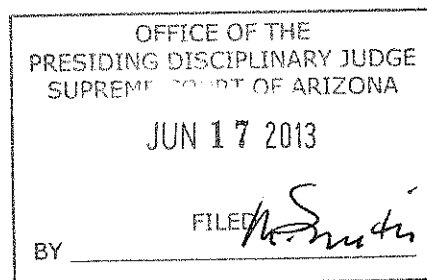


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**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

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

JERRY R. ALBERT,
Bar No. 011370,

Respondent.

PDJ-2013- 9053

[State Bar File No. 12-0125]

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent Jerry R. Albert, who is represented in this matter by counsel Brick P. Storts, submit their Tender of Admissions and Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz.R.Sup.Ct. A probable cause order was issued on December 21, 2012, but a formal complaint has not been filed. [Exhibit A, probable cause order] Respondent voluntarily waives the right to an adjudicatory hearing on the complaint, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ER(s) 3.3(a) and 8.4(d), Ariz.R.Sup.Ct. Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Reprimand. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding.¹ The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit B.

FACTS

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on [date].

COUNT ONE (State Bar File No. 12-0125)

2. In *United States v. Lopez-Avila*, the defendant was charged with possession with intent to distribute a controlled substance after she attempted to transport 10.3 kilograms of cocaine into the United States from Mexico.

3. The defendant initially pled guilty but later successfully moved to withdraw her guilty plea on the ground that she committed the crime because she had been threatened.

4. Following the withdrawal of the guilty plea, defense counsel and Respondent agreed not to make any reference to the guilty plea during the trial.

¹ Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

5. At a status conference the day before trial commenced, defense counsel informed the court of the agreement, and the court expressed its approval of the agreement.

6. At trial, the defendant testified on direct examination that the man who had supplied her with the drugs threatened to harm her and her family if she refused to transport them.

7. On cross-examination, when Respondent sought to impeach the defendant with the transcript of her response to a question from the plea colloquy, defense counsel objected in anticipation that Respondent was going to reveal the guilty plea.

8. The court held a sidebar conference to ensure that Respondent was not going to mention the plea. In providing that assurance and without further objection from defense counsel, Respondent told the court and defense counsel that Respondent intended to read the following question from the plea colloquy transcript to set up the impeachment: "Ms. Lopez, has anyone threatened you?"

9. Respondent failed to tell the court and defense counsel, however, that in order to avoid any reference to the plea, the question Respondent proposed to read omitted a significant portion of the complete question as read by the magistrate judge during the plea colloquy: "Ms. Lopez, has anyone threatened you or forced you to plead guilty?"

10. Based on the sidebar representations, the court allowed Respondent to impeach the defendant by reading aloud the redacted question "[H]as anyone threatened you?" followed by the defendant's answer "No", which she had given to

the full question she had been asked during the plea colloquy "[H]as anyone threatened you or forced you to plead guilty?"

11. The impeachment as presented, created the false impression that the defendant had contradicted herself about having been threatened.

12. When defense counsel, who represented the defendant at her plea proceeding, later realized what had transpired, he moved for a mistrial.

13. The court granted that motion but denied defense counsel's request to dismiss the case on double jeopardy grounds.

14. If this matter were to proceed to hearing, Respondent would testify that he did not originally plan to impeach the defendant with the dialogue from the plea colloquy. He made the decision to do so spontaneously at trial in response to the defendant's testimony about the alleged threats, which she appeared to embellish as compared to the testimony she gave at a hearing on the motion to withdraw her guilty plea.

15. Respondent would further testify that prior to the sidebar discussion, he had not thought extensively about the scope of the information he needed to tell the court concerning the plea dialogue. Furthermore, when the sidebar discussion took place, Respondent was in trial, and did not clearly articulate everything he should have told the court.

16. If this matter were to proceed to hearing, Respondent would testify that he should have advised the court that his questions at trial were based on a redacted question rather than the change of plea hearing.

17. On appeal, the Ninth Circuit affirmed the district courts ruling on the double jeopardy issue, but criticized Respondent's conduct in its opinion:

[T]he prosecutor's quotation was only part of what he represented was a question asked the defendant under oath by the magistrate judge. It was a half-truth. Without telling the court or defense counsel, the prosecutor presented to court and counsel an altered version of the prior hearings question and answer, and the altered version of such dialogue made it appear as though [the defendant] had contradicted herself on a material point, when she plainly had not. The district court naturally assumed the prosecutor had read the question and answer whole, and allowed the questioning to proceed. When the prosecutor's misrepresentation was discovered by defense counsel, he moved for a mistrial, which the court swiftly granted. The defense then moved to dismiss the indictment with prejudice, on double jeopardy grounds, but the district court denied that motion. Lopez-Avila's appeal from the denial of that motion is the legal issue before us.

