**BEFORE THE PRESIDING DISCIPLINARY JUDGE**

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| IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA<br><br>**DOUGLAS B. LEVY,**<br>**Bar No. 016623**<br><br>Respondent. | **PDJ 2019-9044**<br><br>**DECISION AND ORDER IMPOSING SANCTIONS**<br><br>[State Bar No. 18-2088]<br><br>**FILED September 1, 2021** |

An evidentiary hearing was held on July 1 and July 2, 2021 in Tucson, Arizona before a hearing panel comprised of Presiding Disciplinary Judge Margaret H. Downie, attorney member Stephen H. Lesher, and public member Marsha Morgan Sitterley. The State Bar of Arizona was represented by Bradley F. Perry. Respondent Douglas B. Levy represented himself. Numerous exhibits were admitted into evidence,[1] and the following individuals testified:

- Douglas B. Levy
- David Boyan
- Eric Nadler
- Christina Esala

After the hearing, the parties submitted written closing arguments. Having considered the record before it (which includes evidence and argument from the first evidentiary hearing), the hearing panel issues the following findings of fact, conclusions

[1] Mr. Levy's proffered exhibits totaled more than 4,000 pages. Many were irrelevant and were not admitted, including news articles about and court filings from the Paul Manafort trial, a newspaper article about a Tucson man on death row, and 1018 pages of transcript from a pro bono family court matter Mr. Levy handled.

of law, and sanction in the form of a 90-day suspension, followed by a two-year term of probation.

**PROCEDURAL HISTORY**

The State Bar's complaint alleges three general categories of misconduct by Mr. Levy: (1) alteration of the text of discovery requests propounded by opposing counsel ("Discovery Text Changes"); (2) misconduct involving opposing counsel; and (3) ethical violations occurring during the State Bar's investigation of the bar charge submitted by Pima County Superior Court Judge Brenden J. Griffin.

In October of 2019, the State Bar filed a motion for summary judgment. Presiding Disciplinary Judge (PDJ) William J. O'Neil granted the motion in part, ruling that, as a matter of law, Mr. Levy violated ER 3.4(c) and ER 4.4(a) in connection with the Discovery Text Changes. Judge O'Neil otherwise denied summary judgment, and he later denied Mr. Levy's motion for reconsideration as to the Discovery Text Changes.

The first evidentiary hearing was held on December 9, 2019 in Tucson before PDJ O'Neil, attorney member Stephen H. Lesher, and public member Marsha Morgan Sitterley. After the State Bar presented its case-in-chief and rested, and following extensive discussion between Mr. Levy and Judge O'Neil, Mr. Levy rested without testifying or presenting mitigating evidence. The hearing panel thereafter dismissed all charges except those stemming from the Discovery Text Changes.

The hearing panel filed its Decision and Order Imposing Sanctions on January 24, 2020. Affirming the PDJ's earlier summary judgment ruling, the panel reprimanded Mr. Levy for violating ER 3.4(c) and ER 4.4(a) in connection with the Discovery Text Changes.

The hearing panel also assessed costs and placed Mr. Levy on probation for two years "under the Membership Assistance Program preceded by an evaluation by Dr. Lett."

Mr. Levy appealed, and the State Bar filed a cross-appeal. In his opening brief, Mr. Levy stated he was appealing Judge O'Neil's "nonsensical granting of summary judgment" and labeled the order that he undergo a psychological evaluation "laughable, insulting, and factually pathetic," arguing, "it is PDJ O'Neil who requires psychological evaluation and counseling."[2]

On February 2, 2021, the Supreme Court of Arizona issued a ruling ("Decision Order") that vacated the hearing panel's decision and remanded for further proceedings. (Mr. Levy has called the Supreme Court's ruling "inexcusable" and "grotesquely

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[2] Mr. Levy has repeatedly attacked Judge O'Neil, including making the following statements:

> "PDJ O'Neil conducted an abysmal hearing on December 9, 2019. . . . PDJ O'Neil embarrassed himself."
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> "PDJ O'Neil's comments . . . are simply nonsensical. Respondent cannot even attempt to explain what PDJ O'Neil is rambling about."
>
> "Whatever PDJ O'Neil was attempting to articulate . . . was incomprehensible gibberish."
>
> "PDJ O'Neil caused nonsensical colloquy which can only be described as pathetic. It was as if PDJ O'Neil was unraveling (which is ironic since PDJ O'Neil has wrongfully suggested that Respondent be evaluated by a psychologist!)."

None of these statements form the basis for the violations found or the sanctions imposed. They do, however, paint a picture of an attorney who lashes out in condescending, unprofessional fashion when he encounters someone who disagrees with him or questions his conduct.

wrong.") The Court directed that, on remand, the hearing panel "allow Respondent to present evidence that the *repeated* use of demeaning language was objectively and reasonably necessary to advance the litigation and respond to the Bar Charges and also allow him to present mitigating evidence." (Emphasis in original.) The Court noted that it had intentionally rejected language included in the Preamble to the ABA Model Rules of Professional Conduct stating that lawyers have an obligation to "zealously" protect and pursue their clients' legitimate interests. *See also Nix v. Whiteside*, 106 S. Ct 988, 995 (1986) ("an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct").

Comparing Mr. Levy's conduct to that of the respondent lawyer in *In re Bemis*, 189 Ariz. 119 (1997), the Supreme Court stated:

> This Court [in *Bemis*] found that the need to represent a client did not justify the proposed order's distortions and excesses, and entered a censure and one-year probation. *Bemis* also predates the 2003 language change intended to dissuade attorneys from undue zealousness. Also, *Bemis* involved only one instance of drafting inappropriate comments, whereas here Respondent's abusive rhetoric began with his response to the January 31, 2018 email and continued throughout the Lawsuit and then unapologetically escalated during the Bar investigation. [Internal citations omitted]

The Court rejected the hearing panel's use of a subjective standard when evaluating Mr. Levy's conduct, stating:

> [T]he Panel erred in determining that the subjective belief that abusive language is acceptable if it reflects the "honest opinion," and should have applied an objective standard to determine if the demeaning language constituted unprofessional conduct and was objectively and reasonably necessary to advance the Lawsuit and respond to the Bar Charge.

