BEFORE THE PRESIDING DISCIPLINARY JUDGE

PDJ 2022-9037

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DAVID S. GINGRAS** **Bar No. 021097** **Respondent.**	**No. 21-2455** **RESPONDENT'S ANSWER**

Pursuant to Supreme Court Rule 58(b) Respondent David S. Gingras ("Respondent" or "Gingras"), by and through undersigned counsel, respectfully submits the following Answer to the Complaint filed in this matter on June 2, 2022.[1]

GENERAL ALLEGATIONS

1. Admit.

COUNT ONE (File no. 21-2455/Ivchenko)

2. Respondent admits the Complainant in this matter is an Arizona-licensed attorney named Andrew Ivchenko. Respondent further admits starting in May 2019, Mr. Ivchenko filed and/or instigated at least eight separate lawsuits in the Maricopa County

[1] Respondent notes the Complaint contains an incomplete and therefore misleading discussion of the facts giving rise to this matter. At the same time, due to its omission of extensive material facts, the Complaint fails to comply with Supreme Court Rule 58(a) which provides: "The complaint shall be sufficiently clear and specific to inform a respondent of the alleged misconduct."

Due to the volume and complexity of the underlying facts (the understanding of which is necessary to the just outcome of this matter), it is not possible for this Answer to set forth "in short and plain terms [Respondent's] defenses to each claim asserted" as required by Ariz. R. Civ. P. 8(c)(1)(A). Nevertheless, the facts supporting Respondent's defenses are set forth in his initial Disclosure Statement submitted concurrently herewith. The facts contained therein are expressly incorporated into this Answer by reference.

Superior Court (in additional to other cases filed outside Arizona), beginning with a matter styled *Renee Ivchenko v. Kyle David Grant*, *et al*., Case No. CV2019-090493 (filed May 9, 2019). A chart reflecting these eight cases is shown below.

	Case Number	Party / Business Name
1	CV2019-015355	Grant, Travis - DOB: N/A
2	CV2019-090493	Grant, Travis - DOB: N/A
3	CV2020-055202	Grant, Travis - DOB: N/A
4	CV2020-055722	Grant, Travis - DOB: N/A
5	CV2020-093006	Grant, Travis - DOB: N/A
6	CV2021-090059	Grant, Travis - DOB: N/A
7	CV2021-090710	Grant, Travis - DOB: N/A
8	CV2021-093562	Grant, Travis - DOB: N/A

To the extent the Complaint alleges: "Andrew Ivchenko … is an attorney who had represented multiple plaintiffs in litigation against a mugshot website operator …" that allegation is denied. Referring to the table of eight cases shown above, Mr. Ivchenko represented only a single identified plaintiff – his wife Renee Ivchenko – and Mr. Ivchenko's direct representation of Mrs. Ivchenko occurred in only one single case – Case #2 on the above table (CV2019-090493). Mr. Ivchenko voluntarily dismissed Case #2 on May 30, 2019, long before the conduct which is the subject of this disciplinary proceeding occurred.

For reasons unknown, Case #2 contains a higher case number than Case #1 (CV2019-015355), even though Case #2 was filed earlier (on May 9, 2019) than Case #1 (CV2019-090493; filed December 17, 2019). Like Case #2, Case #1 was also subsequently abandoned by the plaintiffs (Mr. and Mrs. Ivchenko), resulting in Mrs. Ivchenko's claims in Case #1 being dismissed with prejudice on June 26, 2020, long before the conduct which is the subject of this disciplinary proceeding occurred.

To be clear – Mr. Ivchenko did not "represent" Mrs. Ivchenko in Case #1. In that matter, both Mr. and Mrs. Ivchenko appeared as party-plaintiffs, and they were represented by other counsel (David Ferrucci, Esq., of Dickinson Wright), not by Mr. Ivchenko himself.

It is unknown whether Mr. Ivchenko represented the plaintiff(s) in Cases 3 and/or 4 with respect to the claims asserted in those cases. Cases 3 and 4 were both filed by a different attorney named Craig Rosenstein. However, during the course of those matters, Mr. Ivchenko made statements to Respondent suggesting that the plaintiff(s) in Cases 3 and 4 (identified only as "John Doe") were either "his clients" or his "former clients." Mr. Ivchenko further stated that he was "working with" the Rosenstein firm (despite never appearing as counsel of record in either Case 3 or 4). Cases 3 and 4 were subsequently resolved via settlement in late 2020, and none of the parties to either case ever indicated that they were represented by Mr. Ivchenko at the time the cases were resolved. Under these circumstances, the status of Mr. Ivchenko's relationship (if any) with the plaintiffs in Cases 3 and 4 is unknown.

