In the Supreme Court of Iowa

Supreme Court No. 20-0187
Grievance Commission No. 888

Iowa Supreme Court
Attorney Disciplinary Board,

Appellee,

vs.

David Ebong Akpan,

Appellant

Appeal from the Report of the Iowa Supreme Court Grievance Commission

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Appellee's Final Brief

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Routing Statement

The Supreme Court should retain this case because under Iowa R. App. P. 6.1101 "[t]he Supreme Court shall ordinarily retain the following types of cases: … e. Cases involving lawyer discipline."

Statement of the Case

Nature of the Case

The Attorney Disciplinary Board (Board) brought this lawyer disciplinary action against David Ebong Akpan (Akpan) alleging violations of the Texas Disciplinary Rules of Professional Conduct (Rules).

Course of Proceedings and Disposition

On March 27, 2019, the Board filed its Complaint against Akpan. Complaint. On April 23, 2019, Akpan filed his Answer. Answer.

On August 15, 2019, the Board filed its Amended Complaint (AC). On August 26, 2019, Akpan filed an Answer to the Amended Complaint. Amended Answer (AA).

On October 7 and 8, 2019, the Grievance Commission (Commission) heard and received the parties' evidence.

On January 30, 2020, the 608th Division of the Commission filed its Findings of Fact, Conclusions of Law, and Recommendation. Commission Report (Report).

Commission's Conclusion

The Commission concluded that Akpan violated Texas Disciplinary Rules of Professional Conduct 1.04(a) and (b), Rule 1.14(a) and (c), and Rule 1.15(d). Appendix (App.) pages (pp.) 54-59.

Commission's Aggravating Circumstance

The Commission concluded that this aggravating factor existed as to Akpan: multiple rule violations. App. p. 59.

Commission's Mitigating Circumstances

The Commission concluded that these mitigating factors existed as to Akpan: 1) cooperative in the disciplinary process, filing responses in a timely fashion and participating in the hearing before the Commission and 2) serves an underserved community of low-income immigration applicants. App. p. 59.

Commission's Recommendations

The Commission recommended that the Court suspend Akpan's law license for a period of not less than 61 days and, before reinstatement of his license, require Akpan to complete at least 4.75 hours of continuing legal education offered by the State Bar of Texas on the topics of managing client funds, managing a trust account, nonrefundable retainers, and establishing and operating a solo practice. App. p. 60.

Akpan's Appeal

On February 4, 2020, Akpan filed his notice of appeal with the Commission clerk. App. pp. 61-62.

Statement of the Facts

The Board is a Commission of the Supreme Court of Iowa. AC/AA ¶ 1. App. pp. 13, 35.

Akpan has a license to practice law in Iowa that he obtained in 2010. AC/AA ¶ 3. App. pp. 13, 35. Akpan does not hold a Texas law license. AC/AA ¶ 4A. App. pp. 13, 35. Akpan is admitted to practice law in the United States District and Bankruptcy Courts for the Southern, Eastern, and Northern Districts of Texas. AC/AA ¶ 4B. App. pp. 13, 35. Akpan files annual reports with the Client Security Commission and the Commission

on Continuing Legal Education in Iowa and pays the annual assessments. AC/AA ¶ 5. App. pp. 13, 35.

Akpan resides in Richmond, Texas, and practices immigration and bankruptcy law in Texas. AC/AA ¶ 6. App. pp. 14, 35. Akpan's Iowa law license enables him to represent immigration clients before the U. S. Citizenship and Immigration Services (USCIS) agency and the Immigration Court system and bankruptcy clients in three federal bankruptcy and district courts in Texas. AC/AA ¶ 7. App. pp. 14, 35. Akpan's office is in Houston, Texas. AC/AA ¶ 7A. App. pp. 14, 35.

On February 23, 2016, Villatoro retained Akpan to represent her and her husband, Nelson Alberto Guzman (Guzman), who, at the time, was in the United States lawfully on Temporary Protected Status (TPS). AC/AA ¶ 8. App. pp. 14, 36.

Villatoro and Guzman reside in Katy, Texas. AC/AA ¶ 8A. App. pp. 14, 36. Villatoro is a citizen of the United States. AC/AA ¶ 8B. App. pp. 14, 36. Guzman is a citizen of El Salvador. AC/AA ¶ 8C. App. pp. 14, 36.

The Secretary of Homeland Security previously designated El Salvador for TPS for El Salvadorans who were in the United States since February 13, 2001, due to conditions in El Salvador that temporarily prevent its nationals from returning safely or where the country is unable

to handle the return of its nationals adequately. AC/AA ¶ 8D. App. pp. 14, 36.

On February 23, 2016, Villatoro and Akpan executed a fee agreement (Agreement) which stated the following in relevant part with respect to legal services involved and attorney fees:

LAW OFFICES OF DAVID E. AKPAN
Attorneys & Counselors At Law
2306 BLODGETT STREET, 2ND FLOOR
Houston, Texas 77004

ATTORNEY CLIENT AGREEMENT AND POWER OF ATTORNEY

1. Date of Contract: 2-23-16

2. Name of Client: Nelson Alberto Guzman

3. Address of Client: 4219 Prairie meadow Dr
Katy TX 77449

4. Phone Number: 281-650-8852

5. Legal Services Involved: I-485, I-130

6. Agreed Legal Fees: $4,000.=

Pursuant to our oral discussion and based upon the information you provided to our Law Firm. You, Rosa L Villatoro, agree to hire The Law Offices of David E. Akpan to represent you as your attorney in the matter described in item 5 above.

7. **FEES**

Our legal fees for the representation will be ~~$7,000.00~~ DA 2/23/16 excluding the filing and expenses as explained in the item 10 below. The fees will cover consultations with you and your authorized representatives, the opposing party and any other party that we deem necessary for effective disposition of your matter. The fees will also cover research into your legal matter. Procurements of information from government agencies and courts of law.

7(a) Allocation of Fees and Schedule of Payment
(i) Initial Payment: $1,500.-
(ii) Due upon Filing: _____
(iii) Due every 1st day of the month: $500.= DA 4/1/16

8. The above fees in item 7 do not include appeals of denials, regular appeals, post judgment or services. If such services are required, additional fees will be negotiable.

14. **DISCHARGE AND WITHDAWAL**

Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or good cause. Good cause includes Client's breach of Agreement, refusal to cooperate or to follow Attorney's advice on material matter or any fact and circumstance that would render Attorney's continuing representation unlawful or unethical. Good cause also includes Client's failure to promptly make payments pursuant to the Agreement. When Attorney's services conclude, all unpaid charges will immediately become due and payable.

15. **ENTIRE AGREEMENT**

This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

Accepted by client:

Client Signature

Rosa L. Villatoro

Printed Name

AC/AA ¶ 9 App. pp. 14-16, 36 & App. pp. 64-66.

Paragraph 10 of the Agreement stated: "COMMENCEMENT OF REPRESENTATION Client is hereby notified that legal services will not be rendered and client's file will be placed on hold until clients make payment as described in item 7 above." AC/AA ¶ 9A App. pp. 16, 36 & App. p. 65.

Paragraph 11 of the Agreement stated, in part: "The Law Offices of David E. Akpan does not guarantee or make any promise as to the outcome of your matter …. Further more, we cannot guarantee the exact amount of your total cost to you in pursuing this matter." AC/AA ¶ 9B App. pp. 16, 36 & App. p. 65.

The Agreement identified two legal services: I-485 and I-130. AC/AA ¶ 9C App. pp. 16, 36 & App. p. 64.

The Agreement did not state or establish an hourly rate for Akpan's services. AC/AA ¶ 9D. App. pp. 16, 36.

The Agreement established that the $4,000 fee was related to compensating Akpan for the actual performance of services. AC/AA ¶ 9H App. pp. 17, 36 & App. p. 64.

For a Form I-485 application filed prior to August 26, 2017, Guzman needed to complete and file Form G-325. AC/AA ¶ 9L. App. pp. 17, 36. With a Form I-485 application filing, Guzman needed to complete and file USCIS Form I-864, Affidavit of Support Under Section 213A of the INA; this form is used to show that Guzman is not inadmissible on public charge grounds. AC/AA ¶ 9M. App. pp. 18, 36. With a Form I-485 application filing, Guzman may have needed to complete and file USCIS Form I-131, Application for Travel Document; this form is used to authorize Guzman to return to the United States after travel abroad while the Form I-485 application is pending. AC/AA ¶ 9P. App. pp. 18, 37.

In the processing of a Form I-485 application, Villatoro and Guzman would have received an appointment to go to the local USCIS office for an adjustment of status interview for final adjudication of the

Form I-130 petition filed by Villatoro and the Form I-485 application filed by Guzman. AC/AA ¶ 9R. App. pp. 18, 37.

If the Form I-130 petition and Form I-485 application process was successful, Guzman would have received permanent resident status, a green card, allowing Guzman to live and work permanently in the United States. AC/AA ¶ 9S. App. pp. 19, 37.

On February 23, 2016, the same date Villatoro and Akpan executed the Agreement, Villatoro wrote Akpan a check in amount of $1,500 for legal services. On February 25, 2016, Akpan deposited the $1,500 check into his operating account. AC/AA ¶ 10 App. pp. 19, 37 & App. p. 67.

On February 23, Villatoro and Akpan signed a partially completed DHS Form G-28, Notice of Entry of Appearance as Attorney. AC/AA ¶ 10B App. pp. 19, 37 & App. pp. 68-69. Akpan never filed Form G-28 for Villatoro and Guzman with USCIS. AC/AA ¶ 10C. App. pp. 19, 37.