The Court explained that although "[t]he heat of litigation may foment anger and result in an occasional poorly-worded epithet,"

> a relentless campaign to malign and embarrass opposing counsel and the judiciary is clearly prohibited conduct. If an attorney is unable to discern the difference between the two, the Panel may properly determine that an initial evaluation is needed along with a sanction appropriate to discourage similar behavior in the future.

The Court thereafter denied Mr. Levy's "Motion for Reconsideration Pursuant to Arizona Rule of Civil Appellate Procedure 22 and Respondent's Corrections to the 11 Clear Errors in this Court's Decision Order, Filed 02/02/2021."

Consistent with the orders on remand, during the second evidentiary hearing (and even before, during the final hearing management conference), the PDJ attempted to focus Mr. Levy on the standard enunciated by the Supreme Court: whether the conduct at issue "was objectively and reasonably necessary to advance the Lawsuit and respond to the Bar Charge." Those efforts were largely unavailing.

**FINDINGS OF FACT**

1. Mr. Levy was admitted to the State Bar of Arizona on October 21, 1995.

2. Mr. Levy represented Christina Esala -- the plaintiff in litigation filed in Pima County Superior Court arising out of an automobile accident. (*Esala v. Orangutan Home Services, et al.*, CV 2016-2780). During the pendency of that litigation, the defendants were represented by attorneys with the Phoenix law firm of Elardo, Bragg & Rossi, including Venessa Bragg, James Chong, and Jarin Giesler.

***Discovery Text Changes***[3]

3. Defense counsel propounded requests for admissions, a request for production, and interrogatories in the *Esala* litigation. In its Decision Order, the Supreme Court described Mr. Levy's conduct in responding to those discovery requests as follows:

> Respondent opted to change the language in the requests to words of his own choosing and then prepare responses to the discovery requests and deliver them without notifying opposing counsel of the changes ("Discovery Text Changes"). For instance, in his response to opposing counsel's request for admissions, Respondent substituted the word "accident" with "violent rear-end auto collision which caused $12,131.42 in damage to Plaintiff's 2011 Hyundai Genesis."

4. After the defense lawyers discovered the alterations, they insisted that Mr. Levy amend his discovery responses to be consistent with the requests originally propounded. Mr. Levy complied, sending revised responses to Mr. Giesler, but stating:

> Jarin, I think your letter of May 22, 2017 should have commenced by recognizing the outstanding nature of Plaintiff's initial disclosures. You cannot ignore that the quality, scope and breadth of Plaintiff's disclosures are excellent. I have no problem making these changes because we have the first set of Answers, which accurately reflect the nature of this "accident" in terms of it being a "violent rear-end collision." You have requested meaningless semantic changes. You should have just left this issue alone. It could have been the subject of a motion *in limine* if this case were to ever proceed to a jury trial.

5. Later, when considering defendants' request for sanctions based, in part, on the Discovery Text Changes, Judge Griffin asked Mr. Levy to provide the legal basis for

[3] Because the Supreme Court vacated the January 24, 2020 Decision and Order Imposing Sanctions in its entirety, the hearing panel briefly discusses the Discovery Text Changes. The hearing panel has not revisited or reconsidered PDJ O'Neil's summary judgment ruling regarding this conduct and does not read the Decision Order as a reversal of that ruling.

his alterations. Mr. Levy responded, "I just felt it was appropriate." He continued, "It's been changed back. And I have nothing further to say on that other than point out it's over a year ago."[4]

6. In his response to the bar charge, Mr. Levy called the questioning of his conduct vis-à-vis the Discovery Text Changes "another silly avenue of inquiry" and stated: **"I corrected** the language of defense counsel's discovery requests to make them **conform with the evidence.** This is what great lawyers do."

***Conduct Toward Opposing Counsel***

7. A settlement conference in the *Esala* case was scheduled for February 1, 2018 in Tucson before Judge Pro Tem Dev Sethi. The day before – on January 31, 2018 -- Ms. Bragg sent the following email to Mr. Levy and Mr. Sethi at 8:49 a.m.:

> Dear Doug and Dev:
>
> I have a favor to ask . . . our deadline to conduct the settlement conference is February 16th. Is there any way we can push it back by a week or so? The issue is personal . . . I just realized that my son's school play is tomorrow. I miss so much of his school stuff due to work (he is in 2nd grade), and I will feel horrible if I am not there. I hate to ask this as I know you are both very busy as is the plaintiff, but I am falling on my sword and asking for a "parent" favor. There is no way I can be at the settlement conference at 9:00 a.m. in Tucson and get to my son's play at noon unless I appeared telephonically, which I suspect you will not want.

[4] Mr. Giesler submitted an affidavit explaining, *inter alia*, defendants' delay in seeking court intervention, stating, "We chose to 'take the high road' and not advise the Court of the discovery issue (related to the edits) at or near the time it occurred because we hoped it (or something similar) would not be repeated by Mr. Levy." Mr. Levy mocked Mr. Giesler's affidavit (which included other allegations against him) as "precious" and "a pathetic attempt to smear me."

I apologize for the late request, as well. Another "mom fail" I suppose . . . I forgot about it until he was talking about it on the way to school this morning.

I would appreciate it greatly.

Let me know and thank you.

8. Mr. Levy responded by email to Ms. Bragg and Mr. Sethi at 9:33 a.m., stating:

Dev and Venessa –

So, let's just take a moment to examine how many people are impacted by this typical **Venessa Bragg** level of incompetence (selfishness?):

1. Plaintiff Christina Esala has blocked this morning for the last six weeks.

2. Plaintiff's counsel, undersigned, has blocked this morning for the last six weeks.

3. Judge *pro tem* Dev Sethi is a **volunteer** for the welfare of the Pima County civil justice system.

4. The insurance adjuster on this file.

The attached "settlement conference order" is dated **December 18, 2017,** which is six weeks ago.