In Cases 5, 6 and 7, although he appeared as counsel of record for several unidentified anonymous plaintiffs (20 anonymous plaintiffs in Case 5, one anonymous

plaintiff in Case 6, and one anonymous plaintiff in Case 7), Mr. Ivchenko never disclosed the true identities of any of these plaintiffs, in violation of the Rules of Civil Procedure, and in violation of court orders requiring the disclosure of such information. Based on Mr. Ivchenko's repeated violations of the rules and court orders, Respondent did not know, and could not possibly have known, whether Mr. Ivchenko did, in fact, represent any actual litigant(s) in any of those cases, or whether he misled the Court regarding that fact. Under the circumstances, Respondent affirmatively alleges that he believes Mr. Ivchenko did not represent any actual parties in Cases 5, 6, or 7, and that Mr. Ivchenko intentionally misled the court and Respondent about this fact.

Respondent affirmatively alleges that each of the above lawsuits was filed fraudulently, in bad faith, and as part of an extortion attempt by Mr. Ivchenko; *viz*: Mr. Ivchenko threatened to use baseless legal proceedings containing knowingly false allegations to destroy the Grant Family's business unless Mr. Ivchenko received 2,400 "removal credits" which would allow him to remove content from the Grant Family's website. Mr. Ivchenko's conduct in this regard was extortion as a matter of law. *See*, *e.g.*, *Flatley v. Mauro*, 39 Cal.App.4th 299, 332 (Cal. 2006) (finding lawyer's threats to "ruin" defendant unless defendant complied with lawyer's demands constituted extortion as a matter of law; "This culminates in [lawyer's] threat to "go public" and "ruin" Flatley if the January 30 deadline was not met. We conclude that [lawyer's] conduct constituted criminal extortion as a matter of law ….")

In short, Mr. Ivchenko did not pursue any of the above cases for the purpose of resolving legitimate legal disputes between the parties. Rather, Mr. Ivchenko brought all

of the above cases, knowing they were entirely groundless and knowing they involved false allegations of fact, for the sole purpose of trying to force the defendants (the Grant Family) into giving Mr. Ivchenko control over their websites so that Mr. Ivchenko could then charge money to people who wanted their mugshots removed from those sites. Mr. Ivchenko pursued this course of action as part of a conspiracy with a Florida-based "reputation management" company called Web Presence, LLC, d/b/a NetReputation.com.

Respondent affirmatively alleges Mr. Ivchenko's misconduct was criminal, fraudulent, and tortious. As a result of Mr. Ivchenko's unlawful conduct, the attorney-client and work product privileges did not and do not apply to any of Mr. Ivchenko's communications with any person regarding any of the above cases. *See Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, --- F.Supp.3d ----, 2022 WL 894256, 19–21 (C.D. Cal. 2022) (explaining crime/fraud exception "extinguishes both the attorney-client privilege and the work product doctrine") (citing *In re Sealed Case*, 107 F.3d 46, 49 n.2 (D.C. Cir. 1997) ("the attorney's fraudulent or criminal intent defeats a claim of privilege even if the client is innocent"); *In re Impounded Case*, 879 F.2d 1211, 1213 (3d Cir. 1989) (crime/fraud exception will "defeat the client's privilege where the pertinent alleged criminality is solely that of the law firm")).

Case 8 was a civil lawsuit filed by Mr. and Mrs. Ivchenko against Respondent (personally), as well as against Respondent's clients the Grant Family (who were

defendants in Cases 1-7). In Case 8, Mr. and Mrs. Ivchenko appeared *pro se*,[2] and thus Mr. Ivchenko did not represent any other parties in that action.

3. Admit.

4. Admit, subject to the statements contained in ¶ 2 above. Respondent affirmatively alleges the plaintiffs identified as "John Doe" and "Jane Doe" did not have an attorney/client relationship with Mr. Ivchenko at the time such cases were filed, and/or that such individuals did not actually exist. Respondent alleges Mr. Ivchenko lied about this fact to the Court and to Respondent, and that Mr. Ivchenko lied about that fact to the State Bar.

