

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

10-1601

In Re	:	
Complaint against	:	Case No. 08-081
Vincent A. Stafford Attorney Reg. No. 0059846	:	Findings of Fact, Conclusions of Law and
Respondent	:	Recommendation of the Board of Commissioners on
Disciplinary Counsel	:	Grievances and Discipline of the Supreme Court of Ohio
Relator	:	

The complaint in this case consists of five counts, each alleging multiple disciplinary violations by respondent, Vincent Stafford (0059846), who was admitted to practice law in 1992 and publicly reprimanded in 2000. The hearing panel in this case consisted of attorneys Roger Gates, Nancy Moore, and panel chair Paul De Marco. None of the panel members served on the probable cause panel that reviewed this matter or resides in the appellate district from which the complaint arose. The panel heard testimony and arguments over 22 days, beginning on September 10, 2009 and ending on June 17, 2010. First Assistant Disciplinary Counsel Lori Brown, and Disciplinary Counsel Jonathan Coughlan, appeared on behalf of relator. John O'Neill, and George Coakley, appeared on behalf of respondent, Vincent Stafford.

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

INTRODUCTION

Respondent specializes in domestic relations law. By his own account, he has cultivated a reputation in Cuyahoga County as the “go-to” lawyer for wives involved in high-profile, high-stakes divorces. As he puts it, he relishes advocating for and defending these wives, many of whom find themselves at the end of long marriages facing off against husbands determined to deprive them of their just share of the marital estate. Because many of respondent’s divorce cases involve the division of large marital estates, they tend to be extremely contentious and protracted, with both sides litigating aggressively. As a result, these cases can become bitter and personal on both sides.

The divorce matters underlying three of the counts in this case – Count I (*Radford v. Radford*), Count III (*Janosek v. Janosek*), and Count IV (*Telerico v. Telerico*) – certainly fit this description. The matter underlying Count II (*Muehrcke v. House*), though a legal malpractice action rather than a divorce case, also fits this description. In all four of these underlying matters – Count V, a fee dispute, being the other – it is fair to say that respondent’s opposing clients developed deep enmity toward him, and that his response to their feelings was not to back down but to press the fight against them with dogged determination, some might say aggressiveness. This, of course, only deepened their hostility toward respondent.

The negative feelings that these opposing clients – and, in some instances, their lawyers – harbored for respondent, and he for them, pervaded the panel’s hearings on Counts I, II, III, and IV. This made it all the more challenging to determine which story to believe as to each of these counts – relator’s version, respondent’s version, or something in between – demanding careful attention to discrepancies between witnesses’ versions of relevant events and to the credibility of the witnesses, particularly those who brought some bias or agenda along with their testimony. The panel sifted through mounds of conflicting evidence on Counts I, II, III, and IV, finding each count in its own

way a close call, resolvable only by strict adherence to the “clear and convincing evidence” standard. Gov. Bar R. V(6)(J). In contrast, Count V, the fee dispute, turns chiefly on the panel’s interpretation of a retainer agreement between respondent and his client, coupled with certain of respondent’s fee bills.

In the report that follows, the panel sustains eight of the disciplinary violations alleged in Counts I and II; does not sustain the other nine disciplinary violations alleged in Counts I and II; and does not sustain the disciplinary violations alleged in Counts III, IV, and V and recommends dismissal of these three counts in their entirety. Where the panel sustains alleged violations in this report, it does so because the panel was satisfied that relator presented clear and convincing evidence establishing the alleged violations. Where the panel does not sustain particular violations alleged in Counts I, II, III, and IV, it does so not because the panel believes respondent behaved well or appropriately in the circumstances relevant to the alleged violations – indeed, in many instances, the panel does not – but simply because it is not satisfied that relator presented clear and convincing evidence establishing the disciplinary violations alleged.

The report then turns to the question of what sanction is appropriate for the violations sustained in Counts I and II. The common thread running through these violations is respondent’s palpable indifference to discovery directed at his clients. In each instance, had respondent been even slightly more forthcoming in responding to the discovery – whether by producing what he could of the requested discovery, demonstrating (as he claimed) that he already had complied with it, and/or making clear to opposing counsel and the judges involved which requested documents existed and which did not – he could have spared the courts, his opposing counsel and their clients, and his own clients needless controversy, time, and expense. Because respondent did not take these relatively easy steps, but instead used his considerable abilities as a lawyer to stake out positions

that he knew or must have known would needlessly escalate and prolong the proceedings, the panel concludes that his conduct was prejudicial to the administration of justice, reflects adversely on his fitness to practice law, and obstructed his opponents' access to evidence, and that this conduct warrants suspension of respondent's license to practice law for 18 months, with 12 months stayed, and monitored probation for the entire 18 months.

I. COUNT I: *RADFORD v. RADFORD*

A. Overview of Count I

The 18-month divorce action between Bruce and Diana Radford, in which respondent represented Diana, was marked by bitter disputes between the two sides (at times including their lawyers), by Bruce Radford constantly changing lawyers, and by Cuyahoga County Domestic Relations Judge Timothy Flanagan jailing Mr. Radford, who, the judge told the panel, simply refused to tell the truth during the case. Notwithstanding all of the challenges that the conduct of Bruce Radford and one of his attorneys, Paul Kriwinsky, posed to the litigation process in the case, relator charges that respondent obstructed the discovery process and misrepresented his compliance with his discovery obligations, all in violation of numerous disciplinary rules.

Specifically, relator alleges that respondent's conduct in *Radford v. Radford*, prior to February 1, 2007, violated DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice), and DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law). Relator further contends that respondent's conduct in the same case, after February 1, 2007, violated Prof. Cond. R. 3.3(a)(1) (a lawyer shall not knowingly make a false statement of fact or law to a tribunal); Prof. Cond. R. 3.4(a) (a lawyer shall not unlawfully obstruct another party's access to evidence); Prof. Cond. R. 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Prof. Cond. R. 3.4(d) (a lawyer shall not in pretrial procedure, intentionally or

habitually make a frivolous motion or discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party); Prof. Cond. R. 4.1 (in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person); Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice); and Prof. Cond. R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law).

B. Findings of Fact

{¶1} On April 24, 2006, respondent filed a divorce action on behalf of Diana Radford against Bruce Radford.

{¶2} Respondent represented Diana Radford throughout the action.

{¶3} A total of four attorneys represented Bruce Radford during the action: (1) an experienced domestic relations attorney named Herbert Palkovitz, who represented Radford from May until early September 2006; (2) Paul Kriwinsky, then a new lawyer with no prior domestic relations experience, who assisted with Radford's representation during 2006 and 2007; (3) Eric Laubacher, another experienced domestic relations lawyer, who represented Radford from early September 2006 until January 2007; and (4) Russell Kubyn, a third lawyer with significant domestic relations experience, who represented Radford from January 2007 until the final decree was entered in November 2007.

{¶4} The case was assigned to Judge Timothy Flanagan, then the administrative judge of the Cuyahoga County Domestic Relations Court.

{¶5} Bruce Radford told Paul Kriwinsky when they first met that he (Radford) wanted to file a grievance against respondent.

{¶6} Respondent's compliance with discovery was an issue during the time Laubacher and Kubyn represented Bruce Radford. They raised questions concerning (1) respondent's service of Diana Radford's interrogatory answers, (2) his transmittal of her formal responses to her husband's document requests, and (3) respondent's production of the documents requested by Bruce Radford's succession of attorneys. Although Laubacher and Kubyn raised questions about whether respondent transmitted Diana Radford's interrogatory responses, their challenges to respondent's compliance with his discovery obligations centered on respondent's alleged failure to produce requested documents. The only significance of the interrogatory responses seems to have been the dubious way they came to light in the middle of the trial in *Radford v. Radford*.

{¶7} On July 20, 2006, Palkovitz served interrogatories and requests for production of documents on Diana Radford.

{¶8} Sherri Lanzilotta, Palkovitz's paralegal for more than 20 years, testified that she never saw any responses to those interrogatories.

{¶9} When Palkovitz returned to his office from court on a given day, it was Lanzilotta's practice to retrieve and examine any documents he brought back in his briefcase. She never saw any interrogatory responses from Diana Radford in Palkovitz's briefcase, nor did she ever see them in the *Radford* file.

{¶10} Upon Palkovitz's withdrawal as Bruce Radford's counsel in early September 2006, the Palkovitz office provided the original file to Bruce Radford, without retaining any documents for its records.

{¶11} Although Bruce Radford did not testify before the panel, Lanzilotta testified that Diana Radford's handwritten interrogatory responses were not in the file that Mr. Radford retrieved from the Palkovitz office. Laubacher also never saw these responses during the four months he

represented Bruce Radford.

{¶12} When he took over the case from Palkovitz in early September 2006, Laubacher did not ask Palkovitz or Bruce Radford for Palkovitz's file. Rather, it was his practice when taking over an ongoing case to start building his file from scratch.

{¶13} Not realizing that Palkovitz already had served discovery requests on Diana Radford, Laubacher propounded a First Set of Interrogatories and Request for Production of Documents to Diana Radford on October 3, 2006.

{¶14} Although responses were not yet due when Laubacher and respondent attended a pretrial conference on October 30, 2006, Judge Flanagan directed respondent to respond to Laubacher's discovery within 11 days, or by November 10, 2006.

{¶15} Diana Radford testified that she observed respondent handing Laubacher a white envelope containing documents in the courthouse hallway after an October 30, 2006 pretrial conference. In his testimony before the panel, Laubacher did not dispute Diana Radford's account.

{¶16} Also, Laubacher admitted that he told Assistant Disciplinary Counsel Lori Brown when he met with her during her investigation that he could not recall one way or another if he received documents from respondent.

{¶17} On November 17, 2006, Laubacher filed a motion to compel production of the discovery he had requested.

{¶18} Respondent did not file a response of any kind to Laubacher's motion to compel.

{¶19} Laubacher testified that he did not believe he ever received any documents in response to his requests for production. He further testified that he would not have filed his motion to compel if he had received them prior to November 17, 2006.

{¶20} On November 20, 2006, Judge Flanagan issued a judgment entry granting

Laubacher's motion to compel and requiring respondent to provide discovery responses on or before December 1, 2006.

{¶21} Judge Flanagan testified that, at that time in late 2006, his practice was to grant motions to compel as a matter of course.

{¶22} Laubacher testified before the panel that, as of December 7, 2006, he still had not received any discovery responses from respondent. On that day, Laubacher sent a letter to Judge Flanagan complaining about that fact. Upon receiving a copy of that letter, respondent immediately telephoned Laubacher. During their conversation, respondent told Laubacher that the discovery he had requested would be forthcoming.

{¶23} Laubacher claims that, by the time he withdrew as counsel for Bruce Radford in January 2007, he still had not received Diana Radford's responses to his interrogatories or requests for production of documents.

{¶24} While he was on the case, Laubacher gave Kriwinsky and Radford complete access to the *Radford* file as it was maintained in his office. At the time of his withdrawal, Laubacher allowed Kriwinsky to copy his *Radford* file, with the exception of notes that Laubacher withheld. Kriwinsky transferred the copies to Kubyn's office. There was some question whether Kriwinsky commingled it with Palkovitz's entire file. Kubyn testified the file was a "mess" when it arrived. For some reason, Kriwinsky kept a separate file in Bruce Radford's basement. Nonetheless, he represented to Kubyn that the file was complete.

{¶25} Kubyn, like Laubacher before him, did not realize Palkovitz had issued discovery requests to Diana Radford. He did know of Laubacher's discovery requests.

{¶26} During the time Kubyn handled the case, Kriwinsky – and, through him, Bruce Radford – continued to have access to the *Radford* file.

{¶27} At a pretrial conference in Judge Flanagan's chambers in March 2007, respondent gave Kubyn and Kriwinsky documents. Kubyn and Kriwinsky followed up with a letter to respondent complaining that the production was deficient.

{¶28} The *Radford* trial took place in September and October of 2007, with Kubyn acting as Bruce Radford's lead counsel and Kriwinsky sitting "second chair."

{¶29} One of the contested issues at the trial was whether Bruce Radford would be required to pay Diana Radford's attorney fees. Thus, respondent introduced his fee bills into evidence at the trial.

{¶30} In an attempt to demonstrate that respondent's fee bills were inaccurate or exaggerated, Kubyn pressed the issue of respondent's noncompliance with discovery.

{¶31} Respondent took the stand and testified at length. Kubyn cross-examined him.

{¶32} Respondent testified that he provided Laubacher with "formal responses" to Bruce Radford's request for production of documents.

{¶33} Respondent also testified that he produced documents to Laubacher sometime after October 31, 2006.

{¶34} He testified that he provided a copy of Diana Radford's handwritten interrogatory responses to Palkovitz at a pretrial conference in August 2006, while Palkovitz was still the attorney of record for Bruce Radford.

{¶35} At one point during the *Radford* trial, Diana Radford testified that she had completed those interrogatory answers, whereupon respondent reached into one of his file boxes and produced her original, handwritten interrogatory responses. The responses were neither complete nor verified, and they contained no objections by respondent.

{¶36} Judge Flanagan invited both Kubyn and Kriwinsky to take the witness stand themselves or present other witnesses, in order to refute respondent's testimony regarding his compliance with discovery.

{¶37} Neither Kriwinsky nor Kubyn took the stand to refute respondent's claims of discovery compliance. And, despite assuring Judge Flanagan that they would do so, they did not call Laubacher to contradict respondent's testimony, nor did they call Palkovitz as a witness.

{¶38} Judge Flanagan did not find that respondent failed to comply with his discovery obligations.

{¶39} Palkovitz died before he could testify at this disciplinary panel's hearing.

C. Conclusions of Law

{¶1} Relator alleges that respondent failed to make reasonably diligent efforts to respond to the discovery that Bruce Radford propounded to Diana Radford and that respondent made misrepresentations by testifying before Judge Flanagan that he fully complied with discovery.

{¶2} Relator bears the burden of establishing these allegations by clear and convincing evidence. "Clear and convincing evidence" is defined as "that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Disciplinary Counsel v. Russo*, 124 Ohio St.3d 437, 2010-Ohio-605, ¶ 6 (internal quotations omitted).

{¶3} Assessing the reasonableness of respondent's efforts to comply with discovery under the "clear and convincing evidence" standard is complicated by the peculiar circumstances of the *Radford* case – the constantly shifting lawyers representing Bruce Radford and maintaining his case file; the failure of Kubyn, Kriwinsky, Laubacher, and Palkovitz to testify when the discovery

compliance issue was before Judge Flanagan; Palkovitz's death prior to this panel's hearing; and practical chain-of-custody concerns raised by Kriwinsky's handling of the *Radford* file and by Radford's access to the records contained in it, not only when Palkovitz turned the file over to him but also for the remainder of the case.

{¶4} Parenthetically, Bruce Radford's hostility toward respondent and his expressed determination to file a grievance against him make it significant that Radford had such unusual access to his file – the same file relator essentially has put before us to demonstrate that respondent did not produce all of the documents he was obligated to produce. This concerns the panel because, as Judge Flanagan found, Bruce Radford was given to deceit and misrepresentation. (Bruce Radford did not testify before the panel.) At one point in the case, for example, Bruce Radford surreptitiously intercepted a letter from respondent that clearly was intended for respondent's client, Diana Radford, and brought it to his own lawyers. Other evidence suggested Bruce Radford might have had the motive and opportunity to remove records from or add records to his lawyers' file. The panel can never know whether he did either, but these types of shenanigans, which typified the behavior emanating from Bruce Radford (often enabled by the inexperienced Kriwinsky), planted an undeniable seed of doubt in the panel members' minds as they listened to Mr. Radford's lawyers accuse respondent of not producing documents in discovery and of misrepresenting his discovery compliance.

{¶5} Relator's allegation that respondent misrepresented his compliance with discovery centers on respondent's testimony on October 9, 2007 in *Radford v. Radford*, under questioning by Kubyn, his opposing counsel.

{¶6} This interrogation, which was lengthy and often heated, produced vague claims but only a few definitive assertions from respondent concerning his compliance with discovery. Based

on its line-by-line review of the exchange, the panel is not convinced respondent made any outright misrepresentations while jousting with Kubyn over whether he had responded fully to Bruce Radford's discovery, including Judge Flanagan's order to do so.

