BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY THE
SUPREME COURT OF TEXAS

IN THE MATTER OF JASON MARIO BRUNO State Bar Card No. 24073334 Respondent.	Case No. 65864 **RESPONSE TO ORDER TO SHOW CAUSE**

Attorney Jason Mario Bruno ("Bruno") respectfully submits his Response to the Order to Show Cause issued by this Board. Bruno appreciates the opportunity to be heard and humbly requests that this Board conduct an independent review and decline to adopt the discipline or Decision imposed by the State of Arizona ("Arizona"). Bruno served his suspension in Arizona and was reinstated on May 26, 2021. [Exhibit 29].

Bruno believes that a review beyond the face of the Decision shows that there was insufficient evidence of any violation. Arizona unquestionably considered conduct that never happened and was not charged in the disciplinary Complaint. Arizona did not present authority justifying a violation or the harsh discipline imposed for an alleged first-time offender that produced the documents he was accused of concealing after his objections were overruled by the Superior Court.

Bruno contends that, at most, he asserted an unsuccessful position in a discovery dispute. A concealment finding is refuted by the clear and uncontested record facts that: (1) the issuing party ***admitted*** that the draft report was not sought by a Request for Production; (2) to Bruno's knowledge, the draft report was or should have been provided directly to Bruno's opponent by the expert in July of 2014; (3) and Bruno nonetheless disclosed the draft after his objections were overruled by the Superior Court.[1]

The Decision is fundamentally tainted because it relies upon the uncharged allegation that Bruno instructed a witness to conceal a draft report, an event which never took place. The irrefutable evidence shows that such alleged conduct was not charged in the Complaint, disclosed by the State Bar in its Mandatory Disclosure Statements, encompassed within the State Bar's Answers to Interrogatories seeking the specific basis and support for the charges, placed at issue in the Joint Pre-trial Statement, or presented by the State Bar in its case-in-chief. The only evidence supporting the alleged charged regarding the instruction to the expert is a letter drafted by the State Bar that refutes the live, sworn testimony of the only witness on the subject.

[1] The draft report and related email at issue are contained in Exhibits 23 and 24. Bruno has the entire, voluminous record from the Arizona proceedings through the appeal available and will provide it to this Board in any manner and format requested.

This is not a case where Bruno's opponent obtained information from another source after Bruno concealed it or where Bruno violated a court order by not producing it. Bruno had no reason to conceal, and did not conceal, a draft report, but actually produced it after his objection was heard by the Superior Court and overruled.

INTRODUCTION

Bruno has been practicing law full time since 2004 and is also licensed in the States of Arizona, Nebraska (currently suspended), and Minnesota, the United States Courts of Appeals for the Ninth Circuit, the United States Court of Appeals for the Eighth Circuit, and the United States District Courts for the Districts of Arizona, Nebraska (currently suspended), and Colorado. Bruno has been licensed in Texas since 2010.

Bruno has tried approximately 15 jury cases and handled more than 40 appeals. Bruno has handled hundreds of cases and is currently lead counsel on active cases in various jurisdictions. Bruno has never been sanctioned or disciplined by any Texas court or tribunal. Bruno has earned a Martindale-Hubbell AV Preeminent Rating. Bruno routinely volunteers his time to teach seminars, including national seminars on ethics.

Bruno does not suffer from any disability, psychological condition, or chemical dependency issues. Six people submitted letters attesting to Bruno's

good character, reputation, dependability, and generosity. [Exhibit 1]. Three Arizona attorneys, with a combined 72 years of experience, testified live on Bruno's behalf before the Arizona disciplinary court ("the Disciplinary Court").[2] [Exhibit 2, 63:3, 70:7, 76:5].

Bruno did not suddenly act to jeopardize his name, reputation, and career to unethically aid one client, with whom he had no preexisting relation. Bruno respectfully submits that the record when reviewed fully, objectively, in context, and without speculation and conjecture, contains no evidence of intentional concealment or any other misconduct by Bruno. Bruno expended significant effort and suffered personal detriment ensuring that the obligations imposed upon him directly by the Superior Court of Arizona ("the Superior Court") in the underlying legal malpractice case were fulfilled and that all discoverable information was provided to his opponent regardless of whether it was adverse to Bruno's client.

Bruno respectfully submits that Arizona did not consider exculpatory evidence, stipulated facts, entire defenses, rational explanations, unambiguous rules, and applicable law. The charges brought against Bruno were not sufficient to support a violation. Instead, Arizona violated Bruno's due process rights by imposing discipline upon him for alleged conduct that never occurred, that was

[2] Bruno would have introduced more witnesses to attest to his character and reputation, but abided by the limitations imposed by Arizona. [Exhibit 3, Pg. 5].

never charged or disclosed, and that Bruno did not know could give rise to discipline until he received the Decision long after the hearing concluded. This uncharged, alleged conduct was supported only by a letter written by the State Bar, which contradicted the live testimony of a material witness. [Exhibit 22].

The disciplinary charges against Bruno stemmed from the allegation that he concealed a draft expert report, to which he suggested the removal of all extraneous background information, from his opponent in 2013-2014 even though Bruno actually produced the draft expert report after his objections were overruled by the Superior Court. The following facts are undisputed:

1. The Request for Production ("the RFP") to Bruno's client reads, "Provide copies of all information, notes, documents, correspondence Plaintiffs provided to Financial Architects for Financial Architects' use in preparing the October 11, 2013, Report prepared for Jason Bruno." [Exhibit 4].
2. The attorneys for Bruno's opponent confirmed in testimony that the RFP did not elicit draft reports or anything at all from the expert. [Exhibit 5, 82:23 – 83, 132:6-12].
3. Bruno asserted his position that draft reports were beyond the scope of discovery to both opposing counsel and the Superior Court. [Exhibit 5, 107:20-22 | Exhibit 6, 7, 8].

4. Bruno's objections were overruled and on "August 3, 2017, the Court ordered ***both parties*** to disclose their complete expert files including communications and draft reports." [Exhibit 9, Pg. 3, ¶ 10 (emphasis added) | Exhibit 10].
5. Bruno promptly complied with the reciprocal Order and turned over his expert files, including the draft report that he supposedly was concealing. [Exhibit 5, 134:18-23, 185:15-25 | Exhibit 9, Pg. 3, ¶ 11 | Exhibit 11].
6. Until the August 3, 2017 Order, Bruno's opponent "did not provide a privilege log to Bruno identifying or disclosing the ***2,637*** pages of expert files, including draft reports and communications with experts, that they had not produced." [Exhibit 5, 134:24 - 135:1, 186:1-7 | Exhibit 9, Pg. 3, ¶ 12 (emphasis added)].
7. Bruno's expert agreed, under oath, to provide the remainder of his file directly to Bruno's opponent in July of 2014 ***in Bruno's presence***. [Exhibit 21, Pg. 51:18 – 54:13, 108:4-19].

STANDARD

Bruno acknowledges that he faces a high burden and is required to prove by clear and convincing evidence one or more of the following defenses:

A. That the procedure followed in the other jurisdiction on the disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

B. That there was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that the Board of Disciplinary Appeals, consistent with its duty, should not accept as final the conclusion on the evidence reached in the other jurisdiction.

C. That the imposition by the Board of Disciplinary Appeals of discipline identical, to the extent practicable, with that imposed by the other jurisdiction would result in grave injustice.

D. That the misconduct established in the other jurisdiction warrants substantially different discipline in this state.

E. That the misconduct for which the attorney was disciplined in the other jurisdiction does not constitute Professional Misconduct in this state.