5. Admit.

6. Admit.

7. Admit.

8. Admit that on or around October 27, 2021 (or shortly before), Respondent's client, Travis Grant, wrote and published several articles about Mr. Ivchenko and others, including an article criticizing Mr. Zielinski's firm and the conduct of that firm vis-à-vis an attempt Mr. Grant made to reach a global settlement of all pending litigation. Respondent affirmatively alleges Mr. Zielinski claimed the articles written by Mr. Grant were "defamatory" and that Mr. Zielinski and/or his firm intended to sue Mr. Grant for

[2] Making matters even more confusing, the Complaint in Case 8 indicated that Mr. and Mrs. Ivchenko were represented in that case by an out-of-state attorney named Steven C. Ames; the Complaint's caption identified Mr. Ames as follows: "Steven C. Ames (to be admitted *pro hac vice*)." Despite this, Mr. Ames never actually filed a *pro hac vice* application in Case 8, nor was he ever admitted to appear *pro hac vice* in that case.

publishing those statements. At the same time, Mr. Grant (and his family) expressed to Respondent an urgent desire to reach an immediate global settlement of all pending matters, including the cases filed by Mr. Ivchenko and the case filed by Mr. Zielinski.

Mr. Grant expressed to Respondent that the need to reach a settlement was extremely urgent because a few days earlier, Google terminated its long-standing contractual relationship with Mr. Grant's website, resulting in a complete loss of income to Mr. Grant which at that time exceeded $100,000 per month. Mr. Grant believed (as did Respondent), that Google's decision to terminate its contractual relationship with Mr. Grant's website was due to unlawful threats and tortious inference by Mr. Ivchenko. Mr. Ivchenko had previously threatened to "destroy" the Grant Family's business by causing Google to terminate its contractual relationship with Mr. Grant's website, and as part of that effort, Mr. Ivchenko filed a purported class action suit against the Grant Family which named Google as a defendant (Case #7 in the above table, CV2021-090710).

After discussing these matters, Respondent offered to write a "short article" for Mr. Grant with the intention that he publish it on his website. Respondent denies the article was written "because it could cause [Mr. Ivchenko] SEVERE damage." Rather, the primary purpose of the article was to help Mr. Grant communicate his interest in settlement with any person(s) who may have been involved in either the prior cases filed by Mr. Ivchenko, or the pending class action suit (Case #7). At the same time, both Mr. Grant and Respondent believed (with extremely good reasons) that Mr. Ivchenko was involved in an illegal extortion attempt to use groundless litigation to seize control over Mr. Grant's website, in order to allow Mr. Ivchenko to sell "removal credits" to Web Presence, LLC. Thus, a

secondary purpose of the article was to expose and to stop Mr. Ivchenko's unlawful conduct.

For those reasons, at the time Respondent drafted the article for Mr. Grant, in addition to other reasonable and proper reasons like achieving a settlement of all claims, it was simply noted that the publication of the article could cause "SEVERE damage" to Mr. Ivchenko. This meant the article might help stop his illegal attack against the Grant Family and might help expose Mr. Ivchenko's unlawful and unethical conduct, all of which were legitimate purposes for publishing the statement.

9. Admit.

10. Admit (subject to the limitation that Respondent did not know, and could not possibly have known, whether Mr. Ivchenko actually represented any of the intended recipients at the time the message was published).

11. Admit.

12. Admit.

13. Admit that on October 28, 2021, Mr. Ivchenko sent the following email to Respondent:

> **From:** Andrew Ivchenko <aivchenkopllc@gmail.com>
> **Sent:** Thursday, October 28, 2021 8:41 AM
> **To:** David Gingras <david@gingraslaw.com>
> **Subject:** NOTICE
>
> Mr. Gingras,
>
> I am placing you on notice concerning online activities being conducted by your clients, the Grants. I suggest you review their two websites (www.publicpolicerecord.com and www.usbondsmen.com), including both the home pages and "opt out" pages. For your convenience, I have included screen shots of the later, taken yesterday.
>
> If you have any doubts concerning your legal and ethical obligations in light of these tactics, I would strongly encourage you to obtain legal counsel.

Respondent alleges that upon receiving Mr. Ivchenko's email, he immediately sent the following response five minutes later:

> **From:** David Gingras <david@gingraslaw.com>
> **Sent:** Thursday, October 28, 2021 8:46 AM
> **To:** Andrew Ivchenko <aivchenkopllc@gmail.com>
> **Subject:** Re: NOTICE
>
> I'm sorry, what are you placing me on "notice" of?
>
> What exactly is your issue with this? Is something not accurate? If so, please identify.
>
> Based on my knowledge of the facts, I see nothing wrong with this. If you disagree, please explain why.

Respondent alleges Mr. Ivchenko never responded to this email, and never explained why he believed the website post was improper. Respondent further alleges that he also contacted Mr. Zielinski via email, and asked him to explain why the website post was improper. Like Mr. Ivchenko, Mr. Zielinski never offered any substantive response to that request.