Akpan's February 26 email stated, in part: "Please find attached Immigration forms and other documents that I'll need in order for me to file your husband's application." AC/AA ¶ 11A App. pp. 19, 37 & App. p. 70. Akpan's February 26 email had these documents attached: a) Initial Evidence 2, b) Form g-325a, c) Form i-130, d) Form i-131, e) Form i-485, f) Form i-693, g) Form i-864, and h) Houston Immigration Civil Surgeons.

AC/AA ¶ 11B App. pp. 19, 37 & App. p. 70. The first sentence of the Initial Evidence 2 document attached to the February 26 email read: "Please provide the following information and or documents below in order to file your adjustment of status with the U.S. Homeland Security (Immigration & Naturalization Services)." AC/AA ¶ 11C App. pp. 20, 37 & App. pp. 71-72.

On April 1, 2016, Villatoro wrote a check to Akpan for $500, and on April 4th, Akpan deposited it into his operating account. AC/AA ¶ 12 App. pp. 20, 37 & App. p. 73.

On May 5, 2016, Villatoro wrote a check to Akpan for $500, and Akpan deposited it into his operating account on May 9th. AC/AA ¶ 13 App. pp. 20, 37 & App. p. 74.

On June 15, 2016, Villatoro wrote a check to Akpan for $500, and on June 16th, Akpan deposited it into his operating account. AC/AA ¶ 14 App. pp. 20, 37 & App. p. 75.

On August 30, 2016, Villatoro wrote Akpan a check for $500, and on August 31st, he deposited it into his operating account. AC/AA ¶ 15 App. pp. 21, 38 & App. p. 89.

On September 23, 2016, Villatoro wrote Akpan a check for $500, and he deposited it into his operating account on September 27th. AC/AA ¶ 16 App. pp. 21, 38 & App. p. 90.

Villatoro paid Akpan a total of $4,000 in legal fees pursuant to the terms of the Agreement. AC/AA ¶ 17. App. pp. 21, 38.

On October 28, 2016, Akpan emailed Villatoro and attached one document entitled: Initial Evidence. AC/AA ¶ 17A App. pp. 21, 38 & App. p. 91. Akpan's October 28 email stated, in part: "Sorry for the delay in sending this to you. .... Please provide the documents/information requested in the attachment." AC/AA ¶ 17B App. pp. 21, 38 & App. p. 91. The first sentence of the Initial Evidence document attached to the October 28 email read: "Please provide the following information and or documents below in order to file your I-130, Immediate Relative Petition and I-485, Adjustment of Status and other related documents with the U.S. Homeland Security (U.S. Citizens & Immigration Services)." AC/AA ¶ 17C App. pp. 21-22, 38 & App. pp. 92-93.

Villatoro delivered to Akpan a partially completed, handwritten Form I-130, Petition for Alien Relative; Akpan typed some of the handwritten information on the form. AC/AA ¶ 17D App. pp. 22, 38; App. pp. 94-95; & App. pp. 96-97.

Villatoro delivered to Akpan a partially completed, handwritten Form I-485, Application to Register Permanent Residence or Adjust Status; Akpan typed some of the handwritten information on the form. AC/AA ¶ 17E App. pp. 22, 38; App. pp. 100-105; & App. pp. 106-111.

Villatoro delivered to Akpan a partially completed, handwritten USCIS Form I-864, Affidavit of Support Under Section 213A of the INA; Akpan typed some of the handwritten information on the form. AC/AA ¶ 17F App. pp. 22, 38; App. pp. 112-123; & App. pp. 124-129.

Akpan did not file any documents in the immigration matter. AC/AA ¶ 20. App. pp. 22, 38.

By late 2016 or early 2017, Villatoro had discharged Akpan as it related to the services identified in their February 2016 Agreement. AC/AA ¶ 20A. App. pp. 22, 38.

Villatoro's April 26, 2017, email stated: "Sorry to bother you Mr David but just when clients bring their paper and say they don't want extension I have to file it before the due date this divorce papers are prolonging too much I want to proceed this week." AC/AA ¶ 22A App. pp. 23, 39 & App. p. 155.

On June 26, 2017, Villatoro and Akpan exchanged text messages. AC/AA ¶ 24A. App. pp. 24, 39. On June 26, Villatoro wrote at 10:44 a.m.:

"Please i beg mr david return my money i needed like today i can text you my chase or boa account and you deposited there." AC/AA ¶ 24B App. pp. 24, 39 & App. p. 156. On June 26, Akpan replied at 10:51 a.m.: "I don't understand. I have prepared all the documents but you decided not to go through with it. Please note that we agreed to a flat fee which I wasn't required to keep hours. I don't know how you justify the money being refunded after I have fulfilled my own part of the contract." AC/AA ¶ 24C App. pp. 24, 39 & App. p. 156. On June 26, Villatoro replied: "When we met in your house i send you a text message that i dint feel comfortable with those other referral attorneys. Take out the justify amount for your work and rest refund it to me since i …." AC/AA ¶ 24D App. pp. 24, 39 & App. p. 156.

On July 21, 2017, Villatoro wrote to Akpan. AC/AA ¶ 24E. App. pp. 24, 39. Her July 21 letter stated: "I'm writing to request the return of my money. This is my last request and expect to get the money back from you in two weeks If I don't hear from you I will take it with the Bar of Texas." AC/AA ¶ 24F App. pp. 24, 39 & App. p. 157.

On July 28, Akpan emailed Villatoro. AC/AA ¶ 24G. App. pp. 24, 39. His July 28 email stated: "If you think that you'll continue to harass me and my family, I'll be your worst nightmare. You think you can use my

address and my personal information in violation of the law. If you have a lawyer, I'll advise that you pass this on to your lawyer immediately." AC/AA ¶ 24H App. pp. 25, 39 & App. p. 158.

Akpan did not provide Villatoro with an accounting of the $4,000. AC/AA ¶ 24*I*. App. pp. 25, 39.

On October 20, 2017, Villatoro filed a complaint against Akpan with the Attorney Disciplinary Board. AC/AA ¶ 29. App. pp. 25, 40.

Akpan claims the $4,000 legal fee was a flat fee. AC/AA ¶ 30. App. pp. 25, 40.

Under Iowa Rule of Professional Conduct 32:8.5(b)(2), the Texas Disciplinary Rules of Professional Conduct apply to Akpan's conduct alleged in this Amended Complaint. AC/AA ¶ 30A. App. pp. 25, 40.

JoAnn Barten Testimony

JoAnn L. Barten (Barten) has been an Iowa lawyer since 1998. App. p. 184 lines (ll.) 5-6. Around 2000, she began practicing immigration law primarily. App. p. 185 ll. 1-3.

Barten is familiar with adjusting the status of an alien. App. p. 186 ll. 3-5. She explained the purpose and effect of adjusting an alien's status: The process changes the alien's status to one of permanent residency from some other nonimmigrant status, such as holding a visitor or

student visa; she explained that permanent residency confers on the alien the right to live and work in the United States so long as he or she does not abandon the residency or commit a crime for which he or she could be deported; and she explained that the alien is still a citizen of his or her home country. App. p. 186 l. 6 – p. 187 l. 5.

Paragraph 5 of exhibit 1 references I-485 and I-130; Barten explained that these forms are used to change an alien's status from a nonimmigrant to an immigrant who is a permanent resident through family-based immigration; the United States citizen family member files form I-130 on behalf of the immigrating family member; the I-130 is the main document in a series of documents; the form I-485 is signed by the applicant/immigrant, and it is the main document in a series of documents; these forms are used simultaneously; this type of family-based immigration adjustment is called a one-step process. App. p. 188 l. 13 – p. 189 l. 21.

From Barten's reading of exhibit 1, Guzman and Villatoro hired Akpan to prepare this one-step process set of documents and file them with the U.S. Citizen and Immigration Services agency. App. p. 189 l. 22 – p. 190 l. 2.

Over 20 years, Barten has done hundreds, if not thousands, of these one-step family-based immigration status adjustments for clients married to each other. App. p. 190 ll. 3-21.

Panel President Pawlosky (Pawlosky) admitted exhibit 36, App. pp. 173-181, Barten's July 18, 2019, answer to Akpan's interrogatory 6. App. p. 191 ll. 2-5. Interrogatory 6 asked the Board to identify any expert witnesses that it intended to call at trial, and it asked the expert witness a number of questions, including a question asking the witness to: "(e) State all opinions, conclusions and mental impressions held by [the witness] with respect to the propriety of conduct and acts of [Akpan] …." App. p. 173. Barten answered this question along with the other questions posed. App. pp. 174-178. Barten's answer to question (e) included these points: 1) she identified 25 steps in completing a family-based adjustment of status; and 2) Akpan had completed no more than 10 to 15% of the process for Villatoro and Guzman. App. pp. 174-178.

In exhibit 36, pages 2-5, Barten identified 25 steps to complete the forms I-130 and I-485 in a one-step adjustment process. App. p. 239 l. 1 – p. 240 l. 9. Some of the steps are fact dependent, and they are not necessarily required. App. p. 240 ll. 10-12. Barten agreed that steps 4

through 10 and 13 are fact-dependent steps, depending on the client's "past" or history. App. p. 240 ll. 15-23.

