his position. She knew he was not a felon. He testified that when he became a U.S. citizen he changed his name from Sergio Diaz Gomez (his brother was Bernardo Diaz Gomez) to Sergio Gomez Diaz to honor his deceased mother. (TR 149:14) Respondent's fixation with this issue was a bad faith attempt to smear Sergio. It was in this Hearing Officer's opinion an example of Respondent's scorched earth tactics. She filed too many motions. She was upset that Sergio was using words like "fraud" to describe her conduct and she vastly overdid her response to his actions in the lawsuit. Sergio is a pro per litigant; a particularly tenacious one. His choice of words is at times inflammatory. Apparently in a certificate of service in a response to one of Respondent's Motions to Dismiss, Sergio said he served the documents on the "unprofessional defendant". (Exhibit 98) Respondent's gross overreaction to this statement was to file "Defendant's Motion for Holding Plaintiff in Contempt of

Court". (Exhibit 98) She referred to his certificate as "malicious", a "deliberate, willful, and atrocious mockery of the proper Court's procedure," and called for him to be held in contempt. But Respondent is an attorney. She should have known better than to spend time and paper pummeling the court with multiple change of venue motions and motions attacking Sergio's identity.

Her conduct was obstreperous, frivolous and designed to win by intimidation of Sergio or by overworking the court. Respondent should learn a lesson through these proceedings to change the way she does business. She is very quick to take Ms. Tran's and Sergio's money, but extremely reluctant to give back the money when it is due. Her excuses for not returning Ms. Tran's money were that she did not have an address for Ms. Tran. This makes no sense because the record is clear that Ms. Tran was peppering Respondent's office with calls about receiving her money back. Ms. Tran testified that she gave Respondent's office staff her address. When Respondent was confronted with the fact that Ms. Tran's address was on her bar charge, Respondent changed her story to be that Respondent thought she would be accused of "harassing" Ms. Tran if Respondent sent her a check for $2000 after the State Bar had the bar charge. This explanation makes no sense. Respondent simply decided to believe her husband that Ms. Tran failed to appear for the March 28, 2008 meeting to pick up the check that Respondent had prepared for her. What could Respondent have thought about the months that went by after that meeting? Respondent could not have rationally thought that Ms. Tran simply decided to give up on getting her money. Respondent even offered the explanation that Respondent was afraid of a scam that someone else beside Ms. Tran would try to get the refund. This is the same sort of

convenient "identity" problem that Respondent tried to use against Sergio. Respondent has no "identity" problem issues when she is taking these people's money, only when it is time to return it.

6. The State Bar has proven that Respondent violated ER 3.1 by filing numerous motions that were without merit. This was a frivolous effort to defend against Sergio's complaint. The venue motions and the motions regarding Sergio's identity have already been addressed. Respondent filed a Motion to Sanction Plaintiff for Procedural Violations when Sergio in response to one of Respondent's motions said his complaint had some mistakes and needed to be corrected.

7. The State Bar has proven by clear and convincing evidence that Respondent's conduct as set forth above violated ER 4.4 (a) and 8.4 (d). Respondent used means that had no other purpose than to embarrass, delay or burden Sergio, especially in her motions related to his identity. Her numerous motions (all of which were denied except for adding Bernardo as a party) were prejudicial to the administration of justice. This blizzard of paper was unnecessary and unproductive. If Respondent had a defense to Sergio's lawsuit on the merits she should have filed an answer and defended on the basis that she earned the fee. Respondent should not be sanctioned for choosing to try to get the lawsuit dismissed for appropriate legal reasons. But to file motions regarding Sergio's identity or regarding venue in Tempe when she was doing business in the Agua Fria precinct on a regular basis and should have known Sergio had contacted her staff at the Phoenix office repeatedly, was a misguided attempt to win by throwing everything up against the wall and hoping that either Sergio would give up or something would stick.

