

SUPREME COURT OF ARIZONA

In the Matter of a Nonmember of) Arizona Supreme Court
the State Bar of Arizona) No. SB-16-0022-AP
)
MARINA N. ALEXANDROVICH,) Office of the Presiding
) Disciplinary Judge
Respondent.) No. PDJ20159074
) **FILED 09/06/2018**
_____)

DECISION ORDER

Pursuant to Rule 59, Rules of the Supreme Court, Respondent appealed the hearing panel's Decision and Order Imposing Sanctions and the panel's and presiding disciplinary judge's decisions to deny several post-hearing motions. Upon consideration, this Court suspended the appeal and revested jurisdiction to allow the presiding disciplinary judge to reconsider the motion to disqualify panel member Richard L. Brooks.

Upon remand, the disciplinary clerk appointed the Honorable Maurice Portley (retired) as the Acting Presiding Disciplinary Judge to rule on the motion to disqualify. Following briefing by the parties and oral argument, Judge Portley denied the motion. Respondent has also appealed this decision.

The Court has considered the parties' briefs, supplemental briefs, and the entire record in this matter.

The Court affirms Judge Portley's ruling denying the motion to disqualify Mr. Brooks. Denial of a motion to disqualify is reviewed

for an abuse of discretion. *In re Aubuchon*, 233 Ariz. 62, 66 ¶ 16 (2013). Judge Portley properly applied the preponderance of the evidence standard in Rule 52(g) in denying the motion to disqualify. In reaching his decision, Judge Portley properly weighed the evidence presented by both sides and found Mr. Brooks' affidavits more credible. Having failed to establish bias or any other disqualifying fact, Respondent has not demonstrated that Judge Portley abused his discretion in denying the motion.

With respect to the original appeal, the Court accepts the panel's determination that Respondent violated ERs 1.2, 1.3, and 1.16. We reject the panel's determination that Respondent violated ERs 1.5 and 3.1. There was insufficient evidence to support these charged violations. Further, the Court rejects the panel's findings that Respondent submitted false evidence in the form of the warning letter to her client (Exhibit 66) and her look-back fee accounting (Exhibit 57). There was insufficient evidence to support the findings that this was false evidence.

With respect to the sanction, the Court affirms the imposition of a reprimand, probation, and costs and expenses of the discipline proceeding.

IT IS ORDERED affirming the decision and sanction of the hearing panel as set forth in this order.

IT IS FURTHER ORDERED lifting the stay of the decision and
final judgment.

_____/s/_____
SCOTT BALES
Chief Justice

TO:

Mark I Harrison
Brian K Mosley
Jana Lynn Sutton
Robert B Van Wyck
Nicole Kaseta
Amanda McQueen
Sandra Montoya
Maret Vessella
Beth Stephenson
Don Lewis
Mary Pieper
Raziel Atienza
Lexis Nexis

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

MARINA ALEXANDROVICH,

Respondent.

PDJ-2015-9074

FINAL JUDGEMENT AND ORDER

[State Bar File No. 15-0077]

FILED MAY 3, 2016

This matter came for hearing before the Hearing Panel, which rendered its decision on March 14, 2016. An appeal was filed, but no stay under Supreme Court Rule 59(c) was requested nor issued.

Now Therefore,

IT IS ORDERED Ms. Alexandrovich is reprimanded effective March 14, 2016, the date of the Hearing Panel's Decision and Order Imposing Sanctions.

IT IS FURTHER ORDERED Ms. Alexandrovich is placed on probation for eighteen (18) months.

IT IS FURTHER ORDERED Ms. Alexandrovich shall participate in the State Bar's fee arbitration with Alvarez and shall timely comply with any arbitration award. Within ten (10) days from the date of the final judgment and order, Ms. Alexandrovich shall contact the fee arbitration coordinator and file a petition for fee arbitration.

IT IS FURTHER ORDERED Ms. Alexandrovich shall submit to a State Bar Membership Assistance Program ("MAP") assessment, and complete any follow up deemed necessary by MAP.

IT IS FURTHER ORDERED under Supreme Court Rule 60(2)(B), the issue of costs shall abide the final order of the Supreme Court. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 3rd day of May 2016.

William J. O'Neil

William J. O'Neil
Presiding Disciplinary Judge

Copies of the foregoing e-mailed this 3rd day of May 2016, and mailed May 4, 2016, to:

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**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

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

MARINA N. ALEXANDROVICH,

Respondent.

PDJ-2015-9074

**DECISION AND ORDER
IMPOSING SANCTIONS**

[State Bar No. 15-0077]

FILED MARCH 14, 2016

The Hearing Panel ("Panel"), composed of Michael Snitz, a volunteer public member, Richard L. Brooks, a volunteer attorney member, and the Presiding Disciplinary Judge, William J. O'Neil ("PDJ"), held a two (2) day hearing under Rule 58(j), Ariz. R. Sup. Ct., on December 17-18, 2015. Nicole S. Kasetta appeared on behalf of the State Bar of Arizona ("State Bar"). Robert Van Wyck, Esq., appeared as attorney for Marina Alexandrovich ("Respondent"). The Panel now issues the following "Decision and Order Imposing Sanctions," under Rule 58(k), Ariz. R. Sup. Ct. after carefully considering the case file, exhibits, and testimony.

I. PROCEDURAL HISTORY

On July 27, 2015, the Attorney Discipline Probable Cause Committee issued an order finding probable cause to file a Complaint against Respondent. The State Bar of Arizona (the "State Bar") filed its single count Complaint on August 19, 2015. Notice of Service of the Complaint was filed August 24, 2015, and the Disciplinary Clerk assigned the PDJ the following day.

Respondent filed a Motion to Stay or Dismiss on September 21, 2015 alleging two grounds: (1) the fee-related matter was set for arbitration through the AAA under a written fee agreement; and (2) the State Bar had at least two other charges involving Respondent under current investigation. Respondent argued that in the interests of judicial economy, this disciplinary case should be stayed or dismissed until the other matters being investigated were resolved. Respondent also filed her Answer that same day.

The State Bar filed a Response to the Motion to Stay or Dismiss on October 1, 2015. The PDJ issued an order denying Respondent's Motion on October 9, 2015 for failure to cite authority for either the stay or to show good cause. A Notice of Initial Case Management Conference for September 29, 2015 was sent to the parties on September 22, 2015. It was later reset to October 2, 2015, requesting the parties to appear telephonically.

The PDJ held the mandatory telephonic initial case management conference as planned under Supreme Court Rule 58(c). Nicole S. Kasetta, appeared on behalf of the State Bar. Respondent appeared through her counsel, Robert B. Van Wyck, Esq. Standard scheduling orders were signed and issued that same day, controlling the subsequent course of the action under Supreme Court Rule 48(b), and reminding the parties that Civil Rule 16(i) applies to disciplinary proceedings.

On October 13, 2015, a formal notice of mandated settlement conference was filed, setting the conference before a named settlement officer for November 12, 2015. Respondent's deposition was scheduled for the day before the settlement conference. Respondent filed a Second Motion to Dismiss or Stay on November 18, 2015, requesting either dismissal or a stay as to at least any claim by the State Bar

involving the fee dispute, alleging that the matter needed to go to arbitration under the fee agreement Complainant signed. The State Bar filed an Opposition to Respondent's Second Motion to Dismiss or Stay, arguing that it requested the same relief as the first Motion to Dismiss or Stay. On December 8, 2015, the PDJ also found that the second Motion substantively mirrored the first, and subsequently denied the second. On November 25, 2015, Respondent filed another Motion to Continue the matter based on an injury that allegedly occurred on February 2015. The Motion was supplemented five days later, was opposed and was denied.

On November 30, 2015, the State Bar and Respondent filed a Joint Pre-Hearing Statement. The PDJ held a Final Case Management Conference under Supreme Court Rule 58(c) on December 8, 2015, setting a two (2) day hearing for December 17-18, 2015. The State Bar and Respondent each filed Pre-Hearing Memoranda on December 10, 2015. That same day, Respondent filed a Motion in Limine under Rule 7.2 of the Arizona Rules of Civil Procedure, asking the PDJ to limit the testimony of non-expert attorney witnesses Gerald Burns and Chris Stender to the facts as they had been previously disclosed, alleging that their testimony should not "bleed into expert testimony simply because they are immigration attorneys."

The State Bar filed an Opposition to Respondent's Motion in Limine, alleging that the motion was untimely, "overbroad, and misunderstands the distinction between a fact and an expert witness." By Order of the PDJ filed December 8, 2015, the parties were reminded that the time for filing motions had passed. For that reason, the PDJ denied the Motion as untimely on December 16, 2015.

During the hearing, Exhibits 1-57,¹ 59, 66 and 68 were admitted without objection. No other exhibits were offered for admission or admitted. At the conclusion of the hearing, the parties stipulated to each one's filing simultaneous proposed findings of fact and conclusions of law. The PDJ approved their stipulation. In addition, the PDJ ordered that the parties would have five business days in which to file a response, if any, that was limited to pointing out only actual factual errors, but not taking the position that "Not I disagree with this finding of fact, but this is actually erroneous." The PDJ went further in stating: "If there's a misstatement of the record, if there's something along that line, I want to give you each five days to look into it." [Day Two Non-compliant Transcript, Page 116].

On January 22, 2016, the parties filed their respective proposed findings of fact and conclusions of law. The Panel is not persuaded by the "narrative" offered by Respondent. In addition, multiple exhibits referred to were not offered. The Panel considered the witness testimony and assessed their credibility. Contrary to Respondent's proposed findings, we found there was no meaningful expression of remorse by Respondent. We rejected many of Respondent's proposed findings of fact.

Respondent referenced two hearing transcripts, one for each hearing day, neither of which was compliant with Supreme Court Rules 30 and 47(g). While utilized by the Panel, the transcripts differ significantly one from another. For example the second day transcript often fails to identify the speaker.

On January 25, 2016, Respondent moved to extend the time for filing objections. The Motion was denied the next day. That Order reminded the parties that "[o]bjections were not sought by the hearing panel regarding the proposed

¹ Exhibits 1-54 were stipulated; Exhibit 58 is blank.

findings and conclusions, only errors. No response was to be filed, except if clear error in the proposed findings and conclusions” The Order emphasized that a response was appropriate “to point out errors only, not in logic, but clear error.”

On January 29, 2016, the State Bar filed its corrections to Respondent’s proposed findings and conclusions. That same day, Respondent ignored the clear orders that had previously been filed by the PDJ, and, instead, filed six pages of objections with argument rather than factual corrections. Respondent’s objections were, accordingly, stricken from the record. See Order filed Feb. 29, 2016. On March 2, 2016, Respondent moved to reconsider the striking of those objections, and requested that the Panel accept a *nunc pro tunc* Notice of Errors. That pleading was substantially identical to the stricken pleading apart from the fact that it was two pages longer because of reformatting. The Motion is denied, and the *nunc pro tunc* Notice was stricken. We note the objection to the two hearing transcripts, and find it well founded.