{¶7} It is not that the panel finds respondent's testimony was necessarily truthful. To the contrary, the panel finds itself unable to judge his truthfulness with the confidence that the panel believes the "clear and convincing evidence" standard requires. Circumstances peculiar to this case make it impracticable for the panel to assess with that degree of confidence the truthfulness of respondent's specific statements concerning his compliance with discovery. Most notable among these circumstances were that Bruce Radford repeatedly replaced his attorneys; that Laubacher, upon succeeding Radford's first lawyer, Palkovitz, never asked for Palkovitz's file; that Radford and Kriwinsky suspiciously handled the various files in the case; and that Kubyn failed to call Palkovitz and Laubacher to testify before Judge Flanagan. In effect, these factors, combined with the panel's concerns about Bruce Radford's motives and actions as expressed above, posed insurmountable obstacles to relator's ability to prove the alleged misrepresentations.

{¶8} This does not mean the panel finds that respondent did nothing wrong. To the contrary, our review of the proceedings before Judge Flanagan leaves the panel members convinced that respondent committed misconduct, although not in the nature of the misrepresentations alleged. Rather, the panel finds that respondent's evasive and obstreperous conduct in the proceedings was prejudicial to the administration of justice, adversely reflected on his fitness to practice law, and substantiated relator's contention that he obstructed the overall discovery process in *Radford v. Radford*.

{¶9} The panel must begin its analysis of the proceedings by acknowledging that, in many instances during respondent's testimony, Kubyn's questions and respondent's answers were difficult

to decipher, which contributed to the difficulty the panel faced in gauging the accuracy of respondent's testimony, as discussed above. For example, early in their exchange, Kubyn handed respondent a copy of a document and asked him to identify it. It was Bruce Radford's first set of discovery requests, a combination of requests for production of documents and interrogatories. Palkovitz had served it on respondent while he still was Bruce Radford's counsel. Respondent identified it as "the discovery request for interrogatories from Mr. Palkovitz." Overlooking this jumbled reference, Kubyn asked respondent "when these were produced." It is unclear to the panel what either lawyer was talking about. What did respondent mean by his jumbled reference to "the discovery request for interrogatories?" What did Kubyn mean by "produced?" Was he asking respondent when Palkovitz propounded them, when respondent served formal responses to them, or when respondent produced the responsive documents? Kubyn's very next statement to respondent – "you indicated there was some sort of verification page" – diverted the discussion to a completely different topic, whether Diana Radford ever signed a verification page, which she apparently did not. This is but one example showing why a large part of the verbal jousting between Kubyn and respondent was simply too confusing and convoluted to be of any value to the panel in assessing the accuracy of respondent's testimony.

{¶10} Kubyn's questions, however, eventually shifted to when respondent served the formal responses to the requests for production of documents that Palkovitz had propounded. The best Kubyn could extract was respondent's claim that he handed the formal responses to Palkovitz when they were together at the courthouse during August 2006. Because Kubyn did not call Palkovitz to testify, and Palkovitz died before the panel's hearing, the panel is unable to say with any degree of confidence whether or not respondent really did serve the formal responses on Palkovitz. Given the other circumstances, including the chain-of-custody concerns discussed above,

paralegal Sherri Lanzilotta's testimony that she never saw Diana Radford's formal responses to the document requests in Palkovitz's file is not enough to establish that respondent never gave them to Palkovitz. Without the testimony of Palkovitz to counterbalance those factors, relator simply could not clearly and convincingly substantiate its claim that respondent never gave Palkovitz the formal responses to Bruce Radford's document requests.

{¶11} In the same vein, relator could not prove by clear and convincing evidence that respondent failed to provide Diana Radford's interrogatory answers to Palkovitz in a timely fashion. When respondent retrieved her handwritten answers and gave them to Kubyn in open court, respondent suggested it was not the first time he had provided them to Bruce Radford's counsel. Respondent had provided a copy of them, he claimed, to Palkovitz at the courthouse in August 2006. It was not unusual, he further claimed, for him to transmit discovery responses to opposing counsel whom he encountered in the courthouse, without any cover letter confirming the transmittal. It naturally raised the panel's suspicions that these interrogatory answers, which materialized at trial, were handwritten, incomplete, and unverified, and did not contain the typical lawyerly objections. Yet respondent testified before the panel that he provided them to Palkovitz, and Palkovitz, of course, was unavailable to refute this testimony. Although the suspicious circumstances raise doubts in our minds that respondent actually transmitted these handwritten interrogatory answers to Palkovitz, this is another instance in which built-in proof problems prevented relator from establishing, by clear and convincing evidence, its claim that respondent failed to provide the discovery responses.

{¶12} Also, Kubyn attempted to challenge respondent's claim that he gave Laubacher a stack of documents following a pretrial conference in the fall of 2006, again without a cover letter confirming the transmittal. But, for reasons that are unclear, Kubyn and Kriwinsky failed to call

Laubacher to the witness stand to refute this, despite assuring Judge Flanagan they would.

{¶13} At the hearing before the panel, Diana Radford testified she saw respondent hand Laubacher a stack of documents. While Laubacher testified before the panel that he did not recall this transmittal, he also declined to contradict Diana Radford. So, once again, the panel was left without clear and convincing evidence substantiating relator's allegation that respondent had failed to produce documents responsive to Laubacher's discovery.

{¶14} Kubyn's exchange with respondent before Judge Flanagan meandered along inconclusively until Kubyn began to focus on when respondent actually produced the responsive documents. Respondent simply claimed he handed them to Laubacher at the courthouse. Respondent unhelpfully pegged that production as having taken place "sometime between the date of [Laubacher's] entering an appearance and his motion to withdraw." With the obvious aim of showing that respondent's document production was incomplete, Kubyn then attempted to bore in and establish (a) exactly when respondent claimed to have produced documents to Laubacher and (b) exactly which documents he claimed to have produced. From the panel's standpoint, respondent's testimony in response to this attempt by Kubyn is the most significant part of his testimony before Judge Flanagan.

{¶15} To be clear, it is significant even though it does not clearly and convincingly demonstrate the misrepresentations relator claims respondent made during his testimony before Judge Flanagan. In the end, Kubyn simply was unable to pin respondent down, and Judge Flanagan did little to intervene and compel exact answers concerning which documents he produced and when (and, by inference, which he failed to produce). That Judge Flanagan showed relatively little interest in respondent's compliance with discovery perhaps was due to the fact the primary question then before him was whether Bruce Radford should pay Diana Radford's attorney fees and in what

amount. So, to Judge Flanagan, the question of respondent's alleged non-compliance with discovery might have seemed a subsidiary issue. In light of Kubyn's failure to call Laubacher to refute respondent's testimony before Judge Flanagan, and the disorganized and unreliable manner in which Kriwinsky had handled the *Radford* file, the panel cannot conclude that respondent falsely asserted that he fully complied with Laubacher's document requests and with Judge Flanagan's order compelling him to comply with them. In fact, due in no small part to the many peculiar circumstances of this case (e.g., the fact Palkovitz and Kubyn did not testify at Judge Flanagan's hearing, the commingling of successive attorneys' files, Palkovitz's death, etc.), the panel cannot point with any degree of confidence to a single document that Radford's lawyers requested and that respondent failed to produce. Therefore, the panel cannot find, by clear and convincing evidence, that respondent made any outright misrepresentations about his compliance with his discovery obligations.

{¶16} But that still does not absolve respondent of all of the allegations against him in Count I. Respondent's testimony in response to Kubyn's attempt to establish exactly when he produced documents to Laubacher, and exactly which documents he produced, is significant to the panel because it clearly demonstrates that respondent intentionally was attempting to obfuscate and hinder the truth-seeking process, thereby preventing Kubyn from eliciting facts about respondent's compliance with his discovery obligations. The best way to illustrate why the panel reached this conclusion is to quote at length from respondent's testimony before Judge Flanagan, under questioning by Kubyn on October 9, 2007:

Q: Now, do you recall when this finite period of time was when Mr. Laubacher was on the case?

A: No. Perhaps, if you get a document you would have that period of time.

Q: You just don't recollect?

A: I generally don't take notice of when people come and get off of cases.

Q: Would he have been on the case --

A: I have no idea.

Q: I didn't finish my question.

A: I told you I didn't know when he was on or off the case. I know in October of '06, he was on the case. When he got on or off, I have no idea.

Q: There was a Motion to Compel filed by Mr. Laubacher; wasn't there?

A: I don't know. Appears so.

Q: When?

A: July -- November 17th, 2006.

Q: Was that after you gave him those documents?

A: Again, I told you I didn't know what date he got the documents.

Q: If you had given him the documents and he would have filed that, you would have filed some sort of response.

A: No, that's absolutely not correct.

Q: Why not?

A: My client had already provided the interrogatories and responses to the Request for Production of Documents to predecessor counsel. There was no reason to have a duplicative attempt at discovery by Mr. Laubacher.

Q: Help me out here, Mr. Safford.

A: Sorry. I'm not here to help you out; I'm here to answer your questions.

Q: The answer will help me out. You indicated you provided discovery to Mr. Laubacher?

A: Yes

Q: We just noted that a Motion to Compel Discovery was filed by Mr. Laubacher on November 17, 2006, correct?

A: Yes.

Q: On November 17, 2006 --

A: That's when he filed the motion.

Q: You are indicating that even though you have been forced to --

A: I'm sorry? Forced? I don't think I'm forced to do anything, sir.

Q: Even though you were compelled --

A: Sir, I'm not a party.

Q: Let me finish.

A: You ask a proper question.

MR. STAFFORD: I'm not a litigant to this case, Your Honor.

THE COURT: Are you objecting?

MR. STAFFORD: Objection.

THE COURT: Rephrase it, counsel.

Q: Even though you were served with that motion, you didn't do anything to bring it to counsel's or the Court's attention that, perhaps, this is some sort of frivolous motion?

A: We had already responded to the discovery from Mr. Palkovitz.

Q: So the answer is you took no action?

A: Could I finish my response?

Q: I thought you were finished.

A: Thank you. If you look on the October 31, 2006 billing statement, there is a specific reference of reviewing documents from client, prepare discovery responses relating to this.

Q: What date?

A: 10/31/06. I believe Mr. Laubacher received documents after that date, but the response to the discovery had been well before that.

Q: Let's focus on that. That was October. This motion was filed November 17th.

A: Yes.

Q: It was given in between those two dates?

A: As I told you about five minutes ago, I don't remember on what date that we were before the Court when the documents were given to him.

Q: But they were given before the motion was filed?

A: I didn't say that.

Q: You said that.

A: No. Listen to me. I'll repeat what I just told you. I said I have a specific notation in my billing on 10/31/06 of reviewing documents from my client and preparing the discovery.

Q: I understand.

A: So that was in response to the Request for Production of Documents. The response, the formal response, had already been made. This was the actual production.

Q: The production was then made –

A: At some point after that date.

Q: But before the Motion to Compel was filed?

A: I don't know if it was before the 17th or not. It may have been after the 17th. I don't know. I have told you that now four times. I don't know the exact date. I assume it happened after 10/31. Relator's Exhibit 30, pp. 329-333

* * * *

Q: Can you identify this document? Let me rephrase that. Do you recognize that document?

A: It appears to be a court order.

Q: Can you identify it?

A: It's a court order.

Q: What kind of court order?

A: It says judgment entry.

Q: What kind of judgment entry?

A: Defendant's Motion to Compel –

Q: You are certified in family law?

A: – 234588, filed November 17, 2006, shall be hereby granted. Interrogatories shall be answered and documents produced on or before December 1, 2006. It is so ordered.

Q: You are an officer of the court you indicated, correct?

A: I'm an attorney, yes.

Q: That's a court order?

A: Yes.

Q: Have you complied with all the court orders in this case?

A: I'm not a litigant. I'm an attorney. Any directive of the Court has been complied with.

Q: Are you indicating to the Court that that order has been complied with by the Plaintiff?

A: The interrogatories were unequivocally answered and produced. I don't recall the exact date, as I have testified now for the fifth time, what date the documents were produced. However the responses, the formal responses, under Civil Rule 34 were.

* * * *

Q: What date is on this document?

A: November 20, 2006. I don't know when it was journalized. Just because the judge signs an order doesn't mean it comes through at that time but go ahead.

Q: I understand. Did you ever call the Court's attention and say, "This has already been provided; why are we issuing this order?"

A: I don't think I did. I wasn't overly concerned about it because we had filed the responses.

Q: Did you ever contact counsel and say, "Why are you filing this; I have already complied with it?"

A: We had some discussions.

Q: With which counsel?

A: Which one?

Q: I'm asking you.

A: Which one are you asking about?

Q: The one you were just having discussions with; I wasn't there.

A: I have had discussions about this case with all of Mr. Radford's counsels.

Q: On this particular order, you were about to say, "I didn't file a response because I had discussions with counsel."

A: I didn't say that so don't try to put words into my mouth. What's your question?

Q: When this court order came out –

A: Yes.

Q: – you indicate you had already complied with discovery.

A: Yes. I said I didn't know what date the documents went out. The formal responses had already been provided. If Mr. Radford didn't have his prior counsel's file, that's not my problem and it's not my client's problem. Relator's Exhibit 30, pp. 337-339

* * * *

Q: Accepting your answer that you provided the responses to Mr. Laubacher – that was your response?

A: The response is discovery was produced to Mr. Palkovitz. That's the sixth time at this point.

Q: I'm not asking about that. I accept that answer. The responses to the document requests were given to Mr. Laubacher.

A: You seem to be confused. The responses are written. The actual production are copies. You never arranged to have them copied at an appropriate location pursuant to Civil Rule 34. Out of a courtesy, I had them copied for you.

Q: Thank you for your courtesies. I wasn't on the case at that point.

A: Your predecessor's malfeasance doesn't cut it with me. I don't care, to be honest with you, that you weren't here.

* * * *

Q: Mr. Stafford, I just want a specific answer to a specific question. That's all. May I?

THE COURT: Go ahead and ask it.

MR. KUBYN: Thank you.

Q: To be precise, the courtesy copies of documents, which you didn't have to but did copy and produce, were given to Mr. Laubacher, correct?

A: Correct.

Q: They were given to Mr. Laubacher; you will agree, when he was counsel on the case, correct?

A: Well, yes.

Q: Because you did it in chambers.

A: That would be a logical conclusion.

Q: You wouldn't have given it to [Eric Laubacher] after he was already off the case?

A: Probably not unless something had crossed in the mail. I don't recall when Eric got off the case. It was in the late winter or spring of '07, so, no.

Q: You can't tell me if it was before or after this order labeled as Exhibit K?¹

A: Now for the seventh time, I don't recall when it was.

Q: You didn't happen to keep a copy of these materials; did you?

A: I have copies of what my client produced.

Q: Do you?

A: They are somewhere in those boxes. They have been pulled apart for trial preparation. I know you have them. You produced them in discovery. You gave them back to me. You copied my client's check registers and gave them back to us in discovery. Are you denying this? Relator's Exhibit 30, pp. 342-344

{¶17} In the view of the panel, this excerpt demonstrates clearly that respondent was engaged in a determined game of "hide the ball," designed to obfuscate rather than illuminate one of the issues Kubyn raised before Judge Flanagan, namely respondent's compliance with his discovery obligations. He erected a smokescreen so dense that his exchange with Kubyn at times resembled a

¹ See Relator's Exhibit 17.

replay of “Who’s on First?” rather than a search for the truth. The fact that Kubyn was unable to pierce respondent’s smokescreen and that Judge Flanagan did not deal effectively with respondent’s evasiveness cannot change the character of respondent’s obfuscations. The panel finds this conduct totally unacceptable for an officer of the court. Discovery is a critical part of the litigation process, which often subsumes the majority of the time lawyers spend litigating a given case. ““Our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case.”” *Cincinnati Bar Assn. v. Marsick* (1998), 81 Ohio St.3d 551, 553 (citations omitted). As an officer of the court, respondent was not free to shirk his discovery obligations; nor was he free to prevent Judge Flanagan and opposing counsel from learning whether or not he had done so. As noted above, the panel cannot state, with the confidence that the clear and convincing evidence standard requires, that respondent failed to fulfill his discovery obligations. This is partly due to the peculiar circumstances of this case, as discussed above. But it also is due to respondent’s purposeful obfuscations. In our minds, when an attorney obstructs the process by which a court seeks to ascertain his compliance with discovery, that is equivalent to obstructing the discovery process. Respondent’s actions showed contempt for the discovery process.

{¶18} Accordingly, the panel finds that relator has presented clear and convincing evidence that respondent violated Prof. Cond. R. 3.4(a) (a lawyer shall not unlawfully obstruct another party’s access to evidence), Prof. Cond. R. 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal), Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice), and Prof. Cond. R. 8.4(h) (conduct that adversely reflects on the lawyer’s fitness to practice law). Because these violations were a continuation of a course of conduct that

respondent began to exhibit before February 1, 2007, the panel concludes he also violated DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice), and DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law).