Pawlosky admitted exhibit E, App. p. 63, Barten's July 10, 2019, letter to the Board. App. p. 191 l. 17. Exhibit E addressed these topics: 1) She did not have an opinion as to "whether [Akpan] acted in a competent manner;[1] 2) Akpan had completed "about 10-15% of the work ….[;] and 3) the "work to review [Guzman's] Texas Class A misdemeanor … would be fairly quick …. The petty offense exception would have made it a non-issue." App. p. 63.

Barten had reviewed exhibit 3, App. pp. 68-69, which is Department of Homeland Security form G-28, notice of entry of appearance; she testified that this document is the top page of each document in the form I-130 and form I-485 packages, including form G-639; form G-28 allows the government to acknowledge and accept the attorney's representation of the clients. App. p. 192 l. 9 – p. 193 l. 9 & App. pp. 68-69.[2] A form G-28 is required to be put on all the forms for each spouse. App. p. 241 l. 4 – p. 242 l. 5.

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[1] Neither the Board's initial complaint nor its amended complaint alleged that Akpan failed to provide competent representation.

[2] Villatoro and Akpan signed exhibit 3 on February 23, 2016; the form they signed expired on February 29, 2016.

Barten testified that exhibit 3 is not in final form; it would be adapted to coordinate with the document to which it is attached; for example, part 3, items 1 – 4 are blank; these items would be filled in later to fit with the accompanying document. App. p. 194 ll. 1-20.

Barten has reviewed exhibit 16, App. pp. 94-95, which is a hand-written form I-130, petition for alien relative; she testified that in this form the petitioner is the U.S. citizen spouse and the immigrant spouse is the beneficiary; the petitioner U.S. citizen fills out the left column; the immigrant spouse fills out the right column; on page 2 of the exhibit, the U.S. citizen spouse fills in information about the immigrant spouse. App. p. 194 l. 24 – p. 196 l. 7 & App. pp. 94-95.[3] Form I-130, exhibit 16, is signed by the U.S. citizen spouse. App. p. 196 ll. 8-11.

Barten identified the documents that would accompany exhibit 16, form I-130: 1) form G-28; 2) the filing fee; 3) 2 passport photos of each spouse; 4) form G-325A, a biographic form; 5) marriage certificate; 6) birth certificate for each spouse; 7) document showing how Villatoro became a citizen, 8) passport or governmental identification document from immigrant's spouse's home country; and 9) proof that all prior

[3] Akpan delivered exhibit 16 to Villatoro by an email dated February 26, 2016, exhibit 4; the form he delivered expired on December 31, 2015.

marriages are terminated. App. p. 196 l. 12 – p. 197 l. 13 & App. p. 197 l. 9 – p. 199 l. 11.

Barten identified exhibit 18, App. pp. 98-99, as form G-325, biographic information; the government used to have two similar forms – G-325 and G-325A; exhibit 18 asks both spouses for detailed information regarding addresses, employers, parents, etc. App. p. 199 l. 12 – p. 200 l. 4. Exhibit 18 would be an attachment to exhibit 16; page one for one spouse and page two for the other spouse. App. p. 200 ll. 5-10.

Barten identified exhibit 19, App. pp. 100-105, as form I-485, application to register permanent residence or adjust status; it is handwritten. App. p. 200 ll. 13-24. The immigrant spouse signs this form. App. p. 201 ll. 8-13.

Barten identified the documents that would accompany exhibit 19: 1) form G-28; 2) two passport photos; 3) filing fee; 4) form G-325; 5) form I-864, affidavit of support; 6) form I-765, application for temporary employment authorization (optional); and 7) form I-131 temporary travel authorization (optional). App. p. 201 l. 21 – p. 202 l. 18.

Barten identified exhibit 21, App. pp. 112-123, as form I-864, affidavit of support under section 213A of the INA (Immigration Nationality Act); this is a required form; the U.S. citizen spouse signs this

form; this one is handwritten. App. p. 203 l. 11 – p. 204 l. 3. Barten testified that proof of income and assets must accompany this form, including: 1) most recent federal income tax return; 2) most recent W-2s; and 3) employment letter for the U.S. citizen spouse; the U.S. citizen spouse must show income at or above 125 % of the poverty guidelines. App. p. 204 l. 4 – p. 205 l. 5.

Barten identified exhibit 24, App. pp. 143-149, as form I-765, application for employment authorization; the immigrant spouse signs this form; in 2016, it was an optional form, but she highly recommended it; it would be a required form if the immigrant spouse did not already have U.S. work authorization. App. p. 205 ll. 8-21. Per Akpan's admission to paragraph 8 of the amended complaint, Guzman had temporary protected status; he would likely have had work authorization through this TPS program. App. p. 205 l. 22 – p. 206 l. 6.

Barten explained the TPS program: when the U.S. cannot send an alien back to his or her home country because of a natural disaster or an armed conflict, the department of homeland security can designate that country for TPS; if the alien is present on the applicable date, with or without inspection, and he or she has no more than one misdemeanor, the U.S. will grant the alien TPS; TPS is reviewed periodically. App. p. 206

l. 19 – p. 207 l. 24. El Salvador obtained TPS because of a civil war and then natural disasters. App. p. 236 ll. 1-5.

Barten recommended this form, exhibit 24, for Guzman even though he had TPS because there is no additional filing fee; it is included in the form I-485 filing fee, and if TPS ended, he could still work with this authorization. App. p. 208 ll. 7-24. She identified the documents that would accompany form I-765, exhibit 24: 1) form G-28; 2) 2 passport photos; 3) passport; and 4) TPS work permit. App. p. 208 l. 25 – p. 209 l. 10.

Barten identified exhibit 25, App. pp. 150-154, as form I-131, application for travel document; it goes with the form I-485 package; there is no filing fee for this form if it accompanies form I-485; when the travel document is received, the immigrant can travel outside of the U.S. and return to the U.S. by presenting a passport and this travel document. App. p. 209 l. 13 – p. 210 l. 8 & App. p. 211 l. 25 – p. 212 l. 2. The immigrant spouse signs this form. App. p. 210 ll. 9-11. This is an optional form. App. p. 210 ll. 12-19. She acknowledged that Guzman might have had a travel authorization document through the TPS program; she testified that it would be best practice to include it. App. p. 210 l. 20 – p. 211 l. 24.

Barten testified that when the service center receives the one-step package it will send out a receipt notice. App. p. 212 l. 23 – p. 213 l. 14.

Barten testified that the next event will be the biometrics appointment; the immigrant spouse reports to an application support center to be photographed and fingerprinted. App. p. 213 l. 14 – p. 214 l. 3. Attorneys do not go to the biometrics appointment. App. p. 214 ll. 17-25.

Barten testified that the next event is the marriage interview. App. p. 214 ll. 8-10. Another name for the marriage interview is the adjustment interview. App. p. 235 ll. 6-10. The adjustment interview is for both spouses; the U.S. citizen spouse gets interviewed first about the form I-130; the bona fides[4] of the marriage are discussed; the spouses may be separated if the interviewer chooses to do so; when the officer approves the form I-130, then the interview shifts to the form I-485; this interview focuses on the immigrant spouse. App. p. 215 l. 1 – p. 216 l. 9. The Citizenship and Immigration Services agency does not require the

[4] Black's Law Dictionary defines "bona fides" as "good faith"; it defines "good faith", in part, as, "A state of mind consisting in (1) honesty in belief or purpose … or (4) absence of intent to defraud or to seek unconscionable advantage." Black's Law Dictionary 217, 836 (11th ed. 2019).

attorney to be present for the adjustment interview, but the spouses must waive in writing the attorney's presence if the attorney does not attend. App. p. 216 ll. 10-21.

Barten testified that at the adjustment interview, if all the documentation is present and current, the adjudicator will state whether approval will or will not be recommended. App. p. 217 l. 15 – p. 218 l. 4.

Barten identified exhibit 4, App. p. 70, as an email from Akpan to Villatoro dated February 26, 2016. App. p. 218 ll. 9-15. She identified the forms that Akpan attached to this email – g-325a, i-130, i-131, i-485, i-693, and i-864. App. p. 218 l. 16 – p. 219 l. 13. She testified that there is no significant difference between the g-325 and the g-325a forms. App. p. 219 ll. 14-21.

Barten testified that form I-693, report of medical examination and vaccination record, is a required form. App. p. 219 l. 22 – p. 220 l. 4. Exhibit 23, App. pp. 130-142, is the form I-693 that a physician completes after examining the immigrant spouse. App. p. 220 ll. 5-12.

Barten had reviewed exhibits 9, 10, and 11, App. pp. 76-88; under the Texas Code, she concluded that Guzman's crime involved moral turpitude, but it came within the petty offense exception in the immigration law. App. p. 221 l. 20 – p. 222 l. 18.

Barten explained that a form I-94, which Akpan referenced on page 2 of exhibit 15, App. p. 93, is the document that demonstrates lawful entry into the U.S. App. p. 222 l. 23 – p. 223 l. 10. Akpan may have needed the form I-94, unless Guzman qualified under a different method. App. p. 223 l. 22 – p. 224 l. 9.

Barten identified exhibit 17, App. pp. 96-97, as a typed version of form I-130. App. p. 225 ll. 3-6. She testified that exhibit 17 is incomplete; for example, items A-1, A-2, and A-3 are not completed. App. p. 225 ll. 7-21. Barten testified that she prepared exhibit 31, App. pp. 159-160, which is a highlighted version of exhibit 17. App. p. 225 l. 22 – p. 226 l. 8.

