GINGRAS LAW OFFICE, PLLC

4802 E. Ray Road #23-271, Phoenix, AZ 85044 ▪ Tel: (480) 264-1400 ▪ Fax: (480) 248-3196

November 22, 2021

VIA EMAIL: jennifer.smith@staff.azbar.org
& U.S. Mail

Ms. Sierra M. Taylor
Staff Bar Counsel; State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, AZ 85016-6266

Re: File No. 21-2455; Complainant: Andrew Ivchenko

Ms. Taylor,

I have received and reviewed your letter dated Nov. 1, 2021 regarding a complaint you received from a lawyer named Andrew Ivchenko. This letter, combined with a separate part for which confidentiality is requested per Ariz. Sup. Ct. R. 70(g), is my response to Mr. Ivchenko's complaint.

I. INTRODUCTION/SUMMARY

Mr. Ivchenko's complaint generally alleges that in late October 2021, I attempted to directly contact one or more of his clients regarding the subject of the representation. If true, this would be an obvious violation of ER 4.2.

As explained below, Mr. Ivchenko's allegation is not true. I have done nothing that could, even arguably, qualify as a violation of ER 4.2, or any other ethical rule.

To help understand that conclusion and the reasons for it, I need to offer some background details of the underlying dispute. Unfortunately, the underlying dispute is *exceptionally complicated* and it appears Mr. Ivchenko has told you nothing about it. In short, over the last three years, Mr. Ivchenko has been involved in nearly a dozen lawsuits arising from/relating to the same event—the arrest of his wife in April 2018. Most of these cases have been resolved, but five (5) currently remain pending.

Rather than giving you every detail of these cases and the extremely bizarre history of events leading up to Mr. Ivchenko's current complaint, I will try to condense my response into the shortest possible summary of what occurred. At the same time, concluding that no ER 4.2 violation occurred here requires understanding at least some of the background history of the dispute, so my response will begin there.

I currently represent three individuals: **Travis Grant**, his wife **Mariel Grant**, and Travis's brother, **Kyle Grant** (collectively, the "Grant Family"). The Grant family all live in Florida. Mariel Grant is a stay-at-home mother who takes care of two young children. Travis Grant owns and operates several websites (explained further below). Kyle works for Travis in various administrative capacities.

As you may know, most law enforcement agencies in the United States publish arrest booking photos (a/k/a "mugshots") and other arrest-related information on their websites. For example, the Maricopa County Sheriff's Office (MCSO) routinely publishes mugshots and related information about everyone who is arrested on its website at: https://www.mcso.org/i-want-to/mugshot-lookup.

Travis Grant owns and operates several websites which, until recently, were involved in gathering, indexing, and archiving public records, including mugshots. As explained further below, in mid-October 2021, Travis's websites were taken offline, and they remain offline today. We believe this occurred because of unlawful conduct on the part of Mr. Ivchenko which is, at least in part, the subject of pending litigation.[1] Before Travis's websites were shut down, they contained more than 20 million arrest records and mugshots gathered from 45 different U.S. states.

The current dispute with Mr. Ivchenko began in April 2018 when his wife, Renee, was arrested for assaulting a police officer in Scottsdale during a domestic dispute. Mrs. Ivchenko was subsequently charged with one felony count of aggravated assault on a police officer.[2] In keeping with its normal practice, after Mrs. Ivchenko was booked into jail, her mugshot was taken by MCSO and published on its website, along with her name and details of the charges against her.

Shortly after her arrest, Mrs. Ivchenko's mugshot and related information was automatically copied from MCSO's website, then it was indexed and archived by one or more of Travis's websites. The same information was also archived by several other unrelated websites (sites that are not owned or operated by Travis). As a result, a Google query for "Renee Ivchenko" showed her mugshot and arrest details on various sites, including at least one site owned by Travis Grant.

---

[1] To be clear—the question of whether Mr. Ivchenko has engaged in unlawful or unethical conduct has no bearing on the separate issue of whether I have done something improper. As such, I am not making these statements about Mr. Ivchenko to distract from his complaint against me. Rather, I am simply explaining the history and context in which this dispute arose.

[2] The criminal case against Mrs. Ivchenko was *State v. Renee Rochelle Ivchenko*; Maricopa County Superior Court Case No. CR2018-119949.

After seeing his wife's mugshot published on the Internet, Mr. Ivchenko flew into an uncontrolled rage. This rage has manifested itself in a long series of lawsuits against my clients, but also against many other targets.[3]

As it relates to the Grant Family, Mr. Ivchenko has filed and/or otherwise instigated[4] at least eight (8) different lawsuits here in Arizona, and one case in Florida. Those matters are:

1.) *Ivchenko v. Grant*; MCSC Case No. CV2019-090493 (filed 5/9/2019);
2.) *Ivchenko v. Grant*; MCSC Case No. CV2019-015355 (filed 12/17/2019);
3.) *Doe v. Grant*; MCSC Case No. CV2020-093006 (filed 5/1/2020);
4.) *Doe v. Grant*; MCSC Case No. CV2020-055202 (filed 9/24/2020);
5.) *Doe v. Grant*; MCSC Case No. CV2020-055722 (filed 11/6/2020);
6.) *Doe v. Grant*; MCSC Case No. CV2020-090059 (filed 1/6/2021);
7.) *Doe v. Grant*; MCSC Case No. CV2021-090710 (filed 2/12/2021);
8.) *Ivchenko v. Gingras*; MCSC Case No. CV2021-093562 (8/3/2021);
9.) *Doe v. Grant*; Seminole County (Florida) Case No. 2021-CV-960 (filed 4/9/2021)

