BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DIANA L. HERRERA,** **Bar No. 014474** Respondent.	**PDJ 2020-9034** **FINAL JUDGMENT AND ORDER** [State Bar No. 19-1175] **FILED JULY 13, 2021**

The hearing panel issued its decision on June 11, 2021, imposing a reprimand and costs. Neither party appealed. The State Bar filed a Statement of Costs and Expenses, seeking to recover $5,745.16. Respondent objected to the itemized costs for investigator mileage and deposition fees. The State Bar replied in support of its application.

It is undisputed that Administrative Order 2011-17 (AO) authorizes the $4,000 assessment for the State Bar's general administrative expenses. In addition, the AO recognizes the judicial branch's "constitutional and inherent administrative authority to assess costs and expenses in lawyer disciplinary proceedings" and states that the PDJ (among others) may assess costs and expenses in addition to general administrative expenses.

Rule 60(d) makes clear that the imposition of costs and expenses is a form of sanction, which materially distinguishes such an assessment from taxable costs the legislature has deemed recoverable in civil cases. Rule 60(d) states:

> An assessment of costs and expenses related to disciplinary proceedings shall be imposed upon a respondent by the committee, the presiding disciplinary judge, the hearing panel, or the court, as appropriate, *in*

> *addition to any other sanction imposed.* Upon a showing of good cause, all or a portion of the costs and expenses may be reduced, deferred, or waived.

(Emphasis added).

In *In re Shannon*, 179 Ariz. 52 (1994), the Arizona Supreme Court made clear that costs in attorney disciplinary proceedings are not tethered to statutory enactments governing the recovery of costs in civil proceedings. Although *Shannon* addressed A.R.S. § 12-109, the court's separation of powers analysis applies with equal force to Respondent's argument predicated on A.R.S. § 12-331 (taxable costs in supreme court in civil proceedings). The court noted that imposing costs and expenses "is necessary to effectively carry out our constitutional duties," is "part of the rehabilitative process," and "serves the additional function of deterring other lawyers from engaging in unprofessional conduct." *Id*. at 79.

Based on the foregoing,

IT IS ORDERED that Respondent **DIANA L. HERRERA**, is reprimanded for her conduct in violation of the Arizona Rules of Professional Conduct.

IT IS FURTHER ORDERED that Respondent pay costs and expenses incurred by the State Bar of Arizona in the sum of $5,745.16. There are no costs or expenses incurred by the Office of the Presiding Disciplinary Judge in these proceedings.

DATED this 13th day of July 2021.

Margaret H. Downie
Margaret H. Downie
Presiding Disciplinary Judge

COPY of the foregoing e-mailed
this 13th day of July 2021, to:

State Bar of Arizona
Craig D. Henley
Senior Bar Counsel
4201 N. 24th Street, Suite 100
Phoenix, AZ 85016-6266
Email: LRO@staff.azbar.org

Counsel for Respondent
Donald Wilson Jr.
Jessica K. Kokal
Broening Oberg Woods & Wilson PC
2800 North Central Ave, Suite 1600
Phoenix, AZ 85004
Email: dwj@bowwlaw.com
jjk@bowwlaw.com

by: SHunt

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, DIANA L. HERRERA, Bar No. 014474 Respondent.	PDJ 2020-9034 DECISION AND ORDER IMPOSING SANCTIONS (State Bar No. 19-1175) FILED JUNE 11, 2021

An evidentiary hearing was held on May 19 and 20, 2021 before a hearing panel consisting of Presiding Disciplinary Judge Margaret H. Downie, attorney member Richard L. Brooks, and public member Howard M. Weiske. The State Bar of Arizona was represented by Craig D. Henley. Respondent Diana L. Herrera was represented by Donald Wilson, Jr. and Jessica J. Kokal. The parties stipulated to a number of facts, exhibits were received into evidence, and the following individuals testified:

- Diana L. Herrera
- Judge Cynthia Gonzales
- Jessica Coate
- Dylan Peralta
- Danilo Ballecer, Esq.

Having considered the matters presented, the hearing panel issues the following findings of fact, conclusions of law, and sanction in the form of a reprimand for violations of Supreme Court Rule 42, ER 3.3(a), ER 4.1(a), ER 4.2, and ER 8.4(c).