{¶19} The panel does not believe respondent was reasonably diligent in responding to the discovery requests propounded by Palkovitz and Laubacher. However, it appears this conduct occurred before the effective date of Prof. Cond. R. 3.4(d) (a lawyer shall not in pretrial procedure, intentionally or habitually fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party). So the panel does not conclude that respondent violated Prof. Cond. R. 3.4(d). Rather, the panel concludes that his lack of diligence in responding to discovery propounded by Palkovitz and Laubacher falls within the ambit of obstructing discovery, which the panel believes constitutes violations of DR 1-102(A)(5) and DR 1-102(A)(6).

{¶20} For the reasons detailed above, the panel concludes relator did not present clear and convincing evidence establishing that respondent violated Prof. Cond. R. 4.1 (in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person), Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), or Prof. Cond. R. 3.3(a)(1) (a lawyer shall not knowingly make a false statement of fact or law to a tribunal).

II. **COUNT II: *MUEHRCKE v. HOUSEL***

A. **Overview of Count II**

As with Count I, Count II alleges that respondent committed disciplinary violations related to the discovery process. Also as with Count I, the matter underlying Count II was an extremely acrimonious case, this time a legal malpractice action brought by respondent on behalf of Dr. Robert

Muehrcke against his former attorney, Robert Housel. During discovery in *Muehrcke v. Housel*, the defense sought evidence of attorney fees Dr. Muehrcke had paid or incurred in pursuing the malpractice action. Housel's attorneys, Alan Petrov and Monica Sansalone, believed they could demonstrate to the jury that Muehrcke was spending far more in attorney fees than he could ever hope to obtain as damages in the malpractice case against Housel. Petrov believed that, by showing this, the jury would understand that Muehrcke's motivation for the malpractice lawsuit was not really to recover money lost as a result of malpractice, but rather that the lawsuit was a vendetta on Muehrcke's part. Petrov assumed that, if the jury believed the lawsuit was a mere vendetta, it would return a verdict in Housel's favor or, if it found malpractice, would award Muehrcke very little in damages.

The allegations against respondent arising out of *Muehrcke v. Housel* relate to a privilege claim his law firm (Stafford & Stafford Co., LPA) made on behalf of Muehrcke. Beginning in the fall of 2004, the firm took the position Muehrcke should not be required to produce documents evidencing the attorney fees he had incurred in prosecuting the malpractice action. The firm did so based chiefly on the attorney-client privilege but also based on the work-product doctrine. The nub of the violation alleged is that respondent failed to explain to the trial court and Housel's attorneys, until May 2006 (almost two years after first invoking the privilege), that the firm had not previously sent any fee bills to Muehrcke for its work in the malpractice action. In other words, Stafford & Stafford and respondent claimed privilege as to "attorney fee bills, i.e., written communications between Robert Muehrcke, M.D. and ... the firm of Stafford & Stafford Co., L.P.A.," without disclosing the fact that it had never sent Muehrcke any fee bills for the malpractice action.

In essence, relator alleges it was misconduct for respondent to claim privilege as to documents that had not yet been created. Relator alleges that this conduct violated DR 1-102(A)(4)

(conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice); DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law); DR 7-102(A)(1) (in his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another); DR 7-102(A)(5) (in his representation of a client, a lawyer shall not knowingly make a false statement of law or fact); DR 7-102(A)(7) (in his representation of a client, a lawyer shall not knowingly counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent); and DR 7-106(C)(1) (in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence).

B. Findings of Fact

{¶1} Respondent and his law firm, Stafford & Stafford, represented Dr. Robert Muehrcke in his legal malpractice action against Robert Housel. The complaint alleged that Housel had committed malpractice while representing Dr. Muehrcke, his wife Laura, and their daughter Susan in a negligence action arising out of an automobile accident in which Dr. Muehrcke was seriously injured, causing him to discontinue practicing as an orthopedic physician.

{¶2} Attorneys Alan Petrov and Monica Sansalone represented Housel in the malpractice action. Housel also entered an appearance on his own behalf and participated actively in the defense of the action.

{¶3} The case was assigned to Judge Nancy McDonnell, administrative judge of the Cuyahoga County Court of Common Pleas.

{¶4} Following his automobile accident, Muehrcke hired Housel to pursue claims against the tortfeasor and various insurance companies.² Following a settlement with the tortfeasor's insurer, Muehrcke filed suit against his own insurer, Indiana Insurance Company.³ Claims were made on behalf of Muehrcke himself, his wife Laura, and his minor daughter, Susan. Both Laura's and Susan's claims were solely for loss of consortium.

{¶5} Following a jury trial in June 2001, Muehrcke was awarded \$9,377,252. The jury additionally awarded one million dollars to Laura and \$500,000 to Susan. Since the verdict exceeded the maximum coverage available, and was subject to additional set-offs for other recoveries, Indiana Insurance tendered the limits of its policy of \$3,000,000. In exchange for a waiver of all future claims, Indiana Insurance Company agreed to pay an additional \$1,950,000 to the Muehrckes with a specific \$50,000 award to Susan.

{¶6} As Susan Muehrcke was a minor at the time of the award, the distribution of her monies fell within the jurisdiction of the probate court. In late October 2001, Laura Muehrcke filed an application seeking appointment as Susan's guardian. Shortly after filing her original application, Laura filed a second application seeking to settle Susan's \$500,000 award for \$5,000. She later orally requested that the probate court approve a \$50,000 settlement.

{¶7} In January 2002, the probate magistrate entered his recommendation. He determined that the jury's award of \$500,000 was 4.6 percent of the total jury award and found that the same percentage as applied to the settlement award equaled \$230,000. He further found that the relationship between Laura and Susan was in direct conflict, since any decrease in Susan's award

² See *Robert C. Muehrcke, M.D., et al. v. Carolyn Storey, et al.* (Oct. 28, 1999), Cuyahoga App. No. 74365.

³ See *Robert C. Muehrcke, M.D., et al. v. Indiana Ins. Co.*, Cuyahoga County Common Pleas Case Number 413100.

would increase the amount available to Laura or Robert Muehrcke. Following objections by the Muehrckes, the probate court adopted the magistrate's recommendation and appointed attorney Richard Koblentz as guardian of Susan's estate. In March 2004, Dr. Muehrcke filed the malpractice action against Housel, claiming that his actions fell below the standard of care.

{¶8} One aim of Housel's discovery strategy in *Muehrcke v. Housel* was to show the jury that Dr. Muehrcke was spending far more money fighting what Petrov called "the battle" with Housel than the maximum additional amount the probate court could possibly allocate to Susan.

{¶9} Housel initially pursued this discovery in the first interrogatories he propounded to Muehrcke, which the plaintiff answered on August 4, 2004. In response to a question about damages, Muehrcke stated that the damages claimed in the malpractice case would include "all costs associated with various matters of litigation including the Probate proceedings" and that "[t]he associated costs of litigation have not been finalized. All final damages will be provided."

{¶10} Petrov followed up on this at Muehrcke's deposition about three weeks later, at which Judge McDonnell was intermittently present to keep order. Petrov began by asking Muehrcke about "costs" he was "incurring over at the probate [*sic*]." Relator's Exhibit 43, p. 113. In response, Muehrcke confirmed, "I have attorneys' fees." *Id.* at 114. Petrov asked, "You're paying Mr. Stafford and his firm for their representation at the probate proceedings, are you not?" When Muehrcke said, "Yes," Petrov asked, "And do you know how much you have been billed by Mr. Stafford's firm?" Muehrcke replied, "No." *Id.* One by one, Petrov ascertained how much Muehrcke had paid the various law firms involved in the probate proceedings, including those representing his wife Laura and Susan's guardian.

{¶11} Asked by Petrov if he had “spent more money fighting about the probate litigation than the probate litigation is worth,” Muehrcke stated he did not know the total amount he had spent, estimating it was more than \$200,000.

{¶12} When Petrov asked Muehrcke about the Stafford firm’s fees in the probate proceedings, respondent objected and stated for the record in Judge McDonnell’s presence, “We’re not going to make any claims as it relates to the, my firm’s fees as it – from the Probate Court in this action.” Id. at 123. But Petrov rejected respondent’s reasoning: “I don’t care whether he’s claiming it as damages or not. I think that I’m entitled to demonstrate to the jury that the battle they’re fighting, they are spending far more money fighting it than the ... worst case scenario can be.” Id. at 164. Petrov added: “Bills are not privileged.” Id. at 165. Respondent replied, “Written correspondence and billing is clearly privileged.” Id. Judge McDonnell rejected respondent’s argument. When he asked if he could brief the issue, she responded, “The answer is no, you can’t brief it,” adding “I could be wrong.” Id. at 166.

{¶13} Petrov persisted: “Dr. Muehrcke, can you tell me the attorney’s fees that you have paid to Mr. Stafford or other members of his firm relating to the probate proceedings?” After respondent clarified Petrov was only asking about the probate proceedings and respondent renewed his objection, Muehrcke replied, “Probably about 15,000.” Id. at 170. Petrov then asked, “Are there bills that have been presented to you that you have not yet paid?” Id. at 170-71. Over respondent’s objection, Muehrcke said “Yes,” explaining that there were bills for “copying charges. Things like that.” Id. at 171. When Petrov asked if there are “any bills for fees that have not been paid,” Muehrcke said “Yes,” estimating they totaled “Three grand.” Id. When Petrov clarified his questions related to “bills sent to you by Stafford & Stafford” or any lawyer in the firm, Muehrcke explained his estimate was “for what Joe [Stafford] did for probate,” but did not reflect “all the work

they've done for me" Petrov asked, "What other work is there?" Id. at 172. Muehrcke said, "If I paid Vincent toward this lawsuit, towards his being here today ... then you want to know"

Respondent interjected, "That's not part of the question or the response," but Judge McDonnell said, "I think it is. Go ahead." Incredulous, respondent asked Judge McDonnell, "What he pays me in this lawsuit is not protected by attorney/client privilege?" She replied, "Correct." Id. at 173. This exchange between Petrov and Muehrcke ensued:

Q: What are the bills and the charges relating to this case?

A: I'd say it's probably got to be, gees, I'd be guessing."

Q: Well, give me your best estimate."

* * * *

A: How much money have I paid –

Q: Paid or been billed?

A: – to the Stafford law firm?

Q: In connection with this lawsuit against Mr. Housel?

A: Okay. I have to say about ten, 15,000. It's a guesstimate.

* * * *

Q: Is there any contingency component, contingency fee in relationship to Mr. Stafford?

MR. STAFFORD: Objection.

A: No.

Id. at 174-176.

{¶14} Less than a month later, on September 14, 2004, Housel served Muehrcke with a second set of requests for production of documents, asking for, *inter alia*, "Any and all documents demonstrating and/or evidencing any and all expenses you have incurred or claim to have incurred, including, but not limited to, attorney fee bills from ... Stafford & Stafford Co., L.P.A., .. in connection with the [probate proceedings]." Relator's Exhibit 44, p. 4. The term "document" was defined to include "every ... form of stored or recorded information" and "the contents of storage media used in data processing systems." Id. at 2.

{¶15} In Muehrcke's response to these document requests, respondent and his co-counsel Greg Moore objected "in as much as the Defendants seek documents relating to ... Stafford & Stafford, Co., L.P.A.," maintaining that "the requested documents are privileged attorney-client communications and are not discoverable by the Defendants." Relator's Exhibit 46, p. 1. Greg Moore signed the objections. Id.

{¶16} Housel moved to compel Muehrcke to respond to this discovery, stating "Defendants' Second Request for Production simply asks the Plaintiff to produce the documents that confirm the sort of expenses Dr. Muehrcke has already testified to," which "the Court has already ruled ... is not privileged" Relator's Exhibit 47, pp. 3, 5.

{¶17} Muehrcke moved for a protective order as to Housel's second set of requests for production. In his motion, Muehrcke stated, "The Defendants['] request seeks attorney fee bills, i.e., written communications between Robert Muehrcke, M.D. and ... the firm of Stafford & Stafford Co., L.P.A. Such communications are protected by the attorney/client privilege.... The documents requested by the Defendants relate to the attorney/client communications, advice, and/or confidences and/or ... the law firm of Stafford & Stafford Co., L.P.A.'s work product on behalf of Robert Muehrcke, M.D. in this and/or other matters. Therefore, the information is equally privileged." Relator's Exhibit 48, pp. 6, 7. (emphasis omitted) Moore signed this filing too.

{¶18} On October 18, 2004, Housel served Muehrcke with a third set of requests for production of documents, asking for, *inter alia*, "Any and all documents demonstrating and/or evidencing any and all expenses you have incurred or claim to have incurred, including, but not limited to, attorney fee bills from Stafford & Stafford Co., L.P.A., .. in connection with the [malpractice action]." Relator's Exhibit 45, p. 4. The term "document" was again defined to include

“every ... form of stored or recorded information” and “the contents of storage media used in data processing systems.” Id. at 2.

{¶19} Muehrcke responded with another motion for a protective order. In it, he stated, “The defendants are requesting payments and billing records between the Plaintiff, Robert Muehrcke, M.D. and his attorney.” Relator’s Exhibit 49, p. 3. Muehrcke reiterated that he was “not claiming the attorney fees paid to the law firm of Stafford & Stafford Co., L.P.A. as damages in this matter,” and that “[t]he documents requested by the Defendants relate to the attorney/client communications, advice, and/or confidences and/or ... the law firm of Stafford & Stafford Co., L.P.A.’s work product on behalf of Robert Muehrcke, M.D. in this and/or other matters. Therefore, the information is equally privileged.” Id. at 5, 7. Muehrcke argued that “[t]he Defendants are no more entitled to attorney fee bills sent by Stafford & Stafford Co., LPA to the Plaintiff, than the Plaintiff would be entitled to the attorney fee bills sent by [Housel’s lawyers] to the Defendants in this matter.” Id. at 6. Moore also signed this filing.

{¶20} In an entry dated December 8, 2004, Judge McDonnell granted Housel’s motion to compel, denied Muehrcke’s protective order motions, and invited Muehrcke to comply with the discovery requests by submitting the “requested documents to the court for in camera inspection by 12/9/04.” Relator’s Exhibit 50.

{¶21} Instead of complying or submitting the documents for in camera inspection, Muehrcke filed a notice of appeal to the Eighth District Court of Appeals on December 9, 2004. Relator’s Exhibit 51.

{¶22} Muehrcke’s appellate brief, which was signed by a Stafford & Stafford attorney other than respondent and Greg Moore, reiterated many of the arguments made in Muehrcke’s protective order motions. The brief argued that “documents, including but not limited to any correspondence,

which was sent to the Appellant, Robert Muehrcke, relating to fee agreements, billing, and/or attorney fees paid by the Appellant” were privileged, citing both attorney-client privilege and work product, and that, if this discovery were permitted, “[e]ach litigant would be able to discover the other party’s attorney fee bills, invoices, and/or other evidence of attorney fees in every case. This door should not be opened.” Relator’s Exhibit 52, p. 5.

{¶23} Housel’s response brief on appeal explained that “[t]he purpose of the request was to obtain documents that would help demonstrate that Dr. Muehrcke is incurring attorney fees and expenses – and causing others to incur them, too – needlessly and thus for an ulterior purpose.” Relator’s Exhibit 53, p. 6. Focusing on the “attorney fee bills” language in Housel’s second and third sets of requests for production of documents, the brief argued for affirmance on grounds that (1) the fee bills are not per se privileged; (2) even if they contained “a small amount [of] information which is privileged or protected by the attorney work product doctrine,” Muehrcke could have redacted them or submitted them in camera; and (3) because he submitted neither documents nor a privilege log, there was nothing for the court of appeals to review. *Id.* at 9-14.

{¶24} On October 13, 2005, the court of appeals affirmed. The court quoted verbatim the document requests and rejected Muehrcke’s contention “that all documents relating to fee agreements, billing, and/or attorney fees paid” are privileged. Relator’s Exhibit 56, p. 7. Moreover, the court faulted Muehrcke for making “a blanket assertion of privilege without so much as requesting an in camera inspection.” *Id.* The court of appeals opinion also stated, however, “that there were reasonable grounds for this appeal.” *Id.* at 11.

{¶25} On March 8, 2006, the Supreme Court of Ohio declined jurisdiction to hear the case. Relator’s Exhibit 58.

{¶26} Following remand, Muehrcke served on Housel a Rule 34 request seeking documents identical to those sought in Housel's second and third sets of requests for production of documents, except that it substituted the name of Petrov's firm for that of the Stafford firm. Housel objected based in part on the argument that "the documents requested ... are protected from discovery by the attorney-client privilege and work product doctrine." Relator's Exhibit 60, p. 2.