Based on Mr. and Mrs. Ivchenko's unlawful actions, the Grant Family is also currently suing Mr. and Mrs. Ivchenko for malicious prosecution, among other things. That matter (which is currently pending in federal court here in Phoenix) is:

10.) *Grant v. Ivchenko*; Case No. 21-cv-108-PHX-JJT (filed 1/21/2021)

---

[3] For instance, after her arrest, Mrs. Ivchenko sued the City of Scottsdale for false arrest, but the case was thrown out after the U.S. District Court determined probable cause existed for the arrest. This ruling was recently affirmed by a unanimous panel of the Ninth Circuit Court of Appeals. *See Ivchenko v. City of Scottsdale*, 2021 WL 4739642 (9th Cir. Oct. 12, 2021). Mrs. Ivchenko (represented by Mr. Ivchenko) also sued an alcohol treatment center where she sought care for her alcoholism. Other lawsuits filed by Mr. Ivchenko against third parties also remain pending.

[4] Mr. Ivchenko has previously accused me of "lying" about the number of cases he has filed, so to be clear – Cases 4 and 5 on the above list were filed by a different law firm, not by Mr. Ivchenko. However, Mr. Ivchenko has personally told me (in writing) that the plaintiffs in those matters were "his clients" and that he was working closely with the firm that filed those actions. Thus, it is fair and accurate to say that Mr. Ivchenko "instigated" those two lawsuits. The same is true of Case 9; Mr. Ivchenko has not personally appeared as counsel of record in that case, but he has submitted testimony as a *witness* in that matter, and the plaintiff's local Florida counsel has told me, in writing, that the plaintiff in that case has, or had, an attorney-client relationship with Mr. Ivchenko.

To resolve Mr. Ivchenko's current ethics complaint, it is not necessary for you to understand every detail of the litigation cited above. However, a few points are important to understand. First, excluding matters which remain pending, Mr. Ivchenko has either abandoned or lost every prior suit he has filed against the Grant Family. Each time, Mr. Ivchenko has filed a new lawsuit against the Grant Family, litigated that case for a while, caused the Grant Family to incur thousands of dollars in fees, and then Mr. Ivchenko dropped the case before losing on the merits. Mr. Ivchenko will then refile a virtually identical new case, and the cycle repeats again, and again, and again.

Specifically, Mr. Ivchenko voluntarily dropped/abandoned Cases 1, 2 and 3 on the above list. The fourth action (which is technically item #6 on the above list; CV2020-090059) was not voluntarily abandoned. Rather, the fourth case was dismissed by the Superior Court based on a finding that every claim brought by Mr. Ivchenko was barred by federal law. Mr. Ivchenko is, of course, currently appealing that loss.

Also, one other critically important detail – after he voluntarily abandoned the first two cases (both of which involved his wife as a named plaintiff), Mr. Ivchenko began filing new actions on behalf of anonymous plaintiffs identified only as either "JOHN DOE" or "JANE DOE" (this is why the above list starts with cases styled *Ivchenko v. Grant* and then switches to cases styled *Doe v. Grant*).

In each of these Doe-plaintiff cases, Mr. Ivchenko has flatly refused (in violation of the Rules of Civil Procedure and controlling Arizona Supreme Court precedent) to disclose any information about the identity of the plaintiff(s). In one specific instance (Case #3 on the above list) the federal court specifically ordered Mr. Ivchenko to allow discovery into three (of the twenty) anonymous plaintiffs. Rather than complying with the court's order, Mr. Ivchenko simply dismissed the action the very next day, thus abandoning the claims of all twenty anonymous plaintiffs in that case.

These actions (and others) have caused my clients and I conclude as follows: Mr. Ivchenko is not pursing claims on behalf of any real people. Rather, we believe that Mr. Ivchenko is either suing on behalf of people who do not exist, or on behalf of people who may exist, but whom Mr. Ivchenko does not represent.

That obviously unusual concern is part of the reason for the events which give rise to Mr. Ivchenko's current complaint. In short, in late October 2021, Travis Grant posted a settlement message directed at Mr. Ivchenko's current/former clients. The point of this message was to help ascertain whether any of these unknown people actually existed, and, if so, whether they would agree to settle their claims against the Grant Family. As explained further below, no one (other than Mr. Ivchenko) ever responded to the message posted by Mr. Grant. This tends to support the conclusion that Mr. Ivchenko's "clients" do not, in fact, exist.

This issue is also relevant to the question of whether a violation of ER 4.2 occurred here for one obvious reason—that rule prohibits a lawyer from having direct communications with a *"Person Represented by Counsel"*. Here, my clients suspect that Mr. Ivchenko does not, in fact, represent anyone other than himself and his wife.

If Mr. Ivchenko only represents fictional/non-existent people, then there is no "*person* represented by counsel" on his side of the cases which remain pending. In other words, a *pro se* litigant is, by definition, not a person represented by counsel,[5] and a fictional person who does not exist is also not a person represent by counsel.