United States v. Lopez-Avila, 678 F.3d 955, 958 (9th Cir. 2012).

18. The court remanded the case to the district court to consider, among other things, whether "to discipline the prosecutor directly," but it "express[ed] no opinion on whether [Respondent] in fact should be disciplined." *Id.* at 965.

19. On remand, the district court exercised its supervisory powers and dismissed the case with prejudice after concluding that Respondent's conduct was "flagrant," and that Respondent acted in "reckless disregard of [Respondent's] constitutional obligations."

CONDITIONAL ADMISSIONS

Respondent's admissions are being tendered in exchange for the form of discipline stated below and is submitted freely and voluntarily and not as a result of coercion or intimidation.

Respondent knowingly made a false statement by omission² when he failed to tell the court that a question he planned to ask during a criminal trial was redacted in such a way as to make it appear as though the defendant had contradicted herself on a material point, when she had not. Respondent conditionally admits that his conduct violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 3.3(a) and 8.4(d).

RESTITUTION

Restitution is not an issue in this matter.

SANCTION

Respondent and the State Bar of Arizona agree that based on the facts and circumstances of this matter, as set forth above, the following sanction is appropriate: Reprimand

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

² ER 3.3, comment 3, Ariz.R.Sup.Ct.

In determining an appropriate sanction consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

The parties agree that *Standard 6.12* is the appropriate *Standard* given the facts and circumstances of this matter. *Standard 6.12* provides that suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The defendant's duress argument came up after the initial guilty plea, so it is not possible the Magistrate was referring to the duress argument during the colloquy at the change of plea hearing. Even so, Respondent presented the redacted question to Judge Jorgenson without informing her of the redaction. The trial went on for another forty minutes before there was a recess, at which time defense counsel realized what Respondent had done and moved for a mistrial.

The duty violated

As described above, Respondent's conduct violated his duty to the profession, the legal system, and the public.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent knowingly failed to reveal to the judge at the sidebar that the question he planned to ask had been redacted.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was actual, harm to profession and the public because Respondent's conduct led to the dismissal of all charges against Ms. Lopez-Avila, not on the merits, but as part of the court's supervisory powers. There was also a scathing amended opinion issued by the 9th Circuit Court of Appeals on February 14, 2012, directed at not only Respondent, but at the government, too. "Yet we cannot find a single hint of appreciation of the seriousness of the misconduct within the pages of the governments brief on appeal." *United States v. Lopez-Avila*, 678 F.3d 955, 957 (9th Cir. 2012)

Aggravating and mitigating circumstances

The presumptive sanction in this matter is suspension. The parties conditionally agree that the following aggravating and mitigating factors should be considered.

In aggravation:

Standard 9.22

- (i) substantial experience in the practice of law;

In mitigation:

Standard 9.32

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(g) character or reputation; Attached as Exhibit C, are letters of support from judges, Assistant United States Attorneys, and the defense bar. All attest to Respondents good character and reputation.

(k) imposition of other penalties or sanctions. While not technically a penalty or sanction, Respondent self reported his conduct to the United States Department of Justice, Office of Professional Responsibility (OPR). OPR conducted an investigation into the judicial criticism of Respondent's conduct in *United States v. Lopez-Avila*, but "could not conclude ... that [Respondent] engaged in professional misconduct" OPR concluded that Respondent acted "inappropriately and exercised extremely poor judgment by impeaching the defendant with a redacted question from the plea colloquy based on a clearly erroneous interpretation of the full question" OPR referred its "poor judgment findings in this matter to United States Attorney John S. Leonardo for consideration as a management matter."

Proportionality:

In re Telep, Jr., SB-10-0022-D, April 7, 2010. Sixty-day suspension, one year probation. Michael T. Telep, Jr. (Telep) violated the Constitutional and Statutory Victims Rights of a minor crime victim when he subpoenaed the minor's medical and school records absent a motion or court order and without giving notice to the minor victim or the state. Respondent further demonstrated a lack of candor to the court and parties when he falsely stated in court that he had no

knowledge of receiving records. Telep violated Rule 42, Ariz.R.Sup.Ct, specifically ERs 1.3, 3.1, 3.2, 3.3, 3.4(c), 4.1, 4.4(a), 8.4(c) and 8.4(d). There were three aggravating factors (multiple offenses, vulnerability of victim, and substantial experience in the practice of law). There were five mitigating factors (absence of prior discipline history, absence of dishonest or selfish motive, good faith effort to rectify consequences of misconduct, full and free disclosure, imposition of other penalties). His mental state was knowing and there was actual and potential injury.