Now Therefore,

IT IS ORDERED, Respondent shall file a rule compliant transcript of the proceedings with any notice of appeal. In anticipation of the filing of a Rule-compliant transcript, members of the Panel cited parts of the transcript submitted.

II. FINDINGS OF FACT

Ms. Alexandrovich is a lawyer licensed to practice law in the State of New York, having been first admitted in New York in 2004. Ms. Alexandrovich practices immigration law exclusively in Arizona, where she maintains and operates two separate law offices, but is not licensed to practice law in the State of Arizona. During Respondent’s deposition, which was made part of the record without objection by

Respondent's counsel, Respondent engaged in, and we find, conduct that was evasive, deceptive and in bad faith. For example, in response to unambiguous questions by Bar Counsel, Respondent gave sworn testimony that she could not remember (a) which law school she attended, (b) the date of her graduation from law school, (c) whether she remained in the State of New York after graduating from law school, (d) where she received her law license, after graduating from law school, (e) whether or not she had a legal job in New York after she graduated from law school (although, during the hearing, Respondent admitted that she had been a commercial litigator in New York after she graduated), or (f) even when she relocated to Arizona. [Exhibit 47; Respondent's Testimony, Day 1 Non-compliant Transcript Page 110.].

When questioned by a Panel member, Respondent swore she had graduated from three law schools, her last one having been a Canadian law school, but could not name any of them. She said she attended Albany Law School in upstate New York but was "short" of hours needed for graduation. [Respondent Testimony, Day 1 Non-compliant transcript, Page 145.]. The following day she was asked if she did civil litigation work in New York after she graduated from law school. At first she testified, "[o]nly after I graduated from law school." She then corrected herself, stating "I apologize. I did not graduate from the law school, I explained that I was three or five courses short, so that would be incorrect to say that I graduated." Based on her inconsistent testimony, we are not convinced that Respondent graduated from any law school.

When Respondent was then asked: "You didn't disclose this civil litigation record when I asked you in your deposition did you, about any legal work in New

York?" by Bar Counsel, Respondent became argumentative, responding that "[y]ou were asking me about work in Arizona." She was then impeached with her deposition. [Respondent Testimony, Day 2, Non-compliant transcript, Pages 107-108 and Exhibit 47, SBA000196, page 7 lines 23-25.] Accordingly, we find that her testimony throughout was often misleading and deceptive, and therefore not credible.

Complainant Odila Alvarez ("Alvarez") is a citizen of Mexico, who entered the U.S. in the early 1990s when she was approximately 12 years old. [Exhibit 48]. Alvarez graduated from high school, attended college in the U.S., and was gainfully employed in the U.S. as a medical assistant. She is a single mother to a 10-year-old daughter who, unlike her mother, is a U.S. citizen. In July 1999, when Alvarez was 19 years old, Alvarez travelled to Mexico. She was subsequently detained by an immigration officer when she tried to return to the U.S. in August of that year after a birth certificate was presented to the officer that was not hers at a government check point in Nogales, Arizona.

On August 20, 1999, the Immigration and Naturalization Services ("INS") issued a Notice and Order of Expedited Removal ("removal order") which determined that Alvarez was inadmissible to the U.S. for falsely representing herself to be a U.S. citizen. [Exhibit 21]. The removal order also effectively banned Alvarez from reentering the United States for five years. Despite the ban, Alvarez returned to the United States less than a month later without first being admitted or inspected. She has admittedly resided in the U.S. illegally since 1999.

In 2000, Alvarez filed an Application to Register Permanent Residence or Adjust Status with the INS. [Exhibits 31 and 32]. The INS denied Alvarez's Application on June 16, 2000 via letter, stating:

The records of this Service establish that on August 20, 1999, you were arrested by Immigration Inspectors at the Nogales, Arizona Port of Entry. At that time you attempted to gain admission into the United States by falsely claiming to be a United States citizen. . . .

In view of all the factors, it must be found that the circumstances of your arrest and subsequent removal subject you to the provisions of section 212(a)(6)(C)(ii) of the Act, in that admission into the United States is a benefit under the Immigration and Nationality Act, and your claim was false in that you are not a citizen of the United States. **As there is no waiver available for this ground of exclusion, it must be found that you are inadmissible to the United States and, therefore, not eligible for adjustment of status to that of a permanent resident of the United States. Accordingly, your application must be, and hereby is, denied. There is no appeal to this decision.**

[Exhibit 33, (Emphasis Added)].

In February 2010, Alvarez retained Respondent's services as an immigration attorney. On February 25, 2010, Respondent entered into a flat fee agreement with Alvarez for \$500.00, defining representation as "FOIA G-639." [Exhibit 1]. Page 3 of that document is a "Liability Release, Waiver, Discharge and Covenant Not to Sue." It stated that Alvarez "acknowledges that the attorney advised, elaborately explained and warned me of the dangers, hazards and risks associated with filing for the FOIA." When asked in her deposition what those risks were, however, Respondent replied, "[d]o you want me to speculate?" Then when asked at her deposition what adverse immigration consequences there were, Respondent swore, "I can only speculate to the worse possible extent." When Respondent was also asked what she advised Ms. Alvarez were the possible adverse immigration consequences, she testified, "[a]s stated in the document." We find, based on the credible evidence, that Respondent did not advise, explain, or warn Ms. Alvarez of anything related to that release, especially any adverse consequences. [Exhibit 47, SBA000199-200, pages 19-21.]

When further asked in her deposition what Ms. Alvarez wanted her to do, Respondent testified, “[t]o obtain a green card.” She testified that the green card was “[l]awful permanent residency.” [Exhibit 47, SBA 000198, Page 14, lines 19-22.] Respondent submitted a Freedom of Information Act (FOIA) request to obtain a copy of Alvarez’s official file. Respondent subsequently received various documents in 2010 and early March 2012, respectively, including the June 16, 2000 letter from the INS denying Alvarez’s application for permanent residency. [Exhibit 47, at 22:25-23:23; Respondent's Testimony, 12/17/15 Recording at 9:46:34-9:47:00].

In her prehearing memorandum [Page 2, Line 13], the joint pretrial statement [Page 9, paragraph 15], and her testimony at the hearing, Respondent took the position that she wrote an expansive warning letter [Exhibit 66] cautioning Ms. Alvarez on August 18, 2011 about any attempt to change her status. We find that her testimony was inconsistent and not credible with undisputed record evidence. Respondent testified that she did not receive exhibits 21 and 22 from her FOIA request, informing her that Ms. Alvarez was inadmissible, until 2012. During the hearing, Respondent testified that she could not determine from the documents whether any order had been executed or whether her client had even been “physically removed” from the United States. Respondent’s testified that the documents she received in 2010 only informed her that Ms. Alvarez had been ordered removed. [Testimony of Respondent, Page 19.] After receiving a portion of the FOIA documents in 2010, Respondent did not assist Ms. Alvarez with obtaining her legal permanent residency in 2010. [Testimony of Respondent, Page 24.]

Importantly, Respondent’s “fee look-back review” billing statement shows that no activity took place from 9/29/2010 until 3/1/2012. [Exhibit 3, SBA000011.]

Respondent, on that billing review, wrote that as of September 29, 2010, the “[s]cope of representation was completed.” There was no representation again until the consultation on May 1, 2012 according to Respondent’s own billing statement review. There was no plausible purpose for the generation of any such warning letter at that time.

In her deposition, Respondent did not remember Ms. Alvarez ever acknowledging receipt of the warning letter or even mailing the letter to Alvarez. [Exhibit 47, SBA000224 at page 120, lines 18-23]. The document was not disclosed during the State Bar’s screening investigation, or with her initial disclosure statement. In her deposition, Respondent was evasive in her answer attempting to explain the reason for the lateness of disclosure. [Exhibit 47, SBA000224 at page 117, lines 16-17, page 119 line 1 through page 120, lines 6]. It concerns us that the exhibit appears to have been cut and pasted together with no “contract” attached. Nor would a contract have existed at that point in time inasmuch as Respondent had not received the final documents until 2012.

Ms. Alvarez testified that she did not receive any such letter. Having observed both witnesses and their demeanor, we find Ms. Alvarez’s testimony to be credible, and that she was truthful regarding this matter, whereas Respondent was not. Considering Respondent’s misleading actions in this litigation and her misleading and evasive testimony both in her deposition and during the hearing in particular, we conclude Respondent deceptively prepared the document solely for her defense after the State Bar initiated proceedings against her.

By early March 2012, at the latest, Respondent knew of the INS expedited order of removal, finding Ms. Alvarez inadmissible for making a false claim to U.S.

citizenship and ordering her removal from the U.S. for five years. [*Id.*; Exhibit 47; Respondent's Testimony, 12/17/15 Recording at 9:50:51-9:56:40]. Because Respondent had been provided with the 1999 removal order, she also was on notice that Alvarez had reentered the U.S. in 1999 without authorization, and that her application for permanent residency had been denied in 2000.

After Respondent secured the above documentation, she advised Ms. Alvarez to adjust her status. On March 1, 2012, Respondent entered into a second flat fee agreement for \$6,000.00 with Ms. Alvarez. In this second fee agreement, the scope of representation was defined as follows:

(1.) Prepare and file AOS [Adjustment of Status] / ***Marina will attend interview with [Alvarez]***. (2.) Preparation defense if needed. (3.) BIA (Board of Immigration Appeals) appear if needed.

[Exhibit 2 (Emphasis Added)].

Respondent never explained to Ms. Alvarez the references to "prepare and file AOS", "deportation defense" and "BIA Appeal" contained in the second flat fee agreement. [Exhibit 48; Alvarez's Testimony, 12/18 Recording at 8:25:10-8:26:15]. Respondent only informed Ms. Alvarez that she was "going to fight . . . the false claim of citizenship" and "get [Alvarez's] status fixed." [Exhibit 48; Alvarez's Testimony, 12/18/15 Recording at 8:26:15]. Ms. Alvarez paid Respondent the \$6,000.00 fee required by the second fee agreement, as well as costs. Ms. Alvarez delivered two checks to Respondent in 2012. After they were returned for insufficient funds, Ms. Alvarez replaced both checks with cash and a money order in full payment of the agreed retainer. [Exhibit 48; Respondent's Testimony 12/17/15 Recording at 9:58:14-9:59:19].