II. DISCUSSION

With these background facts in mind and turning to Mr. Ivchenko's specific complaint, here is the shortest version I can offer to explain what happened.

In mid-October-2021, Travis Grant determined he wanted to try and resolve all Ivchenko-related litigation as quickly as possible. To do this, Travis instructed me to present a settlement offer to Mr. Ivchenko and to a Florida law firm which is pursing Case #9 on the above list. As instructed, I sent a settlement offer via email on October 25, 2021. Mr. Ivchenko failed to include a copy of this offer with his complaint, but a copy is attached hereto as Exhibit A.

The terms of the offer are self-explanatory, but there is one key point I need to explain. Settlement Term #3 informed Mr. Ivchenko that to reach a global resolution of all pending matters, and to ensure that no further lawsuits would be filed by Mr. Ivchenko's clients against the Grant Family in the future: "Enforceable releases of all claims will be exchanged between everyone; this includes all of your current/former clients including anyone who has sued the Grants anonymously in the past." (emphasis in original; yellow highlighting added).

A couple short comments about Term #3. First, Mr. Ivchenko (and the Florida firm he claimed to be working with) are the only attorneys who have sued the Grants on behalf of anonymous plaintiffs. Accordingly, the reference to "anyone who has sued the Grants *anonymously in the past*" was not meant to include a huge class of people who Mr. Ivchenko did not know. Rather, it was meant to apply to anyone Mr. Ivchenko currently or previously represented, since those are the only people who have sued the Grant Family anonymously.

[5] In two of the five cases which remain pending (Cases 8 & 10), Mr. and Mrs. Ivchenko are representing themselves *pro se*.

Second and more importantly, Term #3 used the term "**former clients**" for a very specific reason—as explained in the confidential portion of my response submitted herewith, I am aware of at least one individual who previously hired Mr. Ivchenko, then apparently terminated that relationship and retained other counsel. To the best of my knowledge, that individual (who has signed a release of all claims against the Grants) is no longer represented by Mr. Ivchenko, and was not represented by him at the time his claims were settled.

Of course, because Mr. Ivchenko has refused to disclose any information about who his current/former clients are, it was (and is) impossible to formulate a global settlement unless Mr. Ivchenko identified everyone he *currently* represented in litigation against the Grant Family, as well as anyone he *previously* represented even if that representation has since ended. That is why Term #3 used the term "former clients".

After I made this offer on October 25, two days later on October 27 I received an email from attorney John Zielinski, a copy of which is attached hereto as Exhibit B. Mr. Zielinski is counsel of record for the anonymous plaintiff in Case 9 on the above list. In his message, Mr. Zielinski rejected the Grants' settlement offer and stated "There is no interest in a resolution without a monetary payment to my client."

Two brief comments about Mr. Zielinski's response. First, Mr. Zielinski previously told me, in writing,[6] that Mr. Ivchenko had an attorney-client relationship with the plaintiff in Case #9, even though Mr. Ivchenko is not counsel of record in that case. Despite this, Mr. Zielinski refused to provide any other information about the scope or duration of the relationship between the plaintiff and Mr. Ivchenko, including whether or not the relationship had ended. That refusal to provide information is the subject of a Motion to Compel currently pending in the Florida litigation.

Second, the settlement offer I presented to both Mr. Ivchenko and Mr. Zielinski in my October 25th email was clear—the Grants were willing to resolve all pending matters, but they were not willing to pay any money to any of the plaintiffs under any circumstances. The fact that Mr. Zielinski rejected this offer meant the offer was immediately rescinded as to any/all other plaintiffs, including anyone else who would have been willing to accept the terms of the original offer. This was obviously extremely disappointing to the Grant Family who have been dealing with groundless, harassing litigation from Mr. Ivchenko for nearly three years.

[6] This relationship was raised as an attorney-client privilege objection in response to a discovery request which asked for copies of correspondence between Mr. Ivchenko and the plaintiff.

Mr. Zielinski's rejection of the settlement offer also immediately created serious concerns for obvious reasons. My clients wanted to resolve all pending cases, not just some of them. Based on prior experience (as explained further in my confidential response), we believed that if Mr. Ivchenko actually represented any real people, those people would almost certainly have accepted the terms of the settlement. We also became extremely concerned that Mr. Ivchenko may not have communicated the terms of the settlement to his "clients", assuming they existed.

To help resolve those concerns, on October 27, 2021, Travis Grant posted a message to his website under the heading "**IMPORTANT NOTICE REGARDING MUGSHOT REMOVAL***". A copy of this message was included with Mr. Ivchenko's complaint, and as I understand it, this message forms the sole basis for his complaint.

In the message, Mr. Grant explained he had extended a settlement offer to all current and former plaintiffs which was rejected by one individual (the anonymous Florida plaintiff who may or may not be a client of Mr. Ivchenko). The message further expressed concern that because the offer was rejected by one person, this appeared to create a conflict of interest with anyone else who would have been willing to accept the original offer. The message concluded by repeating the general terms of the offer, and it invited anyone who wanted to accept the offer to contact the Grant Family directly via email to discuss the matter further.

The following day, Mr. Ivchenko sent me an email (included with his complaint) stating that he was "placing me on notice" regarding the message posted by my clients. However, Mr. Ivchenko never explained the nature of his complaint and he never responded to my follow-up request for explanation of his concerns. Instead, he immediately reported the matter to your office.