Please take a look at **paragraph 11 of Judge Aragon's October 16, 2017** scheduling order (second attachment). This mandates that the settlement conference occur before a trial date will be set (February 26th trial setting conference).

We now have **five** different calendars of busy people to consider because of Venessa's incompetence.

Clearly, **no one** loves 2nd graders more than Dev Sethi and Doug Levy and Christina Esala. We all have two children and we love them with all of our hearts.

> This is not just a "mom fail." This is yet another "lawyer fail."
>
> Of course, we have time (16 days), and since Dev is such an experienced lawyer, he is familiar with the old boxing adage of "rolling with the punches."
>
> I shall defer to Dev's wise judgment. I will conclude with this. If this were Judge like retired Judge Charles Sabalos, Venessa would be looking at a hefty sanction and the continuance would not be granted.
>
> Dev is not retired Judge Sabalos.
>
> How can a lawyer really oppose the request of a mother who wants to attend the school play of her second grader?
>
> Can I just request that the three of us have a conference call ASAP, so that we can see if another date will work for the five people involved?
>
> Again, I find it the height of incompetence that Venessa's school play issue was not discovered much earlier. This is basic scheduling 101, and this is the pattern for Venessa's conduct in this case. I have to waste my time typing this e-mail, finding another good date within 16 days, **and** I have to inconvenience my delightful client (just as we did for the IME with Dr. Maric which had to be schedule [sic] at the very last minute because of defense counsel incompetence).

9. Mr. Sethi vacated the February 1, 2018 settlement conference and directed defense counsel to take the lead in coordinating a new date. Mr. Sethi expressed dismay about the "tone and content" of Mr. Levy's email, stating:

> We are all busy people trying to do the best we can as life moves by pretty quickly. The goal of my involvement in this case is to help see if we can navigate a hotly disputed case to resolution. This is not a novel or rare occurrence. Big disputes get settled all the time. Injecting personal commentary is not helpful to our end goal.
>
> Doug, I was taken back by the tone and content of your email this morning. I urge you to focus on the merits of the case, and take the wise counsel of A Lawyer's Creed of Professionalism of the State Bar of Arizona.

10. The vituperative comments Mr. Levy made about defense counsel in his January 31, 2018 email were not objectively and reasonably necessary to advance the litigation. Although the last-minute continuance request was a legitimate source of frustration, Mr. Levy could have politely declined Ms. Bragg's request by pointing out the inconvenience associated with it. He instead accused her of incompetence four times, stated she would be "looking at a hefty sanction" if a different judicial officer were deciding the issue, and belittled her by referring to "basic scheduling 101" and a "lawyer fail." Moreover, no legitimate purpose was served by discussing other occurrences Mr. Levy labeled as "incompetence" with Mr. Sethi. Ms. Bragg testified that Mr. Levy's response to her request was "incredibly embarrassing" and "incredibly upsetting," particularly because he copied the settlement judge. She testified that Mr. Levy's communication was "belittling and served no purpose other than to intimidate me or make me feel bad for what I thought had been a fairly polite request." She further stated:

> I did not understand how his being so aggressive with me helped his client in any way, or helped us further the case. I could understand his frustration, obviously, about even a request to move the settlement conference, as I knew his client I'm sure was hoping to get it done, but I did not understand why he needed to embarrass me in front of the settlement conference judge.

11. On February 5, 2020, Mr. Levy emailed Mr. Sethi and Ms. Bragg, stating, in pertinent part: "I can report that Venessa has done absolutely nothing to take the lead in order to get this settlement conference re-scheduled. No phone call. No FAX. No email." In a response sent only to Mr. Levy, Ms. Bragg stated:

> Doug –

> Is it impossible for you to be polite? Can you pick up the phone and call me without sending horrible e-mails?
>
> I will send an e-mail regarding my availability.
>
> You do not need to be so cruel.

Mr. Levy responded that there was "nothing remotely cruel nor horrible" about his email and stated: "I am glad that you are actually reading your e-mails this evening."

12. Later in the litigation, the lawyers disagreed about the length of the deposition of plaintiff's treating physician. After Ms. Bragg advised that the deposition would take longer than one hour, Mr. Levy responded with the following statements, among others: "Nice try." "This is **your** fault and the fault of **James**." "Venessa, I think you should take a deep breath. Own this series of mistakes. Do your best today from 1:00 – 2:00 p.m."

13. At the conclusion of the treating physician's deposition, Mr. Levy stated the following on the record about Mr. Chong: "As a professional today, -- today was embarrassing. James was not prepared." In later email correspondence with Ms. Bragg, Mr. Levy stated that the "deposition could have been so simple if you (or James) had just bothered to prepare yourselves" and called the deposition "completely botched." He continued: "Most lawyers could easily have concluded Dr. Davis's deposition during that period of time. It only required a little focus, preparation, and basic knowledge of musculoskeletal medicine." He called one of Ms. Bragg's objections "embarrassing" and told her: "Take a deep breath." He stated, "James did not even know what 'cervicalgia' was, and he did not know what 'loss of cervical lordosis' is, and that it is caused by

whiplash injury. This is who you sent to take Dr. Davis's deposition." These statements by Mr. Levy were belittling and unprofessional and were not objectively and reasonably necessary to advance the litigation.

14. During the *Esala* litigation, Mr. Levy interjected other gratuitous, condescending, unprofessional comments that were not objectively and reasonably necessary to advance the litigation, including the following language contained in emails he sent to defense counsel:

> "While my suggestion for you to involve Dev was **brilliant**, the import of the suggestion would have been meaningless had Dev not been willing to spend his time listening to you and your needless and demeaning gripes about the *Esala* case."
>
> "It was my hope that you would take Christina's deposition. However, according to James Chong, your adjuster was able to actually watch Christina testify during her deposition. Further, you were on the phone listening and I know that you were texting follow-up questions to James. [I am glad that you refrained from interrupting the actual questioning. That would have been annoying, unprofessional and unacceptable.]"
>
> "You know that silly little deposition questionnaire that you provide to your young associates to help them ask their questions at deposition. James likes to check off the questions after he asks them. Well, James was working off of your "chiropractor deposition questionnaire" because James asked a series of questions about how Dr. Davis sets his billing rates. Really?"
>
> "Your letters of May 22 and 26 have really been an utter waste of time. I am going to Notice the deposition of [the defendant] for my office for Friday, August 11, 2017, so that we can get you thinking productively about this case."