In re Yragui, SB-10-0061-D, May 28, 2010. Reprimand, one-year probation. Yvonne Yragui (Yragui) made a false statement to the court by stating in her motion for continuance that she had to attend an out of state funeral for a relative, when in fact Respondent scheduled an emergency appointment with a healthcare provider to discuss help for a gravely ill family member. Yragui violated Rule 42, Ariz.R.Sup.Ct, specifically ER 3.3(a)(1). There was one mitigating factor (substantial experience in the practice of law), and four mitigating factors (absence of prior discipline history, personal or emotional problems, full and free disclosure, delay in disciplinary proceedings). Her mental state was knowing and there was potential injury.

In re Hansen, 179 Ariz. 229, 877 P.2d 802 (1994). Hansen, an assistant city prosecutor, allowed a victim to leave before trial began because she thought that the defendant was going to enter a plea agreement. When the court announced that they would proceed with the trial that day, Hansen told the judge and the defense attorney that victim witness had not appeared. When asked by the court if her office had heard from the victim that day, she told the court it had not.

Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.3, 3.3, 4.1 and 8.4(a),(c), and(d). There was one aggravating factor (dishonest or selfish motive) and five mitigating factors (no prior disciplinary record, remorse, full and free disclosure and was fully cooperative throughout the disciplinary proceedings, and inexperience in the practice of law). In addition, although not a factor listed in the *ABA Standards*, Hansen resigned from the City Prosecutor's Office on the day the misconduct occurred.

Discussion

The parties have conditionally agreed that the lesser sanction of reprimand, instead of suspension, would be appropriate under the facts and circumstances of this matter.

In its determination that [reprimand] is appropriate in this matter, despite indications by the Standards that suspension or disbarment may be warranted, the Commission considered the Theoretical Framework to the Standards, which indicates "the standards ... are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct."

Matter of Hansen, 179 Ariz. 229, 232, 877 P.2d 802, 805 (1994). Like *Hansen*, Respondent is not likely to repeat such misconduct again, and he is well aware of the seriousness of his misconduct. In addition, Respondent's conduct was limited to one instance of a misleading omission to the court, which is similar to both *Hansen* and *Yragui*. Respondent's conduct is dissimilar to *Telep* because *Telep's* engaged in multiple violations, which garnered him a suspension.

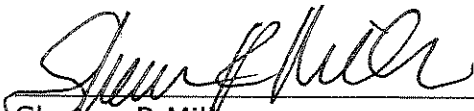
Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the presiding disciplinary judge, the State Bar and Respondent believe that the objectives of discipline will be met by the imposition of the proposed sanction of reprimand and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit D.

DATED this 17th day of June, 2013.

STATE BAR OF ARIZONA


Shauna R Miller
Senior Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

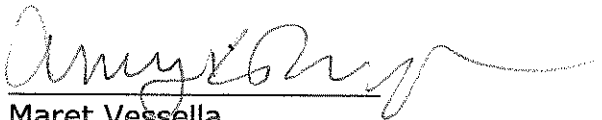
DATED this _____ day of _____, 2013.

Jerry R. Albert
Respondent

DATED this _____ day of _____, 2013.

Brick P. Storts
Counsel for Respondent

Approved as to form and content


Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
this 17th day of June, 2013.

Copies of the foregoing mailed/emailed
this 17th day of June, 2013, to:

Brick P Storts
Barton and Storts
271 N. Stone Ave
Tucson, AZ 85701-1228
Email: brickstorts@yahoo.com
Respondent's Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

DATED this 14th day of JUNE, 2013.



Jerry R. Albert
Respondent

DATED this 14 day of JUNE, 2013.



Brick P. Storts
Counsel for Respondent

Approved as to form and content

Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
this ____ day of _____, 2013.

Copies of the foregoing mailed/emailed
this ____ day of _____, 2013, to:

Brick P Storts
Barton and Storts
271 N. Stone Ave
Tucson, AZ 85701-1228
Email: brickstorts@yahoo.com
Respondent's Counsel

Copy of the foregoing emailed
this 17th day of June, 2013, to:

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
Email: officepdj@courts.az.gov
lhopkins@courts.az.gov

Copy of the foregoing hand-delivered
this 17th day of June, 2013, to:

Lawyer Regulation Records Manager
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by: Rodney T. Brown
SRM/raq

**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

**IN THE MATTER OF A MEMBER OF THE
STATE BAR OF ARIZONA,**

**JERRY R. ALBERT,
Bar No. 011370**

Respondent.

PDJ-2013-9053

FINAL JUDGMENT AND ORDER

[State Bar No. 12-0125]

FILED JUNE 25, 2013

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on June 17, 2013, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED that Respondent, **Jerry R Albert**, is hereby Reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$ 1,200.00. 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 25th day of June, 2013.

/s/ William J. O'Neil

**The Honorable William J. O'Neil
Presiding Disciplinary Judge**

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 25th day of June, 2013.

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by: MSmith