As I understand it, Mr. Ivchenko claims the message posted by Travis Grant on October 27th violated ER 4.2 because he thinks this was an *indirect attempt*, by me, to communicate directly with his clients (his clients being the anonymous/unknown individuals who may or may not exist). Mr. Ivchenko also alleges, without any basis or explanation, that Travis Grant is somehow my "alter ego", therefore I am ethically responsible for the message Travis posted.

Mr. Ivchenko's view on each of these points is simply wrong.

The main reasons for this are explained in ABA Formal Opinion 11-461, a copy of which is attached hereto as Exhibit C. As this opinion explains, ER 4.2 does not prohibit clients from communicating (or attempting to communicate) directly with the opposing party, even if the opposing party is represented by counsel. Furthermore, because parties are always free to communicate directly with each other, a lawyer who

represents one party is free to advise his/her client about exercising that right, and, without violating ER 4.2, the lawyer may even help the client draft specific points or terms to communicate to the opposing side. On those issues, the opinion summarizes the rule as follows:

> *Parties to a legal matter have the right to communicate directly with each other.* ***A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication****. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer*. (italics in original; underling emphasis added).

Among other things, ABA Formal Opinion 11-461 explains that direct contact between represented parties may be especially desirable and appropriate in certain circumstances, such as when settlement discussions are occurring or where such discussions are stalled: "It sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel. Two examples may be where the parties wish to cement a settlement or break an impasse in settlement negotiations." (emphasis added).

Further, the opinion also explains direct client-to-client contact (or attempted contact) may be particularly necessary and proper when a concern arises regarding potential misconduct by opposing counsel. In that instance, the opinion offers the following example of a case where a settlement offer was made to opposing counsel, and the offeror (plaintiff) believed opposing counsel (for the defendant) failed to communicate the offer to his client:

> Plaintiff's lawyer suspected that opposing counsel had not informed the defendant of the offer …. [A]lthough the plaintiff's lawyer could not communicate the settlement offer directly to the defendant without violating Rule 4.2, the plaintiff's lawyer had an ethical duty under Rules 1.1, 1.2(a), and 1.4(b) to advise the client that the lawyer believed his settlement offer had not been communicated by defendant's counsel to the defendant *and that the plaintiff had the right to speak directly with the defendant to determine whether the settlement offer had been communicated*. (emphasis added)

To help clarify this conclusion, ABA Formal Opinion 11-461 cites to Formal Opinion 92-362 which states: "where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty …[to] fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation." (emphasis added).

Having said all this, my position here can be summarized in four basic points:

First, there is no question the Grant Family had (and has) an absolute, unrestricted right to communicate directly with any person who is suing them, even if the opposing party is represented by counsel and even if opposing counsel objects. Thus, even if the Grant Family knew who Mr. Ivchenko's clients are/were (and assuming such people actually exist), it would not be a violation of ER 4.2 (or any other rule) for Travis Grant to communicate directly with the opposing party, or to attempt to do so, particularly when the purpose of the communication was to discuss settlement. This is a *good/desirable* thing, not something contrary to any ethical rule.

Second, although Mr. Ivchenko offers no evidence to show that I was involved in these events, ABA Formal Opinion 11-461 makes it clear that it would not have been a violation of ER 4.2 for me to discuss this concept with Mr. Grant or to draft the statement he eventually published. That single fact should be conclusive of Mr. Ivchenko's complaint.

Third, due to the unique nature of ER 4.2 (which expressly *allows* direct client-to-client communications, regardless of the circumstances or the reasons), Mr. Ivchenko's "alter ego" arguments simply do not apply, nor do they make any sense. For one thing, I am not the "alter ego" of the Grant Family (I don't even understand what Mr. Ivchenko means by this). For another, there is simply nothing wrong with a litigant like Mr. Grant reaching out to the opposing party for the purposes of discussing settlement. Accordingly, this is not a situation where a lawyer (me) sought to use a third party (Travis Grant) to do something the lawyer was ethically precluded from doing. Rather, under these facts, ER 4.2 simply does not prohibit direct client-to-client contact, even if a lawyer advised the client to attempt such contact.

Fourth, the essential element of an ER 4.2 violation is that a lawyer attempts to directly communicate "about the subject of the representation with *a party* the lawyer *knows* to be represented by another lawyer …."

Here, as explained above and in my separate confidential response, based on our experience in dealing with Mr. Ivchenko (in which he has steadfastly and unlawfully refused to disclose the identity of any of his clients), there is no basis to conclude that I did anything to communicate with a person who I knew to be represented by counsel. Indeed, I have no idea who any of Mr. Ivchenko's clients are, or whether they even exist.

On the contrary, I have substantial evidence and substantial reason to believe that Mr. Ivchenko does not represent anyone other than himself and his wife. My belief is that he has lied about representing anonymous, non-existent parties as part of his vendetta to exact revenge on Travis Grant for publishing Mrs. Ivchenko's mugshot.

Under these circumstances, even if Mr. Ivchenko had previously represented any real (non-fictious) clients, those clients certainly may have terminated their relationship with him at some point prior to the settlement offer I extended on October 25th. Of course, if a person was once represented by Mr. Ivchenko, but the attorney-client relationship ended and the person was no longer represented by counsel, ER 4.2 would not prohibit me from communicating directly with Mr. Ivchenko's former client.

