

IN THE SUPREME COURT OF IOWA

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No. 20 - 0187  
Grievance Commission No. 888

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DAVID EBONG AKPAN,  
Respondent-Appellant,

vs.

IOWA SUPREME COURT  
ATTORNEY DISCIPLINARY BOARD,  
Complainant-Appellee.

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APPEAL FROM THE GRIEVANCE COMMISSION

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RESPONDENT-APPELLANT'S BRIEF

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DAVID EBONG AKPAN

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**STATEMENT OF THE ISSUES**

**I. DID THE GRIEVANCE COMMISSION ERR IN FINDING DAVID AKPAN VIOLATED THE TEXAS RULES OF PROFESSIONAL CONDUCT?**

*In re Ruffalo*, 390 U.S. 544 (1968)

*Crawford v. Washington*, 541 U.S. 36 (2004)

*Iowa S. Ct. Atty. Disc. Bd. v. Van Ginkel*, 809 N.W.2d 96 (Iowa 2012)

## **ROUTING STATEMENT**

This is an appeal from the Grievance Commission's Findings of Fact, Conclusions of Law, and Recommendation. It must be retained by the Iowa Supreme Court. Iowa Ct. R. 36.22.

## STATEMENT OF THE CASE

This is an attorney discipline case involving David Akpan, an Iowa licensed attorney who practices immigration law exclusively in Texas.<sup>1</sup> The Board alleged Mr. Akpan charged an unreasonable fee and failed to place funds in his trust account in his representation of the complainant, Rosa Villatoro. Mr. Akpan denies the allegations. The Commission found a violation and recommended a 61-day suspension. (App. p. 60)

Prior to hearing, the Grievance Commission ruled that Ms. Villatoro would be permitted to testify via video conferencing. This ruling was made over Mr. Akpan's objections that testimony via video conferencing violated his constitutional rights and the Grievance Commission Rules of Procedure which provides specifically:

**36.17(5)** The respondent may defend and has the right to participate in the hearing in person and by counsel to cross-examine, to be confronted by witnesses, and to present evidence.

**36.17(6)** The presentation of evidence must conform to the Iowa Rules of Civil Procedure and the Iowa Rules of Evidence. The grievance commission chair or division president will determine all questions of procedure, including objections to evidence.

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<sup>1</sup> Mr. Akpan is licensed to practice federal immigration law as he is admitted in the United States District Court and Bankruptcy Court for the Southern, Eastern, and Northern Districts of Texas. Mr. Akpan has never practiced law in Iowa despite having an Iowa law license.

A two-day hearing was held before the Grievance Commission at the Iowa Judicial Branch Building despite the matter having minimal connection to Iowa. The original complainant and the Respondent are both residents of the Houston, Texas, region. The Board brought allegations that Mr. Akpan violated the Texas Rules of Professional Conduct. The **only** connection this matter has to Iowa is Mr. Akpan's Iowa license to practice in this state.

The Board **failed** to carry their burden in proving the allegations against Mr. Akpan. The **only** credible factual testimony provided at the hearing came from Mr. Akpan. Mr. Akpan testified that he charged a flat fee and **earned all fees** after performing a tremendous amount of work on behalf of his client. Conversely, Ms. Villatoro did **not** provide credible testimony and actually admitted to **fraudulently misrepresenting** the status of her marriage to federal immigration officials in order to obtain permanent resident status for her husband!

The Commission entered its Findings of Fact, Conclusions of Law, and Recommendation on January 30, 2020. (App. p. 42) In the Findings, the Commission included a section on the "Video Testimony". The Commission found that Ms. Villatoro's testimony was **not** relied upon in their ruling. In so finding, the Commission stated **if the video-testimony was in error, it was harmless error.**

As a result of their ruling on "Video Testimony", the Commission did **not** make a ruling on two critical issues squarely within the scope of their duties as a

Commission. First, the Commission **failed** to make any ruling on whether video testimony violated his rights to confront his accuser. Second, the Commission **failed** to make any credibility finding regarding the sole complainant, Ms. Villatoro.