Barten identified exhibit 20, App. pp. 106-111, as a typed version of form I-485. App. p. 226 ll. 9-15. She testified that exhibit 20 is incomplete; for example, it does not provide the I-94 number. App. p. 226 ll. 16-22. She testified that she prepared exhibit 32, App. pp. 161-166, which is a highlighted version of exhibit 20. App. p. 226 l. 23 – p. 227 l. 6.

Barten identified exhibit 22, App. pp. 124-129, as a typed version of form I-864. App. p. 227 ll. 13-18. She testified that exhibit 22 is incomplete; for example, it does not include the even-numbered pages. App. p. 227 l. 23 – p. 228 l. 10. She testified that she prepared exhibit 33, App. pp. 167-172, which is a highlighted version of exhibit 22; the colored

areas show missing information or typographical errors. App. p. 228 l. 16 – p. 229 l. 4.

Based on Akpan's emails and attachments, exhibits 4, 5, 14, and 15, App. pp. 70, 71-72, 91, & 92-93; based on Akpan's work product, exhibits 3, 17, 20, and 22, App. pp. 68-69, 96-97, 106-111, & 124-129; and based on Guzman's criminal case documents, exhibits 9, 10, and 11, App. pp. 76-88, Barten had an opinion about what percentage of the total project for obtaining permanent resident status for Guzman that Akpan had completed. App. p. 229 ll. 5-16.

Barten's opinion was that the case was at its initial stages; Akpan had completed 10 to 15 percent of the case; Villatoro and Guzman had the list of necessary documents; they had started completing the necessary forms; Akpan had prepared typed versions of the forms; the typed forms were not complete; and Akpan had reviewed the criminal case documents to see if they met the petty offense exception. App. p. 229 l. 17 – p. 230 l. 7.

Rosa Villatoro Testimony

Villatoro is a high school graduate. App. p. 244 ll. 19-20. Spanish is her first language. App. p. 245 ll. 1-2. She was born in El Salvador. App. p.

245 ll. 3-4. She is married to Guzman. App. p. 245 ll. 7-8. She married Guzman in 2004. App. p. 272 l. 25 – p. 273 l. 2.

Villatoro is a bookkeeper/accountant; she prepares income tax returns. App. p. 245 ll. 15-18. She used to work for a CPA, Edward Apenteng; he died in February 2017. App. p. 263 l. 19 – p. 264 l. 3. She now works for herself preparing income tax returns. App. p. 264 ll. 4-8. She has been registered with the IRS as a tax preparer for two years. App. p. 264 ll. 9-17.

Villatoro met Akpan when she worked for Apenteng; they did his taxes. App. p. 245 l. 19 – p. 246 l. 1.

In 2016, Villatoro hired Akpan to apply for Guzman's green card. App. p. 246 ll. 5-9. Akpan and she agreed that his fee would be $4000. App. p. 246 ll. 10-12. Akpan and she did not discuss whether the fee was refundable. App. p. 246 ll. 22-24. Exhibit 1, App. pp. 64-66, is their written fee agreement. App. p. 246 l. 25 – p. 247 l. 6 & App. p. 247 ll. 7-10.

Villatoro described exhibit 3, App. pp. 68-69, as a form that identified Akpan as their lawyer. App. p. 247 ll. 11-21. She thought that exhibit 3, part 2, item 1 meant that Akpan had graduated from law school in Iowa. App. p. 248 ll. 5-16.

As of February 23, 2016, Villatoro thought Akpan was licensed to practice law in Texas. App. p. 248 ll. 17-20. She did not think that Akpan was an Iowa lawyer. App. p. 248 ll. 21-24. She learned that Akpan was an Iowa lawyer when she filed a complaint with the Texas Bar. App. p. 248 l. 25 – p. 249 l. 4.

Villatoro testified that Guzman had a criminal record in Texas because he had changed price labels; she told Akpan about this because she wanted to know if it would affect Guzman's green card. App. p. 267 l. 23 – p. 268 l. 15. Akpan knew that Guzman was on community supervision through the Harris County criminal court. App. p. 250 l. 20 – p. 251 l. 2. She obtained Guzman's court documents, exhibits 9, 10, and 11,[5] App. pp. 76-88, when Akpan requested them. App. p. 251 ll. 3-10.

Villatoro testified that Akpan told her that Guzman's case was a misdemeanor, and it would not affect his immigration case; she does not remember when Akpan told her that. App. p. 251 ll. 11-19.

Villatoro testified that she never saw any of the typed documents that Akpan prepared. App. p. 274 ll. 19-21.

[5] The District Clerk of Harris County, Texas, certified Exhibits 9, 10, and 11 as a "true and correct copy of the original record" on November 21, 2016.

Villatoro testified that at the end of 2016, she decided to stop the adjustment of status proceeding because of Guzman's infidelity. App. p. 252 ll. 12-19. She told Akpan of this decision in a phone call; she told Akpan what was going on and that she wanted a divorce. App. p. 252 l. 20 – p. 253 l. 2 & App. p. 271 ll. 8-14.

On April 26, 2017, Villatoro sent Akpan an email asking for an update on the divorce. App. p. 254 ll. 11-15. She wrote exhibit 26, App. p. 155, to find out why the divorce was taking so long; she wanted to get it done as soon as possible as possible. App. p. 255 l. 13 – p. 256 l. 7.

Villatoro testified that on May 13, 2017, Akpan and she met for about one hour at his house to discuss the divorce situation. App. p. 256 l. 19 – p. 257 l. 6.

Villatoro had told Akpan in a written message that he should keep what he earned, "whatever is appropriate for whatever he did," and refund the rest; she did not tell Akpan what he should refund. App. p. 269 ll. 4-14. Akpan texted her and stated he did not understand why she was asking for a refund. App. p. 258 ll. 19-24.

Villatoro testified that exhibit 27, App. p. 156, is copy of three text messages. App. p. 258 l. 25 – p. 259 l. 9. The three texts are from June 26,

2017; the top text is Villatoro's; the middle text is Akpan's; the bottom text is Villatoro's. App. p. 259 l. 10 – p. 260 l. 3.

Villatoro testified that exhibit 28, App. p. 157, is her July 21, 2017, letter to Akpan asking that he return the money. App. p. 260 ll. 4-12.

Villatoro testified that exhibit 29, App. p. 158, is Akpan's July 28 email reply. App. p. 260 ll. 13-19. She did not know what Akpan was talking about in exhibit 29. App. p. 276 ll. 8-19.

Villatoro testified that she filed a complaint against Akpan in September 2017 with the Texas Lawyer Regulation Office; the Texas authorities referred her to Iowa authorities because Akpan is not licensed in Texas. App. p. 260 l. 24 – p. 261 l. 10.

Villatoro testified that Akpan has never refunded any portion of the $4000 to her. App. p. 261 ll. 11-13. Akpan has never provided her with an itemization or accounting of his services. App. p. 261 ll. 14-16.

Villatoro testified that she sued Akpan for the $4000 and the trial is November 6 in Houston, Texas. App. p. 261 l. 22 – p. 262 l. 3. She sued Akpan because they disagree on how much he earned. App. p. 269 ll. 15-18. She believed that she should receive some, "total or partial," refund. App. p. 270 ll. 9-11.

Villatoro testified that Guzman got his green card in July 2019. App. p. 265 ll. 16-17 & App. p. 277 ll. 3-5. His green card is without conditions. App. p. 281 ll. 2-13. Guzman had someone help him do this. App. p. 265 ll. 18-21.

David Akpan Testimony.

Akpan testified he is from Nigeria, and he came to the U.S. in 1990. App. p. 282 ll. 10-17. He became a U.S. citizen in 1994 through marriage. App. p. 284 ll. 16-21. He is age 50. App. p. 298 ll. 19-20.

He attended Thurgood Marshall School of Law of Texas Southern University in Houston. App. p. 285 ll. 2-7. He graduated from law school in 2003. App. p. 286 ll. 2-6.

Akpan has known Villatoro since 2009 because she worked in his "tax guy's office;" she hired him for an immigration matter. App. p. 289 l. 20 – p. 290 l. 5. Exhibit 1, App. pp. 64-66, is the contract they signed. App. p. 293 ll. 9-14.

Akpan wrote exhibit 1. App. p. 302 ll. 23-25. He agreed that exhibit 1 did not contain the word "non-refundable;" the fee agreement did not state that any portion of the fee was non-refundable. App. p. 303 ll. 1-7. He agreed that exhibit 1 did not state any times or events at which he would be entitled to a portion of the fee. App. p. 304 ll. 10-13. He agreed

that exhibit 1 did not state that any portion of the fee was to compensate him for the loss of the opportunity to accept employment from other clients. App. p. 305 ll. 10-14. He agreed that paragraph 14 of exhibit 1 allowed Villatoro to discharge him at any time. App. p. 306 ll. 1-5. He agreed that paragraph 15 of exhibit 1 stated that the writing contained the entire agreement of the parties. App. p. 306 ll. 6-10. Although the fee agreement said that he would charge for phone calls, he did not charge her for them. App. p. 337 l. 24 – p. 338 l. 11. The expenses identified in paragraph 9 of exhibit 1 did not apply to a flat fee agreement. App. p. 354 ll. 5-9. He agreed that paragraph 12 of exhibit 1 did not apply to a flat fee agreement either. App. p. 339 ll. 9-11.

Akpan claimed to have worked about 10 hours on Villatoro's case before she signed the February 23 agreement. App. p. 294 ll. 13-21.