FINDINGS OF FACT

1. Diana L. Herrera was admitted to the State Bar of Arizona in 1992. At the time of the events relevant to these proceedings, Ms. Herrera had been employed by the City of Phoenix prosecutor's office for approximately 25 years.

2. In August of 2018, *State v. Dylan Peralta* – a misdemeanor DUI case with an accompanying civil traffic citation – was set for a jury trial on November 5, 2018 at 8:30 a.m. in the Phoenix Municipal Court. Attorney Danilo Ballecer represented Mr. Peralta.

3. On August 13, 2018, an employee of the prosecutor's office documented that a police officer availability check had been completed in the Peralta case. On August 14, 2018, the file was notated: "Pls subpoena wits (601)" -- signifying that subpoenas should indicate the witnesses were to be available as of 8:30 a.m. on the day of trial, with the final trial time to be determined by Courtroom 601 on the day of trial.

4. The policy of the Phoenix Municipal Court was to send cases set for jury trials to Courtroom 601 for a Trial Disposition Conference (TDC), where it would be determined which cases were ready to proceed. If a case was ready for trial, Courtroom 601 would assign it to a judge, with an "off-standby" or "on-standby" designation. "Off-standby" meant the case would proceed at 8:30 a.m. on the trial date; "on-standby" meant the assigned trial judge would typically provide the parties with an hour's notice of the start time.

5. In early October 2018, the police officers' availability for the Peralta trial was again confirmed and documented by the prosecutor's office.

6. City prosecutor Mark Borzych submitted a Certificate of Readiness in the Peralta case on October 31, 2018, stating that all witnesses were available and the State was ready to proceed.

7. On November 1, 2018, Courtroom 601 placed the Peralta trial on "on-standby" status, and the case was assigned to Ms. Herrera. At the time, Mr. Borzych did not anticipate a trial would occur because of the lack of disclosed defenses. If a trial did occur, Mr. Borzych intended that an intern from the prosecutor's office would try the case. However, if a change of plea were to be entered on the day of trial, office policy precluded an intern from handling that proceeding.

8. On the same day the Peralta case was assigned to her, Ms. Herrera contacted Court Services (a division of the court) and spoke with Angelique Hechler, who confirmed that the police officers were available for the November 5 trial. Ms. Herrera documented their availability in the file. She also telephoned Mr. Ballecer to inquire whether there would be a trial or a change of plea given the lack of disclosed defenses. Mr. Ballecer did not respond.

9. On November 4, 2018 – the day before the trial - Officers Stevens and Stemburg called in and were advised they were on standby for the Peralta case – meaning they were to be available by phone. Court Services will call an officer scheduled to testify on the day of trial, after which the officer has an hour to respond to the assigned courtroom.

10. At approximately 9:30 a.m. on November 5, 2018, the City prosecutor's office (specifically, Veronica Cabrera) received notice from Courtroom 601 that the

Peralta case was set for trial at 10:30 a.m. in Courtroom 505 before Judge Cynthia Gonzales. Ms. Cabrera relayed that information to Ms. Herrera. Based on written policies in effect, Ms. Herrera assumed that Ms. Cabrera had already called Court Services about the case placement and that Court Services would contact the police officer witnesses. Although Ms. Cabrera was only responsible for contacting civilian witnesses, police officers would sometimes contact the prosecutor's office directly, so Ms. Herrera told Ms. Cabrera that witnesses in the Peralta case would not be needed before lunch if the matter proceeded to trial.

11. Sometime before 10:00 a.m. on November 5, 2018, Mr. Ballecer entered Courtroom 505 and sat at defense counsel's table. Dylan Peralta and a companion – Jessica Coate – arrived at approximately 10:14 a.m. They sat together in the back row of the courtroom behind defense counsel's table, with Mr. Peralta on the aisle and Ms. Coate to his right. Mr. Ballacer, Mr. Peralta, and Ms. Coate engaged in conversation for approximately ten minutes.

12. Ms. Herrera entered Courtroom 505 at 10:25 a.m. When she asked Mr. Ballecer if there was going to be a trial, he inquired where her witnesses were. Ms. Herrera advised they would testify if the matter went to trial. She further stated that regardless of whether Mr. Peralta pled or went to trial, he would receive the "mandatory minimums."