Mr. Akpan's constitutional due process rights require the Board prove the allegations brought before the Grievance Commission by a convincing preponderance of the evidence. His rights further require the opportunity to face his accusers. These rights were violated in this case. The complaint against Mr. Akpan should accordingly be dismissed.



## STATEMENT OF FACTS

David Akpan is a licensed attorney originally from Nigeria. (App. 282) Mr. Akpan came to the United States in 1990 where he became a United States citizen through the legal immigration process in 1994. (App. pp. 282, 284). Mr. Akpan graduated from Thurgood Marshall Law School in Houston, Texas in 2003. (App. p. 286). In law school, his peers elected him to serve as the Chief Justice of the student Honor Court that addressed ethical matters related to students at his school. (App. p. 285).

Mr. Akpan obtained his law license in Iowa in 2010. (App. p. 287). He is also federally licensed in the United States District Court and Bankruptcy Court for the Southern, Eastern, and Northern Districts of Texas. (App. p. 288). He does not have a law license in the State of Texas and accordingly does not practice in the state jurisdiction in Texas. Mr. Akpan practices solely in the federal field of immigration law in the Houston, Texas region.

Mr. Akpan is married to Olayide Akpan. (App. p. 283). They recently became parents to their first son, Andikan Akpan. Andikan was born a month-and-a-half prior to hearing. Shortly before the original hearing date there were serious health concerns for the baby and mother. Due to the concerns the baby's due date was much sooner than originally anticipated. Mr. Akpan filed an emergency motion to continue so that he could be with his wife for the birth of his child. (App. p. 31).

Despite the distance from his residence in Richmond, Texas, to Des Moines, Iowa, and the fragile health of his newborn son, Mr. Akpan still presented to testify live before the Grievance Commission panel at the Iowa Judicial Branch Building. (The complainant, who was also living in the Houston region, testified by video conferencing and did not come to Iowa to be physically present!)

In early 2016, Mr. Akpan was approached by Rosa Villatoro seeking legal services on behalf of her husband Nelson Guzman. Ms. Villatoro is a United States citizen whereas her husband was in the United States on temporary protected status from El Salvador. (App. p. 206). Ms. Villatoro sought Mr. Akpan's immigration expertise to change her husband's residency status to permanent status. Prior to entering into a fee agreement Ms. Villatoro informed Mr. Akpan that Mr. Guzman had previously been convicted of fraudulent concealment – a crime of moral turpitude that could potentially prohibit him from obtaining permanent resident status. (App. p. 291).

Mr. Akpan conducted 10 hours of legal work with regards to how the Texas crime of fraudulent concealment would affect his ability to obtain permanent resident status before any contract was signed by either party. After conducting the necessary legal work to determine that Mr. Guzman was still eligible to obtain permanent resident status, Mr. Akpan entered into a **flat fee** agreement with Ms. Villatoro. (App. p. 64)

The fee agreement was signed in February 2016. The agreed upon sum was for \$4000.00 total with an initial payment of \$1500.00 due at the signing of the contract and \$500.00 paid in installments to begin on April 1, 2016. Ms. Villatoro eventually made all payments to Mr. Akpan. The payments made to Mr. Akpan were deposited into his operating account as he had already **earned** the fees.

Over the course of the representation, Ms. Villatoro was unwilling or unable to provide Mr. Akpan with the necessary documents to complete the immigration application on behalf of Mr. Guzman. Mr. Akpan continued to research and prepare immigration forms per the agreement. In total, Mr. Akpan estimates that he spent over 40 hours on Ms. Villatoro's case. (App. p. 296).

Eventually, Ms. Villatoro discovered that Mr. Guzman had a physical intimate relationship with an unrelated female. She therefore requested that Mr. Akpan discontinue his work on the immigration application as she was no longer willing to be the required sponsor for Mr. Guzman. (App. p. 296). Mr. Akpan's representation of Ms. Villatoro and Mr. Guzman was accordingly terminated at that time.