Through 2015, Akpan estimated that he had handled at least 50 permanent residence adjustment cases. App. p. 300 ll. 22-24. Most of these were family-based, involving a married couple. App. p. 300 l. 25 – p. 301 l. 8. Through 2015, he estimated that he had handled at least 10 permanent residence adjustment cases in which the immigrant spouse had a deferred adjudication for a class A misdemeanor. App. p. 301 ll. 9-14.

Akpan estimated that he had worked 40 to 50 hours on the immigration case when Villatoro told him to stop. App. p. 295 ll. 7-19. His estimate of 40 to 50 hours included travel time, but he did not get reimbursed for mileage. App. p. 292 ll. 18-25 & App. p. 297 ll. 1-2. He testified that he made 10 trips to Villatoro's office; round trip time for each was two hours. App. p. 306 ll. 11-18. According to Akpan, each trip to her office resulted in a fee of $300. App. p. 355 ll. 2-8. He did not have specific dates for these trips. App. p. 307 ll. 18-23. Most of his 40 to 50 hours was travel to Villatoro's office to pick forms that she did not have ready and to research anew whether he was using the current forms. App. p. 334 ll. 9-19. He did not advise her that he would charge for each trip to her office. App. p. 356 ll. 1-6. He did not want to use the mails because things get lost in the mail. App. p. 335 l. 25 – p. 336 l. 4. He kept no records. App. p. 307 l. 24 – p. 308 l. 3. He kept no record of specific time or hours that he worked on Villatoro's case. App. p. 310 ll. 9-12. He did not have a timekeeping system. App. p. 353 ll. 7-10.

Akpan did not know how many private pay clients he had in 2016. App. p. 309 l. 16 – p. 310 l. 8.

In 2016, the various immigration agencies had web sites from which the permanent residence status forms could be downloaded. App. p. 302 ll. 12-22.

In 2016, Akpan did not have a client trust account. App. p. 311 ll. 17-19. He explained that he did not have a trust account because 1) he did not have many clients; 2) he had bills to pay; and 3) some clients did not pay in advance. App. p. 349 l. 5 – p. 350 l. 23. He testified that he had never put money into the trust account. App. p. 352 ll. 9-15.

Akpan deposited exhibit 2, App. p. 67, into his business/operating account at Cadence Bank on February 25, 2016. App. p. 311 l. 20 – p. 312 l. 1. He testified that by February 25 he had: 1) met with Villatoro; 2) described the immigration process to her; 3) given her a copy of the "initial evidence" document; and 4) researched the effect of Guzman's criminal case. App. p. 312 ll. 2-19 & App. p. 332 ll. 10-20. He used a hornbook for his research in Villatoro's case. App. p. 330 ll. 14-24. He could not remember the name or author of the hornbook that he used. App. p. 331 ll. 6-15. In addition to the hornbook, he would have used the online "Desk book" from the Executive Office of Immigration Review. App. p. 333 ll. 11-18. Villatoro obtained Guzman's criminal records when he requested them. App. p. 357 l. 24 – p. 358 l. 2.

Akpan deposited exhibit 6, App. p. 73, into his business/operating account on April 4, 2016. App. p. 312 l. 20 – p. 313 l. 1. He testified that by April 4 he had provided these additional services: 1) met with Villatoro in March about the documents that needed to be completed; 2) discussed with her the changes made to the forms and necessary updates; and 3) worked with her on completing some forms. App. p. 313 l. 2 – p. 314 l. 1.

Akpan deposited exhibit 7, App. p. 74, into his business/operating account at Cadence Bank on May 9, 2016. App. p. 314 ll. 2-8. He testified that by May 9 he had provided this additional service: told her that he needed to see Guzman's final criminal record, including the final record of release from Harris County, exhibit 11, App. pp. 87-88. App. p. 314 ll. 9-24. Exhibit 11 is dated July 25, 2016.

Akpan deposited exhibit 8, App. p. 75, into his business/operating account at Cadence Bank on June 6, 2016. App. p. 314 l. 25 – p. 315 l. 6. He testified that by June 6 he had provided these additional services: 1) met with Villatoro again, date unknown, to go over the forms; 2) asked her questions about the affidavit of support and the documents needed to complete this affidavit; and 3) performed research to make sure the forms he was using were current. App. p. 315 l. 7 – p. 317 l. 2.

Akpan deposited exhibit 12, App. p. 89, into his business/operating account at Cadence Bank on August 31, 2016. App. p. 317 ll. 3-9. He testified that by August 31 he had provided this additional service: met with and interviewed Guzman in July. App. p. 317 ll. 10-24. Guzman's crime was one of moral turpitude, but it fell within the petty crime exception. App. p. 291 ll. 8-22.

Akpan deposited exhibit 13, App. p. 90, into his business/operating account at Cadence Bank on September 27, 2016. App. p. 317 l. 25 – p. 318 l. 69. He testified that by September 27 he had provided this additional service: continued his efforts to get documents, forms and attachments, from Villatoro. App. p. 318 l. 7 – p. 319 l. 5.

Akpan did not request records from any governmental agency. App. p. 357 ll. 20-23.

While representing Villatoro, Akpan had other pending adjustment of status cases so his research on forms and law changes would have benefited other clients too. App. p. 358 ll. 14-21. He did not know what forms changed while he represented Villatoro. App. p. 358 l. 22 – p. 359 l. 1.

Akpan agreed that all the steps outlined by Barten in exhibit 36, part (e), App. pp. 174-178, are pertinent to a one-step family adjustment

case. App. p. 360 ll. 8-25. He cannot say that any item in Barten's section (e) would never be included in the one-step adjustment process. App. p. 361 ll. 10-18.

Akpan believed that he had earned the $4000 "long before" Villatoro made her last payment. App. p. 329 ll. 12-16. He believed that he earned the $4000 based on the hours involved times his hourly rate of $125 or $150. App. p. 330 ll. 3-10.

Akpan prepared exhibit 17, App. pp. 96-97, that is a typed version of exhibit 16, App. pp. 94-95. App. p. 320 l. 22 – p. 321 l. 1. He prepared exhibit 20, App. pp. 106-111, that is a typed version of exhibit 19, App. pp. 100-105. App. p. 321 l. 21 – p. 322 l. 3. He prepared exhibit 22, App. pp. 124-129, that is a typed version of exhibit 21, App. pp. 112-123. App. p. 323 ll. 4-15.

Exhibits 16, 19, and 21, App. pp. 94-95, 100-105, & 112-123, are the only immigration forms that Akpan received from Villatoro. App. p. 323 l. 16 – p. 324 l. 1. Villatoro handwrote exhibits 16, 19, and 21, but she did not do so in his presence. App. p. 362 ll. 2-9. The only documents that he received from those identified in exhibits 5 and 15, App. pp. 71-72 & 92-93, are exhibits 9, 10, and 11, App. pp. 76-88. App. p. 324 ll. 2-11. He never filed any immigration forms because he never received all the necessary

information. App. p. 324 ll. 12-16. During the 10 meetings about which he testified, Villatoro and he did not finalize any forms. App. p. 362 l. 16 – p. 363 l. 6.

Akpan met with Villatoro at his residence on Saturday, May 13, 2017. App. p. 325 ll. 1-7. He stated that he did not say "no" to representing her in the divorce until after he had given her the two referrals; after that she called and asked him to handle the divorce; then he said no. App. p. 345 ll. 2-19.

Akpan received and sent text messages with Villatoro on June 26, 2017, exhibit 27, App. p. 156, but he believes part of these messages is missing. App. p. 325 ll. 8-24.

Akpan admitted that he sent exhibit 29, App. p. 158, to Villatoro. App. p. 326 ll. 8-11. Exhibit 29 is a text, not an email. App. p. 328 ll. 4-12.

Akpan admitted that he never provided an accounting to Villatoro of the $4000. App. p. 326 ll. 12-15. He admitted that he never provided an itemization to her of the $4000. App. p. 327 ll. 13-16. He admitted that he never refunded any of the $4000 to her. App. p. 327 ll. 19-21. He agreed that it would have been prudent to send her a letter explaining what he had done to earn the fee, but he never did so. App. p. 342 ll. 4-18. He did not have any documentation to support $4000 worth of work. App. p. 343

ll. 13-15 & App. p. 344 ll. 3-7. He refused to answer or did not know what percentage of the project he had completed before Villatoro told him to stop. App. p. 346 l. 21 – p. 348 l. 11.

Akpan testified that he had had other clients stop their immigration case, and he had not kept the entire fee; he would explain to the client what work he had done, and if there was money left, he would refund it to the client. App. p. 340 l. 17 – p. 341 l. 14.

Akpan estimated the going rate for this type of case in his geographic area would be $7000 to $9000. App. p. 351 ll. 9-16.

Applicable Disciplinary Rules

Texas Disciplinary Rule of Professional Conduct 1.04 - Fees

In its Report, the Commission concluded that Akpan violated Texas Disciplinary Rules of Professional Conduct 1.04(a) and (b), Fees.

Rule 1.04(a) states: "A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."

Rule 1.04(b) states:

Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3) the fee customarily charged in the locality for similar legal services;

4) the amount involved and the results obtained;

5) the time limitations imposed by the client or by the circumstances;

6) the nature and length of the professional relationship with the client;

7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Comment 8 to the Rule states:

Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is overreaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated. For example, a fee arrangement negotiated at arm's length with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior

> experience in such matters should be more carefully scrutinized for overreaching. While the fact that a client was at a marked disadvantage in bargaining with a lawyer over fees will not make a fee unconscionable, application of the disciplinary test may require some consideration of the personal circumstances of the individuals involved.