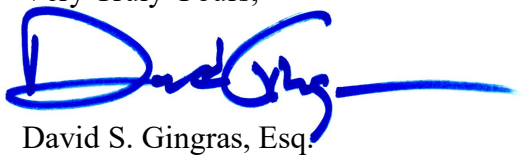
For each of those reasons, there is simply no evidence to show that I intentionally communicated, or attempted to communicate, with a person who I *knew* was currently represented by counsel. The mere fact that Mr. Ivchenko *claims* to represent an anonymous person (whom he refuses to identify, even when ordered to) does not mean that such a person actually exists.

III. CONCLUSION

For all the reasons stated above, probable cause does not exist to conclude misconduct occurred on my part under the rules. Accordingly, I request that you dismiss Mr. Ivchenko's complaint pursuant to Supreme Court Rule 55(b)(2)(A)(i).

Of course, I am happy to provide any further information you may require or to discuss this matter to answer questions you may have. In that case, please feel free to reach me at (480) 264-1400 or via email at: david@gingraslaw.com.

Very Truly Yours,



David S. Gingras, Esq.

Exhibit A

David Gingras

From: David Gingras
Sent: Monday, October 25, 2021 11:54 AM
To: John Zielinski; Jim Lussier; Andrew Ivchenko
Cc: Chelsea Strudwick; stevenames.atty@gmail.com
Subject: RE: Doe v. Grant - Settlement Offer

Andrew,

Well, here's an email I was hoping never to write, but write it I must…..

As you know, last week Google removed its ads from the Grants' websites. I assume this was done as the result of you making some sort of unlawful threat to Google and/or you making false statements to Google. In either of those cases, the value of the Grants' claims against you just increased by a factor of about 10,000x.

At the same time, even though the Grants could sue you for $30 million+, there is little value in pursuing that case since you don't have sufficient resources to pay such a judgment, and at the end of the day, Google always had (and still has) final discretion to choose not to allow its ads on whatever websites it chooses.

Thus, it suffices to say that despite having literally zero legal or factual merit, you've finally won your battle. You have killed the Grants' websites and put them in a position where there is simply no value to continuing this battle.

For those reasons, I have been asked to communicate the following settlement offer to you. Note that I am cc'ing FL counsel on this because this is a package deal that would require the termination of *all* litigation against the Grants, not just some of it. A partial settlement would have no value to the Grants, so if you are not able to deliver a final resolution of *all* pending matters, then we need not discuss anything else.

Here are the terms:

1.) All pending lawsuits against the Grants will be dismissed, with prejudice. To be clear, this includes:
    a. Case 6 (CV2021-090059) and the related appeal;
    b. Case 7 (CV2021-090710);
    c. Case 8 (FL; Seminole County Case No. 2021-CA-000960)
2.) The Grants will dismiss their malicious prosecution action against you (Ariz. Dist. Court Case 21-CV-00108-PHX-JJT), with prejudice;
3.) Enforceable releases of all claims will be exchanged between everyone; this includes all of your current/former clients including anyone who has sued the Grants anonymously in the past.
    a. NOTE: A release signed by "John Doe" or "Jane Doe" is not enforceable and thus has zero value. Accordingly, that means you must disclose the names of every former client of yours in all previous lawsuits against the Grants (I think this is at least 60 individuals), and all of those folks will each have to sign an individual release of all claims. Obviously those names will be kept confidential.
4.) The Grants will immediately cease publishing mugshots/criminal records and they will agree not to re-enter that business at any time in the future. In addition, the Grants will agree *not* to sell/transfer their websites or the database of contents to any third parties.
5.) The Grants will transfer ownership of andrewivchenko.com and reneeivcheno.com (and any other similar domains they have), and you will transfer ownership of any/all domains you have relating to either the Grants or to me.
6.) All parties will agree to mutual non-disparagement and confidentiality.

A few additional remarks:

A.) I have already talked to Travis about the likelihood that you would demand some sort of payment as part of this deal. Please be aware – that is a non-starter. Travis will not agree to pay anything as part of this deal. If you insist on money as part of the agreement, then we will simply continue forward with litigation.

B.) Time is of the essence. As you know, the AZ Court of Appeals has ordered us to pay the filing fee for the cross-appeal by the end of the day today. While it is likely that Travis will abandon the cross-appeal even without an agreement (because the purpose of such is largely moot now), I would still appreciate a final response from you as soon as possible so I can meet the court's deadline if Travis changes his mind.

David Gingras, Esq.
Gingras Law Office, PLLC
David@GingrasLaw.com
https://twitter.com/DavidSGingras
http://gingraslaw.com
Tel.: (480) 264-1400
Fax: (480) 248-3196
*Licensed in Arizona and California

Exhibit B

David Gingras

From: John Zielinski <john@nejamelaw.com>
Sent: Wednesday, October 27, 2021 5:43 AM
To: David Gingras; Jim Lussier
Cc: Chelsea Strudwick; stevenames.atty@gmail.com
Subject: RE: Doe v. Grant - Settlement Offer

David,

There is no interest in a resolution without a monetary payment to my client.