Ms. Villatoro alleges she thereafter retained Mr. Akpan with regards to obtaining a divorce from her husband. This allegation was denied by Mr. Akpan who is not licensed to practice family law in the State of Texas. Ms. Villatoro testified that she was eventually able to sponsor Mr. Guzman and obtain permanent residence for him. In so sponsoring her husband, Ms. Villatoro testified that she **fraudulently**

**withheld** from federal immigration services that she was seeking a divorce from Mr. Guzman. (App. p. 280). Ms. Villatoro testified via video conferencing claiming that she was unable to come to Iowa as she has to care for her children. (App. pp. 262-263).

JoAnn Barten, an immigration lawyer in Ames, Iowa, also provided testimony before the Grievance Commission panel. Ms. Barten provided no opinion as to the quality of Mr. Akpan's legal services or the reasonable fee for immigration services in the Houston region. (App. p. 63). Barten did testify that she uses a flat fee of \$3500 in her line of work and that she has once charged between \$12,000 and \$15,000 on a single case. (App. pp. 237-238, 243). There was **no testimony** provided related to flat-fee agreements, trust account management, reasonable fees, or immigration legal services in Texas. **No** Texas immigration lawyer testified on flat-fee agreements, trust account management, reasonable fees, or immigration legal services.

## ARGUMENT

### I. THE GRIEVANCE COMMISSION'S RECOMMENDATION SHOULD BE REVERSED.

Error Preservation: This matter has been fully preserved in the pleadings and record before the Grievance Commission of the Iowa Supreme Court.

Scope and Standard of Appellate Review: The Court reviews attorney disciplinary proceedings *de novo*. “The Commission's findings and recommendations are given respectful consideration, but we are not bound by them. The Board has the burden of proving attorney misconduct by a convincing preponderance of the evidence.” *Iowa S. Ct. Atty. Disc. Bd. v. Piazza*, 756 N.W.2d 690, 692 (Iowa 2008) (internal citations omitted).

## ARGUMENT

David Akpan filed a written objection prior to hearing seeking to protect his constitutionally guaranteed rights to “participate in the hearing in person and by counsel to cross-examine, to be confronted by witnesses, and to present evidence.” Iowa Ct. R. 36.17(5); *see also In re Ruffalo*, 390 U.S. 544 (1968); *Crawford v. Washington*, 541 U.S. 36 (2004); (Objection to Bd. Witness). It was critical that he be afforded a **fair opportunity** to confront and cross-examine the complainant Ms. Villatoro because he was certain that she was not being truthful. It was critical that the Grievance Commission be afforded the opportunity to make a credibility finding for Ms. Villatoro. It was the **duty** of Commission to ensure that Mr. Akpan received

that opportunity and to make a **finding** on Ms. Villatoro's credibility. The Commission did neither.

The Commission permitted the video testimony of Ms. Villatoro over Mr. Akpan's objections only to later rule that their findings would not rely on her testimony at all! In so ruling, the Commission fails to make any finding related to Ms. Villatoro's credibility and evades the issue of whether the video testimony was permissible. The resulting prejudice is twofold for Mr. Akpan, culminating in a draconian sanction recommended by the Commission.

After two full days of hearings before the Grievance Commission panel the Board failed to produce any evidence that Mr. Akpan violated any of the allegations presented in the Amended Complaint. This is a case where the Board has alleged Mr. Akpan collected an unreasonable fee and failed to place unearned payments in a trust account in Texas. There were no other charges presented before the Commission and there were **no issues tried by consent**.

In a case where the Board alleged Mr. Akpan failed to deposit payments in a trust account, the uncontroverted evidence demonstrates Mr. Akpan had spent over 40 hours working complex issues **prior** to depositing the fees into his operating account. The fees had been earned long before the payments were received!

Further, in a case where the Board alleges the fee was unreasonable, there was no testimony or evidence, in any capacity, related to what constitutes a reasonable

fee for immigration services in Houston. Conversely, **all** testimony presented confirms that Ms. Villatoro paid a fair amount for the extensive services Mr. Akpan provided.

The problematic nature of the case presented by the Board does not end with the complete lack of evidence in support of their allegations. Mr. Akpan testified credibly as to the extensive legal services he performed on behalf of Ms. Villatoro. Conversely, Ms. Villatoro was not a credible witness and **admitted committing fraud** before federal immigration agents.

