

ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,

Relator,

vs.

Scott Clifford Smith

Respondent.

CASE NO. 2014-0197

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

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v.	:	<b>CASE NO. 2014-0197</b>
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Respondent.	:	<b>RESPONDENT'S OBJECTIONS</b>

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**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS**

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Now comes relator, Disciplinary Counsel, and submits the following answer to the objections of respondent, Scott C. Smith, to the findings, conclusions and recommendation of the Board of Commissioners on Grievances and Discipline (the "Board"). Relator has attached the Board's Findings of Fact, Conclusions of Law and Recommendation (the "Findings") hereto as Appendix A. *See*, S. Ct. Prac. R. 6.2(B)(5)(b).

**STATEMENT OF THE CASE AND PRELIMINARY MATTERS**

On July 11, 2011, relator, Disciplinary Counsel, filed a single-count complaint alleging professional misconduct against respondent. The Board certified relator's complaint on August 16, 2011, and respondent filed an answer to the allegations on or about September 26, 2011. The formal complaint arose out of a grievance filed against respondent by Weston Hurd, LLP (the "Firm"), respondent's former law firm, originally on or about August 29, 2007. On or about July 16, 2008, relator closed his investigation of the allegations because the Firm and respondent were participating in mediation and respondent had been unwilling to provide a detailed response to

the allegations. In the winter of 2011, relator received a letter from Harry Sigmier, a partner at the Firm, inquiring as to the status of the investigation. Relator subsequently learned that the mediation had completed without resolution and opted to reopen his investigation at that time.

During the proceedings on this matter, respondent filed numerous pleadings, including a motion for summary judgment, a motion for a protective order seeking to stay discovery pending the outcome of the motion for summary judgment, a motion to strike relator's attachments to his response to the motion for summary judgment, a witness list, which disclosed only respondent and Steve Brigance as witnesses, a motion in limine, which was filed with the Board on January 28, 2013, but which was never served upon relator<sup>1</sup>, and a motion in limine excluding the testimony of Steve Brigance, the one other witness that respondent indicated he intended to call at the hearing.

On July 24, 2012, the panel chair denied respondent's motion for summary judgment as well as the motion to strike. See, Appendix B - Entry on Respondent's Motion for Summary Judgment and Denial of Motion to Strike filed July 24, 2012. As one basis for her decision, the panel chair noted that, because BCGD Proc. Reg. 5 only permitted a unanimous panel to dismiss a case and that there were no provisions for consideration of a motion by the unanimous panel prior to the hearing, Civ. R. 56 (C) and a motion for summary judgment was not practicable and not permitted under the rules. The panel chair did not solely rely on the procedural technicality as the basis for the denial of the motion; she additionally analyzed whether a question of material fact existed and determined that one did exist.

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<sup>1</sup> Respondent orally argued the motion in limine filed on January 31, 2013 at the outset of the hearing on February 4, 2013. Prior to that time, relator was entirely unaware of the motion and only saw it for the first time the following day when respondent's counsel had his assistant email it.

Respondent requested only three subpoenas during the proceedings -- one for Carolyn Cappel, Victor DiMarco and Randy Wetzel. The subpoenas duces tecum issued to Cappel and DiMarco were issued less than one week before their agreed-upon and previously scheduled depositions and required the witnesses to provide 49 separate items. The subpoena duces tecum issued to Wetzel was filed on January 28, 2013 at 3:31 p.m., less than one week before the scheduled hearing, and required Wetzel to produce 49 separate items by 10:30 a.m. on January 31, 2013. The panel chair properly granted relator's motions to quash the subpoenas given the lack of time provided to the witnesses to comply with the request. In her entry granting relator's motion, the panel chair specifically indicated that "Respondent has had ample time to request these documents in a proceeding that has been pending before this Board since August 2011 ...." See, Appendix C - Entry on Relator's Motion to Quash Subpoena Duces Tecum Issued to Randy Wetzel filed January 31, 2013.

During discovery, respondent deposed Cappel, DiMarco, John Goodman, general counsel for Altercare, and Mary Cibella. Respondent issued no subpoenas to Weston Hurd, Altercare, Covenant Care or Golden Living seeking the production of documents that he believed had not been previously provided. He issued no subpoenas requiring any other individual, including Steve Brigance or any third-party administrator, to produce any documents or to appear and testify at the February 4-6, 2013 hearing.