15. Defense counsel repeatedly asked Mr. Levy to modify his behavior. Mr. Giesler testified: "Our office tried every way we could think of to get the behavior to change, and it simply did not." He described Mr. Levy's conduct as consistently

obnoxious, rude, and unprofessional. During cross-examination by Mr. Levy at the first evidentiary hearing, Mr. Giesler testified:

> Mr. Levy, I'll be frank with you on it. And I don't mean to hurt your feelings, but I find you as a very rude and obnoxious individual. Your tone is – you have a very demeaning, superior tone that I don't agree with, so virtually every conversation or communication I have had with you or have seen you have with my office, I stand by what I said.

Mr. Giesler further testified that Mr. Levy made two of his law firm's support staff members cry and pushed them "to the edge of their sanity." Ms. Bragg made repeated requests of Mr. Levy to modify his behavior, including in a May 15, 2018 email, where she stated: "I specifically told you over the phone that I do not want to argue with you. I just want us to move forward and finalize this matter civilly. I asked that you please not make snarky remarks to me either over the phone or via e-mail." She also sent Mr. Levy an email on May 23, 2018, stating, "I would again ask that you please refrain from needless and demeaning commentary."

16. On June 22, 2018, defense counsel filed a motion for sanctions against Mr. Levy. In responding to the motion, Mr. Levy called it "just another in a long string of embarrassments to defense counsel," labeled the motion "incompetent," and said it should "shock the conscience of this Court that a motion so devoid of context could be filed by an attorney with more than 10 years at the practice of law." Mr. Levy accused defense counsel of "lying," labeled their arguments "bogus," "nonsense" and "farcical," called the deposition of plaintiff's treating physician "an embarrassing fiasco for defense counsel" and "a pathetic performance by defense counsel," described one of the defense lawyers as "a 'lethal' combination of incompetence and an abuser of legal process," and

called the motion "scurrilous," "utterly frivolous," and "mean." Mr. Levy asserted that his email communications demonstrated he had conducted himself "with the utmost professionalism."

17. Mr. Levy's belittling, unprofessional, demeaning statements in response to the motion for sanctions were not objectively and reasonably necessary to achieve his objective of having the court deny the motion.

18. Judge Griffin heard oral argument on defendants' sanctions motion on July 9, 2018. Near the outset of the hearing, Judge Griffin stated, "I will put Mr. Levy on notice that one of the things I am thinking about is whether I am obligated to report you to the bar or whether it would be appropriate to report you to the bar for things that I have read about your conduct in this case." Judge Griffin called Mr. Levy's January 31, 2018 response to Ms. Bragg's request to continue the settlement conference "beyond the pale." Mr. Levy responded: "I don't feel there's anything remotely close to inappropriate about what I said." That response led to the following colloquy:

> THE COURT: So why not just say, I'm sorry, Ms. Bragg. I can't do you this favor. My client is insisting that we have the settlement conference. Here are the reasons why we can't do it. Mr. Sethi, please order her to go forward.
>
> Why call – repeatedly call Ms. Bragg incompetent? Why tell her that this is not just a mom fail, this is yet another lawyer fail? This is basic scheduling 101 you tell her. This is a pattern of practice for her. I just – how is that in any way appropriate to do that sort of behavior?
>
> MR. LEVY: It is appropriate in my view. We had had already two deadline extensions which I stipulated to. And I wasn't refusing to do it. I said, I'm not objecting. I'll let Dev Sethi – we're prepared to go, go forward.

> The word mom fail was used by Vanessa [sic] Bragg. I said it's a lawyer fail. For the life of me, I don't see how you can realize that my child has something going on the very next day and you don't know about it until the day before when we had five schedules. We also had her insurance adjustor, Dave [sic] Sethi, my client and me. And I think it was very selfish.

19. Judge Griffin granted defendants' motion for sanctions in part, ordering as follows:

> 1. Defendants are awarded attorneys' fees and costs associated with having to get Mr. Levy to undo the alterations he made to their discovery responses.
>
> 2. Defendants are awarded their fees and costs for any additional time spent dealing with what the Court feels are Mr. Levy's unprofessional comments surrounding getting a settlement conference continued and moved.
>
> 3. Defendants are awarded their fees incurred in bringing this motion before the Court.

Judge Griffin concluded the hearing by stating that he would be referring Mr. Levy to the State Bar.

20. Thereafter, the *Esala* case settled, with an agreement that the sanctions Judge Griffin had awarded against Mr. Levy would be waived.

21. Mr. Levy correctly notes that much of his interaction with defense counsel in the *Esala* case was professional and appropriate. Indeed, in their motion for sanctions, defendants acknowledged that "not all communications with Mr. Levy have been negative or cruel. Many have been cordial. That being said, too many have been anything but pleasant despite repeated requests for Mr. Levy to refrain from needless and inappropriate commentary." The defense lawyers further conceded they had "made mistakes or been less than friendly in the past," but stated, "[t]he difference here is that

Mr. Levy refuses to stop despite numerous requests and a courteous suggestion by Mr. Sethi. In light of this, it appears Mr. Levy's only purpose can be to, among other things, embarrass, intimidate, harass, and annoy."

*Conduct During State Bar Proceedings*

22. The Supreme Court's Decision Order makes clear that lawyers' ethical obligations extend to their conduct during State Bar disciplinary proceedings.