Best Regards,

John

John W. Zielinski, Esquire
Partner

NeJame Law
189 South Orange Avenue
Suite 1800
Orlando, Florida 32801
407-500-0000 office ext. 105
407-802-1431 fax
www.NeJameLaw.com
john@nejamelaw.com

From: David Gingras <david@gingraslaw.com>
Sent: Monday, October 25, 2021 2:54 PM
To: John Zielinski <john@nejamelaw.com>; Jim Lussier <JLussier@MateerHarbert.com>; Andrew Ivchenko <aivchenkopllc@gmail.com>
Cc: Chelsea Strudwick <chelsea@nejamelaw.com>; stevenames.atty@gmail.com
Subject: RE: Doe v. Grant - Settlement Offer

Exhibit C

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 11-461 **August 4, 2011**

Advising Clients Regarding Direct Contacts with Represented Persons

Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.[1]

A lawyer may not communicate with a person the lawyer knows is represented by counsel, unless that person's counsel has consented to the communication or the communication is authorized by law or court order. ABA Model Rule 4.2 (sometimes called the "no contact" rule). Further, a lawyer may not use an intermediary, i.e., an agent or another, to communicate directly with a represented person in violation of the "no contact" rule.[2]

It sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel. Two examples may be where the parties wish to cement a settlement or break an impasse in settlement negotiations. In this opinion, the Committee explores the limits within which it is ethically proper under the Model Rules of Professional Conduct for a lawyer to assist a client regarding communications the client has a right to have with a person the lawyer knows is represented by counsel. Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.[3] In addition, a client may require the lawyer's assistance and a lawyer may be reasonably expected to advise or assist the client regarding communications the client desires to have with a represented person. A client may ask the lawyer for advice on whether the client may lawfully communicate directly with a represented person without their lawyer's consent or their lawyer being present. The comments to Rules 4.2 and 8.4(a) state that such advice is proper.[4] Even if the client has not asked for the advice, the lawyer may take the initiative and advise the client that it may be desirable at a particular time for the client to communicate directly with the other party.

For example, a lawyer represents a client in a marital dissolution. The client's husband also is represented by counsel. The parties and their lawyers have reached an impasse in their negotiations over various issues. The client may ask her lawyer if she may communicate directly with her husband to see if an agreement can be reached on some contested issues. Alternatively, the lawyer might independently

---

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Rule 8.4(a). The Rule states: "[i]t is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995) ("Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject of the representation, she [under Rule 8.4(a)] may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do."); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 408 (ABA 7th ed. 2011) ("A lawyer may not, however, "mastermind" a client's communication with a represented person.").

[3] *See* Holdren v. General Motors Corp., 13 F.Supp.2d 1192, 1195 (D. Kan. 1998) ("there is nothing in the disciplinary rules which restrict a client's right to act independently in initiating communications with the other side, or which requires that lawyers prevent or attempt to discourage such conduct." (citing New York City Bar Association Formal Opinion No.1991-2, at 5-6)); Dorsey v. Home Depot U.S.A., Inc., 271 F.Supp.2d 726, 730 (D.Md.2003) ("Nothing in the law prohibits litigants or potential litigants from speaking among and between themselves, as opposed to attorneys for such parties attempting direct communications with represented parties."); Northwest Bypass v. U.S. Army Corps of Engineers, 488 F.Supp.2d 22, 28-29 (D.N.H. 2007) (not improper for represented party to communicate directly with represented opponent).

[4] *See* Rule 4.2 cmt. 4 ("A lawyer may not make a communication prohibited by this Rule through the acts of another. *See also* Rule 8.4(a) cmt. 1 ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.").

suggest that the possibility of resolving outstanding issues would be enhanced if the client communicates directly with her husband. The client also might benefit from the lawyer's advice on how she should conduct such settlement negotiations, the topics or issues to be covered, and the goals or objectives to be reached. The client also could ask the lawyer to prepare a marital settlement agreement with the goal of having her husband execute the agreement during her meeting with him.

The language of Rule 4.2 Comment [4] raises the primary question addressed in this opinion, to what extent may the lawyer advise and assist the client in communicating directly with the represented husband without violating Rule 4.2 through the acts of another, i.e., the client.[5] However, there is tension between Comment [1] to Rule 4.2 and Rule 8.4(a). In ABA Formal Op. 92-362 (1992), this Committee opined that, without violating Rules 4.2 and 8.4 (a), a lawyer may ethically advise the client to communicate directly with a represented adversary to determine if the adverse party's lawyer had informed them that a settlement offer was pending.[6] The inquiring lawyer in the opinion represented the plaintiff in a civil case in which the defendant also was represented by counsel. Previously, the plaintiff's lawyer made a settlement offer to opposing counsel. Plaintiff's lawyer had received no response, and the case was set for trial in two weeks. Plaintiff's lawyer suspected that opposing counsel had not informed the defendant of the offer. In that opinion, the Committee concluded that, although the plaintiff's lawyer could not communicate the settlement offer directly to the defendant without violating Rule 4.2, the plaintiff's lawyer had an ethical duty under Rules 1.1, 1.2(a), and 1.4(b) to advise the client that the lawyer believed his settlement offer had not been communicated by defendant's counsel to the defendant and that the plaintiff had the right to speak directly with the defendant to determine whether the settlement offer had been communicated.