14. Respondent admits that after the settlement message was posted, an attorney in Florida named Jim Lussier (who was Respondent's local counsel in pending litigation against the Grant Family in Florida) contacted Respondent to express concerns about the message. Respondent then discussed the matter with Mr. Lussier and explained his position in an email sent on October 28, 2021:

> **From:** David Gingras <david@gingraslaw.com>
> **Sent:** Thursday, October 28, 2021 5:38 PM
> **To:** Jim Lussier <JLussier@MateerHarbert.com>
> **Subject:** RE: NOTICE
>
> Jim,
>
> Just one other thing – I don't know if the Florida rules are different, but the AZ ethical rule (ER 4.2; shown below) includes a comment that *expressly* authorizes direct client-to-client contact. That's been the default standard here for many, many years.

This exception allowing direct client-to-client contact is unconditional. It's allowed in *every* case, no matter what the situation. It is simply never an ethical issue to have clients talk directly to each other, or to attempt to do so.

Obviously the rule could have been written to say that client-to-client contact is only permissible if the lawyer had nothing to do with helping the client figure out what to say. But the rule doesn't say that, and that's obviously completely unrealistic. I'd argue that it would actually be malpractice for a lawyer to allow his client to speak directly with the opposing party without at least some prep work and some guidance on what to say. If you think about it, I'm sure you'll see my point.

So again, maybe the rules in Florida are different, but here in AZ, if a client has a lawyer, and the client decides to speak directly with the opposing party, I think it's absolutely routine for the client to ask his lawyer about what to say, or what not to say, etc. That's all that happened here.

https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/

After reviewing Respondent's explanation, Mr. Lussier sent the following reply:

From: Jim Lussier <JLussier@MateerHarbert.com>
Sent: Thursday, October 28, 2021 2:40 PM
To: David Gingras <david@gingraslaw.com>
Subject: RE: NOTICE

I think you'll find Florida is the same. Ghost writing is not contacting, I think that is defensible.

Jim Lussier

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15. Admit.

16. Deny.

Statement of Additional Issues/Defenses

Without acknowledging the following points are affirmative defenses for which Respondent bears the burden of proof (as opposed to issues for which the State Bar bears the burden), Respondent alleges his conduct did not violate any ethical rule(s) for the

following additional reasons. The factual and legal bases for these arguments are set forth fully in Respondent's Disclosure Statement which is submitted herewith and which is incorporated by reference.

I. The State Bar's Position Misstates The "No-Contact" Rule Set Forth In ER 4.2; Direct Client-To-Client Communication Is Always Permitted Under The Rule, Even If A Lawyer Drafts The Communication Or Otherwise Encourages It.

II. Respondent Did Not Engage In "Overreaching"

III. The State Bar's Interpretation Of The Term "Overreaching" Is Unconstitutionally Vague And Overbroad

IV. Special Rules Apply In Uncertified Class Action Cases, And Under Those Rules Potential Class Members Are Not "Represented Parties" For The Purpose Of ER 4.2

V. Respondent's Speech Is Protected By The First Amendment And Cannot Form The Basis For Discipline

VI. Respondent Did Not Know Whether Complainant Andrew Ivchenko Represented Anyone At The Time The Settlement Message Was Published. Therefore, Respondent Did Not Attempt To Communicate With Someone He "Knew" Was Represented By Counsel

VII. ER 4.4 Is Unconstitutionally Vague And Overbroad As Applied

VIII. The State Bar's Conduct Violated Respondent's Rights To Due Process/Equal Protection

IX. This Disciplinary Proceeding Violates Arizona's Anti-SLAPP Law

Respondent's Address

Pursuant to Sup. Ct. R. 58(b), Respondent's address is:

David S. Gingras
Gingras Law Office, PLLC
4802 E. Ray Road, #23-271
Phoenix, AZ 85044

Tel: (480) 264-1400
Email: David@GingrasLaw.com.

Respondent confirms the above address is the address reported to the state bar pursuant to Sup. Ct. R. 32(c)(4)(iii).

WHEREFORE, Respondent prays for the following:

A. For an order finding that Respondent's conduct in this matter did not violate any rule of professional conduct;

B. For an award of Respondent's reasonable attorney's fees and costs pursuant to A.R.S. § 12-353 and/or A.R.S § 12-752;

C. For such other and further relief as appropriate.

Respectfully submitted: August 5, 2022

/s/ Marc J. Randazza
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Respondent

CERTIFICATE OF SERVICE

Original electronically filed via email to officepdj@courts.az.gov on August 5, 2022, with:

Attorney Disciplinary Probable Cause Committee
Administrative Office of the Courts
1501 W. Washington St., Suite 102
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/s/ Marc J. Randazza
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