23. Judge Griffin filed a bar charge against Mr. Levy dated July 11, 2018. Although Judge Griffin furnished voluminous documentation, his cover letter focused on the Discovery Text Changes and Mr. Levy's conduct in connection with defense counsel's request for a continuance of the February 1, 2018 settlement conference.

24. Mr. Levy filed a 76-page response to the bar charge. Excerpts from that response include the following:

> "[L]et me clearly state that I handled the personal injury litigation of *Esala v. Orangutan/Hinderliter* virtually perfectly. I would eliminate the word "virtually," but if no one is perfect. . . . . There is **nothing** that I would have handled differently. I performed magnificently for Christina Esala at every step of the litigation **and she will readily agree with that.** As with most of my clients, Ms. Esala views me as a hero because of how magnificently I handled her case."
>
> "Judge Griffin's unfortunate and thoughtless (unworthy of a judicial officer) letter of July 11, 2018 **alleges** a violation of ARCP 11(b)(1) . . . Judge Griffin states that this rule was violated and he is wrong."
>
> "Perhaps if Judge Griffin had actually read Plaintiff's discovery responses instead of **blindly** relying upon the falsehoods written by defense counsel, he would have understood how excellent and honest they were."

"It is really pretty sad that Judge Griffin elected to ignore Ms. Bragg's basic rule violations when erroneously electing to sanction me. It is what it is, but it is a really unfortunate commentary on Judge Griffin."

"Given the issues in the *Esala* litigation, it is hard for me to fathom that we are having this discussion about my e-mail to a clearly incompetent Ms. Bragg. Dev Sethi, my friend and colleague, made a **careless** e-mail reply. His careless reply has snow-balled into Judge Griffin's erroneous commentary. As the worst President in U.S. history would say: 'Sad.'"

"Venessa Bragg lies and lies and lies. Until the State Bar disciplines her, she will continue to find justification for her incompetency. The real misfortune is what she does to the young lawyers who have the misfortune of having to work with her and her unfortunate law partners, John Elardo and Mike Rossi."

"I feel sorry for anyone who has to work with the firm of Elardo, Bragg & Rossi because their firm is the epitome of what it means to be unprofessional and uncalled for."

"Before I address what an incompetent and mean lawyer Venessa Bragg is . . ."

"This simply demonstrates that Venessa Bragg and James Chong were incompetent."

"As for the deposition of Dr. Davis on May 15th, it was a total fiasco. Mr. Chong knows very little about the actual medicine involved in a personal injury case. He was not competent to ask Dr. Davis follow-up questions. . . . It was a pathetic performance. It was embarrassing for the legal profession."

"Ms. Bragg and her staff are **used to being called liars because they do it so frequently."**

"***JUDGE GRIFFIN NEEDS TO BE FORMALLY INVESTIGATED BY THE COMMISSION ON JUDICIAL CONDUCT AND REPRIMANDED FOR THE UNPREPARED AND THOUGHTLESS WAY HE 'PRESIDED' OVER THE JULY 9, 2108 HEARING.***"

"I believe it is Judge Griffin's **job** to know that the Phoenix insurance defense firm of Elardo, Bragg & Rossi is horrible."

> "[T]he way Judge Griffin conducted the July 9th hearing was a **fiasco** for which he should be embarrassed and apologize. I shall accept his apology if he is a confident enough person to admit his wrong-doing."
>
> "How could any reasonable person believe they would receive a fair trial from Judge Griffin after his July 9th Minute Entry. What would Judge Griffin care? How many **individual Plaintiffs** did he represent through a jury verdict during his career as a lawyer?"
>
> "I did not require an unfair advantage to easily defeat an incompetent lawyer like Venessa Bragg at this trial. What I needed was a Judge with common sense and wisdom to separate the merits from the garbage arguments. Judge Griffin was not up to the task. He failed."
>
> "Shame on Judge Griffin."
>
> "I am more than happy to meet with Judge Griffin at the State Bar of Arizona office in downtown Tucson to listen to his apology and more fully discuss all of these issues with him. I am **not** interested in being lectured. That will be a complete waste of my time. This is a Venessa Bragg issue and a Judge Griffin issue."

25. In later email exchanges with bar counsel, Mr. Levy stated:[5]

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[5] Throughout these proceedings, Mr. Levy has repeatedly attacked bar counsel Bradley Perry, including making the following statements:

- "At best, your work product on this case is **substandard.** That is a fact."
- "Note, I have not used the word, 'incompetent,' but if I chose to use the word 'incompetent' to describe your investigation, it would not be difficult to justify. I can stick with substandard because after 7.5 months, your submission is what it is; and you understand that better than anyone."
- "To Doug Levy, it appears that you have **never** drafted a JPS, while I have **never** had an issue getting one submitted in my 24 years of trial practice in Arizona."
- "[W]hy does Mr. Perry have to write so many **lies** in his 42-page gibberish of a Supreme Court brief?"
- "The statement that Respondent caused **harm** to Judge Griffin or defense counsel during the *Esala* litigation is another sad **lie** by Mr. Perry. Maybe it makes him feel good to write such nonsense?"

During the second evidentiary hearing, Mr. Levy continued his attack, at one point stating: "Bradley, you are incompetent, and you are a liar, and you're unprofessional."

> "The only person who should be issuing an apology regarding this matter is Judge Griffin. It is my hope that Judge Griffin learns from how he conducted himself in this case and never treats another lawyer the way he treated me again."
>
> "In this case, Judge Griffin **really performed poorly.** He obviously does not care."
>
> "If I were Judge Griffin and Venessa Bragg, I would be embarrassed. All I did was prosecute a civil case in an outstanding manner only to watch it be torpedoed by an unprepared Judge at the very end."

26. The belittling, unprofessional statements quoted in paragraphs 24-25 were not objectively and reasonably necessary for Mr. Levy to respond to the bar charge.

## CONCLUSIONS OF LAW

1. Unprofessional conduct during the practice of law may result in the imposition of discipline pursuant to Rule 41(g).[6] Rule 41, cmt. 1.

2. "Unprofessional conduct" means "substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona." Rule 41(a).