{¶27} On May 23, 2006, respondent had a telephone conversation with Monica Sansalone, Muehrcke's lawyer, during which respondent acknowledged there were no Stafford & Stafford fee bills and asked if Sansalone wanted to know why. Sansalone testified that, when she said she did, respondent replied that Muehrcke was represented on "a contingency fee basis." Respondent denies making this statement.

{¶28} At a pretrial hearing on May 24, 2006, respondent again admitted there were no Stafford & Stafford fee bills, this time claiming that Stafford & Stafford performed legal services for Muehrcke on "a handshake."

{¶29} On May 30, 2006, respondent's associate Greg Moore sent Judge McDonnell a letter by hand delivery, attaching fee bills paid by Muehrcke between 2002 and the date of the letter. All but one of the fee bills came from other firms that had represented Robert or Laura Muehrcke in the probate proceedings. The lone fee bill from the Stafford firm to Muehrcke carried the same date as Moore's letter, which explained that, prior to that date, there never had "existed any itemized bill statement(s) issued by the law firm of Stafford & Stafford Co., LPA, to Robert Muehrcke, M.D., relating to" either the probate proceedings or the malpractice action.

{¶30} Judge McDonnell turned over the Stafford firm's itemized billing statement, along with the other firms' fee bills, to Housel's attorneys.

{¶31} On June 1, 2006, two days after Moore's letter, Housel moved for sanctions on the ground Muehrcke had failed to disclose the fact that no Stafford & Stafford fee bills existed, notwithstanding Muehrcke's privilege claims. Housel filed additional sanctions motions against Muehrcke with the trial court and the court of appeals in 2007. All of these motions were denied.

{¶32} On the first day of trial in *Muehrcke v. Housel* in 2007, Petrov told the visiting judge trying the case that Housel had not "received any fee bills, which is the subject of our motion for sanctions." Monica Sansalone later admitted to the panel that this statement was inaccurate.

Acknowledging that "[t]here have been representations made that they're not seeking" the Stafford firm's attorney fees as damages, Petrov told the visiting judge, "So I don't think they would be relevant at the trial of the case."

{¶33} At the conclusion of the trial, the jury returned a verdict in Muehrcke's favor, awarding him \$179,166.66 in damages.

{¶34} On September 4, 2008, the Eighth District Court of Appeals vacated the judgment, holding "there is absolutely no evidence in the record that Housel's alleged negligence proximately caused any damage to the Muehrckes." Relator's Exhibit 76, ¶ 20. The court reasoned that, to the extent Muehrcke's recovery was reduced, it was not due to any conduct by Housel, but because the probate court determined that a different allocation for Susan Muehrcke was warranted. *Id.* at ¶¶ 19-21.

{¶35} The court of appeals also affirmed the trial court's decision not to sanction Muehrcke for frivolous conduct with respect to the Stafford fee bills claimed to be privileged. The court observed: "Our review of the record indicates that this was a complex, protracted, and acrimonious litigation. Indeed, both parties filed numerous motions for sanctions and attorney fees during the course of the trial and this appeal. While the panel would not have found an abuse of discretion had

the trial court determined that both parties engaged in frivolous conduct, the panel does not find the trial court's decision not to find frivolous conduct to be unreasonable, arbitrary, or unconscionable." Relator's Exhibit 76, ¶ 34.

{¶36} Although Stafford & Stafford had not sent any attorney fee bills for the malpractice action to Muehrcke prior to May 30, 2006, and Muehrcke had not paid any Stafford & Stafford fee bills for that case, attorneys at the Stafford firm, including respondent, had maintained contemporaneous records of their time and billing relative to the prosecution of *Muehrcke v. Housel* and the other matters in which the firm represented Muehrcke. These records were stored electronically at the Stafford firm during *Muehrcke v. Housel*.

{¶37} There was no evidence that respondent authored, signed, or specifically ratified any of the Stafford & Stafford filings in the trial court or the court of appeals that are quoted above. He did, however, argue the interlocutory appeal on the privilege issue.

{¶38} Respondent never represented Laura Muehrcke, and she was never a party to *Muehrcke v. Housel*.

C. Conclusions of Law

{¶1} The issue of the fees and expenses Muehrcke had incurred in connection with the probate proceedings and the malpractice action arose during his deposition on August 27, 2004. When it arose, respondent stated on the record in the presence of Judge McDonnell, who was monitoring the deposition, that Muehrcke was not claiming his attorneys' fees and expenses in the probate proceedings as part of his damages for Housel's alleged malpractice.⁴ Despite this representation, Judge McDonnell allowed Housel's attorneys to continue pursuing discovery of the

⁴ In prior interrogatory answers, Dr. Muehrcke claimed his damages included "all costs associated with various matters of litigation," which could have encompassed fees in the malpractice action.

fees and expenses Muehrcke had incurred in connection with the malpractice action. The litigation over this aspect of discovery, in both the trial court and the court of appeals, consumed almost two years, delaying the trial of the case.

{¶2} Relator essentially blames respondent for this delay, claiming that, if only he had revealed from the start that Stafford & Stafford had not sent Muehrcke any fee bills in connection with the malpractice action, all of the time and money wasted on privilege arguments could have been avoided. The panel agrees, although for reasons different from those relator advances.

{¶3} Housel's document requests covered actual "attorney fee bills," but they were "not limited to" such bills. Their scope was much broader than that, encompassing "[a]ny and all documents demonstrating and/or evidencing any and all expenses" that Muehrcke had "incurred ... in connection with" the probate proceedings and the malpractice action. Given that Housel's document requests defined "document" as including electronic data, the time and billing records that the Stafford firm maintained in electronic form on its computer system fell within the ambit of the document requests because those records "evidenc[ed]" the Stafford & Stafford attorney fees that continually were accruing. Because access to these records would have given Housel and his lawyers an incredible glimpse into the Stafford firm's work in *Muehrcke v. Housel* and its attorney-client relationship with Muehrcke, the panel cannot blame respondent and his firm to the extent they maintained that the firm's electronically stored time and billing records, as requested in Housel's second and third sets of document requests, were at least to some degree subject to the attorney-client privilege and/or protected as work product. The vast majority of civil litigators would instinctively raise such objections as grounds for refusing to turn over contemporaneously

maintained time and billing records to an opponent in ongoing litigation.⁵ The best evidence that this is the classic litigator's response is the fact that Housel and his lawyers reacted in precisely this way when the Stafford firm -- in attempting to prove "what's sauce for the goose is sauce for the gander" -- served a document request on them for their fee bills to Housel.

{¶4} Where the panel finds fault with Stafford & Stafford is the way in which they described the documents they were refusing to produce on privilege grounds. Knowing full well that the firm had *never* sent any written fee bills to Muehrcke for work done on the malpractice action, Stafford & Stafford nevertheless implied in court filings that they in fact had sent such bills to Muehrcke. For example, their first protective order motion stated, "The Defendants['] request seeks *attorney fee bills, i.e., written communications between Robert Muehrcke, M.D. and ... the firm of Stafford & Stafford Co., L.P.A.* Such communications are protected by the attorney/client privilege." Relator's Exhibit 48, p. 6 (emphasis in original). Their second protective order motion stated, "The defendants are requesting *payments and billing records between the Plaintiff, Robert Muehrcke, M.D. and his attorney....* The Defendants are no more entitled to *attorney fee bills sent by Stafford & Stafford Co., LPA to the Plaintiff*, than the Plaintiff would be entitled to the attorney fee bills sent by [Housel's lawyers] to the Defendants in this matter." Exhibit 49, p. 6 (emphasis added). And their appellate brief stated that the defendants were seeking "documents" that were "*sent to*"

⁵ On the other hand, the panel does fault the repeated assertion of a blanket privilege for all fee records without any legal foundation for such an argument. Even if respondent's gut reaction at the deposition was to assert a blanket privilege as to all of his fee records, he should have realized that such reaction was flawed as he had time to reflect on Housel's written discovery requests and in the course of drafting the motions for protective orders. Although Judge McDonnell offered the opportunity for an in camera review of the records during which respondent's firm could have pointed out the portions of its records which were claimed to be either privileged or protected by the work product discovery protection, no consideration was apparently given to resolving the dispute in this manner. Instead, respondent's brother and partner Joseph simply challenged Judge McDonnell to issue her ruling so that they could take the issue "across the street" to the court of appeals.

Muehrcke relating to “billing” Relator’s Exhibit 52, pp. 3, 5. (emphasis added)

{¶5} There is no question that the statements quoted and italicized above strongly suggest that the Stafford firm actually had sent attorney fee bills to Muehrcke in this matter. The panel can find no legitimate excuse for making this misleading suggestion, not just once but over and over. It does not excuse this conduct for respondent to point out that these court filings also contained subtle hints that in retrospect could be interpreted as referring to the fact that the firm maintained electronic billing records. If Stafford & Stafford meant to claim privilege only as to electronic “documents” that had not yet been turned into “fee bills” and “sent to” Muehrcke, it easily could have said so, without implying that it also was claiming privilege as to actual bills “sent to” Muehrcke.

{¶6} On May 30, 2006, Moore’s letter openly acknowledged that the firm never had sent Muehrcke any fee bills for work done in the malpractice action prior to May 27, 2006. There is absolutely no reason respondent could not have been just as candid about this fact in October 2004, when Housel first requested attorney fee bills from Stafford to Muehrcke. For that matter, there is no reason respondent could not have corrected other misimpressions created in 2004, such as that engendered by Muehrcke’s “guesstimate” that he already had paid the Stafford firm “about ten, 15,000” for its work on the malpractice action. Nor is there any reason respondent could not have cleared up the confusion engendered by the three extant descriptions of the Stafford-Muehrcke fee arrangement – *i.e.*, (1) that there was no contingent fee component, Relator’s Exhibit 43, 176; (2) that there was a contingent fee (which Sansalone claims respondent told her about on May 23, 2006); and (3) that there was a “handshake” deal.

{¶7} Courts cannot function properly unless the lawyers practicing before them observe their duties of candor. See *Disciplinary Counsel v. Rohrer*, 124 Ohio St.3d 65, 2009-Ohio-5930 and

Cincinnati Bar Assn. v. Nienaber (1997), 80 Ohio St.3d 534. The corollary to this is that, if lawyers are candid with courts, courts can function properly. In this circumstance, respondent did not fulfill his duty of candor toward the trial court or the court of appeals. He could have done so easily and with no prejudice to his client, and could have spared the courts and his own client almost two years of needless, acrimonious, and costly litigation. Accepting relator's theory that respondent was to blame for this delay does not require the panel to believe that Housel and his lawyers would have ceased pursuing evidence of fees and expenses Muehrcke had paid or incurred if only respondent had disclosed that his firm had not sent Muehrcke any fee bills. Rather, the presumption of regularity in court proceedings gives us confidence that, had he observed his duty of candor to the courts, what turned into a long discovery diversion could and would have been avoided by judicial fiat.⁶

{¶8} The panel therefore concludes that respondent's lack of candor warrants a finding that relator has established by clear and convincing evidence that violated DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice) and DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law). These findings are based on respondent's failure to candidly dispel misimpressions created by Stafford & Stafford's misleading court filings.

{¶9} Based on the lack of evidence that respondent authored, signed, or ratified any of the filings containing any of these misleading statements, the panel cannot find that relator has established the other violations alleged in Count II, namely DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 7-102(A)(1) (in his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on

⁶ Relator attempted to call Judge McDonnell as a witness, but, due to a serious illness, she remained too ill to testify throughout the nine months it took to hear this matter.

behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another), DR 7-102(A)(5) (in his representation of a client, a lawyer shall not knowingly make a false statement of law or fact), DR 7-102(A)(7) (in his representation of a client, a lawyer shall not knowingly counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent), and DR 7-106(C)(1) (in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence).

III. COUNT III: *JANOSEK v. JANOSEK*

A. Overview of Count III

In Count III, relator charges that, during the pendency of a divorce action in which respondent represented James Janosek's wife, respondent engaged in misconduct during an encounter with Janosek in Cleveland Browns Stadium at half-time of a preseason football game. Relator alleges that respondent's conduct violated DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law) and DR 7-104(A)(1) (during the course of his representation of a client, a lawyer shall not communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter). The panel concludes that relator has failed to prove, by clear and convincing evidence, the factual allegations upon which the charges of misconduct in Count III are based, and recommends its dismissal.

B. Findings of Fact

Based on the evidence presented on October 22 and 23, 2009, December 17 and 18, 2009, and January 6, 2010, the panel makes the following findings of fact.

{¶1} On August 18, 2006, respondent was actively representing Sandra Janosek in a protracted divorce action against her husband James Janosek, which had started in 2002.

{¶2} Respondent knew at all times that James Janosek was represented by a lawyer during the divorce litigation.

{¶3} During the divorce action, James Janosek was ordered to make two payments totaling approximately \$71,000, to Sandra Janosek for respondent's interim attorney fees and expenses.

{¶4} In July 2005, James Janosek paid an additional \$320,000 to Sandra Janosek for her attorney fees pursuant to the divorce decree.⁷

{¶5} On August 18, 2006, Mr. Janosek attended a preseason football game at Cleveland Browns Stadium with several family members and friends. Respondent attended the same game with his brother Joseph Stafford, Joseph's 11-year old son, and the Staffords' associate Greg Moore.

{¶6} At halftime, the Janosek group decided to leave the game and go to a local restaurant. Leaving their seats, the Janosek group headed to an escalator to exit the stadium.

{¶7} At the same time, respondent's group left their seats and went out to the concourse behind their seats in the area of the same escalator.

{¶8} The testimony from the two groups recounting what happened after the Janosek group reached the escalator is irreconcilable.

{¶9} James Janosek and other members of his group testified that, as they started down the escalator, respondent leaned over the left side of the escalator and, while laughing, yelled, "Hey Jano, write me another check," followed by "F--- you, Jano." Transcript, 1512. (Janosek's nickname is Jano.) James Janosek's son, Bryan, testified respondent's brother Joseph yelled something about Mr. Janosek bringing "his hired muscle" to the game. James Janosek testified that

⁷ This portion of the divorce decree was vacated by the Eighth District Court of Appeals in January 2007, and the parties subsequently entered into a settlement that included a lesser amount for Sandra's attorney fees.

he observed respondent's brother Joseph standing near the entrance to the escalator making threatening gestures toward him, and that Joseph probably "flipped him off." Amy Regal, a friend of James Janosek's then-girlfriend, and a member of the Janosek group, testified that when respondent began leaning over the left side of the escalator and shouting, she was not quite on the escalator, and that she had a verbal confrontation with Joseph Stafford near the top of the escalator. James Janosek conceded he "flipped off" the Stafford group and yelled "F--- you." Transcript, 1512, 1530. Another member of the Janosek group, James Mooney, admitted to flipping off the Stafford group too, while riding the escalator down with James Janosek. Ms. Regal testified to Bryan Janosek and James Mooney flipping off the Stafford group. Transcript, 1646-47.

{¶10} Respondent, his brother Joseph, and their associate Greg Moore all testified that they never approached the escalator. Instead, they stated that they were standing about 50 feet from the escalator when they heard someone in the vicinity of the escalator yell, "There's that a--hole Stafford." Respondent testified that he simply turned his head and tried to ignore the situation. Respondent, his brother, and Moore further testified that Amy Regal came charging at them from near the escalator, yelling that respondent was an "a--hole" and using other profanity. Respondent testified that he did not communicate with James Janosek during half-time of the football game; that he used no vulgar language or gestures toward Ms. Regal or any member of the Janosek group; that he simply asked Ms. Regal to stop yelling vulgarities at him; and that, when he was unsuccessful in defusing the situation, he simply walked away and returned to his seat. Transcript 1693, 1704, 1719-1723. After the Stafford group returned to their seats, respondent telephoned Carl J. Meyer, Jr., Vice President of Security and Operations for the Cleveland Browns, to report the behavior by the Janosek group.

{¶11} Each of the members of the Janosek group who testified during relator's case stated unequivocally that respondent leaned over the left side of the escalator from above while yelling at them.

{¶12} Respondent presented photographic evidence showing that the left side of the escalator was blocked by a floor-to-ceiling wall composed of glass panels, which would have prevented anyone from leaning over that side of the escalator.

{¶13} After respondent presented this evidence to the panel, relator recalled to the witness stand James Janosek's son Bryan, who earlier had testified definitively, as had others in his group, that respondent leaned over the left side of the escalator while yelling at them. Returning to the witness stand, Bryan Janosek testified that, at the time of this incident, there was only a half-height wall on the left side of the escalator.