For purposes of applying to adjust status using form I-485, there are instructions included for filling it out, including a list of persons who are not eligible to adjust their status [Respondent's Testimony, 12/17/15 Recording at 10:01:17-10:01:23]. Persons who are not eligible to adjust their status include persons who "were not admitted or paroled following inspection by an immigration officer", like Ms. Alvarez who was determined inadmissible.² [Exhibit 21]. Respondent admitted that an alien must be admissible to adjust their status, and that an alien who makes a false claim to U.S. citizenship is permanently inadmissible. [Exhibit 47, Respondent's Testimony, 12/17/15 Recording at 9:56:43-9:57:15 and Transcript page 23].

Respondent admitted to the State Bar that the denial of Ms. Alvarez's application to adjust status was "very probable," as was the likelihood that Alvarez would be arrested after being interviewed. [Exhibit 7; Stipulated Exhibit 47; and Respondent's Testimony, 12/17/15 Recording at 10:06:53-10:07:22, Transcript Page 30]. Respondent never explained to Ms. Alvarez that her adjustment of status petition could be denied. [Exhibit 48]. Instead, Respondent assured Alvarez that her application to adjust status would be granted. [Alvarez's Testimony, 12/18/15 Recording at 8:27:05-8:27:28].

Although Alvarez did not qualify to adjust her status, Respondent nonetheless filed an application to adjust Alvarez's status in June 2012. Respondent also filed a supplement to the application and paid the \$1,000.00 fee. [Joint Prehearing

² See 8 U.S.C. § 1255(a) (alien must be "inspected and admitted or paroled into the" U.S. to adjust status); and 8 U.S.C. § 1182(a)(6)(A)(i) and (a)(6)(C)(ii) (aliens who are in the U.S. without being admitted are inadmissible and an alien who falsely claims U.S. citizenship is inadmissible).

Statement at 3; 12]. However, Respondent admitted that supplements cannot be used by an alien who entered the United States without inspection. [Respondent's Testimony, 12/17/15 Recording at 10:09:18-10:09:22, Transcript page 31].

On July 16, 2012, the USCIS issued a Request for Initial Evidence to Respondent, requesting Ms. Alvarez to submit evidence "of [her] lawful admission or parole into the United States" or, if she last entered the United States without inspection, "evidence of [her] eligibility for adjustment of status" [Exhibit 34]. The USCIS scheduled Ms. Alvarez's interview for December 3, 2012. [Exhibit 35].

Around that time, Ms. Alvarez sought the assistance of another immigration attorney, Gerald Burns ("Burns"). [Exhibit 48]. By then, Respondent had not completed the scope of the representation called for in her second flat fee agreement with Ms. Alvarez. Specifically, Respondent had not attended any USCIS interview with Alvarez, and had not filed a BIA appeal. [Exhibit 47, Respondent's Testimony, 12/17/15 Recording at 10:18:00-10:18:45]. Burns secured Ms. Alvarez's file from Respondent, and agreed to perform a review and analysis of Ms. Alvarez's immigration case for her. [Burns' Testimony, 12/17/15 Recording at 3:47:09-3:47:27].

After consulting with Burns, Ms. Alvarez agreed that he should send a letter to the USCIS withdrawing her application to adjust status. [Exhibit 37-38; Burns' Testimony, 12/17/15 Recording at 3:49:09-3:49:30]. Burns had advised Ms. Alvarez to withdraw the adjustment of status application because he believed that she did not qualify. At the hearing, Burns explained that the Request for Initial Evidence [Exhibit 34] was confirmation, in his mind, that Ms. Alvarez should not seek to adjust her status, and that she would be arrested if she attended an interview with USCIS.

[Exhibit 48]. On November 26, 2012, the USCIS issued a "Notice of Withdrawal" acknowledging receipt of Mr. Burn's October 9, 2012 letter. [Exhibit 36].

Burns was concerned about the INS denial of Alvarez's application because there was language stating that Ms. Alvarez claimed to be a U.S. citizen, which implied that Alvarez would be subjected to an expedited order of removal. [Burns' Testimony, 12/17/15 Recording at 3:49:30-3:51:29]. Burns' belief that Ms. Alvarez would be subject to an expedited removal order was confirmed when he reviewed an F.B.I. background report on her. According to Burns, when a person is subject to an expedited order of removal, like Ms. Alvarez, such a person is not eligible to adjust her status, and can be detained by immigration officials. [*Id.*]. Burns testified that he advised Ms. Alvarez to request a refund from Respondent because he felt that Ms. Alvarez had paid Respondent too much "just to do paperwork." [Alvarez's Testimony, 12/18/15 Recording at 8:28:24-8:30:32].

After Ms. Alvarez told Respondent about the advice Burns had provided her, Respondent responded that Ms. Alvarez should not have been worried about being arrested; that she should have attended the interview; and that if she had attended, she would have already had her "green card" by that time. [Exhibit 48; Alvarez's Testimony, 12/18/15 Recording at 8:30:49- 8:31:00].

Respondent then advised Ms. Alvarez to resubmit her application to adjust status. [Alvarez's Testimony, 12/18/15 Recording at 8:31:00-8:31:10]. Ms. Alvarez was persuaded to do so, partly because Respondent informed Alvarez that Respondent had succeeded on similar cases for other clients. [Alvarez's Testimony, 12/18/15 Recording at 8:31:12-27]. Respondent again assured Ms. Alvarez that her adjustment of status petition would be granted. [Alvarez's Testimony, 12/18/15

Recording at 8:31:27-46]. Ms. Alvarez believed the second flat fee agreement was continuing, and Respondent required no new fee agreement for this continuing representation. [Exhibit 47; Respondent's Testimony, 12/17/15 Recording at 10:19:01-10:19:09].

On October 18, 2013, knowing that Ms. Alvarez did not qualify to adjust her status, Respondent nonetheless filed: (1) a notice of appearance, (2) an application to adjust status, and (3) a supplement to the application to adjust status to the USCIS for Alvarez. [Respondent's Testimony, 12/17/15 Recording at 10:18:46-10:18:52, 10:19:16-41]. Alvarez signed the application to adjust status but Respondent, or her staff under her supervision, completed the application to adjust status after having her sign it. [Alvarez's Testimony, 12/18/15 Recording at 8:32:08-37].

Respondent only asked Ms. Alvarez to make sure her name, date of birth, phone number, and address were correct as set forth on the document. [Alvarez's Testimony, 12/18/15 Recording at 8:33:25-45]. In the application, Respondent caused the "no" box to be checked to the question of "[h]ave you ever been deported from the United States or removed from the United States," and did not otherwise disclose the existence of the previous removal order. [Respondent's Testimony, 12/17/15 Recording at 10:29:08-10:29:30].

On May 2, 2014, Respondent filed an I-212 Form, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, to the USCIS on behalf of Ms. Alvarez. [Respondent's Testimony, 12/17/15 Recording at 10:31:58-10:32:29]. Respondent took the position that Alvarez did not have to leave the U.S. before submitting this form. [Exhibit 47]. However, the USCIS's instructions for filing this form stated: "If you need to obtain consent to reapply, it is very

important that you do not return to the United States before you file an application for consent to reapply, and before the [DHS] . . . has approved it." [Exhibit 9].

Respondent stated that she relied on a Ninth Circuit case from 2004, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), as support for filing the I-212 petition. [Respondent's Testimony, 12/17/15 Recording at 2:30:04-2:31:55]. Immigration attorney witness Stender testified however, that case had been overruled by the time that Respondent cited it.

We reviewed the State Bar citation reference to another 9th Circuit case, *Acosta-Olivarria v. Lynch*, 799 F.3d 1271, 1274 (9th Cir. 2015) that was decided after *Perez-Gonzalez*. The issue is of nominal importance to us. The legal background of the tension caused by enactment of changes in the United States Code and the differing views of the Ninth Circuit and the Board of Immigration Appeals regarding those changes is set forth in *the foregoing Lynch* decision wherein the Ninth Circuit deferred to the BIA interpretations under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U. S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). The Ninth Circuit then determined: "Thus, in *Gonzales*, we held that our decision in *Perez-Gonzales* was no longer valid in light of *Torres-Garcia*. See *Gonzales* 508 F.3d at 1235-42." *In Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006)

Respondent testified that she sent a May 6, 2014, letter to the USCIS stating: "Please be advised that our client filed the I-212 waiver on or about April 28, 2014 with your field office. As per settlement agreement filed in the U.S. District Court for

the Washington District of Washington in *Duran-Gonzalez v. U.S.* DHS No. C06-1411, please do not detain or initiate Removal Proceedings against my client" [Exhibit 25]. Later, she testified that she gave it to her Ms. Alvarez to deliver. Regardless, despite relying on the *Duran-Gonzalez* settlement, Respondent admitted the settlement in issue in the *Duran-Gonzalez* case did not apply to Ms. Alvarez. [Respondent's Testimony, 12/17/15 Recording at 10:33:34-10:34:48]. We find she did not give the letter to Ms. Alvarez.

The day before her [INS] interview, Ms. Alvarez and her coworker, Rosario Cazares ("Cazares"), met with Respondent [Exhibit 48]. At this meeting, Ms. Alexandrovich informed Ms. Alvarez that she did not intend to attend the interview with Ms. Alvarez because "most of the times, the clients get nervous" when their attorney is present. [Cazares' Testimony, 12/17/15 Recording at 4:06:24- 4:07:15; Alvarez's Testimony, 12/18/15 Recording at 8:37:58-8:38:15]. Ms. Alvarez was surprised by Respondent's decision not to attend the interview; however, she trusted Respondent's advice that she attend the interview alone. [Alvarez's Testimony, 12/18/15 Recording at 8:38:15-32]. Respondent did not provide with Alvarez any documents to take to the interview. [Alvarez's Testimony, 12/18/15 Recording at 9:08:40-9:08:53].

The testimony of Respondent on this event varied significantly. For example, in the testimony of Respondent, [Day 2 Non-compliant transcript, pages 81-86], Respondent testified that she spent hours preparing Ms. Alvarez with the expectation of attending the interview with her. On page 83, however, Respondent testified that "[t]his [is the] letter I gave to [Alvarez] at the conclusion of my meeting with her on May 7th 2014 with instructions to her to give it to the officer." [Exhibit 25]. Obviously

aware of his client's inconsistent testimony, Respondent's attorney asked Respondent twice why she would do that [give her the letter] if she were going with her client to the meeting. Respondent, incredibly, finally acknowledged that "If I were to go, I would not take this letter." Hence, only as the result of the leading questions from her attorney did Respondent finally give truthful testimony about her actual intentions about attending the meeting, testifying, "I'm not going."

We find that the decision not to attend the meeting was Respondent's alone, not a decision made by her client. Respondent acknowledged in her testimony that she had no notes or documentation to corroborate her position that she had been discharged or asked not to go to this critical meeting. We find that Respondent never intended to go to the meeting in spite of the language to the contrary in her fee agreement, and her promises to attend. We find that Respondent, regardless, knew her client would be arrested, thereby abandoning Ms. Alvarez in the face of the likelihood of arrest and detention.