TX ST RULES DISC P 9.04.

Bruno respectfully submits that the record presents a deprivation of due process and an infirmity of proof of misconduct. At least one Court has agreed with Bruno's arguments. The United States Court of Appeals for the Eighth

Circuit determined that Bruno established sufficient cause, did not impose any reciprocal discipline against Bruno, and dismissed its disciplinary proceeding against Bruno. [Exhibit 30].

ARGUMENT

I. ARIZONA DEPRIVED BRUNO OF DUE PROCESS AND A FAIR PROCEEDING.

A. THE DISCIPLINE WAS DEPENDENT UPON CHARGES THAT WERE NOT BROUGHT OR DISCLOSED.

Arizona determined that Bruno coached his expert to conceal the existence of a draft report. This determination was completely false, unsupported by any testimony, and premised entirely upon hearsay "evidence" created by the prosecutor acting as a witness to disputed events.

Bruno's due process rights were violated because he was never charged with supposedly coaching his expert to conceal a draft report. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Galindo v. State*, 535 S.W.2d 923, 927 (Tex. Civ. App. 1976). In Texas, an attorney's right to due process in a disciplinary proceeding can only be satisfied through detailed allegations of the conduct charged. *See Comm'n for Law. Discipline v. Stern*, 355 S.W.3d 129, 138 (Tex. App. 2011) (emphasizing

that the Commission is required to set forth its factual allegations against the attorney in its petition with a "description of the acts and conduct that gave rise to the alleged Professional Misconduct *in detail sufficient to give fair notice to Respondent of the claims made*...." (emphasis in original).

Due process requires that the sanctionee be "provided with sufficient, advance notice of exactly which conduct was alleged to be sanctionable." *In re Lehtinen*, 564 F.3d 1052, 1060 (9th Cir. 2009). "[P]articularized notice is required to comport with due process." *Jones v. Pittsburgh Nat. Corp.*, 899 F.2d 1350, 1357 (3d Cir. 1990) (dealing with Rule 11). The "charges to which an attorney must answer need to be sufficiently clear and specific and the attorney must be afforded an opportunity to anticipate, prepare and present a defense." *In re Disciplinary Action against Taplin*, 837 N.W.2d 306, 311 (Minn. 2013).

Due process required "clear and convincing evidence that respondent committed the violations ***with which he was charged***." *Matter of Myers*, 164 Ariz. 558, 560, 795 P.2d 201, 203 (1990) (emphasis added). A "lawyer has the right to procedural due process in a disciplinary proceeding" that requires charges to be made in a formal complaint or amendment and the opportunity to respond to the same. *Matter of Levine*, 174 Ariz. 146, 169, 847 P.2d 1093, 1116, *reinstatement granted*, 176 Ariz. 535, 863 P.2d 254 (1993) (holding that non-specific amendment to complaint with new charges did not meet due process requirements). "The

complaint shall be sufficiently clear and specific to inform a respondent of the alleged misconduct." Ariz. Sup. Ct. Rule 58. "Only those matters which are specifically charged in the complaint in a disciplinary proceeding can be considered." *Nebraska ex rel. Counsel for Discipline of Nebraska Supreme Court v. Horneber*, 270 Neb. 951, 960, 708 N.W.2d 620, 627 (2006).

Arizona detailed the specific acts serving as the basis for the charges in its Complaint, which did not include Bruno allegedly coaching his expert to conceal an expert report. [Exhibit 12]. In fact, in its pretrial rulings, the Disciplinary Court specifically concluded that Bruno was not charged with directing anyone to conceal information:

> Nor does it appear that there is ***anything within the complaint*** that claims Respondent "directed anyone to lie, withhold evidence, or conceal information in this case or any other."

[Exhibit 3, Pg. 7 (emphasis added)].

In other words, prior to the ultimate Decision and hearing, the Disciplinary Court expressly determined that Bruno was not charged with directing ***anyone to lie, withhold evidence, or conceal information***. The coaching claim was also not disclosed by Arizona in response to Bruno's Interrogatories asking for the factual basis of the charges:

> If you contend that Bruno unlawfully obstructed another parties access to evidence please describe the complete factual basis for your contention including evidence you were referring to, when each

> unlawful obstruction occurred and the manner of each unlawful obstruction.

[Exhibit 25, Pg. 5-6].

A claim that Bruno instructed his expert to conceal a draft report from his opponent and the factual and evidentiary basis supporting the same would certainly be responsive to this Interrogatory, yet no mention was made of it.

Aside from not being disclosed in discovery, the claim that Bruno coached his expert to conceal a draft expert report was also not alleged in Arizona's portion of the contested issues of law or fact in the Joint Pre-Hearing Statement. [Exhibit 9, Pg. 3-6, ¶¶ 1 – 16, Pg. 12-13, ¶¶ 1 – 6]. It is the law of Arizona that "claims of misconduct not included in parties' joint pretrial statement could not form basis for finding of ethical infractions." *In re Tocco*, 194 Ariz. 453, 984 P.2d 539 (1999) (Court syllabus). Following the same pattern, Arizona did not allege that Bruno coached his expert in its Prehearing Memorandum despite again detailing the alleged conduct giving rise to the charges. [Exhibit 13].

At no point, did Arizona specifically disclose or plead that Bruno coached his expert to conceal a draft report. Arizona did not even address the issue or present any evidence in support in its case-in-chief. Bruno learned that he was subject to discipline for supposedly coaching his expert to conceal a draft report when he received the Decision premised largely on that basis and coming down harshly upon him for it. "The most important mechanisms for ensuring that due

process has been provided are notice of the factual basis leading to a deprivation and a fair opportunity for rebuttal." *Senty-Haugen v. Goodno*, 462 F.3d 876, 888 (8th Cir. 2006). The Texas Court of Appeals has indicated that it would be a violation of due process for an attorney to learn the basis for disbarment after trial. *Weiss v. Comm'n for Law. Discipline*, 981 S.W.2d 8, 14 (Tex. App. 1998). The Court in *Weiss* determined that the attorney received due process because he had learned about the charges three months before the trial. *Id*. Bruno was not afforded any notice. Instead, Bruno only learned that he was subject to discipline for supposedly coaching his expert to conceal evidence after he was disciplined.

Despite the express finding that Bruno was not charged with instructing his expert to conceal evidence, the Disciplinary Court ultimately determined multiple times that he did so and found a violation and assessed a sanction, at least in part, on that basis. [Exhibit 14, Pg. 1, 15, 23, 25, 26, 29]. Arizona relied heavily and consistently upon the uncharged conduct to render its findings on liability, credibility, intent, motive, reliance, and discipline. [Exhibit 14]. Within the Introductory Paragraph summarizing the specific acts of conduct determined to be unethical, the Decision states, "He advised the expert to testify in a manner to continue to conceal that information." [Exhibit 14, Pg. 1].

Then, in analyzing how Bruno violated ER 3.3, the Disciplinary Court specifically determined that "Respondent counseled Downer [the expert] not to

discuss draft reports in his testimony before the deposition took place." [Exhibit 14, Pg. 25]. The alleged instruction to the expert also served as a significant basis for the violation of ER 3.4(a):

> Here, Respondent not only withheld material, but represented to Defendants that material did not exist by telling Defendants they had everything. ***Respondent counseled Downer to obstruct Defendants access to evidence when he told Downer not mention draft reports in his deposition***. Like the opposing party in *Dunlap*, here Defendants justifiably relied on Respondent's representations. Like the attorney in *Dunlap*, the purpose here was to conceal information that tended to establish another person's responsibility. By directing that the statement of potential liability of Beller be removed from Downer's report ***and then concealing that information***, Respondent denied Defendants evidence which would have changed their litigation strategy and potentially the outcome of the litigation.