{¶14} Representatives of the Cleveland Browns convincingly refuted Bryan Janosek's testimony by producing photographs and blueprints conclusively establishing that a full-height glass wall continuously has stood alongside the escalator since Cleveland Browns Stadium opened in 1999.

C. Conclusions of Law

{¶1} Based on testimony from the members of the Janosek group, relator charges that respondent's conduct violated DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law) and DR 7-104(A)(1) (during the course of his representation of a client, a lawyer shall not communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter).

{¶2} The panel heard testimony from seven people directly involved in the alleged incident at Cleveland Browns Stadium, but no testimony from anyone who could fairly be

characterized as an independent eyewitness to it. Neither the testimony from the Janosek group's witnesses nor that from the Stafford group's witnesses provided the panel with a convincing account of what actually happened that day.

{¶3} Pursuant to Gov. Bar R. V(6)(J), relator has the burden of proving its allegations by clear and convincing evidence. *Disciplinary Counsel v. Russo*, supra, at ¶ 6. Because the panel concludes that the evidence presented at the hearing was insufficient to meet this burden, the allegations in Count III cannot be sustained. The panel therefore recommends its dismissal.

IV. COUNT IV: *TELERICO v. TELERICO*

A. Overview of Count IV

Count IV concerns respondent's representation of Elaine Telerico in her extremely contentious divorce action against Louis Telerico, her husband of 40 years. In the course of this action, Louis Telerico repeatedly violated court orders, apparently dissipated more than \$3,000,000 in marital assets, including bestowing his largesse on other women, and repeatedly demanded that his wife terminate respondent's representation as a condition of settlement discussions. The allegations in Count IV largely involve the ways in which respondent responded to these actions.

The central incident in Count IV was an ill-fated settlement conference held on August 24, 2006. Afterward, Mr. Telerico, who by all witnesses' accounts, had become enraged at respondent during the conference, told Merrill Lynch co-employees at his office that he would "get" respondent even if it meant going to prison for the rest of his life. The co-employees immediately reported Mr. Telerico's threats to others within Merrill Lynch. Both of Mr. Telerico's lawyers, Ari Jaffe and Sarah Gabinet, were present in Merrill Lynch's offices that day, and at least one of them, Mr. Jaffe, learned of Mr. Telerico's threats against respondent. Neither of them reported the threats to

respondent. After the threats, two Merrill Lynch representatives, Mr. Telerico's son Mark and Peter Bunnell, reported the threats to the Cleveland Police and to respondent himself.

Relator claims respondent's conduct during the course of the *Telerico* divorce action, all of which allegedly occurred before February 1, 2007, violated DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice) and DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law). Count IV consists of the following alleged misconduct:

- that respondent engaged in conduct designed solely to harass, embarrass, and maliciously injure Mr. Telerico, namely, filing numerous motions to show cause why he should not be held in contempt, issuing and serving more than 35 subpoenas duces tecum on banks and other financial institution with which Mr. Telerico did business, and making false or misleading assertions about Mr. Telerico's actions during the divorce;
- that respondent taunted and needlessly provoked Mr. Telerico during the settlement conference;
- that respondent falsely told Mr. Telerico's lawyer, Sarah Gabinet, that he had filed a police report about Mr. Telerico's conduct during the settlement conference and then solicited a payment from Ms. Gabinet and her colleague and co-counsel Ari Jaffe to make the police report "go away"; and
- that respondent called Ms. Gabinet "a lying scumbag" when confronting her for not telling him that her client, Mr. Telerico, had threatened to kill him.⁸

This is another count involving dramatically differing accounts of the same events. For reasons explained below, the panel finds that relator did not prove the violations alleged in this count by clear and convincing evidence and recommends dismissal of the count.

B. Findings of Facts

⁸ Relator originally alleged that respondent also violated DR 7-106(C)(6) (in appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal), but voluntarily dismissed it.

{¶1} Mr. Telerico violated court orders continuously during the 18-month divorce proceedings by selling tens of thousands of restrained assets; obtaining a bank loan for, and then spending, \$1,750,000 of restrained funds; refusing to pay Elaine Telerico's expenses, such as her equestrian expenses, her utility bills, and her credit card balances; spending approximately \$42,000 per month of commercial rent proceeds, which Judge Cheryl Karner of the Cuyahoga County Domestic Relations Court had ordered him to turn over to her appointed Special Master Bernard Agin and not to liquidate.

{¶2} In response to these and other violations of Judge Karner's orders, respondent filed more than 20 motions to show cause against Mr. Telerico.

{¶3} Mr. Telerico never refuted any of the affidavits of Elaine Telerico attached to any of the motions to show cause.

{¶4} Judge Karner repeatedly threatened to jail Mr. Telerico for violating court orders.

{¶5} Mr. Telerico's lawyer, Sarah Gabinet, could not identify anything in the motions to show cause that was false, misleading, meritless, or unsupported by an affidavit.

{¶6} Mr. Telerico never filed a written response or opposition to any of respondent's motions to show cause.

{¶7} The *Telerico* divorce involved many corporations owned by Mr. Telerico, numerous banks with which he regularly dealt, many mortgages with various lenders, numerous personal and corporate credit cards, and several retirement accounts.

{¶8} The issuance of multiple subpoenas to financial institutions is a common practice in complex divorce litigation. Obtaining information directly from a bank through a subpoena generally is considered a more reliable way of obtaining complete financial records than attempting

to obtain them from the opposing litigant. Indeed, not obtaining such records directly from the source can adversely affect a party's case.

{¶9} Mr. Telerico's lawyers did not attempt to quash or move for a protective order concerning the financial subpoenas served by respondent on third parties.

{¶10} Ms. Gabinet, Mr. Telerico's own lawyer, utilizes this practice herself.

{¶11} A settlement conference in *Telerico v. Telerico* occurred on Thursday, August 24, 2006, at the offices of Ms. Gabinet's law firm, Kohrman, Jackson & Krantz. In attendance were Louis Telerico and his lawyers, Sarah Gabinet and Ari Jaffe; Elaine Telerico and her lawyers, Greg Moore and respondent; Special Master Bernard Agin; and the Telericos' son, Mark.

{¶12} Ms. Gabinet opened the conference by indicating that their side wanted to discuss the need to release restrained funds so that Mr. Telerico could pay his bills.

{¶13} Respondent replied that it was necessary to discuss first the disposition of the home the parties had begun constructing on Bristol Drive ("the Bristol house").

{¶14} According to Elaine Telerico, Ms. Gabinet told her she would "get nothing," apparently referring to the Bristol house, to which respondent replied that Mr. Telerico had plenty of money. When Mr. Telerico claimed to be "broke," respondent replied that he had enough money to afford his lavish lifestyle, citing expenditures for cosmetic surgery and porcelain veneers.

{¶15} According to several witnesses, this outraged Mr. Telerico, who stood up on the opposite side of the table from respondent and began yelling about how unethical respondent was.

{¶16} Observing how upset Mr. Telerico had become in such a short time – according to one witness, he had never seen anyone as enraged – respondent asked Mr. Telerico whether he was "going to cry."

{¶17} Witness accounts differ as to what happened from this point forward.

{¶18} According to Ms. Gabinet and Mr. Jaffe, respondent responded to Mr. Telerico's tirade by standing up and shouting back at him. According to Elaine Telerico, however, when Mr. Telerico began yelling obscenities at respondent, respondent stayed calm and remained seated.

{¶19} According to Elaine Telerico and Special Master Agin, Mr. Telerico attempted to come around the table and physically attack respondent, but Jaffe, Moore, and Agin restrained him and forcibly removed him from the room. According to Ms. Gabinet and Mr. Jaffe, Mr. Telerico did not have to be restrained; Mr. Jaffe simply told him to leave the room and then escorted him out without using any force.

{¶20} The settlement conference proceeded, mostly without Mr. Telerico's presence, but the parties failed to achieve any results.

{¶21} On Friday, August 25, 2006, the day after the settlement conference, Mr. Telerico arrived at his Merrill Lynch office around noon. His co-employee Rita Covert observed that he was upset. Mr. Telerico stated that respondent had "egged [him] on" at the conference and that, no matter what it took, he was going to "get" respondent, even if it meant spending the rest of his life in prison.

{¶22} On August 28, 2006, four days after the settlement conference, Mr. Telerico went back to work at his Merrill Lynch office, still angry over what had happened at the conference. He asked co-employee Trudi Miner to help him play a DVD. When it started to play, she saw a rifle, became frightened, and reported it to Ms. Covert. They decided to notify the manager of the office, Adam Schoesler.

{¶23} Mr. Schoesler arrived shortly thereafter and went in to speak with Mr. Telerico. Before long, they were joined by Mr. Telerico's attorneys, Sarah Gabinet and Ari Jaffe, whose firm had offices in the same building as Merrill Lynch.

{¶24} Peter Bunnell and the Telericos' son, Mark, called respondent on behalf of Merrill Lynch and stated that they owed a "duty to warn" him for his physical safety. They advised respondent that Louis Telerico had made a viable threat to respondent's life and physical safety.

{¶25} After Mr. Telerico's threats against respondent, the Cuyahoga County Domestic Relations Court issued a civil protection order in favor of Mrs. Telerico against Mr. Telerico, including a "Brady Gun Disqualification," prohibiting him from possessing firearms.

{¶26} While at court for the protection order, respondent spoke by telephone to Ms. Gabinet. According to her, he called her a "scumbag" for not telling him about Mr. Telerico's ongoing threats. According to respondent, he told Ms. Gabinet that, if she knew over a period of several days that her client was threatening to kill respondent but withheld that information from him, that was a "scumbag move" on her part.

{¶27} Cleveland Police Detective Hugh Mills investigated Mr. Telerico's threats. He initially decided only to bring Mr. Telerico in to speak with him, in the hope that scaring him with the possibility of being arrested would rectify Mr. Telerico's behavior. Before he could do that, however, Detective Mills learned from the City of Aurora Police Department that Mr. Telerico had attempted to obtain a firearm without success. Learning this fact completely changed Detective Mills's thinking about the viability of Mr. Telerico's threats.

{¶28} Mills briefed the prosecutor's office on the investigation, and that office determined the threats were viable and made the decision to arrest Mr. Telerico.

{¶29} Mills notified respondent that Mr. Telerico had attempted to obtain a firearm, that this had changed his thinking about Mr. Telerico's threats to kill Stafford, that Mr. Telerico would be arrested when located, and that in the meantime respondent and his family should leave their

residence immediately, if possible. Respondent complied, vacating his home with his wife and children.

{¶30} Mr. Telerico was arrested and charged with threatening respondent.

{¶31} Merrill Lynch terminated Mr. Telerico's employment on November 13, 2006.

{¶32} Numerous witnesses, including respondent and Elaine Telerico, testified for the prosecution at Mr. Telerico's trial.

{¶33} Following a bench trial before Judge Stuart Friedman, Mr. Telerico was acquitted.

{¶34} During the course of the *Telerico* divorce action, respondent accused Mr. Telerico of committing significant financial misconduct.

{¶35} He alleged that Mr. Telerico spent as much as \$3,500,000 during the divorce, incurring expenses for, among other things, trips to lavish resorts in the Cayman Islands, Mexico, and Arizona; for tickets to a loge suite at Cleveland Browns Stadium; for furnishings and other expensive gifts for an exotic dancer he had befriended; for cosmetic surgery for himself and his paramour; for his paramour's condominium; and for trees totaling \$200,000, along with other additions to the Bristol house.

{¶36} Respondent also accused Mr. Telerico of telling Elaine Telerico that Mr. Telerico wanted the exotic dancer and her child to move into the Bristol house with Elaine and him.

{¶37} Also during the divorce action, respondent accused Mr. Telerico of threatening to sell or kill his wife's beloved horses and of failing to pay routine bills such as utility and credit card bills.

{¶38} Respondent was able to prove that most of these accusations were true.

{¶39} Also during the course of the *Telerico* action, respondent and Ms. Gabinet discussed their respective firms' attorney fees. Ms. Gabinet asked respondent to agree to release restrained

funds in order to permit Mr. Telerico to pay her firm's interim attorney fees. Respondent refused, citing Judge Karner's policy of never permitting interim attorney fees.

C. Conclusions of Law

{¶1} The disciplinary rules at issue in Count IV are DR 1-102(A)(5) and DR 1-102(A)(6). Relator proffered a number of factual bases for these alleged violations.

{¶2} Relator contends respondent filed an excessive number of motions to show cause and served an excessive number of subpoenas on third parties, the intended effect of which was to harass Mr. Telerico. The panel cannot conclude that respondent's filing of multiple motions to show cause and his issuance of numerous subpoenas were intended merely to harass Mr. Telerico, as relator alleges. Respondent had legitimate reasons for raising issues concerning Mr. Telerico's alleged financial misconduct and violations of court orders. Throughout the course of the divorce action, respondent's client, Elaine Telerico, notified respondent repeatedly by fax, phone, and email that her husband was continuing to dissipate marital assets and income earned during the marriage in order to bestow gifts on other women – including cosmetic surgery for his paramour and furnishings and other expensive items for an exotic dancer he had befriended – and to pay for his leisure travel (often in the company of his paramour), for his own cosmetic surgery, and for continued work on the Bristol house, which he admitted was his, not his wife's, dream house. Respondent does not deny that he conveyed these and other accusations about Mr. Telerico's expenditures, in one form or another, to the domestic relations court in the course of the divorce action. He did so – along with evidence supporting the allegations – because he believed they demonstrated Mr. Telerico's financial misconduct. In this proceeding, respondent rebutted relator's charges that he made false or misleading statements about Mr. Telerico: he presented credible documentary evidence (*e.g.*, a check to his paramour with the word "breasts" written on the memo

line) suggesting that his allegations concerning Mr. Telerico's expenditures were true. Although Mr. Telerico's former lawyers, Ari Jaffe and Sarah Gabinet, testified they did not believe respondent's allegations to be true, the basis for their belief in practically every instance was their client's word, rather than facts or documents they had gathered through independent investigation. Given the number of court orders Mr. Telerico violated, and his lack of candor about his violations, the panel is disinclined to accept his word over the documentary evidence respondent presented.

{¶3} In the few instances where respondent did not present the panel with documentary evidence to back up an accusation against Mr. Telerico, relator argues that the lack of such evidence compels the conclusion that respondent's accusation was false. For example, respondent accused Mr. Telerico of spending as much as \$200,000 on trees surrounding the Bristol house. Though it was never clear from the record in what context, how specifically, or how often respondent leveled this charge, it was clear he never produced an invoice showing what the trees actually cost. Instead, he presented an aerial photograph showing what seemed to be a broad swath of trees, which suddenly appeared on the Bristol property in the spring of 2006. Mr. Telerico's lawyers contended that the lack of any invoice documenting the trees' true cost disproves respondent's \$200,000 claim. Relator essentially adopts and advances the same argument. This argument loses sight of Mr. Telerico's forest for his trees. The gist of respondent's accusation about the trees, made in the divorce action and repeated before the panel, was that the sudden influx of them on the Bristol property meant Mr. Telerico was flouting a court order prohibiting him from spending *any* money there. Given the number of times respondent had to resort to motions to show cause and third-party subpoenas to trace assets Mr. Telerico had hidden, dissipated, or encumbered, it is hardly surprising that respondent would have difficulty pinpointing the exact amount of money Mr. Telerico was spending in violation of the court's orders. Mr. Telerico endeavored to conceal such spending from

respondent and Elaine Telerico, so to the extent their estimates of it were off-target, they cannot reasonably be treated as misrepresentations. Rather, they were merely over- or under-estimates.

{¶4} Relator also claims it adversely reflects on respondent's fitness as a lawyer that he went so far as to ask Ms. Gabinet to keep Mr. Telerico's paramour away from the Barrington Country Club, where Elaine Telerico also belonged. The panel disagrees. It is very common in divorce cases for a wife to become angry seeing her husband in public with his new girlfriend. Respondent's decision to address his client's anger over this delicate situation by asking Ms. Gabinet to prevent its recurrence was appropriate and in no way reflects adversely on him as a lawyer.

{¶5} Ms. Gabinet also accused respondent of making inappropriate comments to her client at the Barrington Country Club. Respondent's version of the same events would lead to the opposite conclusion -- that Mr. Telerico and his companions directed inappropriate comments or behavior at respondent and his children. Notably lacking any independent witness accounts of these events, the panel cannot reliably determine what really occurred. Because it is relator's burden to demonstrate alleged violations by clear and convincing evidence, this allegation fails.