A three-person panel of the Board held a three-day hearing on this matter, beginning on February 4, 2013 and concluding on February 6, 2013. At the conclusion of the hearing, the panel requested that respondent's discovery depositions be entered into evidence as exhibits. See, Respondent's Exhibits ("Resp. Ex.") 19 - 22. The panel further indicated that it intended to keep the record on the matter open until it had had a chance to review the voluminous

materials entered into evidence and determine whether any further testimony was needed. On March 12, 2013, the panel ordered the parties to submit their closing arguments in writing by April 11, 2013. Relator submitted his closing argument on April 11, 2013; respondent filed his closing argument the following week, on April 17, 2013. On February 4, 2014, the Board issued its findings of fact, conclusions of law and recommendations, recommending that respondent be suspended from the practice of law indefinitely.

### STATEMENT OF FACTS

Respondent's Statement of Facts contains many assertions that are factually unsupported by the evidence and, rather, are part of a continuing attempt to vilify the Firm for filing a grievance and relator for pursuing the formal complaint against respondent. Respondent recites these unsupported assertions in his Statement of Facts contained in his objections as if his version of what occurred is undisputed. Respondent's testimony at the hearing was entirely self-serving, and respondent offered no evidence substantiating his position.

The allegations in relator's formal complaint against respondent arose out of respondent's billing discrepancies that the Firm, respondent's former employer, discovered in respondent's billing practices. Respondent had been employed with the Firm since 1989, beginning as an associate and becoming a partner in 1996. From 2004 until his resignation in August 2007, respondent served as the managing partner of the Firm. During his tenure at the Firm, respondent cultivated a long-term care practice and served as head of that practice. Transcript of Hearing ("Tr."), p. 482. Golden Ventures f/k/a Beverly Enterprises ("Golden Ventures") was respondent's first long-term care client; it continues as a client at the Firm today. Tr., pp. 331-332 and 482. Victor DiMarco joined the Firm in 2000 working as an associate and, in 2002,

began primarily working with respondent and the long-term care practice group. Tr., p. 330. In 2007, DiMarco became a partner in the Firm and continued working with respondent in the long-term care practice.

At the Firm, the attorneys were required to submit written timesheets recording the amount of time spent on any particular client matter, the day on which the attorney performed the services and a narrative description of what work the attorney completed. Tr., p. 306. These hand-written time sheets were subsequently input into the computer. Thereafter, the accounting department generated a proforma or "BIM", which contained a representation of all of the work completed on a particular client's case by any attorney or paralegal within the firm. The BIM was distributed to the originating partner for review; only the originating partner received these BIMs for review. Tr., pp. 340-341. At the disciplinary hearing, DiMarco testified that the manner in which he recorded his time for the long-term care clients, Golden Ventures, Altercare and Covenant Care, from 2005 through 2007 was consistent with the way the Firm required its attorneys to keep records. Tr., pp. 339-340. Likewise, he continued to record his time in the same manner for Golden Ventures and Covenant Care following respondent's exit from the firm. DiMarco unequivocally testified that respondent never advised him to bill the long-term care clients in a different manner. Tr., p. 342. Golden Ventures, used a proprietary system known as Serengeti and required its outside counsel to submit their invoices on Serengeti. The invoices downloaded onto Serengeti were exactly the same as those created by the firm. Tr., p. 308. The other clients did not use a similar electronic billing system. Tr., pp. 173-174, 341.

In March or April 2007, DiMarco discovered certain billing irregularities by respondent and brought these to the attention of Sigmier, another partner in the Firm. Tr., pp. 350, 352. Prior to becoming a partner, DiMarco did not have access to the BIMs or a client's final bills and

was unaware of any problems in respondent's billing. Tr., pp. 349-350. Generally, only the originating partner, in this case respondent, had access to and reviewed the BIMs and final invoices. Tr., pp. 340-341. At the hearing, DiMarco testified that what he discovered when he looked at the bills was "frightening." Tr., p. 350.

Q: Could you describe what you saw in those bills?

A: Billing and entries and time charges that just didn't make any sense relative to what was being -- what was going on in the file and the status of the file.

Q: Could you give an example?

A: Sure. Discussions, telephone conferences with experts when we didn't even have experts at the time. I think I saw one attendance at a pre-trial on a case that wasn't even in suit. A telephone conference with the court checking the status on a summary judgment three or four days after it was granted. Things of that nature. A lot of stuff with nurses, expert -- nurse experts and doctor experts."