13. Mr. Ballecer became agitated and stated that it was unethical for Ms. Herrera to come to court without her witnesses and that he "wanted to see the whites of their eyes." A few minutes later, he left the courtroom. Ms. Herrera was puzzled by his

reaction and became concerned that she might have missed a rule change that required witnesses to be present when a case was called.

14. While Mr. Ballecer was out of the courtroom, Ms. Herrera asked Ms. Coate if she was present as a witness or for moral support. Ms. Coate responded that she was there for moral support. Ms. Herrera conceded in her response to the bar charge that she assumed the man with Ms. Coate was Mr. Peralta.

15. There is conflicting evidence about whether Ms. Herrera or Ms. Coate initiated further communication. Nevertheless, at one point, Ms. Coate asked Ms. Herrera what "mandatory minimums" meant, suggesting she had overheard the earlier conversation between Ms. Herrera and Mr. Ballacer. Facing both Mr. Peralta and Ms. Coate, Ms. Herrera explained mandatory minimum sentences for first-time DUI offenders, including 10 days in jail (9 days suspended with counseling), various fees and fines, and installation of an ignition interlock device. Ms. Coate asked about the ignition interlock device, at which point Mr. Ballecer returned to the courtroom. Ms. Herrera told him Ms. Coate had asked a question about the ignition interlock device. When Mr. Ballecer did not respond, Ms. Herrera described the device in the presence of Ms. Coate, Mr. Peralta, and Mr. Ballecer.

16. In addition to the exchange discussed in the preceding paragraph, Ms. Coate testified at the disciplinary hearing that Ms. Herrera made a statement about a plea deal being off the table if her witnesses had to appear. Mr. Peralta similarly testified that Ms. Herrera made a statement to the effect: "If witnesses show up, the plea deal could change." Ms. Herrera denied making these statements.

17. Judge Gonzales took the bench at 10:36 a.m. and asked about the status of the case. Ms. Herrera announced that the State was ready for trial, and Mr. Ballecer responded, "ready, I guess." He then stated, "[H]ere's my problem, Judge. I don't think that it is too much to ask for my client and myself to see all of the State's witnesses before they announce ready." The following exchange then occurred:

> THE COURT: Where are your witnesses, Ms. Herrera?
>
> MS. HERRERA: Three officers, Your Honor. They're en route. I told them don't stress about being here at 10:30.
>
> THE COURT: Why? You were called in at 10:30.
>
> MS. HERRERA: Well, because if we start the jury trial and do jury selection, we're not going to actually be ready for the officers until more like 11:30 or 12.
>
> THE COURT: Ms. Herrera, you have to have your witnesses here. The Defense has the right to know who all is here when it's called in. You can't just arbitrarily –
>
> MS. HERRERA: All my officers are here, Your Honor.
>
> THE COURT: Let's pull a jury.

During the disciplinary hearing, Ms. Herrera testified that she was attempting to convey to Judge Gonzales that there was no issue with the scheduling/availability of the police officers and that her use of the pronoun "them" ("I told them don't stress about being here at 10:30") was in reference to her office staff. She further testified that she

believed the officers were on their way ("en route") based on written office policy she had no reason to believe had not been followed.[1]

18. The court declared a recess at 10:38. At 10:39 a.m., Ms. Herrera advised Ms. Cabrera to notify the officers they were needed. Officer Stemburg was contacted at 10:41 a.m. and Officer Stevens was called at 10:42. The parties stipulated that both officers arrived "in well under an hour."

19. During the trial recess, Mr. Ballecer told Ms. Herrera that he believed she had acted unethically and that he would be moving to dismiss the charges against Mr. Peralta based on prosecutorial misconduct. According to Mr. Ballecer, Ms. Herrera laughed and said words to the effect of: "You do what you have to do. But I have to warn you I was on the committee that wrote the rules. It's a small legal community, and I don't think you'll like how this will turn out." During the disciplinary hearing, Ms. Herrera admitted telling Mr. Ballecer "that he practices in a small legal community and might regret alleging prosecutorial misconduct," but stated that her comments were an anomaly that she regretted making and were not intended as a threat. Ms. Herrera testified that she also told Mr. Ballecer she was familiar with the ethical rules, having spent several years on a State Bar committee that interprets those rules.