[Exhibit 14, Pg. 26 (emphasis added)].

Arizona violated Bruno's due process rights by disciplining him for charges that were not brought. The Third Circuit found a Fifth Amendment due process violation and refused to acknowledge a suspension under less egregious circumstances in *Comm. on Prof'l Ethics & Grievances of Virgin Islands Bar Ass'n v. Johnson*, 447 F.2d 169 (3d Cir. 1971). There, the attorney, Johnson, was found to have engaged in conduct that was not charged in the original complaint and arose after the close of the two-day proceedings. A new ***separate complaint*** was filed against Johnson after the hearing concluded. *Id*, 447 F.2d at 171.

Nonetheless, the Third Circuit found a due process violation because "respondent was not given proper notice that these charges would form the basis of

the court's decision to disbar him." *Id*, 447 F.2d at 172. The Third Circuit determined that the attorney had no notice until after he had already testified regarding the phase of the case pertaining to the charges actually brought. *Id*, 447 F.2d at 172. The Third Circuit discussed some of the prejudice suffered by Johnson:

> We need not speculate as to how respondent would have altered the presentation of his case if he had been originally charged with this breach. It is enough to observe that the proceedings became a trap when the first warning of the charges came towards the end of the trial, at the conclusion of the testimony of respondent and his primary witness.

Id, 447 F.2d at 173.

The United States Supreme Court determined long ago that a violation of due process occurs when a lawyer is disciplined for charges that are not made prior to the hearing. *In re Ruffalo* involved an attorney charged with 12 counts of misconduct. 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). A 13th count was added, based on testimony adduced at the hearing. The attorney was disbarred based, in part, on the misconduct charged in the added count. The United States Supreme Court reversed, holding that the attorney had not received fair notice as to the reach of the grievance procedure and the precise nature of the charges:

> In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified at length on all the material facts pertaining to this phase of the case....

> These are adversary proceedings of a quasi-criminal nature.... The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

Id, 390 U.S. at 550–51, 88 S.Ct. at 1225–26 (citations omitted). *See also Myers*, 164 Ariz. at 562, 795 P.2d at 205 (holding that charging a lawyer with specific offenses, but finding that a lawyer committed another fails "to comport with elemental due process"); *Cuyahoga Cty. Bar Assn. v. Judge*, 96 Ohio St. 3d 467, 468–69, 776 N.E.2d 21, 22 (2002) ("imposing punishment for an uncharged violation is untenable because [t]he absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprive[s] [an attorney] of procedural due process"); *In re Doyle*, 144 Ill. 2d 451, 471, 581 N.E.2d 669, 678 (1991) (Any attempt to discipline attorney for activities not charged in the complaint constitutes a violation of due process rights); *Matter of Rosenbaum*, 478 Pa. 93, 97, 385 A.2d 1329, 1331 (1978) (determining that the court "erred in finding the attorney guilty of unprofessional conduct upon a charge of which he had not been formally accused"); *Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Wenger*, 454 N.W.2d 367 (Iowa 1990) (allowing amendment of a complaint to add additional charges at the end of a hearing deprives an attorney

of a meaningful opportunity to respond and therefore violates his right to due process); *Kelson v. State Bar*, 17 Cal. 3d 1, 6, 549 P.2d 861, 863 (1976) (It is a violation of procedural due process for the State Bar to attempt to amend its charges on the basis of testimony before the local committee without having given petitioner notice of the charge and an opportunity to respond).

The violations of Bruno's due process rights were much more than in any of the aforementioned cases. In severely limiting the evidence and defenses Bruno could present, the Disciplinary Court made an express pretrial ruling that Bruno was not charged with instructing anyone to lie or conceal evidence. [Exhibit 3, Pg. 7]. Bruno supposedly coaching his expert to conceal a draft report was not disclosed by Arizona in response to an Interrogatory seeking the specifics and evidentiary basis for the claim that Bruno "obstructed another parties access to evidence." [Exhibit 25, Pg. 5-6].

No separate complaint, amendment, or any formal charge was filed against Bruno related to the coaching claim. This purported conduct was not asserted as a violation by Arizona in its case-in-chief, nor did Arizona offer any witnesses or testimony in support. Unlike some of the lawyers in the cases previously discussed, Bruno had no warning and never knew that he was being charged with supposedly coaching his expert to conceal a draft report. Bruno learned that he

was subject to discipline for such alleged conduct when he received Arizona's Decision long after the hearing concluded.

Presenting evidence of and disciplining Bruno based upon conduct that was not alleged should be a concern to all courts because it violates basic notions of due process, fundamental fairness, and justice. The purpose of Rule 404(b) "is to protect defendant from the undue prejudice that when evidence is received that accused is of a wicked or criminal disposition, juries are likely to find him guilty of the offense charged regardless of whether it is proved by the evidence." *Robbins v. State*, 88 S.W.3d 256, 263 (Tex. Crim. App. 2002) *citing* 2 Ray and Young, *Texas Law of Evidence* (2d ed., 1956).

The fact finder should only have been allowed to consider the specific charges brought against Bruno, not any other alleged crimes, wrongs, or acts. Instead, the fact finder was allowed to hear, from the State Bar nonetheless, that Bruno allegedly coached his expert to conceal evidence, even though the event never occurred. The prejudice to Bruno was extreme and unavoidable. "Evidence of other crimes may create unfair prejudice if a jury would be more likely to draw an impermissible character conformity inference than the permissible inference for which the evidence is relevant or if the evidence otherwise distracts the jury and invites them to convict on a moral or emotional basis rather than as a reasoned

response to the relevant evidence." *Lynch v. State*, 612 S.W.3d 602, 612 (Tex. App. 2020), *petition for discretionary review granted* (Feb. 3, 2021).

Arizona was allowed to insinuate to the fact finder that Bruno was an unethical and dishonest lawyer that coached his expert to conceal evidence from Bruno's opponent (even though Bruno never did so). The allegation of the uncharged instruction could only serve to poison the fact finder against Bruno, taint Bruno's credibility, and make it more likely that the fact finder would rule against Bruno for reasons other than the specific conduct at issue. "The purpose of excluding relevant evidence of an extraneous offense under Rule 403 is to prevent a jury that has a reasonable doubt of the defendant's guilt in the charged offense from convicting him anyway based solely on his criminal character or because he is generally a bad person." *Fish v. State*, 609 S.W.3d 170, 181–82 (Tex. App. 2020), *petition for discretionary review refused* (Jan. 13, 2021).

Bruno suffered the prejudice the exclusory rule is designed to avoid. Bruno was ultimately disciplined, at least in part, for conduct that was never charged. The findings regarding Bruno's credibility, motivations, and intent were obviously premised upon allegations that he coached his expert to conceal a draft report, which was actually a fictitious event. There is no way to assess whether Bruno would have been disciplined, whether the fact finder would have believed Bruno, or what the appropriate discipline would have been if the uncharged conduct was

not considered. If Arizona wanted to discipline Bruno for allegedly coaching his expert to conceal a draft report, they should have done so appropriately through formal charges and adequate disclosure.

The way Arizona handled the disciplinary charges was unfair and deprived Bruno of a fair trial. "Respondent may not be charged with one violation and then, without opportunity for hearing or presentation of evidence, be disciplined for another." *Myers*, 164 Ariz. at 561–62, 795 P.2d at 204–05. The Arizona proceedings turned into the exact "trap" that the United States Supreme Court warned about when Bruno was unquestionably disciplined for charges that were not brought or disclosed. *Ruffalo,* 390 U.S. at 551, 88 S. Ct. at 1226. This Board should not adopt a Decision that was premised, even in part, on uncharged conduct.

