

**FILED**

**DEC 17 2013**

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8  
9 Attorneys for Respondent  
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12  
13 **BEFORE THE STATE BAR COURT**  
14 **OF THE STATE OF CALIFORNIA**  
15 **HEARING DEPARTMENT – SAN FRANCISCO**  
16

17 In The Matter of ) Case No. 13-O-10808; 13-O-11921-LMA  
18 DANIEL ANDREW GIBALEVICH, ) **RESPONSE TO NOTICE OF**  
19 Member No. 217116, ) **DISCIPLINARY CHARGES**  
20 A Member of the State Bar. )  
21 \_\_\_\_\_ )  
22

23  
24 TO THE OFFICE OF THE CHIEF TRIAL COUNSEL OF THE STATE BAR OF  
25 CALIFORNIA AND TO ITS COUNSEL OF RECORD:

26 Respondent Daniel A. Gibalevich responds to the Notice of Disciplinary Charges as follows:

27  
28 **Respondent's Preliminary Statement**

Mr. Gibalevich has been an active member of the State Bar of the California State Bar for over 12 years, and he has had no prior disciplinary charges. The pending State Bar proceeding is based on two cases: one that is more than six years old and one that is over four years old. In the Pocasangre case, Mr. Gibalevich filed an answer to the complaint on behalf of his client; the matter

1 was not in default. Mr. Gibalevich had a lawyer present at the case management conference, and  
2 the court referred the case to mediation. The court acted erroneously by entering an order of  
3 default. Mr. Pocosangre disappeared for five years, between the end of 2007, and December, 2012.  
4 Mr. Gibalevich was prevented from completing Mr. Pocosangre's case because Mr. Pocosangre was  
5 not in communication with Mr. Gibalevich, and had left the United States.

6 In the Alvarez matter, Ms. Alvarez claimed that she fell while she was at an Indian Casino.  
7 However, videotape of Ms. Alvarez on the date in question showed that she was typing on her  
8 phone while she was walking, and failed to pay attention; also, there were safety mats in place in  
9 the casino where Ms. Alvarez was walking. Mr. Gibalevich presented Ms. Alvarez' claim to the  
10 Casino, but it was denied. Because Indian Casinos are part of a Sovereign Nation, no lawsuit can be  
11 filed against them in the United States courts. Mr. Gibalevich repeatedly explained to Ms. Alvarez  
12 that the Casino had denied her claim, and that no lawsuit could be filed. He met with Ms. Alvarez  
13 and explained to her why she had not received a recovery in her claim against the Casino. He did  
14 not fail to communicate with Ms. Alvarez.

15 Mr. Gibalevich did not engage in any wilful violation of any of the Rules of Professional  
16 Conduct. He did not wilfully fail to represent his clients and he did not fail to communicate with  
17 them.

18  
19 **Answer to Specific Allegations Contained in the Notice of Disciplinary Charges**

20  
21 1. Respondent admits that he was admitted to the practice of law in the State of  
22 California on December 4, 2001.

23  
24 **COUNT ONE**

25 2. Respondent objects to the allegations in Paragraph 2 of the NDC on the grounds they  
26 are compound and intertwined with legal conclusions. Without waiving this objection, Respondent  
27 admits in part and denies in part the allegations contained therein. Respondent admits that he was  
28 retained by Lazaro Pocosangre in April, 2006, to represent him in a personal injury matter.

1 Respondent denies the allegation in Paragraph 2 that Respondent failed to appear at the case  
2 management conference. Respondent had a lawyer present at the case management conference to  
3 represent Mr. Pocsangre. Respondent denies that he committed acts in willful violation of Rules of  
4 Professional Conduct, rule 3-110(A), and denies that he failed to perform with competence, because  
5 his client, Mr. Pocosangre, was incommunicado, and Respondent could not to prosecute the claims  
6 without his client.

### 8 COUNT TWO

9 3. Respondent objects to the allegations in Paragraph 3 of the NDC on the grounds they  
10 are compound and intertwined with legal conclusions. Without waiving this objection, Respondent  
11 denies that he failed to keep his client reasonably informed of significant developments, in willful  
12 violation of Business and Professions Code, section 6068(m), because Mr. Pocosangre was  
13 incommunicado and disappeared for approximately five years.