20. When court reconvened at 11:08, Mr. Ballecer made an oral motion to dismiss the charges against Mr. Peralta based on prosecutorial misconduct. As support,

---

[1] Exhibit 26 reflects that, before a prosecutor is informed that he or she has been assigned to a trial that has been "called in," a staff member should have contacted Court Services, which is responsible for contacting law enforcement witnesses.

he mentioned the police officers' absence from the courtroom when the case was called, as well as the communications Ms. Herrera had with Mr. Peralta and Ms. Coate outside his presence. Ms. Herrera first addressed the witness issue, stating, in pertinent part:

> The State indicated to Defense counsel that I had told the officers that they need not worry about being here before the lunch hour because it was my impression that it would take up until the lunch hour to select the jury. That is what I told them.
>
> I told them I would call them as soon as I knew whether it was going to actually be a trial or something else. That's the way it was left with the officers. As it is now, I was telling the officers, please, actually head here as soon as you can.
>
> There are other courtrooms with other trials going on. It is a common occurrence for us to start a trial, to do jury selection without the officers being present in the courtroom. This case is [sic] no civilian witnesses, so when Defense counsel exhibited his anger at my telling him that the officers – you know, he said, do you have your witnesses? Are you ready? And I said, yes.

Ms. Herrera testified that her references to "them" were, once again, to her office staff. Although the hearing panel found this testimony credible, as well as consistent with other evidence, it is also entirely understandable that Judge Gonzales believed Ms. Herrera was describing actions she personally had taken.

21. Judge Gonzales commented on Ms. Herrera "telling her witnesses not to be here when they were told to be here," whereupon the following exchange occurred:

> MS. HERRERA: [T]here's a mischaracterization. I never talked to the officers prior to them walking into the courtroom.
>
> THE COURT: So let me see if I understand –
>
> MS. HERRERA: So I never told them to come or to not come.
>
> . . . .

THE COURT: This case was called in at 10:30. Is it your position that you told court services not to tell them to be here at 10:30?

MS. HERRERA: No, I didn't tell court services not to tell – to have them not here.

THE COURT: How is it that these officers were given information they did not need to be here at 10:30? That's what I want to know.

MS. HERRERA: They weren't given that information.

THE COURT: What information did you provide to court services to have them get here?

MS. HERRERA: I told court services nothing. I didn't have a conversation with court services this morning at all.

. . . .

THE COURT: Let me make it more simple. When your office was told the case is called in at 10:30, what is the proper procedure to let these officers know that they're supposed to be here at 10:30?

MS. HERRERA: There are staff people in my office, typically a law clerk, that calls court services and lets court services know what division and what time.

THE COURT: Okay. The division was my division, 505, and the time was 10:30. Why were these officers not here at 10:30?

MS. HERRERA: The officers, I don't know where they were because I hadn't had a conversation with them yet, Your Honor. But I gave the directive to our [law clerk] upstairs that I was going to go down to see if it was going to be a trial or something else, and that I would let her know as soon as I knew that.

22. When the officers arrived in Courtroom 505, Judge Gonzales questioned each of them under oath. They testified that they knew they were on standby for the Peralta case, meaning they must be available by phone, and if, needed, appear in court

within one hour. Officer Stemburg testified he was called at 10:41 a.m., and Officer Stevens testified he was contacted at 10:42.

23. After Ms. Herrera and Mr. Ballecer answered questions from the court, Judge Gonzales expressed dissatisfaction with the fact that "[w]e are . . . having this situation occur instead of having our jurors [seated]," and later stated to Ms. Herrera: "I think Mr. Ballecer has every right to be upset with you. I am upset with you. But we're going to reset this and stay in my division. Mr. Ballecer, you'll file your appropriate motion, and we will go from there." Judge Gonzales then released the jury panel, and the proceedings concluded at 11:40 a.m.

24. On November 8, 2018 at 4:12 p.m., Ms. Herrera sent an email to Mr. Ballecer's assistant and Presiding Judge Eric Jeffery's bailiff, stating in the subject line: "This case was reset to a motion hearing in error. There is no motion as of 11/5/18. The status should be TDC in 601." Judge Jeffery's bailiff responded only to Ms. Herrera, stating that she had forwarded the email "to the bailiff in Courtroom 505 so that they can look into this." Ms. Herrera replied to the bailiff as follows: "Would you also please put it on the radar of the 601 judge because I do not think it is a good practice to keep pending jury trials in the division under these circumstances." Judge Gonzales later disseminated the entire email string to Ms. Herrera and Mr. Ballecer.[2]

25. During the proceedings on November 5, 2018, Judge Gonzales made it clear that Mr. Ballecer's forthcoming motion to dismiss would stay in her division, and she set

---

[2] The State Bar has not alleged a violation of ER 3.5(b) (*ex parte* communication with officials of a tribunal). The panel therefore does not address the issue.

a briefing schedule in open court. Judge Gonzales later extended the deadline for Mr. Ballecer's motion by one day – to November 9, 2018.