Although Respondent contended the interview was the forum for challenging the false claim of U.S. citizenship, we find that Respondent did not discuss with Ms. Alvarez how she should address the false claim of citizenship during the interview. [Exhibit 48]. Instead, Respondent misleadingly informed Ms. Alvarez that "everything is going to be fine," to just tell the immigration officer what happened, and say there was a discrepancy. [Alvarez's Testimony, 12/18/15 Recording at 8:38:32-8:39:10].

Ms. Alvarez testified that if she had known about the possibility of arrest by attending the interview, she would have never attended the interview because her daughter depends on her. [Alvarez's Testimony, 12/18/15 Recording at 8:39: 15-38]. Respondent initially informed the State Bar that she did not attend the May 8,

2014 interview with Alvarez because Alvarez did not want her to attend it. [Stipulated Exhibit 7]. In her deposition, however, Respondent swore she did not attend the interview because "[w]e did not have a contractual arrangement for any subsequent interviews." [Exhibit 47]. Later during her deposition, Respondent testified differently that she [actually had] intended to attend the interview on May 8, 2014, but Alvarez terminated her on May 7, 2014. [Exhibit 47, SBA000216, Page 87, Lines 2-6]. In her April 23, 2015 response to the State Bar, Respondent stated that Alvarez "did not wish [for] . . . counsel to accompany her." She then engaged in elaborate speculation of why her client did not want her to appear. [Ex. 7, SBA000020, paragraph 7].

Ms. Alvarez attended the interview, where the USCIS officer asked Ms. Alvarez about her prior removal in 1999. [Exhibit 17]. The USCIS officer then asked Ms. Alvarez if "there is anything else you would like to add." Ms. Alvarez responded, "no comment." [*Id.*]. She testified that she did not challenge the 1999 removal order in the interview because Respondent was not present at the interview. [Alvarez's Testimony, 12/18/15 Recording at 8:42:17-37].

After the interview concluded, Ms. Alvarez was arrested by immigration officials. [Alvarez's Testimony, 12/18/15 Recording at 8:42:37-43]. Ms. Alvarez was detained for approximately seven months. [Alvarez's Testimony, 12/18/15 Recording at 8:42:43-50]. During her detention, Alvarez's family took care of her daughter, and she could only visit with her daughter on weekends. [Alvarez's Testimony, Recording at 8:42:50-8:43:06].

When Respondent was informed of what had happened to Ms. Alvarez, she asked Ms. Alvarez's father, Rene Alvarez, to execute a new fee agreement for legal services to help Ms. Alvarez. [Exhibit 8; and Stipulated Exhibit 48]. This third fee

agreement defined the scope of the new representation as "9th Cir. Representation with ICE on reinstated order of removal." [Exhibit 8; Exhibit 47].

Respondent promised that Ms. Alvarez would be released the same night she was detained. [Alvarez's Testimony, 12/18/15 Audio Recording at 8:46:58-8:47:12]. However, Respondent took no steps to secure Alvarez's release. [Exhibit 47]. On May 8, 2014, Respondent, instead, moved to stay Ms. Alvarez's removal and a petition for review with the Ninth Circuit. [Respondent's Testimony, 12/17/15 Recording at 11:38:41-11:40:21; Respondent's Testimony, 12/18/15 Recording at 9:36:48-9:37:22].

On May 13, 2014, the DHS issued a Notice of Intent/Decision to Reinstate Prior Order, indicating its intent to reinstate Ms. Alvarez's August 20, 1999 removal order. [Exhibit 16]. Ms. Alvarez testified that she terminated Respondent around that time because Respondent "gave [her] false hopes" that she would obtain her legal residency and be released the same night she was arrested, and because Respondent "didn't do anything that she said that she would do." [Exhibit 48; Alvarez's Testimony, 12/18/15 Recording at 8:48:52- 8:49:55; and Respondent's Testimony, 12/17/15 Recording at 10:43:32-10:43:52]. On May 21, 2014, Respondent moved to withdraw from the Ninth Circuit case. [Exhibit 14]. The Ninth Circuit granted Respondent's Motion to Withdraw the next day. [Exhibit 15].

Respondent's staff subsequently created an accounting of Respondent's time, showing she allegedly spent over \$15,000.00 worth of time on Ms. Alvarez's matters. [Exhibit 57; Exhibit 47; and Respondent's Testimony, 12/17/15 Recording at 11:08:58-11:08:30]. However, at her deposition, Respondent did not know how her staff created this document or the entries on this accounting. [Exhibit 47;

Respondent's Testimony, 12/17/15 Recording at 11:10:07-11:22:50]. In this accounting, Respondent billed her time in quarter hour increments, but her fee agreements did not disclose that she would do so. [Exhibits 1-2; Exhibit 8; and Respondent's Testimony, 12/17/15 Recording at 11:13:07-11: 13:17]. The accounting also includes entries for copying, mailing, and a meeting that Respondent did not attend. [Exhibit 57]. We note the discrepancy of the spacing of the important May 7-8, 2014 entry and the misalignment of the date. We find the accounting to be false and intentionally misleading. We find Respondent knew it to be false and to intentionally mislead Alvarez to profit herself.

Ms. Alvarez retained new counsel, Christopher Stender ("Stender"), in May 2014. Stender currently represents her. [Stender's Testimony, 12/17/15 Recording at 2:51:06-2:51:09]. Stender initially did not want to represent Alvarez in her "very precarious situation" because Alvarez was previously detained and subject to an expedited order of removal in 1999. [Stender's Testimony, 12/17/15 Recording at 2:51:45-2:52:41]. Stender advised the Alvarez family that it was unlikely a reinstated order of removal could be stopped; that Alvarez would probably be removed from the U.S.; and that Alvarez would probably not be released on a bond or otherwise. [*Id.*].

Stender received a copy of Alvarez's file from Respondent and learned that Alvarez was ordered removed in 1999 at a U.S. port of entry. He knew Alvarez was subject to the reinstatement of that prior removal order. [*Id.*]. Stender testified that there was nothing in the file that led him to believe that the 1999 order of removal had been cancelled. [*Id.* at 2:57: 13-2:57:27]. He also saw nothing in the file

demonstrating that Respondent did anything to challenge the false claim to U.S. citizenship [*Id.* at 2:58:15-2:58:56].

Stender's options, he explained, for assisting Ms. Alvarez were limited because her 1999 removal order was entered at a port of entry as opposed to being entered by an Immigration Judge. [*Id.*]. Because the removal order had not been entered by an Immigration Judge, there was no [available] judicial forum. [*Id.*]. Despite these limitations, Stender nonetheless agreed to represent Ms. Alvarez because her family was distraught and in desperate need. [*Id.*].

On July 13, 2015, Stender filed an appeal to the Ninth Circuit from the decision to reinstate Alvarez's prior removal order. [Exhibit 10; Stender Testimony, 12/17/15 Recording at 3:00:23-3:00:47]. In the appeal, Stender did not dispute the false claim of U.S. citizenship. [Exhibit 10; Stender Testimony, 12/17/15 Recording at 3:00:47-3:01:05]. Stender testified that the Ninth Circuit did not have jurisdiction over the denial of Alvarez's adjustment of status petition. [Stender Testimony, 12/17/15 Recording at 3:00:47-3:01:05]. He added that there is "no path to appeal" from the denial of the adjustment of status petition and for that reason he did not address the denial of the adjustment of status in his appellate brief. [*Id.* at 3:01:10-3:01:22]. His testimony on these points was not disputed.

Stender testified that in his brief to the Ninth Circuit, he instead argued that Ms. Alvarez should not have been subjected to expedited removal in 1999 because she was physically present in the U.S. for over 2 years prior to the INS' inadmissibility determination. [*Id.*]. Stender said that he also argued that Ms. Alvarez had a "reasonable fear" interview after she was detained, and that the Immigration Judge erred in concluding Alvarez had no reasonable fear of returning to Mexico. [*Id.*].

Stender testified that he secured Ms. Alvarez's release from Immigration's custody on December 8, 2014. After she was released, Ms. Alvarez asked Respondent for a refund but Respondent, instead, asked Ms. Alvarez to produce receipts. [Alvarez's Testimony, 12/18/15 Recording at 8:50:55- 8:51:24]. At the hearing, Respondent sought to excuse this by claiming faulty bookkeeping. We find, however, Respondent intentionally failed to account for the money she had received to do the work Respondent promised to do but never did. During the hearing, Respondent acknowledged that she kept receipt books, yet still demanded that Ms. Alvarez produce receipts. Respondent failed to disclose her receipt book in these disciplinary proceedings. [Testimony of Respondent, Day 2, Non-compliant transcript, Page 96-97, 107].

Soon after Respondent was served with the State Bar's Complaint in this matter, she filed for fee arbitration with the American Arbitration Association on September 3, 2015. [Exhibit 11]. Respondent avowed that prior to this filing, she had never requested any fees from Ms. Alvarez under the contract. [Respondent Testimony Day 2, Non-compliant transcript, Page 106 ("I never . . . requested any fees under the contracts. I told her [only] in September [that I demanded] . . . [about] \$9,900.")]. In her AAA filing, Respondent sought fees, interest, arbitration costs, and punitive and exemplary damages from Ms. Alvarez. [*Id.*].

We find Respondent's demand of punitive and exemplary damages to be compelling evidence of Respondent's intentional and deliberate effort to threaten and intimidate Ms. Alvarez and retaliate against her for filing her charge with the State Bar.

During the hearing, Respondent testified that she dismissed the punitive claim and never intended to seek it, saying "I instructed [my] attorney to dismiss that, I just mark[ed] it to be honest, kind of, automatically." To emphasize that point she then stated, "So, I clearly instructed my attorney to dismiss that because that is not what I certainly intend to do." [Testimony of Respondent, Day 2, Non-compliant transcript, Page 92.]

The evidence substantively contradicts her testimony. Under further questioning, Respondent acknowledged that she only notified her attorney to stop seeking punitive damages within the last "couple of days," saying "I just instructed my lawyer, I believe, very recently." When asked how she instructed her lawyer, Respondent said she sent it through text message. [Testimony of Respondent, Day 2, Non-compliant transcript, Page 94-95].

We find, however, Respondent intended to seek punitive damages from Ms. Alvarez in the AAA arbitration. In her Demand for Arbitration form, completed and signed by her, Respondent stated as her description of the dispute that, "Respondent [Ms. Alvarez] breached contracts, *defamed Claimant*, and evades payments." (Emphasis added.) Similarly, Respondent testified that she willingly paid the costs of the arbitration. However, in her Demand for Arbitration, Respondent requested all arbitration costs, punitive/exemplary damages, and other costs related to the dispute. [Exhibit 11].