Texas Disciplinary Rule of Professional Conduct 1.14 – Safekeeping Property

In its Report, the Commission concluded that Akpan violated Texas Disciplinary Rules of Professional Conduct 1.14(a) and (c), Safekeeping Property.

Rule 1.14(a) states, in part:

> A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in the lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. …. Complete records of such accounts funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Rule 1.14(c) states:

> When in the course of representation a lawyer is in possession of funds or other property in which both the

> lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separated by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

Comment 1 to the Rule states, in part: "A lawyer should hold property of others with the care required of a professional fiduciary. …."

Comment 2 to the Rule states, in part:

> When a lawyer receives from a client monies that constitute a prepayment of a fee and that belongs to the client until the services are rendered, the lawyer should handle the fund in accordance with paragraph (c). After advising the client that the service has been rendered and the fee earned, and in the absence of a dispute, the lawyer may withdraw the fund from the separate account. ….

Texas Disciplinary Rule of Professional Conduct 1.15 – Terminating Representation

In its Report, the Commission concluded that Akpan violated Texas Disciplinary Rule of Professional Conduct 1.15(d), Terminating Representation.

Rule 1.15(d) states, in part: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a

client's interests, such as . . . refunding any advance payments of fee that has not been earned. ...."

Comment 9 to the Rule states, in part: "In every instance of withdrawal and even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. See paragraph (d). ....".

Argument

Error Preservation and Scope and Standard of Appellate Review

The Board agrees that Akpan preserved the issues presented for appellate review. The Board agrees with Akpan that the scope and standard of appellate review is de novo.

I. The Grievance Commission did not err in finding that David E. Akpan violated Texas Rules of Professional Conduct 1.04(a) and (b), 1.14(a) and (c), and 1.15(d)

A. Akpan violated Texas Disciplinary Rules of Professional Conduct 1.04(a) and (b)

In violation of Rule 1.04(a), Akpan charged and collected an unconscionable fee, a fee that a competent Texas lawyer could not reasonably believe to be reasonable. Akpan kept all Villatoro's $4000 flat

fee when he did, at most, 15 percent of the work required to apply for a green card for Guzman. While the $4000 fee may have been a reasonable fee in February 2016, it became unconscionable when Villatoro canceled the project long before it was anywhere near complete.

Rule 1.04(b) identifies eight factors the Court "should consider when determining the reasonableness of a fee." The Court should apply these factors in determining whether Akpan's fee is unconscionable. Applying these factors will help the Court determine whether Akpan "earned" $4000 in his representation of Villatoro and Guzman.

The first factor asks the Court to consider three elements:

1) the time and labor required – Akpan testified that he had done about 50 of these family-based, one-step adjustment of status cases; the process requires the completion of approximately six to eight forms with a number of documents attached to each; Akpan's approach to the forms was to have Villatoro complete them by hand to the extent she could; his job was to check her work and to answer the more arcane questions presented on the forms; its fell primarily to Villatoro to find and assemble the attachments; while Akpan painted a scary picture of

keeping up with governmental forms and requirements, all of these materials were maintained online at the various agency websites; while Guzman presented a wrinkle with his pending criminal case, Akpan testified that he had considered the effect of a Class A misdemeanor ten times before; he completed the research on the effect of the criminal case by consulting a hornbook and a governmental web site; all of this adds up to a minimal commitment of time and labor by Akpan.

2) the novelty and difficulty of the questions involved – With Akpan's experience with this type of case, the Villatoro/Guzman case did not present novel or difficult questions to Akpan.

3) the skill required to perform the service properly – Akpan's experience with this type of case established that he possessed ample skill to perform the service Villatoro hired him to perform.

Akpan testified that exhibit 1, App. pp. 64-66, did not address the second factor at all. There is no evidence to support the notion that his acceptance of the Villatoro/Guzman case precluded other employment.

There is no reason to believe that he could not have represented other clients with immigration law issues contemporaneously with Villatoro and Guzman.

The third factor is the fee customarily charged for the service. Akpan estimated that the customary fee in Texas for this one-step case would be $7000 to $9000. The $4000 fee was not unconscionable in February 2016. His retention of 100 percent of the fee, when he completed only 10 to 15 percent of the aborted project, is unconscionable.

The fourth factor is the amount involved and the results obtained. There is not an easy calculation to determine the amount involved. Villatoro wanted Guzman to obtain permanent residence status in the U.S., in part, for the benefit of their children. While permanent residence is a valuable status, it is not easily measured in terms of money. It is readily apparent that Akpan did not obtain or achieve any measurable results for Villatoro.

The record establishes that Villatoro did not impose any critical time limitations on Akpan. Under the facts of this case, the fifth factor does not support any argument by Akpan that he was under the gun to

finish this project or that he had to abandon other work to keep up with Villatoro's demands.

The sixth factor is also not one that helps Akpan argue that he earned $4000. He had never represented either Villatoro or Guzman.

Akpan can make no claim under the seventh factor that his experience, reputation, or ability was "special" to the point of convincingly arguing that he deserved $4000 for what he accomplished for Villatoro.

The eighth factor is of little help to Akpan either. His fee was fixed, and he had been paid, although he had not safeguarded the funds in a trust account. His fee for this service was not contingent or uncertain in any way.

Comment 8 to Rule 1.04 identifies two additional factors that play an important role in determining whether a fee is unconscionable, both of which are present here. The first factor is Akpan's "overreaching" of Villatoro, "who was unusually susceptible to such overreaching." As explained in the Comment, this was not "a fee arrangement negotiated at arm's length with an experienced business client …." Rather, it was "a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters …." The second factor is Akpan's

"failure … to give at the outset a clear and accurate explanation of how a fee was to be calculated." Akpan did not explain to Villatoro that he believed he had "earned" $1500 before she even signed the fee agreement and that he was "earning" $300 each time he came to her office for no recognizable purpose other than to pick up her next payment. Akpan could not bill Villatoro for consultation hours completed before signing exhibit 1. The contract, which specifically recited that it encompassed the entire agreement of the parties, made no provision for such fees.

Paragraph 15 of exhibit 1 provided that the two-page contract is the "entire" agreement; "No other agreement, statement, or promise … will be binding on the parties." The Court should reject Akpan's attempt to amend or modify the agreement with parol evidence.

Akpan wrote a flat fee contract; it included no milestones.[6] It did not include an hourly rate for a time-expended milestone. It did not include a percentage-of-work-completed milestone. It did not include a completion-of-certain-forms milestone. Akpan could bill one time – when

[6] Milestones are identified events in which the attorney's "interest in portions of the fee becomes fixed, such that [the attorney] may and must withdraw a corresponding amount of fees from the trust account. (footnote omitted)." The Forgotten Flat Fee: Whose Money Is It and Where Should It Be Deposited?, 1 Fla. Coastal L. J. 293, 356 (1999).

he submitted the green card application paperwork to USCIS. The Court should reject Akpan's attempt to add an hourly "milestone" to a fee agreement that is totally silent on that subject.

In a flat fee contract without milestones, travel time should not be billed. Travel time under exhibit 1 is part of overhead. Villatoro did not agree to pay Akpan on an hourly basis for anything, including his travel time. She agreed to pay him $4000 for a completed green card application. She did not agree to pay him for driving across Houston numerous times. Akpan's fee agreement established one payday, not several interim paydays; his payday was the day that he submitted the final green card application package to USCIS. His retention of the entire flat fee, $4000, long after Villatoro aborted the project is unconscionable.

The Court should reject Akpan's claim that he had "earned" $1500 before Villatoro had signed exhibit 1, or that he had earned more than $4000 based on an undisclosed hourly-rate milestone. Had Villatoro never signed exhibit 1, he would have had no basis to collect $1500 from her. Had Villatoro not canceled the green card project, Akpan would not have been able to collect more than $4000 from her for completing the project.

In *Comm'n for Lawyer Discipline v. Eisenman*, 981 S.W.2d 737, 741 (Tex. App. 1998), the Court of Appeals wrote that the Rule 1.04(a) prohibition on charging or collecting an unconscionable fee is "very broad." Under a "very broad" definition of what an unconscionable fee is, Akpan's charging and collecting $4000 for what he did for Villatoro and Guzman is unconscionable.

In *Eureste v. Comm'n for Lawyer Discipline*, 76 S.W.3d 184 (Tex. App. 2002), the Court of Appeals, in concluding that Bernardo Eureste violated Rule 1.04(a), noted that he "did not account for actual time spent …." *Id.* at 189. Likewise, Akpan kept no contemporaneous record of the time allegedly spent on representing Villatoro and Guzman. The Court noted the applicability of Rule 1.04, Comment 8 to Eureste's overreaching in his representation of uneducated and unsophisticated clients. *Id.* at 197. Similarly, Akpan engaged in overreaching in retaining all Villatoro's advance fee payment.

Akpan's fee agreement is not ambiguous, and the Court should enforce it as written, i.e., without interim payment milestones. A "conscionable" and reasonable fee for Akpan under his agreement is $400 to $600.

B. Akpan violated Texas Disciplinary Rules of Professional Conduct 1.14(a) and (c)

Akpan violated Rule 1.14(a) by not "safekeeping" any of Villatoro's payments separate from his own property in a Texas trust account. He deposited all Villatoro payments in his business account.

Rule 1.14(c) states when a lawyer and another person, such as Villatoro, claim an interest in the same funds, the funds are to be kept separate until there is an accounting and severance of their interest.