8. The Hearing Officer has not found that the Bar has proven violations of ER 3.3 (a) (1) and 8.4 (c). The statements in Respondent's motions for change of venue are literally true. She does have an office in Tempe. The fee agreement has the Tempe office address printed at the top. That, however does not mean Sergio signed it in Tempe. Nor does it mean that Sergio did not transact business with Respondent's office staff in the Phoenix office. (Exhibit 73, SBA 001086, Sergio lists his numerous contacts with the Phoenix office including paying some of the fee there)

RESTITUTION

The Bar has not asked for restitution. Belatedly, Respondent submitted to the Bar a cashier's check for $2000 for Ms. Tran and Respondent agreed to pay Sergio $4000 in settlement of his civil lawsuit.

ABA STANDARDS

The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. See *In re Peasley,* 208 Ariz. 27, 33, 35, 90 P. 3d 764, 770, 772 (2004); *In re Rivkind,* 164 Ariz. 154, 157, 791 P.2d 1037, 1040. (1990).

In determining an appropriate sanction, the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *See, Peasely,* 208 Ariz. at 35, 90 P. 3d at 772; *Standard* 3.0.

The Hearing Officer has found that Respondent violated ER 1.8 (h) (1) [requiring Bernardo to sign a covenant not to sue Respondent], ER 3.1 [filing motions in Sergio's lawsuit against her that did not have a good faith basis in law or fact], ER 4.4 (a) [filing motions in Sergio's lawsuit for the purpose of embarrassing , delaying and burdening Sergio] and ER 8.4 (d) [filing motions in Sergio's lawsuit without merit was prejudicial to the administration of justice].

The most serious conduct is the conflict of interest in violating ER 1.8 (h) (1). *Standard* 4.33 states, "Reprimand [censure in Arizona] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client."

Therefore, the Hearing Officer concludes that the presumptive sanction is censure. Respondent is not a member of the State Bar. Therefore, the Court cannot disbar or suspend her.

Duty Violated

Respondent violated a duty owed to the client when she required the client to sign a covenant not to sue her. She violated a duty to the legal system when she filed motions without merit in Sergio's lawsuit.

Mental State

Respondent was negligent in not determining that the covenant not to sue was a conflict of interest in violation of ER 1.8 (h) (1). Perhaps her inexperience in the practice of law led to her mistake in having including this covenant in her fee agreements. She

was admitted to practice in New York on January 28, 2004. (TR 34:17-19) It was in Respondent's interest not to be sued for malpractice or for fees. However, her interest conflicts with the interest of our society in permitting clients to seek relief against their attorneys in malpractice actions. Her fee agreement contained an arbitration policy. (Exhibit 17, SBA 000258) Fee arbitration is of course permitted. But the arbitration policy in Respondent's fee agreement was broader than just fee arbitration. It stated, "... any dispute between the parties of the Retainer Agreement must be resolved by binding arbitration." This language is broad enough to preclude a lawsuit for malpractice or a charge to the Bar of unethical behavior.

It appears that Respondent was using boilerplate language from other documents.

Injury

Respondent caused actual injury to Sergio in that she delayed the lawsuit until a settlement was finally reached in March, 2010. She caused the potential for injury to Bernardo, because she might have used the covenant not to sue to prevent him from bringing a malpractice action, if he had any basis for such a claim. The record is not clear that Bernardo was incarcerated longer than he otherwise would have been due to any action or inaction by Respondent.

Aggravating Factors

Standard 9.22 (b) - Dishonest or selfish motive. Respondent was selfish in filing frivolous motions against Sergio, especially with regard to his identity. Her purpose was to avoid paying him any money from the fees he had paid her.

Standard 9.22 (g) - Refusal to acknowledge wrongful nature of her conduct. Respondent should have admitted to the Bar that she should not have filed motions

challenging Sergio's identity. She should have admitted sooner in the proceedings that she should not have used covenants not to sue in her fee agreements. She should have been far more skeptical of her husband's explanation that no meeting occurred with Ms. Tran on March 28, 2008. Respondent should not stonewall so much.