Besides filing an arbitration demand for punitive/exemplary damages against Ms. Alvarez, Respondent also sought Alvarez's bank account records and her personnel file from Alvarez's employer during these disciplinary proceedings. [Respondent's Testimony, 12/17/15 Recording at 11:25:12-11:25:27]. In her

deposition, Respondent was asked how either of those materials related to these disciplinary proceedings. Respondent repeatedly responded with the word, "Directly." When asked to explain how, she repeated: "Directly".

Respondent's attorney repeatedly found it necessary to instruct her to explain the requested relationship between the materials and the disciplinary proceedings. Instead, Respondent's evasion continued until Counsel for Respondent responded that, "I mean, I can answer that." "They relate directly because she's a liar. She's manipulative. And she is falsely in this country since 1992, until this date. She has— she is a nonresident, illegally in the United States. And she's working, and she should not be." [Exhibit 47, SBA000222, Pages 109-111]. Respondent gave no other explanation for her attempt to secure Ms. Alvarez's financial information.

Ms. Alvarez claims that Respondent's actions have caused her harm because she was separated from her daughter while she was detained. [Exhibit 48; Alvarez's Testimony, 12/18/15 Recording at 8:53:41-8:54:08]. Ms. Alvarez testified that she made the decision to report Respondent to the State Bar because she does not want others to go through what she went through with Respondent. [Exhibit 48; Alvarez's Testimony, 12/18/15 Audio Recording at 8:54:08-17].

III. CONCLUSIONS OF LAW AND DISCUSSION OF THE DECISION

The American Bar Association's *Standards for Imposing Lawyer Discipline* ("ABA Standards") is a "useful tool in determining the proper sanction" to be imposed on a lawyer found in violation of the Ethical Rules. *In re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990). The sanction imposed is tailored to the unique circumstances of the case. *In re Wolfram*, 174 Ariz. 49, 59, 847 P.2d 94, 104 (1993). The Panel gives consideration to the following factors: (1) the duty violated; (2) the

lawyer's mental state; (3) the actual or potential injury caused by the misconduct; and (4) the existence of aggravating and mitigating factors. *In re Peasley*, 208 Ariz. 27, 32, 90 P.3d 764, 769 (2004); *ABA Standard 3.0*. A lawyer's misconduct may violate a duty owed to a client, the public, the legal system, or the profession. *Commentary, ABA Standard 3.0*. When disciplinary proceedings are brought against lawyers alleged to have engaged in ethical misconduct, the State Bar must prove misconduct by clear and convincing evidence. *Commentary, ABA Standard 1.3*.

A. DUTY VIOLATED

The Panel considered the charges alleged by the State Bar and finds clear and convincing evidence Ms. Alexandrovich violated Arizona Supreme Court Rule 42 and Ethical Rules 1.2, 1.3, 1.5, 1.16, and 3.1.

a) 1.2 – Scope of Representation and Allocation of Authority between Client and Lawyer

The relevant portion of ER 1.2(a) provides, subject to reasonable limitation to the scope of representation:

A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

The client shall have “the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.” *Comment 1*. Respondent knowingly failed to attend the May 8, 2014 interview with Ms. Alvarez at the USCIS and knowingly failed to challenge the false claim of U.S. citizenship at the May 8, 2014 interview. Respondent knew

she was specifically hired to represent Ms. Alvarez at that interview. We find that Respondent abandoned her client at a critical juncture.

b) 1.3 – Diligence

Ethical Rule 1.3 provides, “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. *Comment 1.*

Respondent knowingly failed to act with reasonable diligence and promptness in representing Ms. Alvarez. Respondent knowingly failed to attend the May 8, 2014 USCIS interview with Alvarez and knowingly failed to challenge the false claim of U.S. citizenship at this interview.

c) 1.5 – Unreasonable Fees

Ethical Rule 1.5(a) provides that, “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: (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) the degree of risk assumed by the lawyer.

We note the testimony of two other lawyers in the same field stating that the fees charged by Respondent were unreasonable. This was not testimony in anticipation of these proceedings, but from their view of events at the time of their respective representation of Ms. Alvarez. Their testimony was not objected to nor disputed. Regardless, the fee quoted by Respondent necessarily anticipated and included Respondent's own anticipation of her client's being arrested. Respondent admitted to the State Bar that she knew that the denial of Alvarez's application to adjust status was "very probable," as was the likelihood that Alvarez would be arrested after being interviewed. [Exhibit 7; Stipulated Exhibit 47; and Respondent's Testimony, 12/17/15 Recording at 10:06:53-10:07:22, Transcript Page 30]. That was a subject matter which the fee contract necessarily covered. Yet immediately after the anticipated event occurred, another \$6,000 was charged under a "separate" fee contract. This we find this to be unreasonable. We are troubled by Respondent's behavior. While we are disinclined to find the original fee amount unreasonable, for the services promised but not delivered, we find that the additional fee charged after the arrest of Ms. Alvarez was not reasonable under E.R. 1.5.

d) 1.15 – Safekeeping of Property and Prompt Notification

Ethical Rule 1.15(d) provides, "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 commands that "except as stated in this Rule or otherwise permitted by law or by agreement . . . a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to

receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.”

Respondent kept virtually no records regarding the fees paid, nor their deposit or separation from costs. She claimed not to have any of the legal file of Alvarez. Respondent was evasive throughout her deposition and in her hearing testimony. We note that Respondent demanded proof of payment in the form of receipts from her client. Respondent avowed that she kept receipt books in her office, but she never produced them. She “covered” herself by claiming that she did not do the “look back” but instead testified it was done by her aids. Her answers in her deposition and during her testimony were evasive throughout. We find that Respondent knowingly failed to properly and promptly review her financial records. We find her records are inaccurate and she was manipulative in creating or allowing others to create a false record. Notwithstanding, we are disinclined to find on the record submitted that there is clear and convincing evidence of a violation of E.R. 1.15(d) on the record before us. We believe that issue would be better resolved through arbitration at this point in time.

e) 1.16 – Declining or Terminating Representation

Ethical Rule 1.16 outlines the circumstances under which a lawyer “shall” withdraw from representation and the circumstances by which “may” withdraw from representation. Under 1.16(d),

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed

for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights. *Ethical Rule 1.16(d)*.

Respondent severed her relationship with her client by refusing to do precisely what her fee agreement mandated- namely, attend the interview. Having effectively abandoned her client, Respondent took no steps to protect her client's interests.

f) 3.1 – Meritorious Claims and Contentions

Ethical Rule 3.1 provides, "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Comment 2, ER 3.1

Respondent applied to adjust Ms. Alvarez's status knowing that she did not qualify for an adjustment of status because Alvarez was determined permanently inadmissible into the United States. Respondent also filed a supplement to the application and paid the \$1,000 fee. However, supplements cannot be used by an alien who entered the United States without inspection. In the application, Respondent caused to be checked the box "no" to the question of "[h]ave you ever

been deported from the United States or removed from the United States," and did not otherwise disclose Alvarez's removal order.

Yet Respondent also submitted an I-212 Form, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, to the USCIS on behalf of Ms. Alvarez. Respondent claimed that Alvarez did not have to leave the U.S. before submitting this form. [Exhibit 47]. However, the USCIS's instructions for filing this form state: "If you need to obtain consent to reapply, it is very important that you do not return to the United States before you file an application for consent to reapply, and before the [DHS] . . . has approved it." There was no good faith argument for the positions taken by Respondent. Her actions harmed her client.

B. MENTAL STATE & INJURY

Ethical Rule 1.0(f) states that "knowingly," "known," or "knows" denotes actual knowledge of that fact and a person's knowledge may be inferred from circumstances. The ABA Standards define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *ABA Standards, Definitions*. Further, the ABA Standards define "intent" as "the conscious objective or purpose to accomplish a particular result." *Id.*

The *Van Dox* case furthered the analysis of the *ABA Standards* for a finding that an attorney acted with a knowing mental state when violating the Ethical Rules by stating "[the ABA] definition clarifies that merely knowing one performs particular actions is not the same as consciously intending by those actions to engage in unethical conduct." *Van Dox*, 214 Ariz. 300, 305, 152 P.3d 1183, 1188 (2007). "[T]he

knowledge required for setting a higher sanction for professional misconduct is 'knowledge that [respondent] may have been violating an ethical rule.'" *Id.* quoting *In re Levine*, 174 Ariz. 146, 171, 847 P.2d 1093, 1118 (1993).

The Panel is aware that a higher mental state beyond mere negligence must be proven. To hold "otherwise would support an allegation in every case that, because lawyers are expected to be familiar with the Rules of Professional Conduct, they 'should have known' of their infractions, thereby effectively reducing the actual knowledge requirement to a nullity." *In re Tocco*, 194 Ariz. 453, 457, 984 P.2d 539, 543 (1999).

Respondent violated her duty to her client under *Standard* 4.42, which states: "Suspension is generally appropriate when . . . a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client" The Commentary explains: "Suspension should be imposed when a lawyer knows that he is not performing the services requested by the client, but does nothing to remedy the situation"

Respondent had advance notice of the May 8, 2014 USCIS interview with Ms. Alvarez, and knew that Alvarez would likely be arrested if she attended it. Respondent, nonetheless, failed to attend this interview and did not attempt to seek a continuance of the interview to protect her client. As a result, Ms. Alvarez suffered actual harm because she was arrested and detained after the interview ended. Further, while she was detained, Ms. Alvarez was separated from her then eight-year-old daughter for many months and Alvarez's family had to care for her daughter while Alvarez was detained.

Respondent violated her duty as a professional under *Standard 7.2* which states: "Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system."

Respondent violated her duty to the legal system under *Standard 6.22* which 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." Respondent filed an adjustment of status application for Ms. Alvarez knowing that she was permanently inadmissible and was unqualified for adjustment of status, and that the application would be denied. Respondent's actions caused actual harm to Ms. Alvarez because she was arrested and detained by immigration officials because of the adjustment of status application.

C. AGGRAVATION AND MITIGATION

Each disciplinary case involves unique facts and circumstances.³ In striving for fair disciplinary sanctions, consideration must be given to the facts pertaining to the professional misconduct, and to any aggravating or mitigating factors. *Commentary, ABA Standard 9.1*. The Panel determined the following aggravating factors are supported by the record:

- a) 9.22(a): Prior Disciplinary Offenses. In File Nos. 08-0766 and 08-1999,

³ Under *ABA Standards, Standard 9.4* the following factors should not be considered as either aggravating or mitigating:

- (a) forced or compelled restitution;
- (b) agreeing to the client's demand for certain improper behavior or result;
- (c) withdrawal of complaint against the lawyer;
- (d) resignation prior to completion of disciplinary proceedings;
- (e) complainant's recommendation as to sanction;
- (f) failure of injured client to complain.