26. At the disciplinary hearing, Ms. Herrera testified that she heard Judge Gonzales say -- toward the end of the November 5 proceedings -- that Mr. Ballecer "has every right to be upset with you." She also heard Judge Gonzales tell Mr. Ballecer to "file your appropriate motion." Ms. Herrera testified, though, that she did *not* hear what the judge said in between those two statements – specifically: "But we're going to reset this and stay in my division." Her testimony strains credulity. Moreover, during a meeting with prosecutor Gary Shupe, Ms. Herrera advised that the yet-to-be-filed motion to dismiss had been set for a hearing before Judge Gonzales, who had also set a briefing schedule.

27. The hearing panel finds by clear and convincing evidence that Ms. Herrera knew Judge Gonzales intended to keep the Peralta case for purposes of resolving Mr. Ballecer's motion and that Ms. Herrera engaged in misrepresentation by omission in attempting to have Judge Jeffery's staff move the case out of Judge Gonzales' division.

28. On November 9, 2018, Mr. Ballecer filed a Motion for Mistrial, or, in the alternative, Motion to Dismiss with Prejudice for Prosecutorial Misconduct. Judge Gonzales held an evidentiary hearing regarding the motion on December 4, 2018 at which the State was represented by Gary Shupe. Ms. Coate and Mr. Ballecer testified at the hearing. Ms. Herrera was not present because she had been directed not to appear. Mr. Shupe argued, in part, that any ethical misconduct by Ms. Herrera "could potentially be

referred" to the State Bar but that dismissal of the charges against Mr. Peralta was unwarranted.

29. In a ruling delivered orally from the bench on January 14, 2019, Judge Gonzales dismissed the charges against Mr. Peralta with prejudice, concluding that Ms. Herrera had engaged in prosecutorial misconduct. Judge Gonzales' order was affirmed on appeal to the Maricopa County Superior Court.[3]

30. At the disciplinary hearing, Ms. Herrera testified that her long-standing practice (and, she believes, the practice of other City prosecutors) was to have police officers wait to come to the courtroom until after it was clear a trial would occur and a jury had been impaneled. In her experience, this had never caused a trial delay. Other than the Peralta case, no defense lawyer or judge had ever voiced an objection to Ms. Herrera about this practice – including Mr. Ballecer in previous cases.

31. On cross-examination during the disciplinary hearing, Judge Gonzales agreed that the following statement she made during the proceedings on November 5, 2018 was untrue: "Ms. Herrera, you have to have your witnesses here." Judge Gonzales testified that she was "quite annoyed at that point in time" and that, "I wanted them [the

---

[3] In determining whether Ms. Herrera violated the charged ethical rules, the hearing panel accords no substantive weight to the findings issued by Judge Gonzales on January 14, 2019 or the superior court's ruling on appeal. Judge Gonzales necessarily ruled based on the record before her. However, Ms. Herrera was forbidden from attending the hearing and from offering testimony that could have clarified certain issues of contention and confusion that were addressed (and, at times, resolved in Ms. Herrera's favor) at the disciplinary hearing. Principles of due process and fundamental fairness preclude reliance on those findings.

witnesses] there." The parties stipulated that there was no court rule, law, or order that required a party's witnesses to be present when a case set for a jury trial was called. Judge Gonzales further conceded there would have been nothing improper in Ms. Herrera or Court Services telling the officers to arrive at 1:30.

32. Ms. Herrera reasonably relied on court and prosecutorial staff to follow written policies regarding contacting the police officer witnesses in the Peralta case. She was unaware of any deviation from those policies.