Further, **fundamental fairness** is at issue. Ms. Villatoro's testimony was not credible and the Commission gave it **no weight**. The only credible evidence was rendered by Mr. Akpan. In light of these issues, the violations alleged against Mr. Akpan were **not** proven by Board. The Complaint should be dismissed.

#### **A. Mr. Akpan did not violate the Texas Rules of Professional Conduct**

The **uncontroverted** evidence in the record clearly demonstrates Mr. Akpan spent several hours performing complex legal work on behalf of his client **prior** to collecting any payment from Ms. Villatoro. This work includes, but is not limited to:

- Legal work the clients' crime of moral turpitude did not jeopardize the immigration application process,
- Compiling and filling out relevant immigration forms,
- Communication with Ms. Villatoro requesting information for immigration application,
- Numerous one-hour trips to Ms. Villatoro place of work to retrieve

- documents and information, and
- Exhaustive research on the ever-evolving statutes and regulations in the field of immigration law.

For all of the services provided, which required approximately 40 hours, Mr. Akpan collected only \$4000.00. The issue of how he handled the flat-fee agreement is **moot** as he earned all fees prior to payment on fees.

The Board is required to prove each and every ethical violation by a convincing preponderance of the evidence. *Iowa S. Ct. Atty. Disc. Bd. v. Nelson*, 838 N.W.2d 528, 532 (Iowa 2013). “This standard is more demanding than proof by preponderance of the evidence, but less demanding than proof beyond a reasonable doubt.” *Iowa S. Ct. Atty. Disc. Bd. v. Ouderkirk*, 845 N.W.2d 31, 33 (Iowa 2014).

The Supreme Court of the United States has noted that attorney discipline cases are **quasi-criminal** in nature. Accordingly, the respondent attorneys in such cases require similar protections as criminal defendants. *In re Ruffalo*, 390 U.S. 544 (1968). Of these protections, the burden of proof resting with the Board, the prosecuting body in these cases, is one of the most important protections.

The right to confront your accuser is a constitutional guarantee meant to protect against the “the principal evil . . . [of the] use of *ex parte* examinations as evidence against the accused.” *Crawford v. Washington*, 541 U.S. 36, 50 (2004). The allegations against Mr. Akpan and have a direct impact on his livelihood -the



practice of law. Mr. Akpan is entitled to protections *greater* than a civil proceeding, and not less. *See In re Ruffalo*, 390 U.S. 544, 550 (1968).

Additionally, flat or fixed fees are legal in Texas. In fact, Rule 1.04 (b)(8) of the Texas Disciplinary Rules for Professional Conduct, specifically contemplates a fixed fee arrangement. The fee, whether flat or otherwise, is held only to a reasonableness standard.<sup>2</sup>

The Commission found Mr. Akpan charged or collected an unreasonable fee and neglected to place unearned fees in a trust account in violation of the Texas Rules of Professional Conduct. The Commission made this finding despite the **uncontroverted evidence** that Mr. Akpan and Ms. Villatoro had a flat fee agreement and all fees were earned prior to the receipt of payments.

As a first matter, without citing any legal authority the Commission found violations of Texas rules. There was **no** testimony supporting any such violation. There was **no** testimony related to flat fee arrangements in Texas. There was **no** testimony related to reasonableness of fees for immigration legal services in the Houston region.

The credible testimony provided by Mr. Akpan demonstrates an uncontroverted account of his representation of Ms. Villatoro. Ms. Villatoro, a

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<sup>2</sup> **No** legal authority has been submitted suggesting the Iowa rule requiring flat fees be placed in a trust account is controlling in Texas.

United States citizen hired Mr. Akpan to represent her and her husband Nelson Guzman, a person residing in the United States on a temporary protected status. (App. p. 206). Ms. Villatoro sought Mr. Akpan's immigration expertise to change her husband's residency status to permanent status. Prior to entering into a fee agreement Ms. Villatoro informed Mr. Akpan that Mr. Guzman had previously been convicted of "fraudulent concealment" – a crime of moral turpitude that could potentially prohibit him from obtaining permanent resident status. (App. p. 291).