{¶6} Ms. Gabinet also accused respondent of making inappropriate comments about the amount of fees his representation of Elaine Telerico was generating for Ms. Gabinet's firm. The gist of his alleged comments was that she should not complain about his behavior, given how much money her firm was earning in fees as a result. In her testimony, Ms. Gabinet gave the impression of being taken aback by respondent's comments. Again, relator presents no independent account of this conversation. The closest to it is an email exchange in which Ms. Gabinet asked respondent to agree to the release of restrained money so that her firm could receive interim attorney fees, a request respondent rejected based on Judge Karner's practice of never allowing interim fees. In the

reprint of their email exchange, which seems to be complete, both Ms. Gabinet and respondent appear at ease discussing the fees Ms. Gabinet's firm had racked up in *Telerico v. Telerico*, even to the extent of engaging in friendly banter about it. The panel finds nothing inappropriate about respondent's remarks concerning Ms. Gabinet's fees. Moreover, this was a legitimate topic for discussion between the two attorneys because the rate at which Mr. Telerico was dissipating the marital estate already posed the risk that neither he nor his wife would be able to pay their attorneys' fees at the end of the case. Based on this email exchange, the panel finds relator has not presented clear and convincing evidence demonstrating that respondent made inappropriate comments about the fees of Ms. Gabinet's firm or his effect on them.

{¶7} Relator's allegations about respondent's behavior during the *Telerico* settlement conference is akin to the incident at Cleveland Browns Stadium alleged in Count III. That is, because in our view no one witness told the panel the whole, unvarnished truth, the panel is left not knowing what really happened. The panel cannot say with any confidence that relator carried its burden of proof on this allegation by "clear and convincing evidence." To be sure, relator painted a picture of some behavior from respondent that the panel has come to recognize – e.g., taking advantage of an opponent's weakness when he can – but such testimony does not tell the panel the *facts* about what happened at the *Telerico* settlement conference. Relator has the obligation to lay out, in clear and convincing terms, what really happened in a given instance of allegedly improper attorney behavior. Relator did not do so with respect to the settlement conference.

{¶8} Perhaps the closest call for the panel was respondent's observation or question (again, depending on whose testimony one believes) about Mr. Telerico being on the verge of crying. When she testified about this at her husband's criminal trial, Elaine Telerico opined

that respondent made this remark not to aggravate her husband, but as an expression of his surprise that Mr. Telerico was so out of control. In her testimony before the panel, she half-heartedly attempted to retreat from her criminal trial testimony, claiming she had since “achieved clarity” – which respondent suggested has something to do with her refusal to pay respondent’s outstanding fee bills. Also, although in testifying before the panel Ms. Gabinet described respondent’s question “Are you going to cry now?” as a key remark made by respondent that aggravated Mr. Telerico, she was asked repeatedly at her deposition what she heard respondent say to Mr. Telerico at the settlement conference, but she never came up with the crying reference. So the remark relator now says was crucial to the alleged violation was not even part of the way Ms. Gabinet told the story at her deposition.

{¶9} This is just one example of the difficulty the panel faces in deciding whose version of the *Telerico* settlement conference to believe. For example, depending on the witnesses:

- **Either** respondent started off the conference by goading and making fun of Mr. Telerico for his dental work (Ms. Gabinet and Mr. Telerico) **or** respondent, in refuting Mr. Telerico’s claim he was “broke,” made reference to his large expenditures on cosmetic surgery and porcelain veneers but not in a goading way (Elaine Telerico and Special Master Agin).
- At that point, **either** respondent and Mr. Telerico stood up, leaned across the table, and started yelling at one another (Ms. Gabinet and Mr. Jaffe) **or** Mr. Telerico began yelling obscenities at respondent while respondent stayed calm and remained seated (Elaine Telerico).
- After respondent’s “cry” reference, **either** Mr. Telerico yelled at respondent until Mr. Jaffe told Mr. Telerico to leave the room (Ms. Gabinet and Mr. Jaffe) **or** Mr. Telerico started around the table to get at respondent but was restrained by Mr. Jaffe, Mr. Agin, and respondent’s associate Greg Moore from physically attacking respondent (Elaine Telerico, Mr. Agin, and Mr. Moore).

Although, from all of the varied witness accounts of the conference, one could cobble together a version that could support a DR 1-102(A)(6) violation arising from respondent’s behavior, there is

no clear and convincing evidence to support that version. In short, the dramatically divergent stories the witnesses have told about the same alleged acts are precisely what the lack of “clear and convincing evidence” looks like.

{¶10} What is clear is that respondent and Ms. Gabinet came to the settlement conference with very different agendas. She wanted to talk about how to resolve the Bristol house issue, while respondent wanted to talk about how to stop Mr. Telerico’s financial misconduct. Respondent had a very legitimate concern that, given Mr. Telerico’s declining earnings at Merrill Lynch and his uncontrolled spending, there would not be enough marital assets left to ensure that Elaine Telerico received a fair award in this case. When respondent legitimately tried to focus the discussion on Mr. Telerico’s spending in violation of restraining orders, Mr. Telerico became enraged. While respondent would have been well advised not to engage Mr. Telerico directly at that point, Ms. Gabinet conceded there were no “ground rules” for the settlement conference that precluded him from doing so. And while respondent might have been well advised not to mention openly what was evident to all (*i.e.*, that Mr. Telerico was on the verge of crying), it would be understandable if respondent viewed Mr. Telerico’s outburst followed by tearing up as a tactic to control, manipulate, or gain sympathy from Elaine Telerico, given that Mr. Telerico had used the same approach previously in an attempt to induce Elaine to fire respondent. In that light, it would be understandable that respondent felt the need to bring Mr. Telerico’s tactics out into the open, in order to keep control of the discussion. Based on the facts and circumstances presented, the panel does not conclude that relator has presented clear and convincing evidence establishing that

respondent's behavior at the settlement conference and in the conversation with Ms. Gabinet recapping it violated DR 1-102(A)(5) or DR 1-102(A)(6).⁹

{¶11} Relator's remaining allegation concerns a remark respondent made to Ms. Gabinet while taking her to task for not telling him that her client had threatened to kill him. Both of them say the word "scumbag" was used, but each puts it in a different context. Respondent claims he used it (fairly, he says) to describe Ms. Gabinet's and Mr. Jaffe's tactics in concealing Mr. Telerico's threats; Ms. Gabinet claims it was a derogatory reference that respondent directed at her, not her perceived behavior. Unlike the settlement conference but like the fee conversation discussed above, the panel had testimony from only two witnesses to consider, despite the fact that the incident was alleged to have happened in the courtroom while respondent was using the courtroom telephone, which the bailiff had just handed to him. From what the panel observed during this lengthy proceeding, it suspects respondent is capable of calling an opponent a scumbag lawyer or using derogatory words to the same effect. The panel does not find the evidence that he did so on this particular occasion to be clear and convincing, however, chiefly because what happened in the aftermath of this conversation casts doubt on the reliability of Ms. Gabinet's account.

{¶12} On August 30, 2006, the day after this incident, Ms. Gabinet wrote a letter to respondent. In it, she did not say anything to the effect of "How dare you call me a scumbag?" or otherwise make reference to it. In fact, her follow-up letter says nothing about what respondent

⁹ Relator makes much of the decision rendered by Judge Stuart Friedman, before whom Mr. Telerico was tried and acquitted for his alleged threats against respondent. In determining what happened at the settlement conference to set off Mr. Telerico, Judge Friedman decided to accept the story told by one participant in the conference, *i.e.*, Mark Telerico, who did not even testify before the panel. In the process, Judge Friedman had to navigate around the stories told by the seven other participants in the conference. The panel declines to consider Judge Friedman's decision for the truth of his ultimate determinations.

supposedly said to her the previous day, nor does it mention their supposedly upsetting phone conversation at all. Instead, the letter confirms and reiterates what Ms. Gabinet said to respondent in their face-to-face discussion at the courthouse once Ms. Gabinet arrived. In that conversation and her follow-up letter, she offered a full-throated defense of her own and her colleague Mr. Jaffe's behavior in not disclosing the threats to respondent. Far from accrediting Ms. Gabinet's story that she was the victim of a derogatory reference by respondent, the letter provides a misleading account of – and arguably attempts to cover up – at least Mr. Jaffe's knowledge of the threatening language Mr. Telerico used regarding respondent at the Merrill Lynch offices on August 28, at which time Merrill Lynch employee Rita Covert says Mr. Jaffe and Ms. Gabinet were present. Ms. Gabinet's letter went further than she needed to go to absolve herself of having failed to alert respondent to the threats. If in fact Ms. Gabinet, though present in the Merrill Lynch offices, had not heard anything about Mr. Telerico threatening to kill or harm respondent, all she needed to say was "I never personally heard any threats against you from Mr. Telerico." But in trying to absolve Mr. Jaffe too, she misled respondent. When confronted with that in her testimony before the panel, she backed off, saying she could not remember talking with Rita Covert at the Merrill Lynch offices on August 28 and could not even remember being in the Merrill Lynch offices that day. When pressed further by respondent's counsel, Ms. Gabinet said she was not denying she had been there, but was only saying she could not remember it. So while she was definitive about this whole topic in her August 30 letter to respondent – even going so far as to say that, if someone at Merrill Lynch said they spoke to her that day, it was "absolutely false" – when she testified before the panel, Ms. Gabinet said "I can't confirm or deny it because I don't recall being there." Transcript, 4016. This casts a large shadow of doubt over the testimony of Ms. Gabinet – the only witness relator called to testify about the "scumbag" remark – too large, in fact, for the panel to accept her account of that

conversation as reliable. Thus, the panel does not find relator proved by clear and convincing evidence that, under the highly unusual circumstances presented, respondent's use of the term "scumbag" adversely reflects on his fitness to practice law.

{¶13} In sum, the panel concludes relator has failed to establish the violations alleged in Count IV and, therefore, recommends its dismissal.

V. COUNT V: *KOSTYA v. KOSTYA*

A. Overview of Count V

In Count V, relator alleges that respondent engaged in misconduct by charging or attempting to collect a clearly excessive fee, making a misrepresentation to relator concerning respondent's filing of an appellate brief, failing to file that brief on time, and failing to communicate with his client. In particular, relator alleges that in failing to file a timely appellate brief, in failing to meaningfully communicate with his client Barbara Kostya, and in failing to provide her with a statement of services from 1995 to 2006, respondent violated DR 1-102(A)(6) (conduct that adversely reflects upon his fitness to practice law) and DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him). Relator further alleges that, in submitting bills for legal services rendered from 1995 to the present without notifying Ms. Kostya of increased hourly rates, respondent violated DR 2-106(A) (a lawyer shall not charge an illegal or clearly excessive fee) and Prof. Cond R. 1.5(a) (a lawyer shall not charge an illegal or clearly excessive fee). Relator also alleges that, in submitting a false and misleading response to relator's letter of inquiry regarding Ms. Kostya's grievance, respondent violated Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice), and Prof. Cond. R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law).

Based upon evidence presented on December 18, 2009 and January 6, 2010, and the video deposition of Ms. Kostya's father, Don Haas, the panel finds that relator did not prove the violations alleged in this count by clear and convincing evidence.

B. Findings of Fact

{¶1} In January 1994, Ms. Kostya retained the law firm known as Joseph G. Stafford & Associates, Inc. to represent her in a divorce action filed by her husband, Joseph Kostya.

{¶2} At the time Ms. Kostya retained the Stafford firm, respondent was one of its employees. While representing her, respondent became a partner of the firm, which changed its name, effective January 31, 2003, to Stafford & Stafford Co., LPA.

{¶3} Ms. Kostya executed a written retainer agreement with the firm on February 22, 1994, which established the terms of the firm's, and respondent's, engagement. This agreement included the following relevant terms:

2. Payment of a reasonable attorney's fee based upon the time and labor required; the circumstances under which the services are performed; the novelty and degree of difficulty of the issues involved and the skill requisite to perform the legal service properly; however, that such fees shall be no less than the normal hourly rates in effect for firm employees who perform the work.

3. Present hourly rates for Firm employees are as follows:

- a. Joseph G. Stafford: Two Hundred Dollars (\$200.00).
- b. Vincent A. Stafford: One Hundred Dollars (\$100.00).
- c. John J. Dyer, III: One Hundred Dollars (\$100.00).
- d. Paralegals: Fifty Dollars (\$50.00).
- e. Law Clerks: Fifty Dollars (\$50.00).

Hourly rates shall be subject to change and increase effective January 1 of each year, provided that notice thereof is given to the client on or before that date. Relator's Exhibit 103, pp.1-2.

{¶4} Although respondent claims to have informed Ms. Kostya orally at various unspecified times concerning increases in his hourly billing rate, she did not receive any separate written notice that respondent's hourly billing rate had been increased from his original rate of \$100

per hour to \$225 per hour in 1997; to \$250 in 1998; to \$295 in or about 2002; to \$325 in or about 2004; and, most recently, to \$350 per hour effective January 1, 2007.

{¶5} Over the course of her professional relationship with respondent, Ms. Kostya was aware that his hourly rates were increasing, though she did not fully understand the extent of the increase as of any particular time.

{¶6} Although Joseph Stafford filed the answer and counterclaim on her behalf, respondent was primarily responsible for representing Ms. Kostya in the divorce action, including the post-decree matters that are the primary focus of this court.

{¶7} The final divorce hearing was held on August 16, 1995, and the divorce decree was filed on September 14, 1995. The decree divided Mr. Kostya's Ameritech pension using a coverture fraction, and retained jurisdiction to enter a Qualified Domestic Relations Order ("QDRO"),¹⁰ approved by the Plan Administrator, to ensure that Ms. Kostya would receive her share of the pension benefits. The decree further provided:

The Defendant [Barbara Kostya] shall be the surviving spouse, and the Defendant shall be entitled to all cost-of-living adjustments, consumer price index adjustments, or other increases provided by the plan. The Defendant shall be entitled to a pro rata share of the participant's early retirement subsidy. The Defendant shall have the right to receive her benefits for her lifetime, based upon her life expectancy. Relator's Exhibit 124, p.5

{¶8} At no time between January 1994 and August 17, 1995 did Ms. Kostya receive a bill for legal services from the firm.

¹⁰ Although federal law requires that all qualified pension plans contain a non-alienability provision, a pension plan does not lose its qualified status if a plan participant's right to receive benefits is assigned, in whole or in part, to the participant's former spouse ("Alternate Payee") by means of a QDRO approved by the Plan Administrator. A Plan Administrator must consider certain statutorily prescribed requirements and restrictions before approving a QDRO. A QDRO may not require a pension plan to provide any greater rights to an Alternate Payee than are provided to the Participant under the Plan.

{¶9} Ms. Kostya received her first fee bill after the final divorce hearing in August 1995 (“the 1995 bill”).

{¶10} The 1995 bill indicated that, from January 26, 1994 through August 17, 1995, the firm had provided 148.80 hours of “professional services” to Ms. Kostya for a total charge of \$20,262.50.

{¶11} The 1995 bill also itemized reimbursable costs totaling \$834.17.

{¶12} After a credit for prior payments totaling \$2,880, Ms. Kostya’s remaining balance due on the 1995 bill was \$18,216.67.

{¶13} Except for three entries that identified the provider of services within the firm, none of the specific entries for professional services identified either the hourly rate applicable to that service, the person who provided the services, or the amount charged for the service.

{¶14} In the absence of such information, Ms. Kostya had no ability to determine the specific hourly rate she was charged for any particular professional service.

{¶15} In accordance with the firm’s offer, Ms. Kostya paid \$16,000 to the firm in full satisfaction of the 1995 bill.

{¶16} Although the 1995 bill clearly charged more than \$100 per hour for professional services, Ms. Kostya did not request additional information concerning the hourly rates the firm had charged in the 1995 bill before she made the \$16,000 payment.

{¶17} Between August 1995 and February 2008, respondent continued to represent Ms. Kostya regarding several post-decree matters, including obtaining approval by the Plan Administrator of the QDRO to complete the division of Mr. Kostya’s pension benefits as ordered in the decree, and multiple post-decree motions filed by the parties regarding enforcement or modification of various provisions of the decree.

{¶18} Each of these post-decree issues ultimately was resolved to Ms. Kostya's satisfaction.

{¶19} For more than twelve years following the filing of the decree, respondent and Diana DiPetta, Mr. Kostya's attorney, engaged in protracted litigation concerning the wording of the QDRO.

{¶20} The dispute focused primarily on language designed to protect Ms. Kostya's right to be treated as Mr. Kostya's surviving spouse.

{¶21} Each of the attorneys filed several proposed QDROs over the course of the litigation. Although the Cuyahoga County Domestic Relations Court approved multiple QDROs, the Pension Plan Administrator failed to approve any of those QDROs until the order that was finally approved and filed on February 18, 2008.