33. Based on a review of Ms. Coate's testimony in the municipal court and before the hearing panel, it appears that at times (and understandably, being a non-attorney), she conflated the topic of mandatory minimum sentences with terms of an expired plea agreement and with the option Mr. Peralta still had of entering a guilty plea on the day of trial. It is undisputed there was no plea agreement that "could change" or be "off the table" as of November 5, 2018. Nor did Ms. Herrera have a motive to coerce a plea from Mr. Peralta. The State's witnesses were available, and an intern – not Ms. Herrera – would try the case if necessary. Although there may have been some reference to an expired plea agreement that called for the mandatory minimums at sentencing, the hearing panel does not find clear and convincing evidence that Ms. Herrera made false or coercive statements in an attempt to induce Mr. Peralta to plead guilty rather than go to trial.

34. The hearing panel finds clear and convincing evidence that Ms. Herrera made one false statement to the court on November 5, 2018. Although the panel credited her testimony about use of the pronoun "them" to refer collectively to office personnel

on several occasions, she made one categorical statement that cannot be explained in that manner. Specifically, when Judge Gonzales pressed Ms. Herrera about the police officers' whereabouts, Ms. Herrera stated, without qualification: "All my officers are here, Your Honor." That statement was false.

CONCLUSIONS OF LAW

1. The State Bar proved by clear and convincing evidence that Ms. Herrera violated ER 4.2, which states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

2. Ms. Herrera did not have Mr. Ballecer's consent to communicate with Mr. Peralta and does not contend she was authorized by law to do so. The panel rejects the suggestion Ms. Herrera did not violate ER 4.2 because she conversed only with Jessica Coate, not Mr. Peralta. Ms. Coate and Mr. Peralta were seated side-by-side, and Mr. Peralta was privy to the entire communication. Moreover, in her initial response to the bar charge, Ms. Herrera admitted that she assumed the individual seated next to Ms. Coate was Mr. Peralta.

3. The panel also has no difficulty concluding that Ms. Herrera communicated "about the subject of the representation." The subject of Mr. Ballecer's representation was the DUI charge (and the civil moving violation) pending before Judge Gonzales. By discussing potential penalties Mr. Peralta would face if adjudicated guilty of the DUI offense, Ms. Herrera clearly communicated about the subject of the representation.

4. The State Bar alleges two distinct categories of false statements/misrepresentations by Ms. Herrera in violation of ER 3.3(a), ER 4.1(a), and ER 8.4(c): (1) her statements to the court about the State's witnesses; and (2) her e-mail communications with Judge Jeffery's staff after the events of November 5, 2018. The hearing panel concludes that Ms. Herrera's statement to the court – "All my officers are here, Your Honor" – was a knowingly false statement, in violation of ER 3.3(a), ER 4.1(a), and ER 8.4(c). The State Bar failed to prove by clear and convincing evidence that other statements Ms. Herrera made to the court on November 5, 2018 violated these rules.

5. The hearing panel further concludes that Ms. Herrera's behind-the-scenes attempt to move the Peralta case to a different judge involved misrepresentation by omission. Ms. Herrera acknowledged in her response to the State Bar charge that Judge Gonzales "still had jurisdiction over the Peralta matter" but that she " believed it would have been preferable for another judge to hear and decide the anticipated Motion to Dismiss" because Judge Gonzales appeared to be biased.

There are rule-based procedures for a party to have an assigned judge removed from a case for cause. Indeed, Ms. Herrera acknowledged that she "could have filed a motion for change of judge" and stated that, "[i]n hindsight, she wishes she had done so to avoid the allegations of improper conduct related to this email." Ms. Herrera omitted material facts from her email communications with Judge Jeffery's staff that, if disclosed, would have made clear that her request to move the case from Judge Gonzales had no factual or legal basis. Her conduct in this regard violated ER 4.1(a) and ER 8.4(c).

6. The hearing panel concludes that the State Bar did not prove by clear and convincing evidence that Ms. Herrera violated ER 4.4(a) ("In 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."). This alleged violation is based on Ms. Herrera's statements to Mr. Ballecer about his intended motion to dismiss. Although Ms. Herrera's statements may have been unprofessional, the panel cannot conclude they were made to "embarrass, delay, or burden" Mr. Ballecer or anyone else.

SANCTION

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. The sanction imposed should be "tailored to the unique circumstances" of each case. *In re Alexander*, 232 Ariz. 1, 13 (2013).

The most serious ethical violations stem from Ms. Herrera's false statement to the court and her later attempt to remove the Peralta case from Judge Gonzales' division. As relevant to this conduct, the ABA Standards provide:

> 6.12. 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.
>
> 6.13. Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes and adverse or potentially adverse effect on the legal proceeding.