B. THE UNCHARGED CONDUCT WAS PREMISED ENTIRELY UPON A LETTER WRITTEN BY THE PROSECUTOR THAT IS NOT SUPPORTED BY ANY TESTIMONY AND CONTRADICTED BY THE LIVE TESTIMONY OF A WITNESS.

Bruno never advised the expert to conceal a draft report during his deposition and there was no competent evidence establishing that he did so. Contrary to Arizona's findings, a review of the expert's deposition testimony shows that the expert *did* discuss drafts with Bruno's opponent at the deposition, completely undermining any suggestion that the expert was coached by Bruno not to mention draft reports or there was some underlying plan to conceal draft reports.

This Board should strongly consider that the expert ***never*** testified, in any proceeding, that Bruno directed him to conceal draft reports. In fact, when asked by Arizona, the expert testified, under oath, that he could not recall any such instruction. [Exhibit 2, 48:8-20]. Instead, this entire event, which never occurred, was derived solely from a self-serving letter authored by Arizona's prosecutor interpreting a private conversation he had with the expert. [Exhibit 22].

Having the prosecutor make himself a witness and generate his own "evidence" in this way is disfavored and ethically problematic:

> A word of caution, however, is indicated. We note the increasing number of cases before this court where the prosecutor is also a witness on some point in issue, usually the admissibility of a confession or statement made by the defendant. This we believe skirts the line not only of the Code of Professional Responsibility, DR5–102, Rule 29(a), Rules of the Supreme Court, 17A A.R.S., but can be a violation of due process. *See* Annotation, 54 A.L.R.3d 100. Where there is prejudice, we would be compelled to reverse on this point. Prosecuting attorneys in the future should avoid putting themselves in this position.

State v. Williams, 136 Ariz. 52, 57, 664 P.2d 202, 207 (1983); *Corporon v. State*, 586 S.W.3d 550, 565 (Tex. App. 2019) (when the testimony of an attorney "goes to a controversial or contested matter, combining the roles can unfairly prejudice the opposing party"); *Gajewski v. United States*, 321 F.2d 261, 268 (8th Cir. 1963).

The allegations, had they been charged, would have been thoroughly and vehemently investigated and contested because Bruno never coached the expert to conceal a draft report.

The State Bar's statements about an unsworn, unrecorded conversation cannot override the expert's sworn testimony. "To impeach a witness by use of a prior inconsistent statement, not only must the in-court testimony be inconsistent with the prior statement, but it also must be the *witness's* statement." *Claussen v. State, Dep't of Transp.*, 750 So. 2d 79, 81 (Fla. Dist. Ct. App. 1999) (citation omitted) (determining that witness cannot be impeached by using a letter authored by another person).

Similarly, a "court properly excludes evidence purportedly offered to prove that the witness has testified falsely, but really introduced only to persuade the jury to believe the past statement, not subject to oath and cross examination, instead of the testimony subject to those safeguards." *United States v. Higa*, 55 F.3d 448, 453 (9th Cir. 1995). The State Bar's letter was utilized solely to convince the fact finder to believe the alleged past statement, which was actually written by the State Bar, instead of the expert's live testimony given under oath.

Regardless of whether it had any other legitimate limited purpose, the law is clear that the alleged statement of the expert, as interpreted by the State Bar, could not be used as substantive evidence against Bruno, which it clearly was. *See e.g. Armstead v. State*, 977 S.W.2d 791, 795 (Tex. App. 1998) ("It is well-settled that a party may not call a witness primarily for the purpose of impeaching the proposed witness with evidence that would otherwise be inadmissible); *Calixto v. State*, 66

S.W.3d 505, 513 (Tex. App. 2001) ("Evidence admitted only for impeachment purposes is without probative value and cannot be considered as evidence of the defendant's guilt"); *Adams v. State*, 862 S.W.2d 139, 147 (Tex. App. 1993) ("Testimony admitted only for impeachment purposes is without probative value and cannot be considered as substantive evidence.").

The Nebraska Supreme Court was presented with an analogous issue in *Tri-City Beer Co. v. Nebraska Liquor Control Comm'n*, 195 Neb. 278, 237 N.W.2d 852 (1976). There, the Nebraska Supreme Court held that a prior written statement of a non-party witness, contrary to statement made before the tribunal, could not be admitted as substantive evidence of the facts declared in the written statement. *Id.* *See also State v. Jackson*, 217 Neb. 363, 367, 348 N.W.2d 876, 878 (1984) ("the State may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible"); *State v. Thames*, 599 N.W.2d 122, 125 (Minn. 1999) ("A prosecutor, however, may not misuse Rule 607 to expose the jury to hearsay under the guise of impeachment when the sole purpose in calling the witness is to introduce the witness' prior statement"); *Moore v. State*, 945 N.W.2d 421, 431 (Minn. Ct. App. 2020), review denied (Aug. 11, 2020) ("A statement not given under oath is inadmissible for substantive purpose").

The purported facts declared in the State Bar's letter were impermissibly used as substantive evidence against Bruno. The self-serving letter was the sole and complete basis for the claim that Bruno coached the expert to conceal a draft. Since the State Bar's letter could not be utilized as substantive evidence under well-established law, there was nothing to support the Disciplinary Court's finding that Bruno coached his expert to conceal a draft report. Without that determination, the Decision and discipline are irreversibly tainted, would unquestionably be different, and should not be adopted in Texas.

Bruno respectfully asks this Board to consider the ramifications of disciplining Bruno under these circumstances. The type and lack of "evidence" utilized to find that Bruno coached his expert should not be sufficient to support a burden of proof in any type of proceeding, especially one seeking to take away an attorney's livelihood. In attorney discipline proceedings, the tribunal "must be persuaded by clear and convincing evidence that Respondent committed the violations charged." *Matter of Wolfram*, 174 Ariz. 49, 52, 847 P.2d 94, 97 (1993). Arizona was required to show that it "was highly probable that the allegations are true." *Matter of Martinez*, 248 Ariz. 458, 462, 462 P.3d 36, 40 (2020).

An unsworn letter written by the State Bar refuting the live testimony of the critical witness given under oath does not rise to the level of clear and convincing. This Board should not condone the suspension of an attorney that relied, at least in

part, on alleged conduct that was not pled, disclosed, or preserved in a pretrial order and not supported by any substantive evidence.

C. ARIZONA EXPANDED ER 3.3(A)(3), WHICH IS NOT APPLICABLE UNDER ITS PLAIN TERMS, TO FIND A VIOLATION AGAINST BRUNO.

Arizona determined that Bruno violated ER 3.3(a)(3) by failing to correct unidentified portions of his expert's deposition testimony. [Exhibit 14, Pg. 16, ¶¶ 45-46, Pg. 24-25]. This finding should not be adopted here because ER 3.3(a)(3), by its plain language, has no application to the present circumstances:

> A lawyer shall not knowingly:
> (3) offer evidence that the lawyer knows to be false. ***If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity***, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

[emphasis added].

The parties stipulated that "Downer [Bruno's expert] was not Respondent's client at the deposition and Respondent [Bruno] did not solicit any testimony from Mr. Downer during the deposition." [Exhibit 9, Pg. 3, ¶ 9]. Accordingly, there could be no violation under the unambiguous language of the Rule.