3. The Oath of Admission to the Bar ("the Oath") provides, in pertinent part, that lawyers: (1) "will treat the courts of justice and judicial officers with respect;" (2)

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As with the attacks on Judge O'Neil discussed *supra*, this conduct does not form the basis for the violations found or the sanctions imposed. It is once again relevant, though, because Mr. Levy's extreme unprofessionalism appears to occur when he encounters someone who disagrees with him or questions his conduct. Given the adversarial nature of the practice of law, this character trait does not bode well for future compliance with the Oath, the Creed, and the Rules of Professional Conduct.

[6] Effective January 1, 2021, the language previously included in Rule 41(g) now appears in Rule 41(b)(7). When the formal complaint was filed, Rule 41(g) was the operative rule. The hearing panel thus refers to Rule 41(g) instead of Rule 41(b)(7).

"will avoid engaging in unprofessional conduct;" (3) "will not advance any fact prejudicial to the honor or reputation of a party or witness unless required by [their] duties to [their] client or the tribunal;" (4) will support "professionalism among lawyers;" and (5) "will at all times faithfully and diligently adhere to the rules of professional responsibility and A Lawyer's Creed of Professionalism."

4. The Creed of Professionalism of the State Bar of Arizona ("the Creed") requires lawyers to conduct themselves in accordance with the Creed when dealing with clients, opposing parties, opposing counsel, tribunals, and the general public. With respect to opposing counsel, lawyers "will be courteous and civil, both in oral and written communication." In negotiations, depositions, and other proceedings, lawyers are to conduct themselves "with dignity" and not "be rude or disrespectful."

5. Mr. Levy engaged in substantial and repeated violations of the Oath and the Creed.

6. Mr. Levy violated Rule 41(g), which states that lawyers shall "avoid engaging in unprofessional conduct" and shall "advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the duties to a client or the tribunal." Rule 41(g) "is not merely aspirational." *In re Martinez*, 248 Ariz. 458, 465 (2020). Diligent and competent representation of a client does not require or justify denigrating, disrespectful, belittling language. *See, e.g., Bemis*, 189 Ariz. at 122 ("Respondent says that he would not have behaved as he did if the judge had acted properly. . . Regardless of respondent's belief that his actions were necessary to protect the clients' interests, his behavior was inexcusable."); *The Florida Bar v. Norkin*, 132 So.2d 77, 86 (Fla. 2013) ("[E]ven

if one considers opposing counsel to be annoying or unpleasant, that does not provide a license for an attorney to engage in misconduct.").

7. In his communications with and about opposing counsel, Mr. Levy violated ER 4.4(a), which states that, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person." Although the hearing panel may consider Mr. Levy's subjective motive in evaluating an ER 4.4(a) violation, it ultimately must apply an objective standard. *See* Decision Order; *Martinez*, 248 Ariz. at 467. We consider the totality of the circumstances. *See In re Wolfram*, 174 Ariz. 49, 55 (1993) ("We note that some of Respondent's acts and omissions, if viewed independently of one another, are not objectionable and may be explained by legitimate lawyering and trial strategy. Nevertheless, an examination of Respondent's conduct, in the aggregate, tells a much different story."). "[A] lawyer cannot escape responsibility for a violation based on his or her naked assertion that, in fact, the 'substantial purpose' of conduct was not to 'embarrass, delay, or burden' when an objective evaluation of the conduct would lead a reasonable person to conclude otherwise." *In re Alexander*, 232 Ariz. 1, 7 (2013).

8. ER 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." ER 8.4(d) "does not require a mental state other than negligence." *Alexander*, 232 Ariz. at 11. Mr. Levy's behavior toward opposing counsel violated ER 8.4(d), as did his conduct during the State Bar's investigation. "When lawyers themselves generate conflict, rather than addressing the

dispute between the parties they represent, it undermines our adversarial system and erodes the public's confidence that justice is being served." Justice Sandra Day O'Connor, 78 Or. L. Rev. 385 (1999).

9. In connection with the Discovery Text Changes, Mr. Levy violated ER 3.4(c) (knowing disobedience of an obligation under the rules of a tribunal – here, the Rules of Civil Procedure) and ER 4.4(a) (using means that have no substantial purpose other than to harass or burden opposing counsel).

10. The State Bar did not prove by clear and convincing evidence that Mr. Levy violated ER 8.2(a). As relevant here, that rule prohibits making statements "that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . ." ER 8.2(a) is materially different from the ethical rules at issue in *In re Riley*, 142 Ariz. 604 (1984). As such, the hearing panel does not find *Riley* to be controlling or particularly helpful. Courts that have addressed ER 8.2(a) – which is based on ABA Model Rule 8.2(a) – have tended to limit its application to statements made about judges with actual malice – i.e., with knowledge the statement was false or with reckless disregard as to whether it was false. *See, e.g., In re Green*, 11 P.3d 1078 (Colo. 2000); *Pilli v. Va. State Bar*, 611 S.E.2d 389 (Va. 2005), *cert denied*, 546 U.S. 977 (2005). We have no difficulty concluding that Mr. Levy violated the Oath, the Creed, Rule 41(g), and ER 8.4(d) by belittling Judge Griffin, accusing him of not reading what he submitted, and directing invectives at him -- none of which were objectively and reasonably necessary. However, we cannot conclude Mr. Levy made statements about

Judge Griffin that he knew to be false or with reckless disregard of their truth or falsity, in violation of ER 8.2(a).

11. The State Bar did not prove by clear and convincing evidence that Mr. Levy threatened to mock Mr. Giesler and spread rumors about him in the Tucson legal community if he failed the Nevada bar examination. Mr. Giesler and Mr. Levy presented dramatically different testimony regarding this issue, and neither version of events was more credible than the other.

**SANCTION**

The State Bar requests a minimum 90-day suspension, followed by a term of probation that includes a Member Assistance Program (MAP) evaluation and compliance with any recommendations arising from that evaluation.