The State Bar makes a colorable claim that suspension would be the appropriate sanction for the violations of ER 3.3(a), ER 4.1(a), and ER 8.4(c). Lack of candor to the court violates one of the most fundamental and important ethical duties imposed on attorneys. The hearing panel, though, would be remiss if it did not consider the context of the conduct at issue. Ms. Herrera made one clear misrepresentation about the whereabouts of her law enforcement witnesses. The remainder of her statements to the court were consistent with other evidence and with her office's established policies. The evidence also establishes that Ms. Herrera attempted to clarify for the court exactly what had transpired with the police officer witnesses and to address what she believed had been a mischaracterization of her statements and actions.

Moreover, the entire chain of events began with the unfounded premise that Ms. Herrera had acted unethically by not having the police officers physically present in Judge Gonzales' courtroom at 10:30 a.m. When the hearing panel weighs the aggravating and mitigating factors (*see infra*), it concludes that Ms. Herrera's misrepresentations – even assuming they would warrant suspension in the first instance under the ABA Standards – are more appropriately addressed with a reprimand.

Turning next to the ER 4.2 violation, the ABA Standards provide:

> 6.32. Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.
>
> 6.33. Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual

> in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

Ms. Herrera was a prosecutor with more than two decades' experience at the time of the Peralta trial. The ethical prohibition against communicating with a represented party is neither new nor challenging to understand and apply. As such, it is difficult to conclude that Ms. Herrera *negligently* communicated about the subject matter of the representation without Mr. Ballecer's consent. On the other hand, the information imparted to Mr. Peralta and Ms. Coate was relatively innocuous, given the panel's conclusion there is no clear and convincing evidence Ms. Herrera made statements that could fairly be characterized as either threatening or coercive. There was actual or potential short-term harm in the sense that Mr. Peralta and Ms. Coate began to question the quality of Mr. Ballecer's representation when they believed he might not have fully informed them of relevant information. On balance, we find the violation of ER 4.2 falls somewhere between suspension and reprimand under the ABA Standards. After mitigating factors are considered (*see infra*), we conclude the ER 4.2 violation merits imposition of a reprimand.

AGGRAVATING AND MITIGATING FACTORS

The State Bar alleges two aggravating factors: (1) substantial experience in the practice of law; and (2) dishonest or selfish motive. Only the first factor was established by reasonable evidence, and only as to one of the violations. *See In re Abrams*, 227 Ariz. 248, 252 (2011) (aggravating and mitigating factors need only be supported by reasonable evidence).

The aggravating factor of substantial experience in the practice of law does not automatically apply to a lawyer with substantial experience. There must be a nexus between the lawyer's experience and the ethical misconduct for this factor to apply. *See In re Peasley*, 208 Ariz. 27, 36-37 (2004) (all lawyers are expected to be truthful, however experienced or inexperienced). We conclude that this aggravator applies only to the ER 4.2 violation. As noted *supra*, Ms. Herrera was a very experienced prosecutor who should have been well aware – and observant – of the prohibition against communicating with a represented party.

In terms of "dishonest or selfish motive, it is important to note that, "[s]imply because an attorney's conduct is intentional or dishonest does not by itself establish a dishonest or selfish motive." *Peasley*, 208 Ariz. at 37. Although the hearing panel finds that Ms. Herrera engaged in two acts of misrepresentation, we cannot conclude she did so with a dishonest or selfish motive. It appears her statement about the police officers being present was made in a misguided attempt to convince Judge Gonzales that there was no issue with the State's witnesses. Although that was in fact the situation, as an officer of the court, Ms. Herrera was required to be scrupulously honest and accurate in responding to the court's questions. Similarly, her conduct in attempting to move the Peralta case from Judge Gonzales was inappropriate, but we cannot find that her actions were premised on a selfish or dishonest motive.

In mitigation, it is undisputed Ms. Herrera has no prior disciplinary record with the State Bar. The hearing panel accords substantial weight to this factor given her service as a prosecutor for 27 years. *See In re Owens*, 182 Ariz. 121, 127 (1995) (noting that a

lengthy law practice "with a spotless disciplinary record is a very substantial mitigating factor"). During her prosecutorial career, Ms. Herrera conducted more than 700 jury trials and 2000 bench trials. Until the Peralta case, she enjoyed an unblemished disciplinary history with the State Bar.