Respondent was informally reprimanded for violating ERs 1.8(h), 3.1, 4.4(a) and 8.4(d). [Exhibit 49; and Respondent's Testimony, 12/17/15 Recording at 11:25:27-11:25:46].

- b) 9.22(b): Dishonest or Selfish Motive. Respondent put her interests in obtaining a fee over her client's interests. Although Alvarez did not qualify for an adjustment of status, Respondent agreed to file such an application only to earn a fee. Respondent misled Alvarez by telling her she was experienced in such specific circumstances as Alvarez. Respondent also acted selfishly by failing to attend the May 8, 2014 interview with Alvarez, knowing Alvarez would be arrested.
- c) 9.22(c): Pattern of Misconduct. In Respondent's prior disciplinary offense where she was informally reprimanded, she was found in violation of ER 3.1 for moving to change venue in one of her client's cases without a good faith basis. In the present case, Respondent had no good faith basis to file Ms. Alvarez's application for adjustment of status, knowing it was barred given the false claim of U.S. Citizenship and that Ms. Alvarez was in the United States illegally.
- d) 9.22(e): Bad Faith Obstruction of the Disciplinary Proceeding. Respondent previously testified at her deposition that she did not know answers to numerous questions asked by the State Bar. [Exhibit 47 and Respondent's Testimony, 12/17/15 Recording at 9:40:13-9:40:27]. However, when the State Bar posed these same questions to Respondent at the December 17-18, 2015 hearing, Respondent offered answers to these questions.

Respondent's purported memory lapses at her deposition demonstrate bad faith and a failure to cooperate with the State Bar. She further failed to disclose her fee receipt book to the State Bar.

- e) 9.22(f): Submission of false evidence, false statements, or other deceptive practices during the disciplinary process.

As cited above, we find that Respondent made multiple deceptive and false statements. We further find she submitted false evidence, including the purported August 18, 2011 letter to her client, [Exhibit 66] and her "Fee look-back" [Exhibit 3] which she acknowledges was not prepared by her.

- f) 9.22(g): Refusal to Acknowledge Wrongful Nature of Conduct. Respondent denies engaging in any misconduct. [Respondent's Answer at 29; Exhibit 7]. Respondent sought defamation with punitive damages against Ms. Alvarez in the AAA arbitration. Respondent's testimony that she simply erred in checking the box is belied by the fact just one or two days before the hearing began, she purportedly "texted" her attorney to withdraw the punitive damages request. Similarly, it is perfectly apparent that Respondent sought Ms. Alvarez's employment records for improper and retaliatory purposes, including retaliation for Ms. Alvarez's filing the Bar charge as well as the fact that she relocated to and remained in the U.S. and Arizona illegally.

- g) 9.22(h): Vulnerability of the Victim. Alvarez was in the U.S. illegally and is a single mother of a young daughter. She remains vulnerable.

- h) 9.22(j): Indifference to Making Restitution. Respondent showed indifference to restitution when she intentionally sought punitive and

exemplary damages against Alvarez for defamation, despite their unavailability. As with her seeking the bank records and employment records of Ms. Alvarez, these actions were done in an effort to avoid the refund of any fees, despite the fact Respondent had failed to complete the scope of her representation.

The Panel considered the following Mitigating factor:

- a) 9.32(c): Personal Stress During Relevant Time. Limited self-serving testimony regarding the head injury of Respondent and no exhibits were offered for mitigation. Nonetheless, these allegations substantially first raised in the proposed findings of fact were balanced by us for mitigation. The proposed findings submitted Ms. Alexandrovich has four children, two of whom were born following difficult pregnancies. It was alleged Ms. Alexandrovich suffered during that time from moderate to severe back pain, and at times could not sit or stand up without severe pain. In addition, it was alleged Ms. Alexandrovich was emotionally distressed because a relative was diagnosed with kidney cancer and another relative is a stage IV cancer patient. Exhibit 61 was not offered nor admitted but would have offered support for one relative's cancer.

While other mitigation was argued in Respondent's proposed findings of fact, we found it unsupported by the record.

IV. CONCLUSION

The object of lawyer discipline is to protect the public, the legal profession, the administration of justice, and to deter other attorneys from engaging in unprofessional conduct. *Van Dox*, 214 Ariz. at 303, 152 P.3d at 1186; *In Re Peasley*,

208 Ariz. at 38, 90 P.3d at 775. Attorney discipline is not intended to punish the offending attorney, although the sanctions imposed may have that incidental effect. *Id.* The Panel finds Ms. Alexandrovich committed professional misconduct.

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In Re Peasley*, 208 Ariz 27, 41, 64, 90 P.3d 764, 778 (2004). Respondent's prior discipline, her prior diversion, her ongoing refusal to acknowledge any wrongdoing coupled with conduct in her deposition at which she could not answer basic questions require that Respondent be suspended from the practice of law for three years. Her disregard for the disciplinary process included deceptive practices. However, Respondent is not licensed to practice law in the State of Arizona and, therefore, suspension is not an available sanction. *See In re Olsen*, 180 Ariz. 5, 881 P.2d 337 (1994) (holding censure to be the most severe sanction that can be imposed on a non-member of the State Bar of Arizona). Therefore:

IT IS ORDERED Ms. Alexandrovich is reprimanded effective the date of this Decision and Order;

IT IS FURTHER ORDERED Ms. Alexandrovich is placed on probation for eighteen (18) months;

IT IS FURTHER ORDERED Ms. Alexandrovich shall participate in the State Bar's fee arbitration with Alvarez and shall timely comply with any arbitration award. Within ten (10) days from the date of the final judgment and order, Ms. Alexandrovich shall contact the fee arbitration coordinator and file a petition for fee arbitration.

IT IS FURTHER ORDERED Ms. Alexandrovich shall submit to a State Bar Membership Assistance Program ("MAP") assessment, and complete any follow up deemed necessary by MAP;

IT IS FURTHER ORDERED Ms. Alexandrovich shall pay costs and expenses under Rule 60(b), Ariz. R. Sup. Ct.

A final judgment and order will follow.

DATED this 14th day of March, 2016.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Michael Snitz

Michael Snitz, Volunteer Public Member

RICHARD BROOKS, ATTORNEY MEMBER, CONCURRING AND DISSENTING

I concur with the Panel's findings that the Respondent committed the enumerated ethical violations above and should be sanctioned accordingly. I respectfully dissent, however, with regard to the actual sanction. The majority recommends reprimand only because Respondent is not licensed to practice in Arizona. Although Respondent is not licensed in Arizona, she still maintains the ability to continue operating law offices in Arizona and providing legal services related to federal immigration law for the people of Arizona. As a matter of public policy and necessity, I would request the Supreme Court of Arizona declare Respondent ineligible to operate and maintain a law office or provide immigration-related legal services to potential Arizona clients, as more fully described herein

The record is replete with evidence of very serious ethical transgressions by Respondent, including, *inter alia*, her bad faith obstruction and attempted manipulation of the disciplinary process; her knowing and intentional failure to attend the important and significant May 8, 2014 USCIS interview; her failure to explain the very significant risks of the interview to Ms. Alvarez;⁴ and her failure to file a Motion to Continue the interview to protect Ms. Alvarez from serious harm which Respondent knew would probably result by allowing Ms. Alvarez to attend the interview alone, and which, in fact, occurred⁵

The warning letter, taken as a whole, also demonstrates that as early as August 18, 2011, Respondent was fully aware that if Ms. Alvarez attended the interview, she would have to “fight the record of [her] past false claim of [U.S.] citizenship and overcome [a prior] order of expedited removal [to Mexico],” as well as the possibility of being arrested on various federal criminal charges, including (1) improper entry into the United States through the international border, (2) false claim of United States citizenship, and (3) reentry into the United States after deportation

⁴ Although both the State Bar and Respondent stipulated that Respondent was licensed to practice law in New York after having been admitted to practice there in 2004, the evidence of Respondent’s unethical conduct with regard to Ms. Alvarez strongly suggests that Respondent has never taken a course in Professional Responsibility or, at the very least, has no understanding of the Rules of Professional Conduct promulgated by our Supreme Court. See Supreme Court Rule 31 (“Regulation of the Practice of Law”).

⁵ Respondent admitted that as early as August 18, 2011, she was personally aware of the significant risks Ms. Alvarez could face by attending the interview regardless of whether or not a lawyer personally represented her at the interview. Respondent claims she delivered a letter (the “warning letter”) to Ms. Alvarez that expressly listed such hazards in August 2011. See Exhibit 66. Assuming, *arguendo*, that Respondent actually delivered the letter to Ms. Alvarez, although credible evidence suggests otherwise, the title alone (“Risk of Immigration Arrest and Risk of Federal Criminal Arrest”), along with the contents of the letter, leave no doubt that Respondent knew Ms. Alvarez would face serious harm simply by attending the interview. *Id.*

or removal. As a result of Ms. Alvarez's arrest, her dependent young daughter was separated from her mother for over six months.

For these reasons in particular, the clear and convincing evidence of Respondent's ethical transgressions resulting in serious injury to Ms. Alvarez, and the existence of numerous aggravating factors, I believe that disbarment by this Panel would be the proper and warranted sanction in this case if Respondent were licensed to practice law in Arizona. *See In re Zawada*, 208 Ariz. 232, 238, 92 P.3d 862, 868 (Ariz. 2004) ("the more serious the injury, the more severe shall be the sanction."). *See also Matter of MacAskill*, 163 Ariz. 354, 361, 788 P.2d 87, 94 (1990) (Disbarment is generally appropriate where "a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client . . .").

This recommendation is particularly warranted where, as here, Respondent's client, who was not sophisticated with respect to immigration matters, placed her entire trust and confidence in Respondent, and was seriously injured as a result. *See, e.g., Matter of Dwight*, 117 Ariz. 407, 573 P.2d 481 (Ariz. 1978) (finding attorney's course of conduct in connection with financially unsophisticated client warranted disbarment); *Matter of Engan*, 170 Ariz. 409, 411, 825 P.2d 468, 470 (Ariz. 1992) (Feldman, J.) (approving recommendation of disbarment where, *inter alia*, "Respondent's failure to pursue matters diligently on behalf of clients, perform services for which he was retained, and appear on his client's behalf at a hearing, resulted in [serious] injury . . .").

Although Respondent's actions would warrant disbarment, or at least a lengthy suspension, in Arizona, it ultimately falls to the New York and federal immigration licensing authorities' to disbar, suspend, or otherwise discipline Respondent. Because

Respondent is not licensed to practice in Arizona, however, the only sanction that can be imposed is a reprimand. Therefore, at the very least, the sanction imposed by this Panel should be made known to those licensing authorities immediately so that they may impose the proper sanctions warranted in this case.