Akpan violated Rule 1.14(c) when he learned, by at least June 26, 2017, exhibit 27, App. p. 156, that Villatoro and he each claimed an interest in the $4000 flat fee. At that point, Akpan had a duty to keep that money separate from his own property "until there is an accounting and severance of their interest" and "until the dispute is resolved;" he never did so.

Comment 1 to Rule 1.14 required Akpan to act with the care of a professional fiduciary; his commingling of Villatoro's fee payments in his business checking account fell substantially below that standard.

Comment 2 to Texas Disciplinary Rule of Professional Conduct 1.14 notes that, in accordance with Rule 1.14(c), the lawyer must hold "a prepayment of a fee" separate from the lawyer's money "until the

services are rendered." The Comment continues, "After advising the client that the service has been rendered and the fee earned … the lawyer may withdraw the fund from the separate account." In Akpan's flat fee agreement with no identified milestones, Akpan's "service" would not have been "rendered" until he had submitted the green card paperwork to USCIS. Until that moment, Villatoro's $4000 needed to be in the trust account.

In *Archer v. State Bar of Texas*, 548 S.W.2d 71, 73 (Tex. Civ. App. 1977), the Court of Civil Appeals concluded that a violation of the trust account rules did not require the actions of A. R. Archer, Jr. to be "fraudulent, culpable, or willful." The Court should conclude that Akpan violated Rule 1.14.

In *Wade v. Comm'n for Lawyer Discipline*, 961 S.W.2d 366, 369-70 (Tex. App. 1997), the Court of Appeals concluded that William Wade violated Rule 1.14(c) when he failed to "safekeep" the disputed portion of a contingent fee in a trust account until he and his clients resolved the dispute. *Id.* at 375. Akpan has never segregated the disputed funds in a Texas trust account. Villatoro asked for an accounting, and Akpan never provided one to her.

In *Fry v. Comm'n for Lawyer Discipline*, 979 S.W.2d 331, 335 (Tex. App. 1998), the Court of Appeals concluded that Gerald Fry violated Rule 1.14(a)-(c) when he withdrew money from the trust account after he knew that his client, Ervin McLeggan, disputed the ownership of the funds Fry held from the sale of McLeggan's real estate. The Court should conclude that Akpan had a duty to deposit the disputed funds into his trust account until Villatoro and he resolved their dispute.

In *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 679-80 (Tex. App. 1998), the Court of Appeals cited the 1977 Archer decision in giving "little or no weight to the fact that [Charles Brown's] commingling violation was technical, ignorant, or inadvertent …." The Court should not excuse Akpan's failure to safekeep Villatoro's funds as a technical, ignorant, or inadvertent violation of Rule 1.14.

In *Cluck v. Comm'n for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App. 2007), the Court of Appeals concluded that Tracy Cluck violated Rule 1.14(a) when he refused to refund any portion of the $20,000 paid by a divorce client, Patricia Smith, after she discharged him. *Id.* at 738. The Court rejected Cluck's argument that the $20,000 "was a nonrefundable retainer that was earned at the time it was received …." *Id.* at 739. The Court recognized the difference between a "retainer" and an "advance

fee." *Id.* at 739-40. Citing Opinion 431 of the Texas Committee on Professional Ethics (1986),[7] the Court noted "that a true retainer 'is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment.' (citation omitted)." *Id.* Cluck's contract did not state that the initial $15,000 payment was to compensate him for his availability or lost opportunities; rather the contract stated that his hourly rate would be billed against it. *Id.* at 740. The Court reminded Texas lawyers: "Advance fee payments must be held in a trust account until they are earned. (citation omitted)." *Id.*

In September 2011, the Professional Ethics Committee for the State Bar of Texas issued it Opinion No. 611, 74 Tex. B. J. 944 (2011); the Committee addressed this question: "Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to include in an employment contract an agreement that the amount initially paid by a client with respect to a matter is a 'non-refundable retainer' that includes payment for all the lawyer's services on the matter up to the time of trial?" *Id.* at 944.

[7] 1986 WL 69161.

The Committee referenced Rules 1.04(a) and (b), and in particular, Rule 1.04(b)(2): "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer …." *Id.*

The Committee also referenced rule 1.14 and its requirement that "funds belonging in whole or in part to the client … when held by a lawyer be kept in a 'trust' or 'escrow' account separate from the lawyer's operating account." *Id.*

Citing two prior Committee opinions, 391 from February 1978[8] and 431 from June 1986, and the 2007 *Cluck* decision, the Committee provided this definition of a non-refundable retainer: it "is not a payment for services but is rather a payment to secure a lawyer's services and to compensate him for the loss of opportunities for other employment. (citation omitted)." *Id.*

The Committee concluded:

> A legal fee relating to future services is a non-refundable retainer at the time received only if the fee in its entirety is a reasonable fee to secure the availability of a lawyer's future services and compensate the lawyer for the preclusion of other employment that results from the acceptance of employment for the client. A non-refundable retainer

[8] 1978 WL 14284.

> meeting this standard and agreed to by the client is earned at the time it is received and may be deposited in the lawyer's operating account. However, any payment for services not yet completed does not meet the strict requirement for a non-refundable retainer … and must be deposited in the lawyer's trust or escrow account.

Id. at 945.

The Court should conclude that Akpan's fee agreement clearly established Villatoro's $4000 as an advance fee payment; it was not a "true retainer," and Akpan needed to deposit these payments into his trust account. The $4000 needed to remain in trust until he completed Guzman's green card project.

Amazingly, Akpan testified that he had never deposited client money into a trust account. His failure to deposit Villatoro's payments violated Rule 1.14(a).

C. Akpan violated Texas Disciplinary Rule of Professional Conduct 1.15(d)

After Villatoro ended the green card application project for her husband in late 2016, Akpan failed to take reasonably practicable steps to protect her interests in violation of Rule 1.15(d). At a minimum, since he had a flat fee arrangement with no milestones, he needed to take the reasonably practicable step of providing her with an accounting for the

money she had paid him. He failed to account for, or refund, any portion of the $4000.

In *Bellino v. Comm'n for Lawyer Discipline*, 124 S.W.3d 380, 387-88 (Tex. App. 2003), the Court of Appeals concluded that Joseph Bellino III violated Rule 1.15(d) when he failed to refund any of the $6775 a restaurant owner, Linda Lok, had paid him to obtain green cards for three of her cooks; after four years he still had completed the project.

While Villatoro canceled the green card project, the *Bellino* court's conclusion fits these facts too; the Court should conclude that Akpan violated Rule 1.15(d) when he failed to refund any of Villatoro's $4000 advance fee payment.

II. The Grievance Commission did not err in permitting Rosa Villatoro to testify by two-way video conference

On May 9, 2019, the Board filed a motion that requested "an order allowing the Board's witnesses to testify by telephone at the hearing in this matter." Akpan did not respond to this motion. On May 28, 2019, Pawlosky granted the Board's motion and "allowed [Villatoro] to testify by telephone at the hearing in this matter."

Subsequently, Pawlosky ordered the Board to present Villatoro's testimony by a two-way video and audio connection.

In *Iowa State Bar Ass'n v. Kraschel,* 148 N.W.2d 621 (Iowa 1967), the Court described the nature of disciplinary proceedings,

> "A disciplinary proceeding is basically an inquiry into the fitness of a member of the bar, in the light of his conduct, to continue in the practice of the law." (citation omitted). This proceeding is not criminal, but is special, civil in nature, and has been described as like an investigation by the court into the conduct of its officers. (citations omitted).

Id. at 625.

In *Comm. on Prof'l Ethics & Conduct v. Wilson*, 235 N.W.2d 117, 119 (Iowa 1975), the Court reiterated that the practice of law is a privilege, "not a vested right. (citations omitted)."

In *Comm. on Prof'l Ethics & Conduct v. Hurd,* 375 N.W.2d 239 (Iowa 1985), the Court wrote,

> We reject Hurd's argument, as we did in his last appeal, that these are quasi-criminal proceedings entitling him to the unique protections of our criminal procedure. (citation omitted). Rather, a disciplinary proceeding involves inquiring into the fitness of a member of the bar to continue to practice law, a civil investigation by the court into the conduct of its officers. *See Iowa State Bar Association v. Kraschel ...* 148 N.W.2d 621, 625 (1967).

Id. at 246.

In *Comm. on Prof'l Ethics & Conduct v. Bromwell,* 389 N.W.2d 854 (Iowa 1986), the Court rejected James Bromwell's argument that the

Commission's Rules did "not provide him the same protections afforded criminal defendants under the Iowa Rules of Evidence. (citation omitted)." *Id.* at 857. The Court concluded,

> The short answer to his challenge is that a disciplinary proceeding "is not criminal, but is special, civil in nature, and has been described as ... an investigation by the court into the conduct of its officers." (citations omitted). The evidentiary restrictions urged by Bromwell might frustrate the goals of the disciplinary inquiry: to determine a lawyer's fitness to practice law and appropriate disciplinary action.

Id.

Akpan cites *In re Ruffalo,* 390 U. S. 544, 550 (1968)[9] in support of his argument that the Commission should not have allowed the presentation of Villatoro's testimony by a two-way video and audio connection. The Court has considered *Ruffalo* several times. In *Comm. on Prof'l Ethics & Conduct v. Behnke,* 276 N.W.2d 838 (Iowa 1979), the Court wrote, "We believe the relevant teaching of *Ruffalo* is not a label for disciplinary proceedings but a recognition that the potentially serious consequences for the attorney invoke substantial procedural due process protections." *Id.* at 842. In *Attorney Disciplinary Bd. v. Taylor,* 887 N.W.2d 369 (Iowa 2016), the Court cited *Ruffalo* in a footnote, "We acknowledge

[9] 88 S.Ct. 1222, 20 L.Ed.2d 117.

the constitutional guarantee of procedural due process requires an attorney charged with an ethical violation in an attorney disciplinary proceeding be given notice of the violation with which he or she is charged sufficient to afford a meaningful opportunity to respond. (citation omitted)." *Id.* at 377 n. 2.