Sanctions imposed against lawyers "shall be determined in accordance with the American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA Standards"). Rule 58(k), Ariz. R. Sup. Ct. In fashioning an appropriate sanction, the hearing panel considers the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating and mitigating factors. *See In re Scholl*, 200 Ariz. 222, 224 (2001).

Mr. Levy violated ethical duties owed to opposing counsel, to the judiciary, and as a professional. His actions were knowing and intentional. He is proud of his conduct.

Mr. Levy's misconduct caused actual harm. The defense lawyers were required to expend time and client funds litigating the sanctions motion and addressing the Discovery Text Changes. Scarce judicial resources had to be devoted to adjudicating the

sanctions request and filing the bar charge. More broadly, opposing counsel were subjected to the type of bullying, belittling, unprofessional conduct that makes the practice of law needlessly stressful and unpleasant – conduct that also contributes to a negative public perception of lawyers and the legal profession. "[T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes." *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 52, n.24 (Del. 1994) (quoting speech to American Bar Association by Justice Sandra Day O'Connor).

"When an attorney faces discipline for multiple charges of misconduct, the most serious charge serves as the baseline for the punishment. We assign the less serious charges aggravating weight." *In re Moak*, 205 Ariz. 351, 353 (2003) (citations omitted). The most serious misconduct consists of Mr. Levy's ethical breaches involving opposing counsel and the State Bar proceedings. We assign aggravating weight to the Discovery Text Changes.

The following ABA Standards are relevant:

> 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system
>
> 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

> 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

Mr. Levy's conduct was not negligent, so Standard 7.3 (reprimand) is inapplicable. Standard 7.1 (disbarment) is not a precise fit because of the "intent to obtain a benefit" element, though it could be argued the intended benefit of Mr. Levy's unethical conduct was to intimidate and force capitulation by defense counsel on terms favorable to his client. On balance, though, Standard 7.2 (suspension) is the most clearly applicable standard.

As discussed *supra*, we assign aggravating weight to the Discovery Text Changes, which, standing alone, would warrant either suspension or a reprimand under the following ABA Standards:

> 6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

> 6.21 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

The panel next considers aggravating and mitigating factors – both of which must be supported by reasonable evidence. *In re Abrams*, 227 Ariz. 248, 252 (2011). The State Bar established the following three aggravating factors by reasonable evidence:

**9.22(a) – prior disciplinary offenses**. On October 30, 2007, the Supreme Court of Arizona suspended Mr. Levy for 30 days in SB-07-0140-D. The Court upheld the Disciplinary Commission's determination that Mr. Levy violated ER 3.4(c) and Rules

41(c), 41(g), and 53(c). Some of the misconduct in that matter is similar to the conduct at issue in these proceedings.

One of the counts in the 2007 proceedings arose out of litigation that was filed against Mr. Levy by his former employees. In court filings in that case, Mr. Levy stated, *inter alia*:

> "This Court will quickly realize that this is absolutely the dumbest lawsuit pending in Pima County Superior Court."
>
> "Plaintiff's counsel has truly acted shamefully by agreeing to file such a patently frivolous lawsuit against undersigned."
>
> "Yes, undersigned is amazed that a lawyer in Pima County agreed to lend his name to this litigation."
>
> "Why would Plaintiff's counsel label Count Three as being 'cryptic,' when paragraphs 10-24 can easily be comprehended by a freshman in high school?"

After Mr. Levy was sanctioned by the trial judge, he refused to pay the sanctions imposed against him, labeling the court's ruling "asinine."

In the second count leading to his 2007 suspension, Mr. Levy represented a plaintiff, stating in the complaint he filed that the defendant was an "obnoxious, self-centered and arrogant individual." Mr. Levy also wrote that the opposing lawyers wrote "whiny letters," were "bullying," and filed an "absolutely, positively pathetic Pre-Arbitration Memorandum."

In upholding the hearing officer's recommendation of a 30-day suspension, the Disciplinary Commission observed that Mr. Levy engaged in "gratuitous name-calling rang[ing] from merely aggressive to needlessly insulting and demeaning." It found that

Mr. Levy's "statements were intentionally insulting *ad hominum* [sic] attacks." The Commission concluded its analysis by stating:

> The conduct at issue in this case are not isolated incidents or the result of a momentary loss of temper. They form a pattern which extends to Respondent's treatment of the Judge described above. Respondent has not expressed any shame or remorse for this conduct. To the contrary, he proudly holds himself up as a role model or a "poster boy" in his own words, whose conduct should be emulated by others in the legal profession. The Commission agrees that Respondent is a poster boy, but not one whose conduct should be emulated or tolerated.

Mr. Levy is unapologetic about the conduct that led to his 2007 suspension. He testified: "Who sits on the disciplinary panel and why would I care about what the people on the disciplinary panel who I have never shaken hands with – what would I care what you think . . ."

Prior discipline is an aggravating factor that weighs heavily against an attorney in a disciplinary proceeding. *In re Brady*, 186 Ariz. 370, 375 (1996). More severe sanctions are appropriate when a lawyer "engages in further acts of the same or similar misconduct for which he or she has already been reprimanded." *In re Brown*, 184 Ariz. 480, 484 (1996). Mr. Levy correctly points out that his suspension occurred almost 14 years ago. We agree that the weight of this aggravating factor is somewhat diminished due to its age but note that the absence of discipline in the interim is not in and of itself proof of good conduct. *Cf. In re Peasley*, 208 Ariz. 27, 38 (2004).

**9.22 (g) – refusal to acknowledge wrongful nature of conduct.** In many respects, this aggravating factor is the most troubling. *See, e.g., Bemis,* 189 Ariz. at 122-23 ("Although respondent has no prior disciplinary record in ten years of practice, he

apparently still fails to recognize the wrongful nature of his conduct. . . .The court is most concerned with respondent's refusal to accept that his conduct cannot be justified by any perceived unfairness in the judges' rulings."). Mr. Levy has asserted in these proceedings: "I do **not** apologize for any of my conduct during [the *Esala*] litigation" and stated that "100 percent of the emails, the correspondence that I had with Ms. Bragg, Mr. Giesler and Mr. Chong were professional, a hundred percent." Mr. Levy maintains that it is Judge Griffin and bar counsel (among others) who owe *him* an apology. Under these circumstances, there is no reason to believe he will modify his behavior in the future.