Mr. Akpan conducted approximately 10 hours of legal work with regards to how the Texas crime of "fraudulent concealment" would affect his ability to obtain permanent resident status **before** any contract was signed by either party. **After** conducting the necessary legal work to determine that Mr. Guzman was still eligible to obtain permanent resident status, Mr. Akpan entered into a flat fee agreement with Ms. Villatoro. (App. p. 64).

The fee agreement was signed in February 2016. The fee agreement was memorialized in writing in clear, unambiguous terms. (App. p. 64). The agreed upon sum was \$4000.00 total, with an initial payment of \$1500.00 due at the signing of the contract and \$500.00 paid in monthly installments to begin on April 1, 2016. Ms. Villatoro eventually made all payments to Mr. Akpan. The payments made to Mr. Akpan were deposited into his operating account as he had already earned the fees.

Over the course of the representation, Ms. Villatoro was unwilling or unable to provide Mr. Akpan with the necessary documents to complete the immigration application on behalf of Mr. Guzman. Mr. Akpan continued to research and prepare immigration forms per the agreement. In total, Mr. Akpan conservatively estimates that he spent over 40 hours on Ms. Villatoro's and Mr. Guzman's case. (App. p. 296).

Mr. Akpan spent numerous hours preparing immigration forms and researching the ever-evolving rules and regulations related to immigration law. Mr. Akpan also spent a tremendous amount of time making requests for more documentation from Ms. Villatoro. On several occasions, Mr. Akpan made the hour-long trip to Ms. Villatoro's office in an attempt to collect more documents. It is uncontroverted that Mr. Akpan spent numerous hours working on Ms. Villatoro's immigration application. The fees were reasonable.

The Commission, without citing any evidence in the record, dismisses Mr. Akpan's credible testimony regarding the hours he spent working on Ms. Villatoro's application. There was **no** testimony or documentary evidence refuting the legal work actually performed by Mr. Akpan. The Commission's disregard of Mr. Akpan's uncontroverted testimony is in error.

Eventually, Ms. Villatoro discovered that Mr. Guzman had an extramarital affair. She requested that Mr. Akpan discontinue his work on the immigration

application as she was no longer willing to be the required sponsor for Mr. Guzman. (App. p. 296). Mr. Akpan's representation of Ms. Villatoro and Mr. Guzman was accordingly terminated at that time.<sup>3</sup>

It should be noted that Mr. Akpan was ready, willing, and able to complete the immigration application on behalf of his client throughout his representation of the parties. The only reason he did not complete the application was because Ms. Villatoro did not provide him the necessary documents to complete the packet.

Mr. Akpan's conduct as an immigration lawyer was supported by the testimony of the Board's expert witness JoAnn Barten. First, Ms. Barten testified that she utilizes a **flat fee** as a best practice in immigration work. (App. pp. 237-238) Further, she testified that she is reliant on her clients to provide the necessary documents to complete the immigration application. If the clients do not provide all of the documents, the application cannot be submitted as it will be rejected. (App. pp. 231-235). Finally, her fee of \$3500.00 with additional premium charges, for immigration legal services in Ames, Iowa, is comparable to the fees charged by Mr. Akpan in Houston, Texas. At times Ms. Barten's fees greatly exceed Mr. Akpan's

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<sup>3</sup> Ms. Villatoro subsequently retained new counsel and gained citizenship for her husband despite knowing it was in violation of federal immigration law. 18 U.S.C. § 1546; 8 U.S.C. § 1229b. (App. pp. 265-266).

fee for an immigration case as she has once charged between \$12,000 and \$15,000. (App. pp. 237-238, 243).

**B. The Grievance Commission erred in permitting Video-Testimony of the complainant and failing to make credibility findings regarding the complainant's video-testimony.**

The Commission **failed** to uphold their obligation to ensure Mr. Akpan had a fair opportunity to confront his accuser in addition to their obligation to make credibility findings for the witnesses. This was a violation of Mr. Akpan's constitutional rights and a violation of the Grievance Commission rules of procedure.