{¶22} The task of obtaining approval of the QDRO was complicated by the fact that, although Mr. Kostya worked for Ameritech at the time of the divorce, his employer and the administrator of his pension plan changed multiple times due to mergers and acquisitions.

{¶23} Neither respondent nor Ms. DiPetta unreasonably delayed the approval and filing of the QDRO.

{¶24} Although Ms. Kostya felt frustrated in her efforts to obtain updates from respondent concerning the status of the QDRO, she was satisfied with respondent's services concerning the post-decree motions and with respondent's communications with her concerning these motions.

{¶25} Respondent's chief method of keeping in contact with Ms. Kostya seems to have been through letters enclosing court filings in her case.

{¶26} Ms. Kostya's father, Don Haas, also communicated with respondent concerning the QDRO. As an Ameritech retiree himself, Mr. Haas possessed more understanding than his daughter

concerning the QDRO issues and was able to provide information about the Ameritech pension plan.

{¶27} During the protracted litigation regarding the QDRO, Magistrate Eileen Gerity issued a decision in the *Kostya v. Kostya* case in December 2000, which provided in part:

A review of the Court's docket indicates that since November 1995 five (5) motions to Adopt the Qualified Domestic Relations Order were filed. Four of the motions were filed by Defendant. The most recent and currently pending Motion to Adopt the Qualified Domestic Relations Order (QDRO) was filed by Plaintiff. A further review of the Court's docket indicates that the Court signed a QDRO in March 1998 and another QDRO in March 1999. Plaintiff alleges that none of the QDRO's signed by the Court have been approved by the Plan Administrator. Defendant alleges that the last QDRO signed by the Court was approved by the Pension Plan. The Magistrate finds that neither party presented any evidence from the Pension Plan Administrator in support of their respective positions regarding the status of the QDRO's signed and journalized by the Court.

* * *

The Magistrate finds that according to the terms of the division of Plaintiff's Ameritech NonManagement Pension Plan found in the separation agreement and the divorce decree Defendant is named as the surviving spouse. Also according to the terms of the separation agreement and divorce decree Defendant is entitled to take her portion of the pension benefits based upon her life expectancy. The Magistrate finds that the phrases taken together are ambiguous. The Magistrate further finds that the Separation Agreement and the Divorce Decree do not specifically set forth that Defendant is entitled to a Qualified Joint and Survivorship Annuity. Under the approaches outlined above the naming as the surviving spouse would be consistent with the qualified joint and survivorship annuity and the ability for the alternate payee to take her benefits based upon her life expectancy would be consistent with the severed approach. Neither party presented any evidence that either approach is available under the Ameritech NonManagement Pension Plan. Without that evidence it is impossible for the Court to adopt a Qualified Domestic Relations Order.

* * *

Defendant's Motion to Strike . . . is denied. Plaintiff's Motion to Adopt Qualified Domestic Relations Order . . . is denied. [Relator's Exhibit 107, pp. 2-4.]

{¶28} Mr. Kostya filed timely written objections to Magistrate Gerity's decision and attached information concerning the Plan (which had not been provided to the magistrate) in support

of his objections. Even though respondent did not file a response to the objections, Judge Timothy Flanagan summarily overruled Mr. Kostya's objections and adopted the magistrate's decision.

{¶29} Mr. Kostya filed a notice of appeal to the Eighth District Court of Appeals from Judge Flanagan's order. Respondent filed a brief on Ms. Kostya's behalf one day after the court's deadline. Apparently as a result, respondent was not permitted to participate in the oral argument.

{¶30} The court of appeals reversed Judge Flanagan's order and remanded the matter to the trial court for consideration of the information that Mr. Kostya had attached to his objections concerning the options available under his pension plan to protect Ms. Kostya's rights as his surviving spouse.

{¶31} Respondent did not inform Ms. Kostya promptly about either Mr. Kostya's objections or the appeal that followed.

{¶32} In his response to relator's inquiry regarding Ms. Kostya's grievance, respondent stated the following: "Mr. Kostya has refused to resolve the QDRO issue, has opposed each of the QDROs proposed by Ms. Kostya and her counsel, failed to prepare and submit a proposed QDRO despite being required to do so by Local Rule 28, and has caused considerable delay to the proceedings by objecting to decisions by the Court and filing an appeal of a decision made by the Court." Relator's Exhibit 113, p. 3.

{¶33} After receiving the 1995 bill, Ms. Kostya did not receive another fee bill from the firm until a bill dated November 30, 2006 (the "2006 bill") in the amount of \$10,955.57.

{¶34} The 2006 bill stated that she owed \$7,959, for 32.50 hours of "professional services" provided to her during the 11 years covered by the bill, plus \$76.07 for certain itemized litigation costs.

{¶35} The individuals at the Stafford firm who provided professional services to Ms. Kostya from 1995 to 2006 are not identified on the 2006 bill.¹¹ Without this information, she could not accurately determine the hourly rate(s) charged for each professional service itemized on the 2006 bill.

{¶36} From the hours and fees stated on that bill, a reasonable person, with knowledge of the matters that were the subject of the representation during the period covered by the 2006 bill, would have concluded that the firm had charged more than \$100 per hour for respondent's services.

{¶37} Respondent admitted that, due to his firm's administrative errors, the 2006 bill incorrectly stated that Ms. Kostya had a previous balance due of \$18,216.67, on which she had paid \$16,500, and that she was incorrectly charged \$1,203.83 for interest on an overdue balance.

{¶38} Based on the hours charged, the costs incurred, and the \$500 payment made by Ms. Kostya in January 1997, the amount of the 2006 bill should have been \$7,535.07.

{¶39} The firm's failure to provide Ms. Kostya with a bill for over 11 years was caused by an error in coding her account in the firm's computerized billing system following the issuance of the 1995 bill.

{¶40} After Ms. Kostya received the 2006 bill, she spoke with respondent and told him that, although she was surprised by the bill, she knew that she owed him for the work he had done for her concerning the post-decree contempt motions. However, she told respondent she should not have to pay for the work on the QDRO because it had not been completed.

{¶41} Respondent told her that she should pay whatever she felt was fair to satisfy the 2006 bill, but that she would need to agree to pay him for the work still to be done to finalize the QDRO.

¹¹ In his response to relator's inquiry regarding Ms. Kostya's grievance, respondent stated he billed Ms. Kostya for a total of 30.6 hours from 1995 to 2006, while his brother Joseph billed her for a total of 1.9 hours from 1995 to 1999.

{¶42} Respondent's business practice is not to argue with his clients over the amount of his bills. Much of his business is generated from referrals from present and former clients, and he has concluded that arguing with clients over their bills is counterproductive.

{¶43} After speaking with respondent, Ms. Kostya did not know how to determine a fair amount to pay to satisfy the 2006 bill. When Ms. Kostya discussed this issue with her father, he advised her not to pay anything and instead to file a grievance against respondent.

{¶44} Ms. Kostya never made any payments on the 2006 bill, and she filed a grievance against respondent on July 31, 2007.

{¶45} During his testimony, respondent indicated that he would be satisfied with a payment of \$5,000 in full satisfaction of the 2006 bill.

{¶46} Ms. Kostya agreed in her testimony before the panel that this would be a fair amount. Ms. Kostya did not dispute any particular entry on the 2006 bill.

{¶47} After his discussion with Ms. Kostya concerning the 2006 bill, respondent continued to perform services in regard to approval of the QDRO. Commencing in January 2007, and continuing at least through June 2007, respondent sent monthly invoices ("the 2007 bills") to her for such services.

{¶48} Although none of the 2007 bills expressly stated the identity of the provider and the hourly rate for each service, a reasonable person would have concluded from the information provided on the 2007 bills that the Stafford firm was charging at least \$325 per hour for these services.

{¶49} Without complaining about the hourly rate(s) charged by the firm, Ms. Kostya paid the full aggregate amount of the 2007 bills for services performed after the date of the 2006 bill.

C. Conclusions of Law

{¶1} Relator charges that respondent violated DR 1-102(A)(6) (conduct that adversely reflects upon his fitness to practice law) and DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him) by failing to timely file an appellate brief, in failing to meaningfully communicate with Ms. Kostya, and in failing to provide her with a statement of services from 1995 to 2006. With regard to these charges, the panel concludes as follows.

{¶2} Although respondent filed an untimely brief and was not permitted to argue in the court of appeals, this negligent act alone does not add up to neglect of a legal matter under DR 6-101(A)(3), nor does it adversely reflect on respondent's fitness to practice. On the whole, the evidence demonstrates that respondent competently performed services that produced favorable results for Ms. Kostya, and that she was not harmed by respondent's failure to file a timely appellate brief. In fact, respondent demonstrated persistence in regard to the approval of the QDRO, and ultimately obtained (albeit due to factors beyond his control) a very favorable result concerning protection of her property rights in her ex-husband's pension.

{¶3} Although Ms. Kostya testified that, after the divorce was final, respondent would not return her phone calls, causing her to basically give up trying to call him, she continued to have him represent her on the multiple post-decree motions filed in her divorce proceeding. Respondent disputed her claims that he failed to return her phone calls, and there was no documentary evidence corroborating her claims. Moreover, respondent maintained steady contact with Ms. Kostya via letters he sent enclosing court filings.

{¶4} In fact, Ms. Kostya expressed little problem with respondent's communication with her on any subject other than the QDRO. She acknowledged that she asked her father to

communicate with respondent on that subject, and that there were communications. Otherwise, Ms. Kostya's biggest complaint was that respondent did not spend enough time answering her questions, and that he was usually rushing to another hearing. Although she had every right to expect that her attorney would answer her questions, the panel does not conclude, by clear and convincing evidence, that respondent's communication shortcomings described in this matter rise to the level of neglect of a legal matter under DR 6-101(A)(3), or adversely reflect on respondent's fitness to practice law.

{¶5} Relator presented no evidence to dispute respondent's testimony that the failure to send a bill to Ms. Kostya for over eleven years was the result of a coding error in the firm's billing system. The panel does not conclude that an administrative error of this sort constitutes neglect of a legal matter by respondent under DR 6-101(A)(3), or that it adversely reflects on respondent's fitness to practice law.

{¶6} Relator charges that respondent violated DR 2-106(A) (a lawyer shall not charge an illegal or clearly excessive fee) and Prof. Cond. R. 1.5(a) (a lawyer shall not charge an illegal or clearly excessive fee) when he submitted fee bills for legal services rendered after 1995 without notifying Ms. Kostya of increased hourly rates. DR 2-106 provides: "(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

{¶7} Although Prof. Cond. R. 1.5(a) contains the same language set forth in DR 2-106(A) and (B), the remainder of Prof. Cond. R. 1.5 sets forth additional requirements not expressly stated in DR 2-106. Much of relator's argument is based on this additional language. Based on the express terms of the firm's retainer agreement with Ms. Kostya, her acknowledged understanding

that respondent's hourly rate had increased since 1994, the basic information contained in the bills issued after February 1, 2007, and her payment of those bills without objection, the panel concludes that relator has failed to establish, by clear and convincing evidence, that respondent violated his obligations under Prof. Cond. R. 1.5.

{¶8} DR 2-106(B) lists eight nonexclusive factors to be considered in determining the reasonableness of a fee. Relator submitted no evidence concerning any of the listed factors. Instead, relator argues that, because the retainer agreement requires that the client be provided with notice of any increase in the hourly fees recited in the agreement, any fee based on increased hourly rates is *per se* excessive in the absence of such notice. Relator cites two decisions of the Supreme Court of Ohio in support of this position.

{¶9} In *Columbus Bar Assn. v. Brooks* (1999), 87 Ohio St.3d 344, Brooks was retained to pursue a medical malpractice claim. As required by R.C. 4705.15(C), Brooks executed a written fee agreement with his clients which provided for either fees for services performed at the rate of \$125 per hour if the case was litigated, or a one-third contingent fee in the event of a settlement. When the case was settled, Brooks charged the contingent fee and further charged the clients for expenses, including work performed, at an hourly rate, by his paralegal, law clerk, and secretary. The Court stated that, although a contingent fee contract should provide that the client will be responsible for the costs of litigation, such costs "generally do not include secretarial charges or fees of paraprofessionals." *Id.* at 345-46. Rather, "[t]hose costs are considered to be normal overhead subsumed in the percentage fee." *Id.* at 346. Therefore, the Court held: "We conclude that by collecting for secretarial and law clerk expenses, in addition to filing fees, deposition fees, and his thirty-three percent

of the settlement, respondent did not adhere to his written contract with the Jacksons and thereby charged a clearly excessive fee in violation of DR 2-106(A).”

{¶10} In *Akron Bar Assn. v. Naumoff* (1991), 62 Ohio St.3d 72, Naumoff was retained to handle administration of a probate estate at an agreed hourly fee of \$80 per hour. Subsequently, Naumoff discovered that another application for authority to administer the estate had been filed and that the administrator intended to contest the right of Naumoff’s client to receive certain funds. Although Naumoff claimed to have discussed with his client changing to a contingent fee arrangement, the Board concluded that the fee was fixed at \$80 per hour, and had not been modified, and that the fee actually charged by Naumoff after his client’s claim was settled “grossly exceeded” the amount to which Naumoff was entitled under the agreed-upon fee. The Court adopted the Board’s finding of a violation of DR 2-106.

{¶11} The panel concludes that these cases are distinguishable from the facts presented in this count.¹² The retainer agreement between Ms. Kostya and the Stafford firm provides for:

¹² Although relator cites several decisions from other jurisdictions, only two of those decisions involved alleged violations of DR 2-106. In its decision in *People v. Calvert*, 915 P.2d 1310 (Colo. 1996), the Supreme Court of Colorado sanctioned an attorney who stipulated that he failed to adequately explain the basis of his contingent fee agreement to his client and charged a clearly excessive fee by taking a contingent fee on no-fault insurance proceeds, even though the fee contract expressly excluded that type of recovery. In its decision in *Attorney Grievance Commission of Maryland v. Kerpelman* (1981), 438 A.2d 501, the Maryland Supreme Court sanctioned an attorney for misconduct in violation of DR 2-106(A), based on expert testimony that the fees charged by Kerpelman were excessive. Kerpelman also was found to have violated DR 7-101(A)(2) and DR 7-102(A)(5) by entering into a contract to represent his client for \$70 per hour and then failing to abide by the agreement by informing the client that his fee would be calculated on a *quantum meruit* basis. The court also found that Kerpelman engaged in dishonest conduct because he agreed to employment at an hourly rate “knowing that he was not going to abide by such an arrangement if the case was won or, having won the case, decided the time was propitious to extract a larger fee than had been agreed upon.” *Id.* at 508. The panel concludes that these decisions are also factually distinguishable from the instant matter.

Payment of a reasonable attorney's fee based upon the time and labor required; the circumstances under which the services are performed; the novelty and degree of difficulty of the issues involved and the skill requisite to perform the legal service properly; however, that such fees shall be no less than the normal hourly rates in effect for firm employees who perform the work.

Although relator argues that this language is "superfluous," the panel is not free to disregard a clear and unambiguous contractual provision. Even though respondent failed to comply with his firm's contractual obligation to notify Ms. Kostya of increases in his hourly rates, the language of this particular agreement does not restrict the firm to charging only fees based upon the hourly rates set forth in the agreement.

{¶12} The panel's analysis would be different if the agreement stated that the firm's fees equaled, or could not exceed, the lodestar (the respective attorneys' hourly rates multiplied by hours worked, then added together); but the agreement, by stating that the firm's "fees shall be no less than the normal hourly rates in effect for firm employees who perform the work," instead indicates that the lodestar is merely the *minimum* amount the firm could charge for fees. In other words, knowing the firm attorneys' operative hourly rates at any given time, at best, would have allowed Ms. Kostya to calculate the minimum she would owe in fees, which hardly seems to be the concern that animated her grievance.

{¶13} Because relator relies completely on the language of the retainer agreement to prove respondent's misconduct, relator must establish that the fees charged in excess of the hourly rates set in the agreement are unreasonable based upon the factors listed in the agreement. Although the time and labor expended by respondent in providing professional services are factors to be considered in determining the reasonableness of the fees, there are other factors listed in the agreement that must be weighed.

{¶14} Respondent testified that, in his opinion, the fees charged in the 2006 bill were reasonable. Relator offered no expert testimony to contradict his position. Ms. Kostya did not testify that the fees charged for services performed during the period covered by the 2006 bill were unreasonable. Although respondent suggested that she pay whatever she thought was fair for his post-decree work, Ms. Kostya testified that she had no way of determining what was fair. Rather than object to the hourly rates charged in the 2006 bill, she actually was more concerned that she not be required to pay fees for work on the QDRO until it was completed.¹³ In testimony before the panel, respondent and Ms. Kostya generally appeared to agree on what would be a reasonable fee for the services reflected on the 2006 bill.