Arizona found a violation by retroactively expanding the Rule, as applied solely to Bruno, to "a witness ***disclosed*** by the lawyer," imposing a duty that does not exist. "Penal statutes are construed narrowly to insure that no individual is convicted unless a fair warning (has first been) given to the world in language that

the common world will understand, of what the law intends to do if a certain line is passed." *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 375, 93 S. Ct. 1652, 1663–64, 36 L. Ed. 2d 318 (1973). Texas requires the narrowest application of a penal statute:

> Applying the rule of strict construction does not require that the statute shall be stintingly or even narrowly construed, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. Thus, under the rule of strict construction, an appellate court must, like we do here, interpret a statute to have the narrowest application, even if that means adopting a broader definition of a particular term in the statute.

Est. of Brazda, 582 S.W.3d 717, 723 (Tex. App. 2019).

ER 3.3(a)(3) specifies the limited circumstances requiring a lawyer to take remedial measures, none of which exist here. Under the time-honored rule of *inclusio unius est exclusio alterius*, the inclusion of certain circumstances is the exclusion of others. *Steering Committees for Cities Served by TXU Elec. v. Pub. Util. Comm'n*, 42 S.W.3d 296, 302 (Tex. App. 2001). A court "may not impose its own judicial meaning on a statute by adding words not contained in the statute's language." *Mahoney v. Webber, LLC*, 608 S.W.3d 444, 447 (Tex. App. 2020).

As the Arizona Supreme Court previously determined:

> The general public as well as the parties herein have a right to rely on the rules as they are written. Likewise this court can only interpret the rules as written and apply to them their plain meaning. We have no power to legislate into them a provision inadvertently left out.

Sw. Iron & Steel Indus., Inc. v. State, 123 Ariz. 78, 80, 597 P.2d 981, 983 (1979).

Bruno had the right to rely upon ER 3.3(a)(3) as written. *See e.g. First Nat. Bank of Gordon v. Dep't of Treasury, Office of Comptroller of Currency*, 911 F.2d 57, 65 (8th Cir. 1990) (absent a specific provision providing for it, courts should be reluctant to impose punishment against a person "even if, with the benefit of later hindsight, his actions are shown to have been in some sense erroneous"). Arizona clearly misapplied the plain language of ER 3.3 when it had no application under the stipulated facts. This Board should decline to suspend Bruno based upon Arizona's expansion of ER 3.3.

D. BRUNO WAS DEPRIVED OF THE OPPORTUNITY TO DEMONSTRATE HIS EXTRAORDINARY EFFORTS TO PROVIDE INFORMATION TO OPPOSING COUNSEL AT GREAT PERSONAL SACRIFICE AND COST.

The Superior Court permitted Bruno's opponent in the underlying legal malpractice case to conduct an extremely broad forensic examination of the email accounts and laptop of Bruno's client without time limitations. [Exhibit 15]. Due to privacy and privilege concerns, the Superior Court ordered ***Bruno*** to open and review the forensic results one by one. [Exhibit 15]. The files located during the forensic investigation were mostly raw computer data and not easily identifiable, accessible, or viewable. [Exhibit 15, Exhibit 1(A)(B)(C)].

Bruno was solely entrusted with the responsibility to withhold objectionable files and produce the remainder to his opponent, accompanied by privilege logs. [Exhibit 15]. Preparing the privilege logs was extremely time-consuming and

frustrating because the file names were generally lengthy and difficult to retype or copy. [Exhibit 15]. The various data formats also made it difficult to identify the date, author or sender, recipient, and/or subject matter. Bruno could not obtain meaningful assistance from his staff because the forensic files needed to be maintained on a portable hard drive and required a complete understanding of the legal issues and facts.

The forensic investigation consumed over ***256*** hours of Bruno's personal time, for which he was not paid. [Exhibit 15]. Due to the complexity and Bruno's handling of more than 50 other cases at the time, Bruno usually reviewed the forensic results during long, uninterrupted intervals of time. Consequently, Bruno reviewed the forensic results on nights, weekends, and even during a family vacation. The forensic investigation was probably the most difficult and time-consuming task Bruno had to undertake in his career.

After being pared down twice, the final set of forensic results contained approximately 3,189 files that Bruno had to individually open and review. [Exhibit 15]. Bruno withheld approximately 980 of those files based upon objections detailed in privilege logs. [Exhibit 15]. Bruno turned over the remaining **2,209** files to his opponent even though no one else had seen them, knew what the files were, and Bruno knew they would be used against his client.

[Exhibit 15]. The forensic files that Bruno disclosed were, in fact, relied on to sanction Bruno's client and dismiss his case more than five years into it.

However, Bruno was precluded in limine from "any mention, testimony, or reference regarding the forensics examination or compliance with these later orders of the court." [Exhibit 3, Pg. 10 | Exhibit 16, Pg. 3]. This prevented Bruno from obtaining a fair hearing, especially since the State Bar was permitted, over objection, to introduce evidence of the forensic investigation, which showed that Bruno's client had engaged in misconduct.

"In Arizona, the relevance standard is very broad; relevant evidence need only tend to make the existence of any material fact more or less probable." *Anderson v. Nissei ASB Mach. Co.*, 197 Ariz. 168, 178, 3 P.3d 1088, 1098 (Ct. App. 1999). "Relevant evidence should be admitted, unless there is some concrete reason for excluding it." *Id.* "To be relevant, evidence need only alter the probability, not prove or disprove the existence, of a consequential fact." *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496, 733 P.2d 1073, 1079 (1987). "[R]elevance requires only a modicum of rationally probative force." *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 402, 10 P.3d 1181, 1189 (Ct. App. 2000).

The circumstances surrounding the forensic investigation and Bruno's actions in conducting the arduous, time-consuming review were clearly relevant to the disciplinary proceedings, the charges made by Arizona, and Bruno's defenses.

Bruno should have been allowed to present this evidence to refute Arizona's charges and show that Bruno: (1) expended significant effort and suffered personal detriment ensuring that all discoverable information *was* provided to his opponent regardless of whether it was adverse to Bruno's client; (2) was candid with the tribunal; (3) fulfilled his duties to provide information to opposing counsel; (4) did not conceal anything from opposing counsel; (5) did not engage in any pattern of misconduct; and (6) certainly did not have any intent or motive to conceal information.

Bruno's actions related to the forensic investigation would also directly refute the allegations that he flaunted numerous rules of professional conduct over an extended period and that he was acting to conceal information during the litigation. Bruno's actions related to the forensic investigation would show that he was never motived, financially or otherwise, to conceal information.

If Bruno wanted to conceal information, he had every opportunity to do so, but instead provided extensive information that ultimately defeated his client's meritorious and valuable suit. Bruno's compliance with the forensic investigation and subsequent production of thousands of files no one else had seen when he knew they would be used against his client should have been considered by the finder of fact.

II. THERE WAS INSUFFICIENT PROOF OF MISCONDUCT.

A. BRUNO PRODUCED THE DRAFT REPORT HE SUPPOSEDLY CONCEALED.

The draft expert report was not concealed, ***but actually produced by Bruno after his objection was heard by the Superior Court and overruled***. The issue of production of draft expert reports and expert communications was eventually decided by the Superior Court because Bruno objected to a subpoena issued by his opponent (after having new lead counsel) upon a different expert. [Exhibit 5, 106:13 – 107:12, 173:9-12, 206:21-24 | Exhibit 17].