In the meantime, however, even though Respondent is not licensed in Arizona, she maintains the ability to continue operating multiple law offices in Arizona and provide legal services related to federal immigration law to Arizona residents including "illegal immigrants," the term used by the U.S. Supreme Court in its latest pronouncement pertaining to this area of the law. Texas v. United States, 86 F.Supp.3d 591, 605 n.2 (S.D.Tex. 2015), *aff'd*, 787 F.3d 733 (5th Cir.2015), *cert. granted*, ___U.S.___, 136 S.Ct. 906 (Jan. 19, 2016), *citing Arizona v. United States*, ___U.S.___, 132 S.Ct. 2492, 2497 (20102). Whether in Arizona legally or illegally, however, Mexican or Latin American nationals like Ms. Alvarez and other similarly situated residents of Arizona are entitled to the protection of the law of Arizona, including the Rules of Professional Conduct promulgated by our Supreme Court. *See, e.g., Matter of Myers*, 164 Ariz. 558, 795 P.2d 201 (Ariz. 1990). Immigration attorneys, in particular, serve "a vulnerable population, many of whom do not speak English and are unfamiliar with the American legal system." *Iowa Supreme Court Attorney Disciplinary Board v. Mendez*, 855 N.W.2d 156, 173 (Iowa 2014). *See also Matter of Myers*, 164 Ariz. 558, 561, 795 P.2d 201, 204 (Ariz. 1990).

Thus, the State Bar's attempts to protect vulnerable immigrant clients and the public at large is reasonably expected to be futile until the New York and federal licensing agencies ultimately act. Even more, such action may take many months if not longer. That is, unless our Supreme Court rules otherwise.

In view of this reality, the pressing question remains, at least in the mind of this Panel Member, whether our Supreme Court has the authority to effectively prevent Respondent, as well as other similarly situated immigration attorneys, from engaging in conduct that is detrimental to Arizona's immigrant community as well as the public at large. For the following reasons, I believe that the answer is "yes."

"The Arizona Constitution gives our Supreme Court "exclusive authority to regulate the practice of law in Arizona." *State Bar of Arizona v. Lang*, 234 Ariz. 457, 461, 323 P.3d 740, 743 (Ariz. 2014), citing *In re Creasy*, 198 Ariz. 539, 541 para. 6, 12 P.3d 214, 216 (Ariz. 2000); see also Supreme Court Rule. 31(a). A lawyer who is not admitted "in this jurisdiction is," like lawyers admitted to practice in Arizona, also" subject to the disciplinary authority of [our Supreme] Court if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct." *State Bar of Arizona v. Lang, supra*, 234 Ariz. at 461-62, 323 P.3d at 744-4, citing Ariz. R. Sup. Ct. 42, ER 8.5(a).

In this case, it is undisputed that Respondent has been practicing immigration law in two separate law offices in which she has been providing legal services to Arizona residents including illegal immigrants who reside in Arizona. The pivotal issue then is whether the Arizona Supreme Court has the authority, if it elects to exercise it for the protection of the public, including vulnerable legal or illegal immigrants, to impose a meaningful sanction against Respondent or other immigration attorneys who violate its Rules of Professional Conduct?

It is my belief that, as a matter of law, the Supreme Court, in the exercise of its injunctive and equitable powers, has the authority to order an immigration

attorney, not licensed by Arizona but operating and maintaining one or more law offices here, to cease and desist from doing so, but not from otherwise practicing before any federal immigration agency or court to which the attorney is admitted, for a period of time deemed appropriate to allow sister states and immigration licensing authorities to conduct reciprocal investigations and impose appropriate sanctions.

At this particular time in this history of Arizona as well as the United States, the practice of law by an immigration attorney has become particularly important. Immigration attorneys serve “a vulnerable population, many of whom do not speak English and are unfamiliar with the American legal system.” *Iowa Supreme Court Attorney Disciplinary Board v. Mendez*, 855 N.W.2d 156, 173 (Iowa 2014). See also *Matter of Myers*, 164 Ariz. 558, 561, 795 P.2d 201, 204 (Ariz. 1990). The consequences of unethical conduct by such attorneys can, as amply demonstrated in the matter before this Panel, result in serious injury to a very vulnerable clientele.

The general paucity of legal authority on this issue in Arizona and other states requires our Supreme Court to formulate a reasoned approach to a resolution of this matter of statewide importance. This Panel Member believes that the time for such a resolution has arrived, and this case provides a particularly appropriate record for that resolution.

The Supremacy Clause of the United States Constitution provides that federal law preempts any conflicting state law.⁶ See U.S. Const. art. VI, cl. 2. Under the Supremacy Clause then, when a state law conflicts or is in some manner incompatible

⁶ Article VI, cl. 2, of the United States Constitution provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme law of the land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

with federal law, the federal law preempts the state law. Federal law may preempt state law in three ways: (1) express preemption; (2) field preemption; and (3) conflict preemption. See *Pac. Gas & Elec. Co. v. Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

The United States Supreme Court has nonetheless recognized the broad authority of states to discipline attorneys violating state law but, it has been circumspect in addressing issues of alleged conflict. In *Sperry v. State of Florida*, 373 U.S. 379, 402 (1963) the U.S. Supreme Court addressed an unauthorized practice of law issue in a case in which the Supreme Court of Florida, acting under its police power, had issued an injunction against a non-lawyer patent agent who was licensed to practice before the U.S. Patent and Trademark Office ("PTO"). The patent agent appealed, "attack[ing] the injunction 'only insofar as it prohibit[ed] him from engaging in the specific activities...covered by his federal license to practice before the Patent Office..' " *Id.*, 373 U.S. at 382-83.

In *Sperry*, the U.S. Supreme Court, addressing that narrow issue, held that because federal law authorized the patent agent to practice before the PTO, the State of Florida had no power to enjoin him from practicing before that federal agency. *Id.* at 83. The Court then narrowed its holding, acknowledging that "[t]he State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives." *Id.* at 402. The Court stated:

A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give the State's licensing board [in *Sperry*, the Florida Bar Association] a virtual power of review over the federal

determination that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.

Id. at 385 (citations and footnotes omitted).

From the Court's foregoing language, it seems clear that the Sperry decision "stands for the general proposition that where federal law authorizes an agent to practice before a federal tribunal, the federal law preempts a state's licensing requirements," but only "to the extent that those requirements hinder or obstruct the goals of federal law." Surrick v. Killion, 449 F.3d 520, 530 (3d Cir. 2006) (italics added);

Principles of federal preemption do not prohibit state action, however, where such state action does not interfere with the requirements of federal law. *See, e.g., Kroll v. Finnerty*, 242 F.3d 1359 (Fed. Cir. 2001), holding that an attorney practicing patent law in New York, and also a member of the New York State Bar, was subject to that state's disciplinary authority without violation of federal preemption principles.

In Kroll, the Circuit Court found that there was no express preemption because the statutory text "gives no indication that [the federal statutes] are intended to preempt the authority of states to punish attorneys who violate ethical duties under state law.") Id. at 1364. The Court held that "because the State of New York is not seeking to suspend or expel Kroll from practicing before the PTO, the conduct of the Grievance Committee does not fall within the field of preemption outlined by Sperry[,] (id. at 1364-65), adding:

With regard to the discipline to be imposed, federal law authorizes the PTO to discipline patent practitioners for incompetence and a wide range of misconduct, much of which falls within the disciplinary authority of the states. That the PTO and the states may share disciplinary

jurisdiction over certain disciplinary matters, however, does not mean that the states' authority is preempted

Id. at 1365.

The facts in the Kroll decision differ from the facts in the case before this Panel to the extent that the attorney under review in the *Kroll* case was not only practicing under federal regulations but was also licensed in the host state. The holding is, however, relevant to the federal preemption issue because it supports the position that where a state has properly asserted disciplinary jurisdiction over an attorney, federal regulations do not necessarily preempt state action. The decision also provides guidance because the New York State disciplinary authorities did not dispute the PTO attorney's right to continue representing clients before the PTO, and did not seek to suspend or expel the PTO practitioner from practicing before the PTO as a sanction.

Until recently, there was sparse legal analysis addressing whether an attorney, who is licensed to practice exclusively before federal immigration agencies and courts,⁷ but who is not licensed by the State in which the immigration attorney operates and maintains a law office, and who has been found to have violated several of the State's ethics rules, can be enjoined by the State from operating and maintaining a law office in that state even though not precluded from practicing before federal immigration agencies and courts in which the immigration attorney is licensed.

Recent decisions by the Iowa Supreme Court may offer some guidance on the issue. In *Iowa Supreme Court Attorney Disciplinary Board v. Carpenter*, 781 N.W.2d

⁷ Federal law allows a member in good standing of any state's bar to practice before the federal immigration courts. See 8 C.F.R. sections 1001.1(f), 1292.1(a)(1) (2011).

263 (Iowa 2010), an immigration attorney was admitted to practice in the State of Minnesota, but not in Iowa. From 2005 to 2007, he maintained law offices in Iowa and provided legal services to Hispanic and other clients in Iowa on federal immigration matters under an Iowa Rule of Professional Conduct providing that:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction [Iowa] that...are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.⁸

The disciplinary complaint, as amended, against the attorney was based in part on his representation of clients in seventeen separate federal immigration matters. *Id.* at 267. Addressing the issue of what, if any, sanctions would be proper under the Court's equitable powers, the Court stated:

[W]hen a non-Iowa licensed attorney commits misconduct that typically warrants a sanction directly affecting licensure, such as suspension or revocation, such sanctions are not feasible because there is no Iowa law license to suspend or revoke. Nevertheless, like our sister courts, we conclude our authority to discipline non-Iowa attorneys includes the ability to fashion practice limitations through our injunctive and equitable powers that are equivalent to license suspension, disbarment, or other sanctions related to an attorney's license. This authority is clearly necessary for the protection of Iowa citizens.⁹

Without addressing Supremacy Clause or preemption issues, possibly because the parties apparently did not raise them, and without imposing or even suggesting

⁸ *Id.* at 266 (citing 8 C.F.R. sections 1001.1(f) and 1292.1(a)(1) (2009)).