Prior to hearing, the Grievance Commission ruled that Ms. Villatoro would be permitted to testify via video conferencing. This ruling was made over Mr. Akpan's objections that testimony via video conferencing violated his constitutional rights. The Board stated video-testimony was needed as it was too expensive for the Board to pay for a hotel, airfare, and other accommodations for a witness residing in Texas. (Bd. Motion for Telephone Testimony). The Board's assertion was **not** corroborated by Ms. Villatoro who testified that she was unable to be physically present for the hearing because she had to care for her children. (App. pp. 262-263).

The claimed justifications for Ms. Villatoro’s remote testimony are *de minimis* compared to the constitutional and procedural rights of the Respondent. Mr. Akpan’s rights under the Grievance Commission Rules of Procedure are:

**36.17(5)** The respondent may defend and has the right to **participate in the hearing in person and by counsel to cross-examine, to be confronted by witnesses**, and to present evidence.

**36.17(6)** The presentation of evidence must conform to the Iowa Rules of Civil Procedure and the Iowa Rules of Evidence. The grievance commission chair or division president will determine all questions of procedure, including objections to evidence. (emphasis added).

Mr. Akpan, the party whose right to practice law was threatened in the matter, is a resident from Texas that appeared in person, paid for airfare, hotel accommodations, and other expenses. Mr. Akpan was also forced to be away from his wife and son who were in a fragile state following serious health concerns after the early birth of their son.

The Commission entered its Findings of Fact, Conclusions of Law, and Recommendation on January 30, 2020. In the Findings, the Commission included a section on the “Video Testimony”. The Commission found that Ms. Villatoro’s testimony was **not** relied upon in their ruling. In so finding, the Commission stated **if video-testimony was in error, it was harmless error**. There was **no** justification for this conclusion.

As a result of their ruling on “Video Testimony”, the Commission did **not** make a ruling on two critical issues squarely within the scope of their duties as a Commission. First, the Commission did **not** rule on whether video testimony violated his rights to confront his accuser. Second, the Commission did **not** make a credibility finding regarding the sole complainant Ms. Villatoro. The two omissions were in error and compounded the prejudice against Mr. Akpan.

**i. Mr. Akpan has a right to confront the witnesses against him.**

The Supreme Court of the United States has noted that attorney discipline cases are **quasi-criminal** in nature. Accordingly, the respondent attorneys in such cases require **similar protections as criminal defendants**, including the right to face their accuser. *In re Ruffalo*, 390 U.S. 544 (1968).

Both the Iowa Supreme Court and the Supreme Court of the United States have stressed the importance of due process of law in the administrative hearing process:

The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be ‘at a meaningful time and in a meaningful manner.’ In the present context these principles require that a recipient have timely and adequate notice . . . and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

...

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative actions were under scrutiny.’ *Carr v. Iowa Empl. Sec. Commn.*, 256 N.W.2d 211, 215 (Iowa 1977) (quoting *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959)) (internal citations omitted). *Id.*

Further, the Iowa Supreme Court requires a higher burden of proof than the burden in a civil proceeding. *Iowa S. Ct. Atty. Disc. Bd. v. Waterman*, 890 N.W.2d 327, 331 (Iowa 2017). “The Board must prove attorney misconduct by a convincing preponderance of the evidence. This standard is more demanding than proof by preponderance of the evidence, but less demanding than proof beyond a reasonable doubt.” *Id.* (emphasis added, citations omitted).

The Respondent’s constitutional rights of are codified expressly in the Grievance Commission Rules of Procedure. The rules require the Respondent “has the right to **participate in the hearing in person and by counsel to cross-examine, to be confronted by witnesses**, and to present evidence.” Iowa Ct. R. 36.17(5).



The Commission permitted the sole witness for the Board to appear via video conferencing. The Commission made **no** credibility findings as to the accuser. The Commission also made **no** credibility finding on the accused yet concluded that he violated Texas Rules. Mr. Akpan appeared in person and his accuser did not. This was in clear violation of his constitutional rights and his rights under rule 36.17. The Commission’s allowance of video testimony was in error. Further, it was **not** “harmless error” as the Commission suggests.<sup>4</sup>

**ii. The Commission has a duty to make credibility findings.**

The Commission completely abdicated their duty to make **any** credibility findings in this case. The Grievance Commission is uniquely situated to weigh the credibility of witnesses before the panel. The Iowa Supreme Court has routinely noted they give special deference to the credibility findings of the Commission. “We give respectful consideration to the findings of the commission, especially when considering credibility of witnesses, but are not bound by them.” *See, e.g., Iowa S. Ct. Atty. Disc. Bd. v. Moothart*, 860 N.W.2d 598, 602 (Iowa 2015); *Iowa S. Ct. Atty. Disc. Bd. v. Van Ginkel*, 809 N.W.2d 96, 107 (Iowa 2012).