{¶15} Therefore, in the absence of any evidence that the professional fees charged by respondent in the 2006 bill were unreasonable based on the factors (including the hourly rates) recited in the retainer agreement, the panel does not find that relator presented clear and convincing evidence that those fees were in excess of a reasonable fee, in violation of DR 2-106.

{¶16} Finally, relator charges that, by submitting a false and misleading response to relator's letter of inquiry regarding Ms. Kostya's grievance, respondent violated Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice), and Prof. Cond. R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law). Relator's only allegation concerning a false and misleading response to a letter of inquiry is contained in ¶ 178 of the Amended Complaint, which states:

¹³ Ms. Kostya also complained that she was erroneously charged for an unpaid balance on the 2005 bill and for interest on that unpaid balance. Respondent readily admitted this was a billing error by his firm.

In his response to relator's letter of inquiry regarding Barbara's grievance, respondent provided false and misleading information regarding the 2001 appeal. In his response and in relevant part, respondent stated, "On May 21, 2001, Mr. Kostya filed a Notice of Appeal to the Eighth District Court of Appeals in Case No. CA-2001-079860, which caused further delays in these proceedings. On behalf of Ms. Kostya, I filed an Answer Brief (Exhibit '12')."

{¶17} Although there is no dispute that the appellate brief respondent filed was not timely, and that he was not permitted to participate in oral argument, the evidence establishes that he did, in fact, file a brief. Considering that respondent's response to relator's letter of inquiry is twelve pages long and attaches a file-stamped copy of the brief filed by respondent, and that the decision of the court of appeals is a matter of public record, the panel concludes that the evidence fails to support a finding, by clear and convincing evidence, that this statement constitutes a violation of Prof. Cond. R. 8.4(c), (d) and/or (h). Although the panel questions whether respondent's response to relator's letter of inquiry, taken as a whole, would meet respondent's obligation under Prof. Cond. R. 8.1 to disclose all material facts in connection with a disciplinary matter, relator has not charged a violation of that rule. The panel may not find rule violations not cited in the complaint without prior notice to respondent. *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 2006-Ohio-5342, ¶ 25, citing *Cuyahoga County Bar Assn. v. Judge*, 96 Ohio St.3d 467, 2002-Ohio-4741, ¶ 4. For the foregoing reasons, the panel concludes that relator has failed to establish, by clear and convincing evidence, that respondent's response to relator's letter of inquiry violated Prof. Cond. R. 8.4(c), (d) and (h). The panel therefore recommends dismissal of Count V.

VI. THE APPROPRIATE SANCTION

Arriving at the appropriate sanction requires consideration of the attorney's misconduct, the duties violated, the injuries caused, the attorney's mental state, and the sanctions imposed in similar cases. *Cleveland Bar Assn. v. McMahon*, 114 Ohio St.3d 331, 2007-Ohio-3673, ¶ 24. Before

recommending a sanction, the aggravating and mitigating factors are weighed in the case, including not only those set forth in BCGD Proc. Reg. 10(B)(1) and (2), but all factors relevant to the case.

Cincinnati Bar Assn. v. Mullaney, 119 Ohio St.3d 412, 2008-Ohio-4541, ¶ 40.

Respondent's obstructive behavior and lack of candor struck at the heart of the discovery processes in *Radford* and *Meuhrcke*, violated three disciplinary rules, and in each case hindered and prolonged the actions to the detriment of the judges, parties, and counsel involved. His mental state was one of deliberate avoidance of discovery, a critical piece of the litigation machinery. "Abuses of an attorney's obligations during the discovery process will not be tolerated." *Cincinnati Bar Assn. v. Wallace* (1998), 83 Ohio St.3d 496, 500.

We take note of three disciplinary cases that involved attorneys whose responses to discovery directed at their clients showed indifference or a lack of candor, as opposed to neglect.

In *Wallace*, the attorney received a public reprimand for submitting an unverified interrogatory answer that assumed the legitimacy of her client's recent property transfer, which the attorney knew to be fraudulent. The Supreme Court faulted the attorney for not disclosing what she knew to opposing counsel. *Id.* at 500. The attorney's conduct did not obstruct the discovery process, as it apparently was relatively easy for the opposing counsel to determine based on public records that the property transfer had been fraudulent. *Id.* at 498.

In *Marsick*, *supra*, at 551, the attorney represented a truck driver who had hit a parked car, killing a passenger and injuring its driver. He repeatedly failed to reveal in discovery responses a tow-truck driver's statement that the truck driver admitted at the scene that he had dozed off. The attorney maintained his silence even when the truck driver testified at his deposition and at trial that he had swerved to avoid a deer. As a result, the jury found the truck driver less than 100% responsible. The judgment was affirmed on appeal. After the attorney revealed the truth during

subsequent proceedings on a contribution claim, the judgment was vacated. The attorney received a six-month actual suspension. *Id.* at 553.

In *Columbus Bar Assn. v. Finneran* (1997), 80 Ohio St.3d 428, 431, the attorney flouted his discovery obligations for purposes of delaying the proceedings in multiple cases, even going so far as to dismiss and refile the cases. The complaint detailed eleven examples of this. The Supreme Court stated that the attorney's "tactics of evasion and delay" reflected "a strategy out of keeping with the purpose and intent of our system of orderly procedures." *Id.* at 431. "Dilatory practices bring the administration of justice into disrepute." *Id.* For this conduct, as well as his lack of cooperation in the disciplinary process, the attorney was suspended indefinitely.

Next we turn to the aggravating and mitigating factors in this case. As to aggravating factors, respondent committed multiple offenses that were part of a pattern of indifference to discovery that had been directed at his clients. BCGD Proc. Reg. 10(B)(1)(c) and (d). Respondent's disregard for such discovery was not part of a pattern of neglect, as occurs in many cases. *Cf. Akron Bar Assn. v. Maher*, 121 Ohio St.3d 45, 2009-Ohio-356, ¶ 25. Rather, he seemed to be taking advantage of his opponents to gain some tactical advantage. This suggests a selfish motive, itself an aggravating factor. BCGD Proc. Reg. 10(B)(1)(b). Respondent has been disciplined previously, another aggravating factor. BCGD Proc. Reg. 10(B)(1)(a). In the prior instance, *Cuyahoga County Bar Assn. v. Gonzalez* (2000), 89 Ohio St.3d 470, respondent and his opponent both received public reprimands for calling one another obscene names in a courtroom, after which they went out into a hallway, stood chest to chest, and continued yelling at each other, in violation of DR 7-106(C)(6). While we do not find conduct rising to the same level in this case, along with respondent's disregard for, and indifference to, discovery in *Radford* (Count I) and *Muehrcke* (Count II) came signs that he still has a tendency to resort to verbal brawling when confronted with open hostility from an

opponent, as happened in both *Radford* and *Muehrcke*.¹⁴ His abilities and acumen as a lawyer are more than sufficient to allow him to rise above such hostility, which, from our understanding of his domestic relations practice, is unlikely to diminish any time soon. He did not always do that in *Radford* and *Muehrcke*. Regardless of what this conduct might say about how far respondent has come as an advocate since his public reprimand in 2000, it shows he remains insufficiently mindful and respectful of his distinct role as an officer of the court, a role that demands dignified conduct. We therefore find commonality between his first offense and the instant violations, which justifies enhancement of the sanction. *Disciplinary Counsel v. King*, 103 Ohio St.3d 438, 2004-Ohio-5470, ¶¶ 23-25 (treating prior and subsequent violations of a similar nature as an added aggravating factor).

Moreover, during the course of this unusually long hearing, respondent periodically displayed disrespect for Assistant Disciplinary Counsel Lori Brown, badgering her on the many occasions when he testified for, in his view, having skewed her investigation. We do not question his right to raise such concerns, but he did so repeatedly, in a personal way, with unwarranted

¹⁴ In *Muehrcke v. Housel*, Robert Housel was respondent's opposing client and opposing counsel. Housel's name arose in connection with the grievances that led not only to Count II but also to Counts III and IV. Housel never testified before the panel, but at the deposition of Dr. Muehrcke, which Judge McDonnell intermittently monitored to keep some semblance of peace, Housel's tempestuous relationship with respondent was on full display. The transcript shows that Housel was out of control – e.g., telling respondent over and over to “shut up,” and walking around to respondent's side of the table to put his face a few inches from respondent's. At one point, respondent asked Housel's lawyer, Petrov, to control him, but Petrov replied “I can't,” while Housel chimed in, “No, he can't.” But respondent misbehaved too, so much that Judge McDonnell threatened him with contempt and placed this on the record: “Every time I've come in here, you have grunted at me, you have thrown up your hands repeatedly, and I don't know where you think that that is a successful strategy, but it's not here, and I will not tolerate it....” Relator's Exhibit 43, p. 175.

Housel is a former member of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. No member of the panel has ever spoken to him about this case.

volume, and in instances where his criticisms were not germane. While we do not find that his treatment of Ms. Brown ever rose to the level of a lack of cooperation in the disciplinary process, over time it evinced what the panel deemed unwarranted disrespect for a fellow officer of the court, which we treat both as an aggravating factor and as a circumstance that makes it impossible for us to credit him with a cooperative attitude toward the proceedings as a mitigating factor. *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048, ¶¶ 3-9, 11, 36; see BCGD Proc. Reg. 10(B)(2)(d).

Respondent did not formally present any evidence of mitigating factors, nor did relator bring any to our attention. Although the parties did not stipulate to his good character, and respondent did not present character testimony or letters, the panel has had the opportunity to observe respondent up close over 22 days of hearings, under intense pressure. Hence, we feel qualified to make some observations that, in our view, bear on his character and qualities as a lawyer. Respondent plies his trade in what some might consider a gladiatorial arena – the Cuyahoga County Domestic Relations Court. While we fault him for exhibiting deliberate disregard for discovery in *Radford* and *Muehrcke*, respondent hardly could be accused of disregarding his clients. He is a very capable lawyer who uses his grasp of domestic relations law to fulfill the needs and protect the interests of those he represents, particularly wives, who are confronting the pain, pressure, and loss involved in ending a marriage. It could not have been easy for respondent to watch his practice and behavior scrutinized for 22 days over a nine-month period. Except for those instances when he lapsed into personal criticisms of Assistant Disciplinary Counsel, respondent behaved appropriately in the

panel's hearings, even in the face of unwarranted and revisionist accusations by two former clients.¹⁵

It weighs heavily in our sanction recommendation that respondent faces discipline for a second time, for conduct not altogether different from the first time. This tells us the public reprimand he received the first time obviously did not serve as the wake-up call it was intended to be. Respondent's tendency to verbally brawl with opponents who are willing to stand toe-to-toe with him, so evident in his first violation more than ten years ago, is still on display in these violations (e.g., Robert Housel in *Muehrcke*). Boorish behavior by his opponents or their clients is no excuse. Respondent simply must control his own behavior. It also is telling that, even when opponents act civilly toward him and insist he play by the rules, as Eric Laubacher and Russell

¹⁵ We feel compelled to respond to evidence in aggravation that relator offered through the testimony of two of respondent's former clients, who impugned the services respondent provided them. Testifying that she had achieved "clarity" in the years since respondent represented her in her divorce, Elaine Telerico blamed respondent for causing her ex-husband's firing and his prosecution, which, evidently in retrospect, she believes forced her into a less lucrative settlement with him. The testimony of Detective Hugh Mills suggested that Mr. Telerico was prosecuted because he made what public officials charged with such decisions viewed as credible threats to harm respondent and engaged in what the same officials considered overt acts in furtherance of those threats. To the extent Elaine Telerico believes respondent brought to light too many examples of her ex-husband's financial misconduct, we note the stream of faxes and emails she sent reporting Mr. Telerico's conduct to respondent and instructing him to use the information to – in her words – hold Mr. Telerico "accountable for fraud" and show him "no mercy." Respondent used such information when she provided it. Although reasonable people can disagree about whether, strategically, that helped or hurt Elaine Telerico in the end, it appears to have been done within the bounds of the rules. Relator also elicited criticisms of respondent from another of its witnesses, Barbara Kostya. Ms. Kostya leveled specific criticisms at respondent for such things as not making her aware his hourly rate had increased and not keeping her up to date on her case via telephone calls, as he had done in the past. We take note of these criticisms not because we found them convincing but merely to point out that, in leveling them, Ms. Kostya repeatedly stated that she was "retracting" prior sworn testimony in which she had given contrary explanations favorable to respondent, including a statement from her deposition suggesting that she did not believe her own grievance against respondent made sense.

Kubyn did in *Radford*, respondent responds by trying to bully or take advantage of them. This also must stop.

Simply put, respondent cannot be allowed to continue toying with the administration of justice. We do not believe another public reprimand would serve to make the necessary impression on him. Neither, we think, would a stayed suspension; only an actual suspension can. Relator recommends a two-year actual suspension, although this recommendation assumed a greater number and broader array of disciplinary violations than the panel has found.

As noted above, the panel does not find, by clear and convincing evidence, that respondent made outright misrepresentations in claiming compliance with discovery in *Radford* or in invoking privileges in *Muehrcke*. Nor does the panel find he made or abetted misrepresentations in discovery responses, as in *Marsick* and *Wallace*. His misconduct was not as egregious as the attorney's behavior in the eleven cases that comprised *Finneran*, where an indefinite suspension was imposed. Respondent's obstructive behavior and lack of candor in *Radford* and *Muehrcke*, however, were just as disruptive to the administration of justice in those cases as outright misrepresentations would have been. As in both *Marsick* and *Wallace*, respondent could have spared the courts, his clients, and his opponents considerable delay and expense by making simple disclosures. Unlike those cases, these disclosures would have had no discernible effect on his clients' cases. The fact that respondent's indifference to discovery and lack of candor did not even advance his clients' cases makes his tactical choices even more difficult to explain than the ones made in *Marsick* and *Wallace*. Moreover, because respondent took advantage of his opponents' lack of knowledge under circumstances where they could not disprove or effectively challenge his claims, his conduct resulted in much longer and more costly delays than the offending attorney's conduct did in *Wallace*. The delays he caused more closely resemble that involved in *Marsick*.

Because the panel believes respondent's obstructive behavior and lack of candor in *Radford* and *Muehrcke* were just as disruptive to the administration of justice as outright misrepresentations would have been, it concludes that his conduct warrants a sanction tantamount to that mandated for misrepresentations, actual suspension. See *Disciplinary Counsel v. Rohrer*, supra, ¶ 43. Indeed, it warrants the same actual suspension that was ordered in *Marsick*, namely six months. In light of the aggravating factors discussed above – particularly respondent's prior offense, the nature of it, and the apparent ineffectiveness of the discipline then imposed – we also believe these circumstances warrant an additional period of stayed suspension, accompanied by monitored probation. The panel recommends monitoring by a well qualified domestic relations practitioner selected by relator.

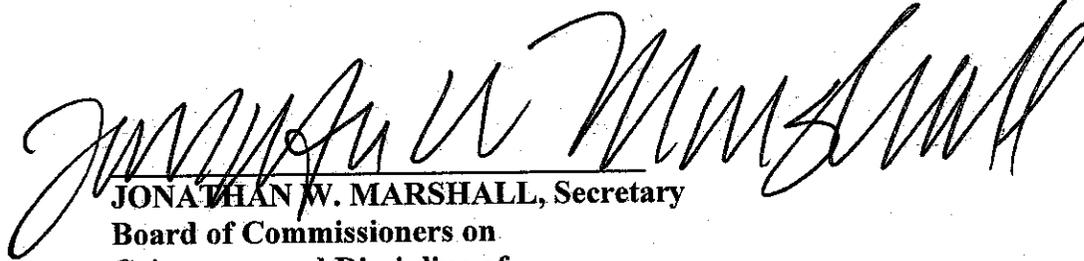
VII. RECOMMENDATION

The panel therefore recommends that respondent be suspended from the practice of law for a period of 18 months, with 12 months of the suspension stayed, subject to the following conditions: (1) that respondent not commit any further misconduct during the period of suspension; and (2) that respondent be monitored during the period of suspension by an attorney selected by relator.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on August 13, 2010. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Vincent A. Stafford, be suspended from the practice of law in the State of Ohio for a period of eighteen months with twelve months of said suspension stayed upon the conditions contained in the panel report. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendation as those of the Board.**

A large, stylized handwritten signature in black ink, which appears to read "Jonathan W. Marshall". The signature is written over a horizontal line.

**JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**