Objective, disinterested third parties who have reviewed Mr. Levy's conduct have found it unprofessional and sanctionable. Additionally, during the first evidentiary hearing, Mr. Levy acknowledged that individuals whom he respects (and who, presumably, are objectively reasonable) would find his conduct problematic, stating:

> [T]he biggest person who would criticize me, outside my mom, would be Stanley [Feldman]. I look up to Stanley just like about anybody else, and I know if I would discuss this with Stanley, he would give me one hell of a lecture. But I – I do what I think. I behave in a way that I think is appropriate.

**9.22(i) – substantial experience in the practice of law.** Mr. Levy has been practicing law for more than 25 years.

Mr. Levy established the following two mitigating factors by reasonable evidence:

**9.32(d) – timely good faith effort to rectify consequences of misconduct.** This factor applies *only* to the Discovery Text Changes.

**9.32(g) – character or reputation.** Mr. Levy is involved in his community, including numerous charitable, religious, and political activities. In those contexts, he

seems to enjoy a good reputation. He is a committed advocate for his clients. Christina Esala testified at the second evidentiary hearing and was quite complimentary of Mr. Levy's representation, though she conceded she would "probably be sad" if he were to call her incompetent, lazy, or horrible. David Boyan has worked with Mr. Levy over the years in his capacity as a videographer. He testified that Mr. Levy is a "passionate advocate" for his clients, and he has never observed him behaving unprofessionally. Mr. Boyan testified that he hopes Mr. Levy has never called him incompetent, lazy, lousy, selfish, pathetic, or a known liar, conceding, "it wouldn't be a pleasant thing to hear." Attorney Eric Nadler has known Mr. Levy for more than 20 years. He often refers cases to Mr. Levy and has never seen him act unprofessionally, though he has never been opposing counsel or had any significant disagreement with Mr. Levy.

An argument can be made that Mr. Levy should be required to demonstrate rehabilitation before resuming the practice of law, which would require identifying "just what weaknesses caused the misconduct" and demonstrating how "he has overcome those weaknesses." *In re Arrotta*, 208 Ariz. 509, 513 (2004) (discussing reinstatement applicant's burden of proof after suspension of more than six months). This argument has some force because Mr. Levy adamantly refuses to view his conduct as anything less than perfect. A lengthy suspension could also serve the recognized objective of deterring Mr. Levy and other attorneys from engaging in the same or similar misconduct. *See In re Zawada*, 208 Ariz. 232, 236 (2004).

Further complicating the analysis is Mr. Levy's strident objection to a psychological evaluation. Yet the hearing panel continues to believe such an evaluation

is necessary to determine what, if anything, can be done to alter future conduct. *See, e.g., Scholl*, 200 Ariz. at 224 (a recognized goal of discipline is "assisting, if possible, in the rehabilitation of an errant lawyer.").

Because the objective of attorney discipline is not to punish the offender, *Scholl*, 200 Ariz. at 224, the hearing panel concludes that a 90-day suspension, followed by two years of MAP probation (including standard MAP terms and a psychological evaluation, followed by compliance with any recommendations) is a sufficient sanction. Mr. Levy has made clear he plans to appeal any decision other than an outright dismissal of all charges. The Arizona Supreme Court will thus have the final word. A published opinion in this area would offer guidance in future disciplinary proceedings and would also make clear the Court's expectations of members of the State Bar of Arizona. Although language included in the Decision Order is helpful, it is not binding precedent and is not readily accessible to members of the bar, the judiciary, and the public.

In addressing unprofessional behavior by an attorney, the Florida Supreme Court has stated:

> There are proper types of behavior and methods to utilize when aggressively representing a client. Screaming at judges and opposing counsel, and personally attacking opposing counsel by disparaging him and attempting to humiliate him, are not among the types of acceptable conduct but are entirely unacceptable. One can be professional and aggressive without being obnoxious. Attorneys should focus on the substance of their cases, treating judges and opposing counsel with civility, rather than trying to prevail by being insolent toward judges and purposefully offensive toward opposing counsel. This Court has been discussing professionalism and civility for years. We do not tolerate unprofessional and discourteous behavior. We do not take any pleasure in sanctioning Norkin, but if we are to have an honored and respected profession, we are required to hold ourselves to a higher standard. Norkin

> has conducted himself in a manner that is the antithesis of what this Court expects from attorneys. By his unprofessional behavior, he has denigrated lawyers in the eyes of the public. . . His unprofessional conduct is an embarrassment to all members of The Florida Bar.

*Norkin*, 132 So.2d at 92-93 (imposing two-year suspension and public reprimand). A similar statement from the Supreme Court of Arizona would be helpful.

**CONCLUSION**

For the reasons stated, the hearing panel orders:

1. Douglas B. Levy is suspended from the practice of law for 90 days, effective 30 days from the date of this order;
2. Upon reinstatement, Mr. Levy shall be placed on probation for two years with the State Bar's Member Assistance Program under standard MAP terms. Within 30 days of reinstatement, he shall submit to an evaluation by Dr. Phillip Lett or a similarly qualified professional *if* both bar counsel and Mr. Levy agree to someone other than Dr. Lett. Mr. Levy is responsible for all costs associated with the evaluation and probation;
3. Mr. Levy shall pay costs and expenses of these proceedings prior to being reinstated, which include costs incurred by the State Bar and by the Office of the Presiding Judge.

A final judgment and order will follow.

**DATED** this 1st day of September 2021.

/s/signature on file
Margaret H. Downie, Presiding Disciplinary Judge

/s/ signature on file
Stephen H. Lesher, Attorney Member

/s/ signature on file
Marsha Morgan Sitterley, Public Member

COPY of the foregoing e-mailed
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