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<sup>4</sup> To determine whether a substantial right of a party has been affected when a nonconstitutional error occurs, we employ harmless error analysis and ask: “ ‘Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?’ ” *State v. Paredes*, 775 N.W.2d 554, 571 (Iowa 2009)

In this instance, the Iowa Supreme Court cannot review the Grievance Commission credibility findings- **there were none**. The Commission specifically cites the video testimony as the specific reason they did not make a credibility finding on the testimony of Ms. Villatoro. This substantially prejudiced Mr. Akpan.

**C. Ms. Villatoro was not a credible witness.**

Ms. Villatoro's inconsistent testimony, in addition to her **admitted untruthful and unlawful behavior**, demonstrates that she was not a credible witness. Ms. Villatoro's testimony related to retaining Mr. Akpan for legal services in obtaining a divorce from Mr. Guzman was inconsistent and uncorroborated by the evidence. First, Mr. Akpan is not licensed to practice family law in Texas. He could not legally or ethically represent Ms. Villatoro in a divorce. Further, the clear and unambiguous terms of the flat fee contract between Mr. Akpan and Ms. Villatoro was signed prior to Ms. Villatoro's discovery of her husband's infidelity. Finally, she had made all payments under the contract for immigration services prior to contacting Mr. Akpan for representation in a divorce. (Mr. Akpan is **not** licensed to practice family law in Texas).

Despite all of the clear evidence presented at trial, when questioned as to why Ms. Villatoro thought Mr. Akpan would represent her in a divorce, she testified, "He never say no, and my understanding is that he was going to represent me, because

he has already been paid.” (App. p. 275). The testimony in in **direct** contradiction to all documentary evidence and the testimony of Mr. Akpan.

Ms. Villatoro also admitted to making misrepresentations to immigration officials in obtaining permanent resident status for her husband:

Q. How long after your husband got a green card did you file for divorce?

A. Three months.

Q. Did you ever tell the immigration authorities that you had filed for divorce?

A. No.

...

Q. Did you hold off on filing for the divorce until you got your husband his green card?

A. Yes. I wanted to help him out for the children.

Q. You knew when you went in and talked to the INS that you were going to file for divorce anyway, didn't you?

A. At that time I didn't know when.

Q. Well, you knew you were going to file; right?

A. Someday. Yeah, someday.

...

Q. And when you met with the immigration interview, for the marriage interview, you didn't tell them that you wanted a divorce, did you?

A. I just answered whatever questions they asked me.

Q. I'm sorry. You didn't tell them you wanted a divorce, did you?

A. No. I just -- I just answered whatever questions they tell me.

(App. pp. 277-278, 279-280).

Ms. Villatoro admitted to fraudulently making a material misrepresentation to the immigration official in her marriage interview in Texas.<sup>5</sup> Her dishonest and

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<sup>5</sup> Committing fraud before immigration officials is a federal offense that can result in criminal penalties and removal from the United States. 18 U.S.C. § 1546; 8 U.S.C. § 1229b.

unlawful conduct has a direct impact on her credibility as a witness. Her testimony should be given no weight by the Grievance Commission.

**D. The Commission's recommended sanction is grossly excessive.**

David Akpan did **not** commit a violation of the Texas Rules of Professional Conduct. Accordingly, a sanction in this matter is **not** appropriate. However, the Commission nevertheless found that a single violation of a mishandling a flat fee agreement warrants a 61-day suspension and completion of several continuing legal education hours. Relative to similar cases under Iowa law, the sanction is Draconian and excessive.