ABA Formal Op. 92-362 acknowledged tension between the lawyer's decision to advise the client of the right to communicate directly with a represented adversary and Rule 8.4(a)'s prohibition against the lawyer's doing indirectly what the lawyer cannot do directly. Nevertheless, the Committee concluded that "where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation."[7] The Committee expressly indicated that it was not addressing what the lawyer might tell the client to say to the other party and where the line might be crossed before running afoul of Rule 8.4(a). The Committee was careful to note that if the client was only going to find out if the other party had been told of the offer, there would be no violation of the rules. Several bar ethics committees likewise have concluded that it is not a violation of the professional conduct rules for a lawyer to suggest or recommend that the client communicate directly with a represented person.[8]

The decision to communicate directly with a represented person may be the client's idea or the lawyer's. Some decisions and opinions suggest that counsel may be violating the rules prohibiting communication with a represented party by encouraging or failing to discourage a client speaking directly

---

[5] We conclude that a lawyer's client is "another" for purposes of Rule 8.4(a). In re Marietta, 569 P.2d 921 (Kan.1977) (lawyer sanctioned for preparing release and advising client to pass it on to represented adverse party); S.F. Bar Informal Opinion 1985–1 (1985) ("it would be inappropriate ... for [a] lawyer to use the client as an indirect means of communicating with the adverse party" in settlement negotiations).

[6] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-362 (1992) (Contact With Opposing Party Regarding Settlement Offer), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 85, 88.

[7] *Id*. at 89.

[8] *See, e.g.*, Massachusetts Bar Op. 11-03 (2011) (not violation of Rules 4.2 and 8.4(a) for lawyer to advise client to urge another person to release attachment on client's property, even though other person is represented by counsel); Oregon Eth. Op. Op. 2005-147 (1997) (Direct Communication Between Represented Parties) ("Allowing the parties themselves to discuss the issues and possible avenues for settlement does not conflict with the policy behind the rule [prohibiting a lawyer from causing another to communicate on the subject of the representation]."); California Comm. on Prof'l Resp. and Conduct Formal

Op. 1993-131 (1993) (lawyer may confer with client as to strategy to be pursued in, goals to be achieved by, and general nature of communication client intends to initiate with opposing party as long as communication itself originates with, and is directed by, client and not the lawyer); Michigan Eth. Op. CI-920 (1983) (in domestic relation case, it is permissible for lawyer to give client draft settlement proposal even when lawyer knows client may discuss document with spouse who is represented by counsel); San Francisco Bar Assoc. Informal Op. 1985-1 (1985) (lawyer may allow or encourage his client to attempt to resolve dispute by communicating directly with opposing party, so long as client is not directly or indirectly acting as agent of lawyer).

to the other party.[9] The "no contact" rules applied in these opinions, however, differ from the Model Rules in that they do not contain the relevant language in Rule 4.2 Comment [4] that "a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." As the Committee observed in Formal Op. 92-362, other rules may require that, in some situations, a lawyer advise the client to consider communicating directly with her represented adversary about a matter related to the representation. Rule 1.1 requires that "[a] lawyer shall provide competent representation to a client." Rule 1.4(a)(2) requires the lawyer to consult with the client as to the means by which the client's objectives are to be accomplished.[10] These fundamental ethical principles, coupled with the comments to Rules 4.2 and 8.4(a), suggest that the assistance a lawyer may give to a client extends beyond advising her of her right to communicate with her adversary.

Rule 8.4(a)'s prohibition against a lawyer's violating the rules through the acts of another raises questions about what a lawyer may or may not say to the lawyer's client, or what the lawyer may do to assist the client in communicating directly with the represented opponent. These issues were explicitly left unaddressed in Formal Op. 92-362. When Formal Opinion 92-362 was issued, the comments to Rules 4.2 and 8.4 did not contain the current language that expressly permits the lawyer to advise the client regarding communications the client is legally entitled to make and actions the client is legally entitled to take. There is very little authority that provides guidance in any context regarding the scope of assistance and advice a lawyer may give a client under the comments to Rules 4.2 and 8.4. Some authority states that because of Rule 8.4(a)'s prohibition against violating or attempting to violate the Rules of Professional Conduct through the acts of another, a lawyer may not "script" or "mastermind" a client's communication with a represented person and may violate Rule 4.2 by preparing legal documents for the client to have a represented person sign without the assistance of their counsel.[11] What constitutes "scripting" or "masterminding" the communication is not clear, but such a standard, if too stringently applied, would unduly inhibit permissible and proper advice to the client regarding the content of the communication, greatly restricting the assistance the lawyer may appropriately give to a client.[12] Relying on language similar to Comment [4] of Model Rule 4.2, the *Restatement (Third) of The Law Governing Lawyers* (2000) ("the *Restatement*") explains:

> The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer."[13]

---

[9] *See, e.g.*, Miano v. AC & R Advertising, Inc., 148 F.R.D. 68, 82 (S.D.N.Y. 1993) ("where a client directly asks his or her attorney whether he should approach a represented adversary, the attorney may not ethically recommend or endorse such action"); N.Y. City Ethics Op. 2002-3 (2002) (if client "conceives of the idea" of communicating with represented adversary, lawyer may advise client about it but must avoid helping client to either elicit confidential information or encourage other party to proceed without counsel); Massachusetts Bar Op. 82-8 (1982) (lawyer who has prepared settlement agreement on client's behalf should discourage client from specifically discussing settlement with other party or directly sending letter that addresses settlement without consent of that party's lawyer).