Ms. Herrera also relies on the following mitigating factors: (1) personal or emotional problems; (2) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and (3) imposition of other penalties or sanctions. We find the second and third factors to be applicable here.

Although Ms. Herrera presented evidence of personal or emotional problems she was experiencing during the general timeframe at issue, she failed to establish a causal nexus between those problems and her conduct. *See Abrams*, 227 Ariz. at 253. The misconduct found by the hearing panel is neither more nor less likely to occur in the midst of personal turmoil of the nature Ms. Herrera described.

There was, however, evidence of significant "other penalties or sanctions" Ms. Herrera has suffered as a result of her conduct in the Peralta case, including separation from a decades-long career with the City prosecutor's office. Reasonable evidence supports the mitigating factor of "imposition of other penalties or sanctions."

Reasonable evidence also supports the mitigating circumstance of "full and free disclosure to disciplinary board or cooperative attitude toward proceedings." In her response to the bar charge, Ms. Herrera expressed regret for her conduct, stating, in pertinent part:

> Ms. Herrera wishes she could relive the morning of November 5, 2018. She wishes that her surprise over Mr. Ballecer's initial allegation that she was "unethical" had not caused her to lose clarity in her thought and analysis. She wishes she could have, in the heat of the moment, been more eloquent and thorough in her attempts to explain her position to Judge Gonzales. She wishes she had not vented her frustration with a long-time colleague, making statements that are completely out of character for her.

Ms. Herrera continued to cooperate at all phases of the disciplinary proceedings.

We conclude that the mitigating circumstances substantially outweigh the one aggravating factor – particularly Ms. Herrera's lack of prior discipline and the imposition of additional penalties or sanctions. Under these circumstances, the hearing panel concludes the appropriate sanction in this matter is a reprimand for violations of ER 3.3(a), ER 4.1(a), and ER 8.4(c).

CONCLUSION

The purpose of lawyer discipline is to protect the public and the administration of justice, as well as to deter both the respondent attorney and members of the bar at large from engaging in the same or similar misconduct. *In re Zawada*, 208 Ariz. 232, 236 (2004). The objective is not to punish the respondent lawyer. *Peasley*, 208 Ariz. at 38 (2004).

The hearing panel has no difficulty concluding that Ms. Herrera is not a threat to the public, the profession, or the administration of justice. Based on the evidence presented, her conduct in the Peralta case appears to have been an anomaly that occurred, in part, due to the animosity that clearly existed between Ms. Herrera and Judge Gonzales.[4] This does not excuse her conduct. But it does explain the context for what

[4] The antipathy between Ms. Herrera and Judge Gonzales was apparent to the hearing panel. Judge Gonzales admitted she does not like Ms. Herrera. And during the

proved to be an unfortunate professional episode for Ms. Herrera. We conclude that a sanction harsher than a reprimand would serve only a punitive purpose.

For the foregoing reasons, the hearing panel orders that Diana L. Herrera is reprimanded for violations of ER 3.3(a), ER 4.1(a), ER 4.2, and ER 8.4(c). A final judgment and order will follow.

DATED this 11th day of June 2021.

Signature on file

Margaret H. Downie, Presiding Disciplinary Judge

Signature on file

Richard L. Brooks, Attorney Member

Signature on file

Howard M. Weiske, Public Member

A copy of the foregoing was emailed
this 11th day of June 2021, to:

Craig D. Henley
Senior Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85015-6266
LRO@staff.azbar.org

December 4, 2018 motion hearing, Judge Gonzales stated: "I've known [Ms. Herrera] for 25 years. I could list my own instances of misconduct against me when I was a defense attorney. How many passes does Ms. Herrera get?" For her part, Ms. Herrera routinely filed notices of change of judge for jury trials assigned to Judge Gonzales because she believed Judge Gonzales was defense-oriented and commonly described as "a defense attorney from the bench." At the disciplinary hearing, both Ms. Herrera and Judge Gonzales did not hesitate to interject negative information about the other and to cast the other's conduct in a harsh light.

Donald Wilson, Jr.
Jessica J. Kokal
2800 N. Central Ave., Suite 1600
Phoenix, Arizona 85004
dwj@bowwlaw.com
Respondent’s Counsel

By: SHunt