The Bar has asked for a finding that Respondent committed multiple offenses and engaged in a pattern of misconduct. The series of her motions in Sergio's lawsuit is considered by this Hearing Officer as conduct that combined leads to a conclusion that ER 3.1 and 4.4 and 8.4 (d) were violated. These aggravating factors have not been found. Bad faith obstruction of the process and false evidence in the bar proceeding have not been found because the Hearing Officer has found that Respondent did not deliberately lie about the March 28, 2008 meeting, but she was misled by her husband. She has not been found to have violated ER 1.5 or 1.15 by not returning funds to Ms. Tran and Sergio only because they were not "clients". Therefore, technically she cannot be found to be indifferent to making restitution. The victims Bernardo and Sergio were not vulnerable in the sense that an incapacitated person might be vulnerable.

Mitigating Factors

Standard 9.32 (a) Absence of a prior disciplinary record. Respondent has no prior discipline.

Standard 9.32 (f) Inexperience in the practice of law. At the time of these events in 2008 Respondent had been a lawyer for about four years.

Respondent asserted that personal and emotional problems should also be considered as a mitigating factor. The Hearing Officer concludes that the fact that Respondent was pregnant with her second child at the time of these events was not in and

of itself sufficient to establish this factor. The fact that she came to the United States from Russia where she lived in a different culture and with a different language is also not a mitigating factor.

Respondent cannot cast herself as naïve in the ways of the American legal system and at the same time engage in the sharp practices of fighting Sergio tooth and nail in the Justice Court lawsuit. Respondent threw every legal argument imaginable at Sergio and the Justice Court, including the covenant not to sue, the arbitration clause, venue, Sergio's identity, adding Bernardo as an indispensable party and the application of New York law to any dispute arising under Respondent's fee agreement.

PROPORTIONALITY REVIEW

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 615, 691 P.2d 695 (1984).

Respondent asserts that *In re Van Dox*, 152 P.3d 1183 (2007) is instructive. Carly Van Dox represented a client in a private mediation in Arizona even though she was licensed to practice only in Florida and Virginia. She was found to have engaged in the unauthorized practice of law [ER 5.5] and to not have responded to the Bar's inquiries [Rule 53 (f)]. The Court discussed the option of diversion for Ms. Van Dox. The Bar argued that since she was not a member of the Bar diversion was not available. The Court did not reach that issue because it determined that diversion was not appropriate. The

Hearing Officer in the instant case finds that diversion is also not appropriate. It is hoped that Respondent will learn from this experience and change her fee agreement to eliminate the covenant not to sue and modify the arbitration policy. She testified in the hearing that she must modify the fee agreement and eliminate the covenant not to sue. (TR 456:4) Therefore, diversion would not be necessary to educate Respondent in this matter.

The Court decided that an informal reprimand was the appropriate sanction in Van Dox. No injury occurred to either party in the mediation. The mediator was told by Van Dox (after opposing counsel raised the issue of Van Dox not being an Arizona lawyer) that she was not licensed in Arizona. The mediator consulted on the telephone with another attorney and returned to tell Van Dox that it was appropriate for her to continue the representation in the mediation. The Court determined that this was a one-time occurrence where Van Dox was negligent.

In the instant case, Respondent probably has used the covenant not to sue in other fee agreements. However, the Hearing Officer is not aware of any other complaints against Respondent concerning that covenant and Bernardo did not file a bar charge in this matter. Sergio filed the charge in Count Two of this Complaint and he was upset about the $4000 fee.

In *In re Leather*, SB 05-0973, Respondent received an informal reprimand when he failed for nearly three months after his client terminated his representation to refund any part of a $1500 advance fee. He was found to have violated ER 8.4 (a) by attempting to withhold $750 of the advance fee when he could only establish that he had earned

$190 of the fee. He also failed to advise the client that upon termination of the lawyer's services the client was entitled to a refund of any unearned portions of an advance fee.

In *In re McMurdie* SB 02-1831 (2005) Respondent received an informal reprimand when she failed to obey a court order, a wage assignment. Respondent employed a woman in her law office. The woman was divorced. Her ex-husband got a wage assignment for child support and lodged the assignment with Respondent, his former wife's employer. Respondent was a domestic relations practitioner and knew full well that an employer must either challenge the assignment or execute it against the employee's wages. Respondent's state of mind was deemed to be negligent. She had no prior disciplinary offenses. However, there was actual injury to the children who had to wait for the child support. Respondent ultimately settled with the ex-husband. The violation was of ER 8.4 (d). At the time of the violation Respondent had been an attorney for eight years.