There is no standard discipline for a particular type of attorney misconduct. The form and extent of any sanction must be tailored to the specific facts and circumstances of each individual case. *Iowa S. Ct. Atty. Disc. Bd. v. Marks*, 759 N.W.2d 328, 332 (Iowa 2009). The Court is, however, concerned with maintaining some degree of consistency throughout disciplinary cases. *Iowa S. Ct. Atty. Disc. Bd. v. Clauss*, 711 N.W.2d 1, 4 (Iowa 2006).

As an initial matter, the Commission **failed** to cite any legal authority supporting their excessive sanction. The Commission found the Respondent violated the Texas Rules of Professional Conduct. Further, there are numerous mitigating factors to be considered. In the event this Court finds a violation of the rules, a private admonition is a sufficient sanction.

Several cases illustrate the excessiveness of the Commission's sanction. In *Piazza*, this Court found that a single instance of violating flat fee agreement procedures warranted a public reprimand. *Iowa S. Ct. Atty. Disc. Bd. v. Piazza*, 756 N.W.2d 690 (Iowa 2008). A public reprimand was also issued in *Herrera*, where the attorney deposited advanced fees in his trust account and failed to keep adequate records. *Iowa S. Ct. Bd. of Prof. Ethics and Conduct v. Herrera*, 560 N.W.2d 592, 595 (Iowa 1997).

A sanction greater than a reprimand is **only** appropriate in cases where additional violations or aggravating factors are present. *Piazza*, 756 N.W.2d at 699. In *Said*, the attorney violated several rules including, failing to inform his client that he had missed an appeal deadline, failed to self-report the missed deadline to the Attorney Disciplinary Board despite representing to the court he would do so, mishandled his trust account, and mishandled a flat fee agreement. *Iowa S. Ct. Atty. Disc. Bd. v. Said*, 869 N.W.2d 185 (Iowa 2015). Even with the numerous rule violations the Court found a 30-day suspension was appropriate.

It is clear that a suspension of any kind is **not** appropriate given the finding of a single violation. Further, in light of the numerous mitigating factors, a private admonition is sufficient should the Court find a violation. *See infra*.

### **E. Mitigating Factors**

David Akpan did **not** commit a violation of the Texas Rules of Professional Conduct. Accordingly, a sanction in this matter is **not** appropriate.

Numerous mitigating factors are present on Mr. Akpan's behalf. *Iowa S. Ct. Atty. Disc. Bd. v. Parrish*, 801 N.W.2d 580, 589 (Iowa 2011).

- Mr. Akpan represents an underserved and vulnerable population as he provides immigration legal services to the Houston region. *Iowa S. Ct. Atty. Disc. Bd. v. Taylor*, 814 N.W.2d 259, 268 (Iowa 2012). “The service by an attorney to a vulnerable population with limited English language skills and lack of familiarity with the American legal system can be a mitigating factor.” *Iowa S. Ct. Atty. Disc. Bd. v. Said*, 869 N.W.2d 185, 194 (Iowa 2015). “Substantial service to the immigrant community” is a significant mitigating factor. *Iowa S. Ct. Atty. Disc. Bd. v. Ta-Yu Yang*, 821 N.W.2d 425, 431 (Iowa 2012). Providing access to the immigrant community is a matter personal to Mr. Akpan. He is an immigrant from Nigeria and became a United States citizen through the same processes he guides his clients through.
- Mr. Akpan has **no** history of attorney discipline in any state.
- Further, he was **cooperative** with the Board and the Grievance Commission. He physically appeared to testify in Des Moines for the hearing before the Grievance Commission despite the distance, birth, and

fragile health of his newborn son whereas the complainant did **not**.

## **CONCLUSION**

There is **no** evidence supporting the allegations made in the Board's Amended Complaint. There is **no** basis to sanction Mr. Akpan. The case should accordingly be **dismissed**.



**APPELLANT'S STATEMENT OF DESIRE TO BE HEARD IN ORAL  
ARGUMENT**

Appellant hereby states his desire to be heard in oral argument pursuant to Iowa Rule of Appellate Procedure 6.21(1).

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
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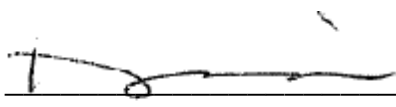
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