Bruno did not conceal the existence of draft reports or expert communications, but objected and asserted his position that those items were beyond the scope of discovery. [Exhibit 7, 8]. Bruno also asserted his objections to the Superior Court in an email as follows:

> The Arizona Rules of Civil Procedure expressly limit the disclosure and discovery permitted upon expert witnesses. Ariz. R. Civ.P. Rule 26.1(a)(6) requires disclosure of only: "the name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert."
>
> Ariz. R. Civ. P. Rule 26(b)(4) is entitled "***Discovery Scope and Limits***" for "***Expert Discovery***" and specifically sets forth the scope and limitations of expert discovery. Under the plain language of the Rule, expert discovery is limited to the following: "A party may depose any person who has been disclosed as an expert witness under

> Rule 26.1(a)(6).” “Under the maxim of expression unius est exclusio alterius, there is a presumption ‘that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.’” *Copeland v. Ryan*, 852 F.3d 900, 907 (9th Cir. 2017). “A well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed.” *Pima Cty. v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982). The legislature’s failure to include terms suggests the intent to exclude them. *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 202, 150 P.3d 773, 775 (Ct. App. 2007).
>
> The Rule does not permit or allow the discovery of anything from an expert outside what is expressly required to be disclosed. Parties are not allowed to subpoena ***any*** records from experts outside what is required to be disclosed. The Rule does not permit it. Parties are not permitted to seek draft reports or correspondence between the expert and the hiring attorney. The Rule does not permit it. It is noteworthy that Defendants have not produced any communications or draft reports from their two experts or anything beyond the limited disclosures required by Rule 26.1. If the Rule permitted any further discovery of an expert other than a deposition, it would specifically say so. By its express terms, the Rule related to experts is one of limitation on and does not permit parties to obtain records from experts because it permits liberal cross-examination during a deposition.

[Exhibit 6 (emphasis in original)].[3]

On “August 3, 2017, the Court ordered ***both parties*** to disclose their complete expert files including communications and draft reports.” [Exhibit 9, Pg. 3, ¶ 10 (emphasis added)]. Bruno promptly complied with the Order and turned

[3] As an example of the unfair process, the email containing Bruno’s objections to the disclosure of draft reports was rejected by the Disciplinary Court despite the parties’ stipulation to its admission and its clear relevance. [Exhibit 5, 180:12 – 183:25].

over his complete expert files, including the draft report and email he was supposedly trying to conceal. [Exhibit 5, 134:18-23, 185:15-25 | Exhibit 9, Pg. 3, ¶ 11 | Exhibit 11].

The record is abundant with evidence and authority supporting logical, non-nefarious explanations and reasonable inferences for Bruno's actions. Bruno did not engage in any concealment. Bruno had a reasonable belief, supported by ample legal authority, that draft reports and expert communications were not discoverable. When the Superior Court overruled his objection, Bruno promptly complied with the reciprocal Order. Bruno's opponent did the same.

B. THE RECORD ESTABLISHES THAT THE EXPERT PROVIDED HIS ENTIRE FILE TO BRUNO'S OPPONENT ON OR ABOUT JULY 25, 2014.

Arizona determined that Bruno engaged in wrongdoing by representing to his opponent that the expert would comply with the subpoena.[4] The record establishes that Bruno's representation (as interpreted by the State Bar) was an accurate one. While Bruno was initially attempting to assist in resolving the objections surrounding the Subpoena, the undisputed evidence shows that Bruno's opponent and the expert eventually handled the matter of the expert's compliance with the subpoena amongst themselves, including through ex parte

[4] Bruno also contends that he could not have a duty to comply with a Subpoena that was served upon and objected to by a third-party. [Exhibit 28, Pg. 13-14].

communications consented to by Bruno. [Exhibit 21, Pg. 8:7-12, 52:18 - 54:13, 69:18-25].

Bruno's opponent testified several times before the Disciplinary Court of both his intent to contact the expert directly and his actual ex parte contacts with the expert. [Exhibit 5, 36:10-14, 37:20 – 38:8]. In his own words, Bruno's opponent testified that "had to get in touch with Mr. Downer and work that out" and that he "discussed it [the expert's objection] with Mr. Downer." [Exhibit 5, 42:25 – 43:1, 96:8-13].

Around the time when Bruno withdrew from the dispute, he sent a letter to his opponent advising that the expert "will produce the documents he has ***directly to you*** via e-mail or mail." [Exhibit 5, 42:10-13 (emphasis added)]. It is undisputed that the expert subsequently provided information directly to Bruno's opponent in response to the subpoena. [Exhibit 5, 92:3-14].

No evidence was provided by Arizona establishing that Bruno knew what his expert provided to Bruno's opponent or that Bruno was given a copy of or afforded the opportunity to review the expert's production before it was provided to Bruno's opponent. Bruno's opponent testified that he did not know whether he ever provided the information received directly from the expert to Bruno. [Exhibit 5, 92:9-14]. The expert testified that he did not know whether Bruno ever saw the file that was transmitted ex parte from the expert to Bruno's opponent. [Exhibit 2,

92:9-14]. The expert even believed the email from Bruno (that was allegedly concealed) regarding the draft report was in the file he produced to Bruno's opponent, but could not be 100% sure. [Exhibit 2, 42:13-18, 42:25 – 43:4].

There is no evidence of concealment, but of Bruno standing aside while his expert agreed to provide his complete file directly to Bruno's opponent. Bruno permitted his expert and his opponent to communicate amongst themselves to resolve the issues related to the subpoena. Bruno's expert also agreed, under oath, to provide the remainder of his file directly to Bruno's opponent in July of 2014 ***in Bruno's presence***. [Exhibit 21, Pg. 51:18 – 54:13]. The expert informed Bruno's opponent, multiple times, during his deposition that he had additional items and emails that were not contained in the expert's initial production. [Exhibit 21, Pg. 52:6 – 54:13]. As one example:

> Q. Do you have the e-mails that he sent to you?
>
> A. Yes.
>
> Q. All right. They are not in the packet of material I received. Can you print off the emails and forward them to me and to Mr. Bruno.
>
> A. Yes.

[Exhibit 21, Pg. 51:18-23].

Consequently, Bruno's opponent requested, and Bruno's expert agreed to provide, "anything and everything from your e-mails" directly to Bruno's opponent:

> Q. Then what I'll request that you do is provide anything and everything from your e-mails. I don't want another copy of stuff you've already sent to me, but all the e-mails that you have that either that you sent or that you received, even information that may have been attached that you didn't consider?
>
> A. Understood, yes.

[Exhibit 21, Pg. 54:6 – 13].

Bruno's opponent concluded his questioning by setting up a time schedule for the expert to Fed Ex the remainder of his file directly to Bruno's opponent:

> Q. Okay. All right. I think that's all I have, Mr. Downer. I appreciate your time.
>
> A. Yeah. Thanks for the good time. I'll get you this stuff we talked about.
>
> Q. What is a reasonable time? I don't know what your workload looks like. I'm sure you're a busy guy. A week? Two weeks?
>
> A. Yeah. If I could have two weeks, it would be good. I have a lot of stuff next week, but yeah. I'll probably have it done before then, if we could set two weeks on it.
>
> Q. That's fine.
>
> A. ***And just Fed Ex paper to you***?
>
> Q. Yes. And I'll make sure Mr. Bruno gets a copy unless you want to send him some fancy way.

[Exhibit 21, Pg. 108:4-19 (emphasis added)].

Bruno did nothing to interfere with that agreement or prevent his expert from providing his complete file to Bruno's opponent, which would have encompassed the draft report at issue. On the contrary, the record proves that Bruno permitted the expert and his opponent to communicate ex parte so they could resolve the expert's objection to the subpoena amongst themselves, which they did.