The Hearing Officer was not able to locate any cases involving a violation of ER 1.8 (h) (1). One case involved a violation of ER 1.8 (a), *In re Cook* 04-0713 (2006). In *Cook*, the Respondent agreed to take jewelry from a client who was a debtor in bankruptcy. When he referred to his fee in a filing in bankruptcy court Respondent did not mention jewelry as a part of his fee, but simply provided a sum of money that Respondent thought was the equivalent of the jewelry. When the court found out about the jewelry, Respondent deposited the jewelry with the trustee in bankruptcy. The court denied Respondent's application to have the jewelry returned to him as part of his legal fee and instead ordered the jewelry liquidated for the benefit of the bankruptcy estate. Respondent was found to have violated ER 1.8 (a) because he had improperly entered

into a business transaction with his client without following the required procedures in ER 1.8. Respondent received an informal reprimand. Respondent had been in practice 32 years at the time of these events. He had no prior discipline. His mental state was negligent and there was no injury to his client. It was an isolated incident. The Hearing Officer relied on *Standard* 4.34 which states in part: "Admonition [informal reprimand in Arizona] is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests... and causes little or no actual or potential injury to a client."

RECOMMENDATION

A censure could certainly be justified in this matter. Respondent is fortunate that the Hearing Officer interpreted ER 1.15 (d) not to apply to Ms. Tran and Sergio in this instance, even though the Rule refers to a lawyer holding money for a third party and Respondent's counsel seemed to concede in Post Hearing Memorandum that ER 1.15 (d) did apply in this situation. (Post Hearing Memorandum, page 3) But upon closer examination Respondent's conduct in Sergio's lawsuit was an overreaction to being sued and being called "unprofessional" and a "fraud". The vehemence with which she attacked Sergio is troubling. However, belatedly (and after a default judgment was entered against her) she has agreed to settle the matter for a payment of $4000 to Sergio. She also agreed belatedly to submit a cashier's check to Bar Counsel in this matter for Ms. Tran. These actions were probably taken to have some influence on this disciplinary proceeding because even though these claims against her were pending for a long time Respondent

resolved the claims in March, 2010, the same month of the hearing in this disciplinary matter.

This is Respondent's first experience with the disciplinary process. Unlike Ms. Van Dox she did not ignore the Bar's requests for information. She participated vigorously in this process. She should take from this proceeding the lesson that she is responsible for knowing what is going on in her office. Her husband is not a lawyer and he should not be her enforcer by trying to strong arm clients who are entitled to refunds into signing covenants not to sue (or not to bring bar charges). The Hearing Officer thinks that an informal reprimand and not a censure is the appropriate sanction. Actually, the Hearing Officer would like to see Respondent on probation with Law Office Management Program (LOMAP) terms so that she could get the benefit of someone to observe her office operation and educate her on where the pitfalls are and what she needs to do now to make sure she is never before the disciplinary system again. But she is not a member of the Bar. The Hearing Officer surmises that member services such as LOMAP are not available to a non-member. Observing Respondent at the hearing (where she was crying when she realized that the evidence strongly suggests that her husband lied to her about the March 28, 2008 meeting), the Hearing Officer concluded that she has been impacted significantly by this process. A censure for her first violations would not be necessary.

SANCTION

The Hearing Officer recommends that Respondent be sanctioned as follows:

1. Respondent receive an informal reprimand and

2. Respondent pay the costs of these proceedings, including the Bar's costs and expenses and the expenses incurred by the Office of the Disciplinary Clerk.

DATED this 12 day of May, 2010

Hon. Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 12th day of May, 2010.

Copy of the foregoing mailed
this 13 day of May, 2010, to:

Thomas E. McCauley
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

Robert Van Wyck
The Van Wyck Law Firm
150 West Dale, Suite 6
P.O. Box 398
Flagstaff, AZ 86002

by: Deann Baker