### 15 COUNT THREE

16 4. Respondent objects to the allegations in Paragraph 4 of the NDC on the grounds they  
17 are compound and intertwined with legal conclusions. Without waiving this objection, Respondent  
18 admits in part and denies in part the allegations contained therein. Respondent admits that he was  
19 retained by Teresa Alvarez in January, 2009, to pursue her personal injury claim against the  
20 Augustine Indian Casino. Respondent completed the legal services for which he was retained.  
21 Respondent denies that he committed acts in willful violation of Rules of Professional Conduct, rule  
22 3-110(A) by not appealing the denial of Ms. Alvarez' claim to the Augustine Tribal Council.

### 24 COUNT FOUR

25 5. Respondent objects to the allegations in Paragraph 5 of the NDC on the grounds they  
26 are compound and intertwined with legal conclusions. Without waiving this objection, Respondent  
27 denies that he failed to keep Ms. Alvarez informed of significant developments in her matter, in  
28 willful violation of Business and Professions Code, section 6068(m).



1  
2 **THIRD AFFIRMATIVE DEFENSE**

3 (Failure to State Sufficient Facts)

4 The Notice of Disciplinary Charges, and each of its purported counts, fails to state facts  
5 sufficient to state a basis for discipline.

6  
7 **FOURTH AFFIRMATIVE DEFENSE**

8 (Attorney Judgment Rule)

9 The Attorney Judgment rule precludes a finding of culpability based on an attorney's  
10 exercise of judgment, and execution of strategic and tactical decisions during the course of a case.  
11 (See, e.g. *Linsk v. Linsk* (1969)70 Cal. 2d 272 and *People v. Frierson* 1985) 39 Cal. 3d 803.)

12  
13 **FIFTH AFFIRMATIVE DEFENSE**

14 (Simple Negligence is Not a Disciplinary Offense)

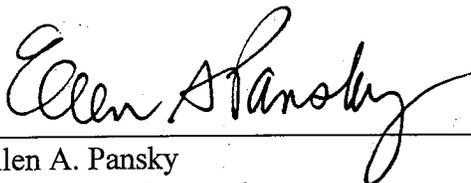
15 Rule 3-110 of the California Rules of Professional Conduct provides for discipline where the  
16 attorney "intentionally, recklessly or repeatedly fail[s] to perform legal services with competence."  
17 Negligent representation does not rise to the level of a disciplinary offense (*In The Matter of Torres*  
18 (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138).

19  
20 WHEREFORE, Respondent prays that the Court find that Respondent did not commit acts  
21 constituting professional misconduct, and that the Notice of Disciplinary Charges be dismissed.

22 Respectfully submitted,

23 PANSKY MARKLE HAM, LLP

24 Dated: December 17, 2013

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26  
27 By: 

28 Ellen A. Pansky  
Attorney for Respondent  
Daniel A. Gibalevich

1 **PROOF OF SERVICE**

2 *In the Matter of Daniel A. Gibalevich*

3  
4 I declare that I am over the age of eighteen (18) and not a party to this action. My business  
address is 1010 Sycamore Ave., Suite 308, South Pasadena, California 91030.

5 On **December 17, 2013**, I served the foregoing document(s) described as:

6 **RESPONSE TO NOTICE OF DISCIPLINARY CHARGES**

7 on all interested parties in this action by placing a true copy of each document, enclosed in a sealed  
8 envelope addressed as follows:

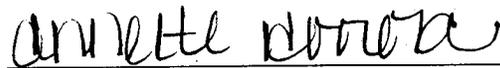
9 Anthony Garcia, Senior Trial Counsel  
Office of the Chief Trial Counsel  
Enforcement  
10 The State Bar of California  
11 1149 South Hill Street  
Los Angeles, CA 90015-2299

12 Fax: (213) 765-1319

13  
14 (X) **BY MAIL:** as follows: I am "readily familiar" with the firm's practice of collection and  
15 processing of correspondence for mailing with the United States Postal Service. I know that the  
correspondence was deposited with the United States Postal Service on the same day this  
16 declaration was executed in the ordinary course of business. I know that the envelope was  
sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in  
the United States mail at South Pasadena, California.

17 (X) **BY FACSIMILE TRANSMISSION:** On December 17, 2013 I caused the  
18 above-referenced document(s) and exhibits to be transmitted to Anthony Garcia at the  
above-referenced facsimile number.

19 I declare under penalty of perjury under the laws of the State of California that the above is  
20 true and correct. Executed December 17, 2013 at South Pasadena, California.

21  
22   
23 Annette Herrera