Bruno would have reasonably presumed that the expert did as he agreed and provided his complete file directly to Bruno's opponent per the agreement reached multiple times on the deposition record. No evidence was offered by Arizona related to whether Bruno's opponent obtained the file directly even though both Bruno's expert and the opponent testified live at the disciplinary hearing. No evidence was presented by Arizona establishing that Bruno knew, or even had reason to believe, that his expert had not provided his complete file directly to Bruno's opponent.

Bruno did not learn that there was any issue until years later when he was accused of concealing the draft report after he produced it in compliance with the Superior Court's Order. Nonetheless, it should be presumed from the record that either Bruno's expert provided the draft report to Bruno's opponent or that Bruno's

opponent did not follow up with the expert for reasons that had nothing to do with Bruno.

C. AS CONFIRMED BY ITS PLAIN LANGUAGE AND ISSUER, THE REQUEST FOR PRODUCTION DOES NOT ELICIT DRAFT REPORTS.

The Disciplinary Court found that "Defendants made clear and unequivocal requests pertaining to an expert witness report." [Exhibit 14, Pg. 1]. That finding was clearly wrong.

There was only one relevant discovery request served upon Bruno's client, which unquestionably did not request draft reports. On its face, the Request for Production ("the RFP"), relied upon by Arizona to discipline Bruno, does not solicit draft reports. [Exhibit 4]. The RFP provides:

> **REQUEST NO. 1:** Provide copies of all information, notes, documents, correspondence Plaintiffs ***provided to*** Financial Architects for Financial Architects' use in preparing the October 11, 2013, Report prepared for Jason Bruno.

[Exhibit 4, Pg. 1 (emphasis added)].

As confirmed by its drafter, the RFP is one-directional, only requesting information provided to Bruno's expert:

> Q. Would you agree with me that the request that your firm made upon the plaintiffs in this case did not include draft reports?
>
> A. It doesn't specifically say draft reports.
>
> Q. In fact, it doesn't even request anything produced by Mr. Downer, does it?

A. Correct.

[Exhibit 5, 132:6-12].

Bruno explained why the RFP was limited and one-directional. Bruno's opponent was only seeking the underlying data utilized to formulate the expert CPA's opinions regarding the valuation of a company, which Bruno timely furnished. [Exhibit 5, 157:20-25, 158:11-13, 158:16-20, 185:1-10, 192:25 - 193:2]. The Disciplinary Court was not persuaded by Bruno, but his testimony was unnecessary because Bruno's opponent verified the limited scope of the RFP in a subsequent letter:

> ***As to our request for the documents Mr. Berg gave to Mr. Downer, when are you going to send them which will be presented at the hearing***.

[Exhibit 26 (emphasis added)].

Nearly a month thereafter, Bruno's opponent again sent a letter describing the limited scope of the RFP in the same fashion:

> ***We received your response to our request for documents that Mr. Berg gave to Mr. Downer***.

[Exhibit 27 (emphasis added)].

Like the RFP itself, the subsequent communications by Bruno's opponent did not mention draft reports or anything obtained from the expert. The plain language of the RFP and Bruno's opponent's communications about the RFP and

live testimony to the Disciplinary Court all prove that the RFP did not elicit draft reports. The Disciplinary Court's determination that the RFP clearly and unequivocally encompassed draft reports is contradicted by all of the evidence and should not be adopted here.

D. ARIZONA DISREGARDED THE UNREFUTED TESTIMONY OF BRUNO'S EXPERT EXPLAINING HIS DEPOSITION TESTIMONY.

Without identifying the specific testimony found to be false, Arizona determined that Bruno violated ER 3.3(a)(3) by failing to correct portions of his expert's deposition testimony. [Exhibit 14, Pg. 16, ¶¶ 45-46, Pg. 24-25]. As discussed previously, ER 3.3 has no application because the expert was not Bruno's client or a witness called by Bruno.

Notwithstanding, there was no violation because the expert's testimony was accurate and Bruno never believed it to be inaccurate. Arizona's confusion was based upon the mistaken assumption that the expert had only prepared one draft report and that Bruno had seen that draft.

In fact, the expert provided unrefuted testimony that he actually prepared two draft reports, but only provided one of those reports to Bruno's client. [Exhibit 2, Pg. 36:9-18 | Exhibit 21, Pg. 23:4-6]. During the deposition, Bruno's opponent only asked whether the expert had received any input on the draft report that was never provided to Bruno's client. The expert confirmed this critical fact to the Disciplinary Court:

Q. All right. Does that refresh your recollection about which report you were talking about when Mr. Beringhaus asked you if you had received any input on the report?

A. Yeah. I mean, I believe he was – he was -- I mean, he was talking about the report that I had in front of me when I called David Berg [Bruno's client].

Q. Had you provided to Mr. Berg a copy of that report before your telephone conversation with him?

A. No.

[Exhibit 2, Pg. 36:9-18].

Since the expert never provided a copy of the draft being discussed to Bruno or his client, his testimony that he did not receive any input on it from Bruno or Bruno's client was accurate. Bruno's opponent ***never*** asked the expert whether he transmitted ***any*** draft report to Bruno or his client, but only inquired as to one specific draft and then moved on to another topic.

The charges that Bruno knowingly failed to correct false testimony should have been dismissed when the expert clarified his testimony and explained that he actually prepared two reports, one of which Bruno undisputedly had never seen. Bruno ***never knew or believed*** the expert's deposition to be inaccurate. Bruno understood the testimony in the same manner as the expert as pertaining to a draft report that he had never seen. [Exhibit 5, 168:20 – 169:4].

E. THE STATE BAR DID NOT CITE TO AUTHORITY DEMONSTRATING THAT DISCIPLINE IS WARRANTED.

1. ER 3.4.

To find violations of ER 3.4(c) and 3.4(d), Arizona relied upon three wholly inapplicable decisions. First, Arizona relied upon *Dunlap v. City of Phoenix,* 169 Ariz. 63, 817 P.2d 8 (Ct. App. 1990), for what it claims are various propositions of law, including that "An attorney may not 'secret[], ensconce[], covertly conceal[],' or 'surreptitiously with[h]old . . . material and information.' [Exhibit 14, Pg. 25-26]. The paraphrased propositions, ***relied upon to discipline Bruno***, were not holdings made in that case or any other as far as Bruno can tell. Instead, they were derived from fragments of the allegations made by the plaintiff, who had been previously convicted of murder, in a complaint that was dismissed by the court. *Id*, 169 Ariz. at 66–67, 817 P.2d at 11–12. *Dunlap* was not a disciplinary case, did not mention or discuss ER 3.4, and has no relevance to the law or facts applicable to Bruno.

Arizona then relied upon *Matter of Gabriel*, 172 Ariz. 347, 352 (1992) and *Matter of Cassalia*, 173 Ariz. 372 (1992). [Exhibit 14, Pg. 27]. Significantly, both cases imposed discipline ***because there was a violation of an order compelling a discovery response***, a critical component to a disciplinary violation that is lacking here.

Gabriel was ***censured*** because he "knowingly disobeyed the orders of the court that he comply with the plaintiffs' discovery requests." *Gabriel*, 172 Ariz. at 351, 837 P.2d at 153. Gabriel failed to comply with ***two*** discovery orders and failed to timely pay the sanction imposed against him.