[10] *See* ABA Formal Op. 92-362, FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 88.

[11] *See, e.g.*, Holdgren v. General Motors Corp., 13 F.Supp.2d 1192, 1193-96 (D.Kan. 1998) (lawyer in age discrimination case violated rules of professional conduct "through the acts of another" by encouraging client to obtain affidavits from coworkers, advising him of difference between "out of court statements" and signed affidavits for trial purposes, and advising him how to draft affidavit); In re Pyle, 91 P.3d 1222, 1228-29 (Kan. 2004) (lawyer "circumvented the constraints" of Rule 4.2 by, at client's request, preparing affidavit for her to deliver to represented defendant in personal injury case); California Comm. on Prof'l Resp. and Conduct Formal Op. 1993-131 ("An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney."); Massachusetts Bar Op. 11-03 ("We believe, however, that the lawyer would cross the line if she prepared a release of the attachment and presented it to the sister for execution without the knowledge and express permission of the sister's lawyer.").

[12] *See* n.11.

[13] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt (k) (2000). *See also* John Leubsdorf, *Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 697 (1979) ("An extension of the [no-contact] rule to communications between clients is hard to reconcile with its ostensible purposes. Whatever dangers flow from the confrontation of professional guile with lay innocence are absent

Restatement § 99 Illustration 6 clarifies this point with the following scenario. A lawyer represents a client who has a dispute with a contractor. On her own, the client drafts a letter outlining her position in the dispute and shows a copy to her lawyer. Viewing the draft as inappropriate, the lawyer redrafts the letter and recommends that the client send it out as redrafted. The client does so. The *Restatement* concludes that the lawyer's assistance to the client was not an improper communication with a represented person.

The lawyer also may draft a document for the client to deliver to the represented adversary although authority restricts the lawyer's assistance to situations where the client originates the communication, stating that it is improper for the lawyer to originate or direct the proposed communication.[14] Section 99 of the *Restatement* does not explicitly address this question, although Comment (k) and Illustration 6 are based on the client having originated a proposed communication with a represented adversary. The line between permissible advice and impermissible assistance may not always be clear. This Committee does not think that line should be drawn based on who initiates the first draft of a communication with a represented adversary. Such an approach favors only those clients who have the sophistication to ask the lawyer to draft a document for the client to give to a represented adversary. In addition, allowing the lawyer to assist only if the client originates the substance of the communication leaves the unsophisticated client without the benefit of the lawyer's advice in formulating communications that the rules allow the client to have with a represented person. Instead, the line must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2, to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel.

This Committee believes that, without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea of having the communication.

This Committee favors the approach taken by *Restatement* § 99 Comment (k). Under that approach, the lawyer may advise the client about the content of the communications that the client proposes to have with the represented person. For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the basic terms of a proposed settlement agreement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution. Rules 4.2 and 8.4(a) may permit the lawyer to fulfill the client's request without violating the lawyer's ethical obligations. However, in advising the client, counsel must be careful not to violate the underlying purpose of Rule 4.2, as explained in Rule 4.2 Comment [1]:

> This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.[15]

---

when two nonlawyers communicate.... Perhaps we have again come across the desire to keep disputes safely in the control of lawyers."); James G. Sweeney, *Attorneys' Arrogance: Warning Unheeded*, N.Y.L.J., June 17, 1991, at 2 col. 3 ("To deny or deter the client from the opportunity of entering into the gauging process of what value is to him in a particular dispute by denying him an opportunity to sit at the bargaining table with his adversary works against the very fundamental idea of the self and of human autonomy.").

[14] *See, e.g.*, California Comm. on Prof'l Resp. and Conduct Formal Op. 1993-131 ("When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100.").

[15] *See* ABA Formal Opinion 95-396 (1995), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 330, 334 ("The anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."). *See also* Niesig v. Team I, 558 N.E.2d 1030, 1032 (N.Y. 1990) ("By preventing lawyers from deliberately dodging adversary counsel to reach-and-exploit the client alone, [the rule prohibiting communicating with a person represented by counsel] safeguards against clients making

Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement.[16]

---

improvident settlements, ill-advised disclosures and unwarranted concessions."); State v. Gilliam, 748 So.2d 622, 638 (La. Ct. App. 1999), *writ denied*, 769 So.2d 1215 (La. 2000) (rule intended to "prevent disclosure of attorney-client communications and to protect a party from 'liability-creating statements' elicited by a skilled interrogator"); Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 764 N.E.2d 825, 830 (Mass. 2000) (rule preserves counsel's "mediating rule" and protects clients from overreaching by other lawyers); Polycast Tech Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (rule prevents lawyers from eliciting "unwise statements" from opponents, protects privileged information, and facilitates settlements by allowing lawyers to conduct negotiations); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 11.6.2, at 611 (1986) ("The prohibition is founded upon the possibility of treachery that might result if lawyers were free to exploit the presumably vulnerable position of a represented but unadvised party"); EC 7-18 ("The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.").

[16] This opinion does not address situations in which a lawyer advises a client with respect to using an investigator or agent to gather facts from a represented person. These situations may involve a variety of factors, not considered in this opinion, relevant to the presence or absence of overreaching.