Akpan cites *Crawford v. Washington,* 541 U.S. 36, 50 (2004),[10] in support of his argument against the video and audio presentation of Villatoro's testimony. In *State v. Williams,* 695 N.W.2d 23 (Iowa 2005), the Court described the *Crawford* decision,

> In *Crawford,* the Supreme Court overruled *Ohio v. Roberts* … and held that when "testimonial" hearsay is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford,* 541 U.S. at 68 …. Thus, out-of-court testimonial evidence is inadmissible unless the declarant is unavailable, and the accused had a prior opportunity for cross-examination. *Id.*

Id. at 29. In *State v. Tompkins,* 859 N.W.2d 631 (Iowa 2015), the Court summarized *Crawford*,

> However, in 2004 the U.S. Supreme Court, in *Crawford,* revised the test for the admission of hearsay statements challenged under the Confrontation Clause. 541 U.S. at 68–69 …. Rather than focusing on indicia of reliability, it stated the inquiry should instead turn on what it identified as the 'principal evil' the Confrontation Clause was intended to

[10] 124 S.Ct. 1354, 158 L.Ed.2d 177.

> protect against: inquisitorial *ex parte* examinations by government officials. *Id.* at 61 …. As held by the Supreme Court, admission of such statements does not turn on notions of reliability. *Id.* at 51 …. Instead, the court held that where such statements are "testimonial," they are admissible in subsequent proceedings only if: (1) the declarant is unavailable and (2) there has been a prior opportunity for cross-examination. *Id.* at 61 ….

Id. at 638–39.

Iowa Rule of Civil Procedure 1.1701(3)(b) states, "A subpoena may be served at any place: (1) Within the state of Iowa; (2) That the court authorizes on motion and for good cause, if a statute so provides." The Commission had no authority to issue a subpoena, to be served in Texas, compelling the attendance of a Texas resident at the final hearing.

Iowa Code § 624.3 states, "In actions cognizable in equity, wherein issues of fact are joined, the court may order the evidence or any part thereof to be taken in the form of depositions, or either party may take depositions as authorized by law, and may in the discretion of the court be granted a continuance for that purpose."

In *In re Estate of Rutter v. Rutter,* 633 N.W.2d 740 (Iowa 2001), the Court addressed the propriety of telephone testimony presented at a hearing on the estate's final report by an estate beneficiary over the objection of another estate beneficiary; the beneficiaries were siblings.

Id. at 744. The executor appealed several issues, one of which was whether the district "court abused its discretion in admitting the telephonic testimony …." *Id.* at 746. Citing Iowa Code § 633.33, the Court concluded this was an equitable proceeding governed by Iowa Code § 624.3. *Id.* at 745-46. The Court identified three situations in which the legislature authorized telephone testimony, but concluded, "There is no rule or statutory provision, however, that would allow witnesses to testify telephonically in equitable proceedings in general. (citation omitted)." *Id.* at 746. The Court continued, "Given this statutory framework, the trial court had no authority to permit Jane Ann to testify by telephone over the objection of the executor. (footnote omitted). Therefore, the court's ruling permitting such testimony was based on an erroneous application of the law and constituted an abuse of discretion. (citation omitted)." *Id.*

In *State v. Rogerson,* 855 N.W.2d 495 (Iowa 2014), the Court applied Sixth Amendment precedent and concluded,

> two-way videoconference testimony should not be substituted for in-person confrontation absent a showing of necessity to further an important public interest. Because the grounds advanced by the State do not reach that level, we

> hold the district court erred in allowing the videoconference testimony.

Id. at 496.

The State had charged Zachariah Rogerson with four counts of serious injury by operating a motor vehicle while intoxicated. *Id.* Over Rogerson's objection that remote testimony would violate his right to be confronted with the witnesses against him, the district court had granted the State's request to allow three out-of-state victims and three state lab analysts to testify by a two-way videoconferencing system. *Id.*

In the context of safeguarding a criminal defendant's Sixth Amendment rights, the Court concluded that it should apply the *Maryland v. Craig* test,[11]

> before permitting a witness to testify via two-way videoconference, the court must make a case-specific determination that the denial of the defendant's confrontation right is necessary to further an important public interest. If the court finds such an interest, it must assure the reliability of the remote testimony. (citation omitted).

Id. at 505.

[11] 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

The Court noted, "Courts vary on whether the fact that a witness resides in a foreign country beyond the state's subpoena power is an adequate justification for remote testimony. Most seem to require some impediment to testifying beyond mere unwillingness to travel." *Id.* at 506.

In reversing the district court's decision to allow two-way teleconferencing, the Court concluded that the State failed to meet the necessity prong of the *Craig* test, "In sum, the State's justifications of mere distance, cost, and efficiency are insufficient to overcome Rogerson's Sixth Amendment rights, and there is no evidence the witnesses are unable to travel." *Id.* at 507.

Good cause existed to receive Villatoro's testimony by a two-way video-audio connection. Through the Board's investigation and discovery in the Commission proceeding, Akpan knew the nature and scope of her testimony. Her testimony at the Commission hearing permitted the Commissioners to observe her demeanor during direct and cross examination and to question her directly.

The Commission established appropriate safeguards for Villatoro's testimony by a two-way video-audio connection. The safeguards that the Commission implemented included: 1) the audio quality had to be

sufficient to understand her; 2) her identity had to be verified and an oath had to be administered; 3) the video quality had to be sufficient to permit her demeanor and credibility to be assessed; 4) no other person could be present who might provide improper assistance to her; and 5) she had to have access to the trial exhibits.

The Court should conclude that Sixth Amendment protections do not apply to attorneys in disciplinary proceedings. The Court should conclude that the safeguards that the Commission implemented for the two-way video audio connection for Villatoro's testimony complied with the Court's due process requirements.

If the Commission erred in receiving Villatoro's testimony, the Court should strike her testimony and review the pleadings, exhibits, and other testimony *de novo*. Alternatively, the Court should remand the case to the Commission with the directive that the parties depose Villatoro in Texas in accordance with Iowa Code section 624.3.

III. The Grievance Commission did not err in assessing Rosa Villatoro's testimony

The Commission relied "almost exclusively" on the exhibits introduced into the record and Akpan's testimony; it relied on Villatoro's testimony "to the extent" that her testimony "coincided" with Akpan's testimony. In effect, the Commission reported that it "relied exclusively on the testimony of [Akpan] to reach the Findings of Fact and Conclusions of Law below." App. pp. 42-43. The Commission fulfilled its obligations under Rule 36.19.

IV. The Grievance Commission's recommended sanction of a 61-day suspension is appropriate

Standard 4.12 of the *Annotated Standards for Imposing Lawyer Sanctions*, (2d ed., Ellyn S. Rosen, ed., 2019), states: "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." *Id.* at 155. The commentary to Standard 4.12 states, in part: "The most common cases under Standard 4.12 involve lawyers who commingle client funds with their own or fail to remit client funds promptly." *Id.* The commentary highlights that "knowledge" is not required: "Lawyers who do not have knowledge that they are dealing

improperly with clients' property may nonetheless face suspension if proven that they should have known they are doing so and the client suffers injury or potential injury." *Id.* at 156.

Akpan's misconduct fits Standard 4.12. At a minimum, he should have known that he had a duty to deposit Villatoro's fee payments into his trust account until he finished and submitted the green card paperwork to USCIS. At a minimum, he should have known that he had not earned $4000 in his representation of Villatoro and Guzman. At a minimum, he should have known that he had a duty to account for the money Villatoro had paid him and to refund the unearned fees to her. At a minimum, he should have known that his failure to do so harmed Villatoro.

Under Standard 7.2, "Suspension can be appropriate when a lawyer charges an unreasonable, improper, or excessive fee. (citations omitted)." *Id.* at 378. The commentary to Standard 7.2 states: "A lawyer's failure to … return unearned fees also falls within the category of cases warranting suspension under Standard 7.2. (citations omitted)." *Id.* at 379.

Akpan's misconduct fits Standard 7.2. Retaining 100 percent of the $4000 fee when he had completed no more than 15 percent of the project

is unconscionable under Texas law. Akpan compounded his misconduct by failing and refusing to account for this money, to itemize the services he had performed, and to refund the unearned balance.

Aggravating Factors

The Court should apply these aggravating factors in determining the sanction it should impose: 1) Akpan's selfish motive; 2) his refusal to acknowledge the wrongful nature of his conduct; 3) Villatoro's vulnerability; and 4) his indifference to making restitution.

Conclusion

Based on the testimony received, the Exhibits admitted in the record, and the aggravating factors identified herein, the Court should conclude that Akpan violated the Rules identified herein and should suspend his law license for at least 61 days.

Iowa Supreme Court
Attorney Disciplinary Board

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Request for Nonoral Submission

The Board requests submission of the case without oral argument.

_____
Wendell J. Harms

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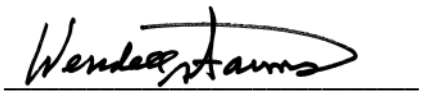

Wendell J. Harms

5/7/2020

Date