Cassalia was suspended for six months because he failed to respond to a request for production, ignored a meet and confer letter, failed to respond to a motion to compel, failed to comply with an order to compel, and failed to pay the sanction ordered by the court upon him. *Cassalia*, 173 Ariz. at 374, 843 P.2d at 656. Cassalia then failed to respond to a subsequent motion to compel and failed to respond to an order requiring him to file an affidavit setting forth the reasons for his non-compliance with a previous order. *Id*. Cassalia's actions caused his client's answer to be stricken and a judgment to be entered against Cassalia's client. *Id*. Cassalia then provided his client a personal check which was dishonored and defaulted on the promissory note Cassalia executed to satisfy the judgment entered against his client. *Id.*

Bruno's conduct is not comparable to either case. It is an irrefutable fact that Bruno was never found to have violated the unusually high volume of orders of the Superior Court in a hotly contested dispute spread out over more than five years. It is also an irrefutable fact that after Bruno's objections were heard by the Superior Court and overruled, Bruno promptly turned over his complete expert

files, including the draft report and email he was accused of concealing. [Exhibit 5, 134:18-23, 185:15-25 | Exhibit 9, Pg. 3, ¶ 11 | Exhibit 10 | Exhibit 11].

2. ER 8.4(c) & 8.4(d).

In finding that Bruno violated ER 8.4, Arizona relied upon *In re Clark*, 207 Ariz. 414 (2004) and *In re Alexander*, 232 Ariz. 1, 300 P.3d 536 (2013). [Exhibit 14, Pg. 29]. A review of those cases demonstrate that no violation occurred here.

Clark committed malpractice and caused his client to lose his case. Then, while in bankruptcy, Clark fraudulently transferred assets to a sham corporation that he created to avoid paying the judgment that his client obtained against Clark.

There is no comparing Clark's conduct to Bruno's. Bruno never committed malpractice or engaged in any other unethical conduct that harmed his client. Bruno asserted a discovery position that was unsuccessful and proceeded to promptly comply with the Superior Court's Order by turning over the information he was alleged to have concealed. [Exhibit 6 | Exhibit 10 | Exhibit 11].

Alexander continued to prosecute a RICO complaint and accuse the defendants of "bribery and/or extortion" even though she was told by more experienced senior attorneys within her office that her "complaint appeared 'legally deficient at every issue' making it 'dead-on-arrival.'" *Alexander*, 232 Ariz. at 6, 300 P.3d 536 at 541. *Alexander* has no application to the circumstances here.

III. SUSPENDING BRUNO WOULD NOT SERVE THE INTERESTS OF TEXAS OR PROTECT THE PUBLIC.

Bruno respectfully submits that suspension in Texas would only serve to punish him unnecessarily and would not aid the public or the profession. Bruno promptly alerted the State Bar of Texas of his suspension by the Disciplinary Court on October 28, 2019. [Exhibit 31]. Bruno promptly alerted the State Bar of Texas of the Arizona Supreme Court's affirmation of his suspension on October 13, 2020. [Exhibit 32].

Bruno has already completed the suspension imposed upon Arizona and was reinstated on March 26, 2021. [Exhibit 29]. Bruno has practiced full time in Arizona since his reinstatement. Bruno's suspension periods in Nebraska and the United States District Court of Nebraska have run and Bruno anticipates reinstatement in those jurisdictions within days or weeks. Suspending Bruno now in Texas would result in a suspension that effectively exceeds six months and impacts Bruno's clients, employees, law firm, and family, when they have done nothing wrong. Another suspension would impede Bruno's ability to market, advertise, assist clients in Texas, and prevent him from practicing in the United States District Court for the District of Colorado, which prohibits practice from an attorney suspended in any jurisdiction.

Bruno has practiced before the courts of Texas since the incidents giving rise to this proceeding occurred more than ***seven*** years ago. Bruno asks for strong

consideration of the facts that he has no disciplinary history in Texas and has never been sanctioned by any Texas court. Bruno has not been a danger to the Texas public or his clients at any point in time and continues to receive excellent client reviews for client service and representation.

Bruno did not violate any orders of the Superior Court, commit any crimes, present false evidence to the Superior Court, steal client's money, malpractice his client, or cause his client to lose his case. Had Bruno actually concealed the draft report or violated his ethical duties, he would have never been subjected to any disciplinary proceedings. If Bruno was trying to conceal information from his opponent, he would have ignored the Superior Court's Order, not promptly and fully complied with it. If Bruno was acting dishonestly, he would not have turned over the thousands of forensic files even though no one else had seen them and Bruno knew they would be utilized adversely against his client.

There is no chance of repeated conduct as best evidenced by Bruno's conduct since 2013-2014 and the decision by Arizona to reinstate him already. Bruno has practiced full time since the events in question in multiple jurisdictions without discipline. Bruno has already increased focus on detail, more consistently and precisely asserted objections, and listened more intently to deposition testimony so he could make corrections if he has any question about accuracy.

Bruno rectified the underlying issue himself by producing the draft report and expert communication in compliance with the Superior Court's reciprocal Order.

Bruno fully cooperated with the disciplinary proceeding in Arizona and timely and fully responded to every request for information. Bruno assisted his affected clients in obtaining representation during the duration of his suspension. Bruno has cooperated with this Board, self-reported to all of the jurisdictions in which he is licensed, and has fully complied with and respected the Arizona suspension even though he believes it to be unfair. If Bruno steps out of line in Texas, this Board has the power to punish Bruno severely and should do so.

Bruno has already paid a severe price. Bruno had his Arizona practice suspended at great financial detriment, followed by a reciprocal suspension in Nebraska. Bruno has expended hundreds of thousands of dollars in time, attorney fees, and costs stemming from the Arizona disciplinary proceedings. Bruno has suffered public humiliation, embarrassment, and damage to his reputation. Consequently, a formal suspension or further discipline by this Board is unnecessary and would be punitive.

If this Board does find that Bruno engaged in unethical conduct, Bruno respectfully requests a public reprimand. This sanction would satisfy the objectives of appropriately punishing Bruno, alerting the public to Bruno's conduct, and deterring others from similar conduct. At the same time, this

alternative sanction would not impact innocent parties and allow Bruno an opportunity to further aid and benefit the profession. If this Board does impose reciprocal discipline, Bruno requests that the sanction run retroactively to the date of the Arizona suspension and deemed to be complete.

CONCLUSION

Bruno respectfully requests that this Board decline to adopt Arizona's Decision or suspension. There is no question that, in rendering its Decisions and discipline, Arizona considered alleged conduct that was not specifically charged in the Complaint. Bruno's due process rights were further violated because the Decision and resulting discipline were dependent upon charges that were not brought and based solely upon "evidence" created by the prosecutor.

There was not sufficient evidence to support a violation. Bruno never concealed the information at issue, but produced it after his objections were overruled and in response to a reciprocal Order requiring both parties to produce their complete expert files. Arizona assumed the absolute worst, engaged in speculation unsupported by the record, and disregarded virtually all exculpatory evidence, testimony, law, and rational inferences favorable to Bruno.

Bruno respectfully submits that suspending him in Texas would not aid the public or the profession. Bruno has been severely punished by Arizona, remedied the conduct at issue many years ago, and has been licensed to practice law in Texas

since 2010 without any issue. Bruno was reinstated in Arizona on March 26, 2021 and has practiced law in Arizona since without any disciplinary issues. If this Board does find that Bruno violated an ethical rule, Bruno respectfully requests a public reprimand. If this Board does impose reciprocal discipline, Bruno requests that the sanction run retroactively to the date of the Arizona suspension and deemed to be complete.

Jason M. Bruno, Respondent,

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CERTIFICATE OF FILING

The undersigned certifies that the foregoing and referenced attachments were efiled on October 21, 2021 to:

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing and referenced attachments were served via email on October 21, 2021 to:

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