⁹ The "sister courts" to which the Iowa Supreme Court referred were the Supreme Courts of the states of Kentucky, Delaware, and Nevada, and the Maryland Court of Appeals. *Id.* at 269-70. None of the cases, however, involved attorneys permitted to practice in federal immigration matters under federal law.

it was imposing a reciprocal suspension, the Iowa Supreme Court concluded that a two-year suspension was justified, then stated:

Translating this suspension to injunctive relief, we order the respondent [Carpenter] to cease and desist from the practice of law in Iowa under Iowa Rule of Professional Conduct 32:5.5(d)(2) or any other law indefinitely with no possibility that the order will be lifted for a period of not less than two years.¹⁰

In its recent decision in *Iowa Supreme Court Attorney Disciplinary Board v. Mendez*, (855 N.W.2d at 156), the Iowa Supreme Court, adhering to its holding in *Carpenter*, and acknowledging that “[f]ederal law allows a member in good standing of any state’s bar to practice before the federal immigration court (citing 8 C.F.R. sections 1001.1(f) and 1292.1(a)(1) (2011),” imposed a cease and desist sanction order against a California-licensed attorney who was “not licensed to practice law in Iowa but acquired a Des Moines-based immigration practice and represented Iowa residents [including illegal residents] in federal immigration proceedings.” *Id.* at 160.

The Court found that Mendez had harmed “several clients” because he personally failed to file one client’s immigration appeal and because one of Mendez’s firm missed the client’s immigration hearing.” *Id.* at 174. Significantly, as emphasized by the Court:

We are unimpressed by his failure to take responsibility for his ethical breaches. As the commission accurately observed, “Mendez does not fully appreciate the seriousness of the transgressions or his obligations to follow the Iowa Rules of Professional Conduct when representing Iowa residents in any legal matter.”¹¹

¹⁰ *Id.* at 271.

¹¹ *Id.* at 174.

Even though Mendez had not been suspended or otherwise disciplined by the State of California or any federal immigration agency or court, the Iowa Supreme Court, through its injunctive and equitable powers, concluded that it had the authority to discipline Mendez, and to prohibit him from practicing law in Iowa, stating:

We order Mendez to cease and desist from all legal practice in Iowa indefinitely with no possibility that the order will be lifted for a period of sixty days

For purposes of having the cease-and-desist order lifted, as well as for other purposes, Mendez shall be treated as though he has been suspended This sanction shall be conveyed to the California state disciplinary authority, the Executive Office for Immigration Review, and other disciplinary authorities as appropriate for their consideration.¹²

While not on “all fours” with the specific issue of whether the Arizona Supreme Court has authority to enjoin Respondent Alexandrovich from maintaining law offices devoted exclusively to the representation of Arizona residents in federal immigration proceedings, a decision by the Pennsylvania Supreme Court may provide additional guidance and support.

In *Office of Disciplinary Counsel v. Marcone*, 579 Pa. 1, 855 A.2d 654 (2004), *cert. denied*, 543 U.S. 11 (2005), an attorney licensed in Pennsylvania had been suspended from the practice of law for a period of four years, and subsequently remained on suspension because he had not petitioned the Pennsylvania Supreme Court for reinstatement. *Marcone*, 855 A.2d at 656–57. Based on the state suspension, the U.S. District Court for the Eastern District of Pennsylvania also

¹² *Id.* at 175.

suspended him from practice before that federal court. *Id.* at 657. The District Court subsequently reinstated the attorney to practice in that specific court. *Id.*

Following the attorney's reinstatement in the District Court, the attorney restricted his practice to "those areas which are permissible pursuant to his federal district court admission." *Id.* at 657. For that purpose, he opened a law office in a nearby county within the District Court's jurisdiction, held himself out as practicing in that District Court, advised clients of his limited federal court practice, and represented clients in that federal district *Id.* at 657. Based on those facts and his "maintenance of a law office while under suspension," the Office of Disciplinary Counsel filed a contempt petition alleging, *inter alia*, that he had "maintained an office for the practice of law in Pennsylvania in violation of the Pennsylvania Supreme Court's suspension order entered several years earlier. *Id.* at 658.

In the subsequent contempt proceedings, the Pennsylvania Supreme Court defined the issue before it as "whether an attorney, who has been suspended from the practice of law by the Supreme Court of Pennsylvania, can maintain a law office in the Commonwealth for purposes of practicing before the [District Court]?" *Id.* The respondent attorney argued, *inter alia*, that "the regulation of federal practice is within the authority of the federal courts[;] that the right to practice 'logically' includes the maintenance of a law office for that practice[;] and [thus] there exists no authority [for the Court] to prohibit his maintenance of a law office dedicated to federal practice. *Id.* at 663–64. The Court rejected this argument, stating:

Through the maintenance of a law office, Mr. Marcone, although suspended, holds himself out to the citizens of our Commonwealth as one competent to . . . counsel clients as to their legal rights and obligations . . . for purposes of practicing before the United States District Court for the Eastern District of Pennsylvania.

We find that by his maintenance of such a law office, Mr. Martone has engaged in the practice of law . . . in violation of our [ethics rules] and thus our order . . . prohibiting him from engaging in . . . the practice of law. *Id.* at 662.

In a related footnote, the Court added:

We emphasize that the issue before us is a narrow one. We are in no fashion speaking to Mr. Marcone’s ability to be admitted to the United States District Court for the Eastern District of Pennsylvania or to represent clients in that court. The sole issue before us is whether Mr. Marcone’s maintenance of a law office within our Commonwealth constitutes contempt of our prior order suspending him from all law-related activities which include, *inter alia*, the practice of law in our Commonwealth. We find that it does.¹³

The Pennsylvania Supreme Court in *Marcone* rejected his argument “that to hold him in contempt would violate the Supremacy Clause of the United States Constitution.” *Id.* at 663-64. The Court stated:

The Supremacy Clause of the United States Constitution prohibits states from enacting laws that are contrary to the laws of our federal government: . . . It is through this clause [U.S. Const. art. VI, cl. 2] that the United States Congress may preempt state Law. In determining whether a state regulation is preempted by federal law, we start “with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless it [is] the clear and manifest purpose of Congress.”¹⁴

The Court, describing the “three ways in which a state law may be preempted,” concluded that “Mr. Marcone’s maintenance of a law office within our Commonwealth is not preempted by federal statute or local [U.S. District Court] rule, and, thus, does not run afoul of the Supremacy Clause of the United States Constitution. *Id.* at 666.

¹³ *Id.* at 662 n. 11

¹⁴ *Id.* at 664.

The Court gave the following reasons for its conclusions: (1) no federal statute or rule expressly preempts a state's regulation of the practice of law in general or an attorney's maintenance of a law office within a state's borders in particular; (2) no conflict existed between the federal statutes and the state's rules;¹⁵ and (3) "we cannot say that our regulation of the maintenance of a law office significantly frustrates the accomplishment of the purposes of Congress."¹⁶

In another, unrelated, disciplinary case, however, the U.S. Court of Appeals for the Third Circuit addressed the issue addressed in *Marcone*, but disagreed with the Pennsylvania Supreme Court's conclusions and rationale. See *Surrick v. Killion*, *supra*, 443 F.3d at 534.

In *Surrick*, the Third Circuit held that an attorney who remained suspended from practice in Pennsylvania state courts, but who had been reinstated to practice before the U.S. District Court for the Eastern District of Pennsylvania, following expiration of a reciprocal suspension, could open a law office in that state for the sole purpose of conducting a federal practice. *Id.* In so doing, the Court held that the state's prohibition against Surrick opening his office, a prohibition based on the Pennsylvania Supreme Court's holding in *Marcone*, was preempted by the District Court's power to control admission to its bar. *Id.* at 531-32.

¹⁵ *Id.* at 665 ("While an attorney's admission to federal court may permit him to represent clients in federal court, it is not impossible or even inconsistent in the least for [the attorney] to comply with our Court's authority to regulate a suspended attorney's maintenance of a law office within our borders from which he holds himself out to the public and consults with clients, even if "limited" to a federal practice.").

¹⁶ *Id.* at 665 ("While regulation of the maintenance of a law office through which one holds himself out to the public and counsels clients may place some burden on one who has been suspended from the practice of law in a particular state but who is nevertheless admitted before a federal court, our regulation of those who maintain a law office within our borders simply does not, without more, result in conflict pre-emption.").

The Third Circuit noted that “the question here is not whether any federal law expressly confers the right to maintain an office, but whether the maintenance of an office is ‘reasonably within the scope’ of the federally conferred license to practice law.” *Id.* at 533. The Circuit Court concluded that maintenance of an office was incident to the federally-conferred license to practice law, and that the federal power preempted the Pennsylvania law barring an unlicensed attorney from maintaining a law office. *Id.*

Significantly, however, the Third Circuit emphasized that its holding did not overrule *Marcone*, because “[o]nly the United States Supreme Court has the power to overrule a decision of the highest court of a state on a question of federal law.” *Id.* at 534, citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). The Third Circuit also acknowledged that its decisions “are not binding on Pennsylvania courts, even when a federal question is involved.” *Id.* at 535. To date *Marcone* has not been overruled by the Pennsylvania Supreme Court or the U.S. Supreme Court.

CONCLUSION

This case demonstrates the increasing need (1) for competent and ethical immigration attorneys by a vulnerable segment of the Arizona population, (2) effective supervision of those attorneys by our Supreme Court and State Bar for the protection of the public and the legal profession, and (3) the need to deter immigration attorneys from engaging in egregious behavior by enjoining them from operating and maintaining law offices in Arizona for a designated period of time, preferably at least until state and federal immigration licensing authorities have had time to investigate unethical behavior and impose reciprocal sanctions. Reprimands of the nature necessarily imposed by the Panel Majority in this case unfortunately,

constitute a mere “slap on the wrist” which, in at least this case, have had no deterrent effect on Respondent.

I therefore believe that, consistent with our Supreme Court’s equitable and injunctive authority, this Panel should order that:

1. Respondent cease and desist from opening or otherwise establishing, operating or maintaining, or employing any individuals to operate or maintain, any office in Arizona for the practice of federal immigration law for a period of what would otherwise be a suspension period of three years provided, however, that Respondent shall be permitted to practice, and specifically shall not be prohibited from exclusively practicing, immigration law during that time period before any federal immigration agency or court to which Respondent was previously admitted and remains in good standing in any state.
2. This sanction, and the record of the proceedings before this Disciplinary Panel, shall be conveyed forthwith to the New York state disciplinary Authority, the Executive Office for Immigration Review of the United States Department of Justice, the Office of the Chief Immigration Judge, and all other appropriate state and federal disciplinary and regulating authorities.
3. Respondent shall remain subject to monitoring by the State Bar of Arizona while the cease and desist order remains in effect to assure Respondent’s compliance therewith. Further, Respondent shall participate in fee arbitration with Ms. Alvarez through the State Bar of Arizona’s fee arbitration program and timely comply with any fee arbitration award.
4. Respondent shall pay all costs and expenses pursuant to Ariz. R. Sup. Ct. 60(b).

Richard L. Brooks

Richard L. Brooks, Volunteer Attorney Member

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Copies of the foregoing
e-mailed this 14th day of March, 2016; and
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