Tr., pp. 350-351.

Sigmier subsequently advised the management committee of the issues. Resp. Ex. 20 - Deposition of Carolyn Cappel, p. 10. The management committee commenced an investigation of the situation and, over the next several weeks, reviewed billing material, such as respondent's timesheets and billing statements, in order to determine whether work that had been billed to the clients had actually been completed. Tr., pp. 48-49. The issues relating to respondent's billing were limited to three separate long-term care clients, Altercare, Golden Living and Covenant Care. Tr., p. 144.

Upon completion of the initial review, the management committee retained Mary Cibella to assist it with the review. Tr., p. 49. Following Cibella's advice, the committee selected five of respondent's case files, three closed and two open, to review in detail. Tr., p. 50; Resp. Ex.

20, p. 20. Cappel, then the assistant managing partner at the Firm and a member of the management committee, independently reviewed the five files in their entirety, comparing the work that respondent claimed to have completed on the invoices with the materials in the case files. Timothy Johnson, the Firm's risk management partner, and Cibella likewise reviewed the files. Tr., pp. 52-53; Resp. Ex. 20, p. 20; Resp. Ex. 22 – Deposition of Mary Cibella, p. 31. The five files were *Robert Seigmund, Deceased v. Edgewood Manor Nursing Home, et al.*, Ottawa County Court of Common Pleas, Case No. 06-CVC-087; *Margaret Maxey, et al., v. Altercare of Canton*, Stark County Court of Common Pleas, Case No. 06-CV-03231; *Stephen Lawson v. Altercare*, Medina County Court of Common Pleas, Case No. 05-CIV 0980; *James Hanson, et al., v. Valley View Nursing & Rehabilitation Center et al.*, Summit County Court of Common Pleas, Case No. 2005-03-1379; and, *John H. Heppner, et al., v. Beverly Enterprises-Ohio, Inc., et al.*, Lake County Court of Common Pleas, Case No. 05 CV 002059.

On July 23, 2007, after thoroughly reviewing each of the five files, the management committee met with respondent regarding its concerns. Tr., pp. 72-73. Thereafter, Johnson and Cibella met with respondent for two days, going through each of the five files. At that meeting, respondent admitted that the billing records were not accurate, explaining that the nursing home clients involved in the five files purportedly required him to bill his legal time by category according to a set legal fee budget. Tr., p. 77. See, also, Resp. Ex. 22, pp. 37-38. Respondent further explained that his clients were fully aware of respondent's billing practices, encouraged such practices and accepted them. Tr., p. 77.

Prior to the hearing, respondent never asserted that the third-party administrators and not Golden Ventures, Altercare or Covenant Care were his clients. Tr., p. 607; see, also, Resp. Ex. 20, pp. 39-41. Prior to the hearing, respondent never argued that the clients would be unaware of

the billing instructions because the third-party administrators guided his actions. Rather, respondent clearly indicated that the clients, Golden Ventures, Altercare and Covenant Care, fully knew of and approved respondent's actions. Notably, even in the affidavit submitted by respondent with the Motion for Summary Judgment, respondent indicated "[t]he clients were experts in long-term care, expert lawyers for each client received bills monthly for each case, were intimately involved in each case and approved each of these billing requirements...." See, Appendix D, ¶ 4. During the trial deposition of Paul Killeen, senior vice-president of litigation for Golden Ventures, respondent never asked Killeen any questions regarding third-party administrators nor did he question Goodman about third-party administrators, either during Goodman's deposition or during the hearing.

When the Firm contacted each of the clients at the end of August 2007, none of the clients supported or agreed with respondent's position. Tr., pp. 86, 148, 165 and 232-233. See, also, Resp. Ex. 20, pp. 39-41. As Johnson explained, each client specifically emphasized the need for their outside counsel to write down an accurate description of the time.

A: ... And then we basically told him -- told them, best we could, what Scott was relating to us as his explanation for these entries and asked them if that was in keeping with their billing guidelines and with their permission.

And sticking to the first one, whichever the two out of town ones there was, they were very emphatic and clear to us that their billing procedures were that you are to write down an accurate description of the time and the correct amount of the time spent on what was done and that there weren't any -- one of them said there maybe some of these instances where there were these attorney general things or something that they would have asked him to bill to a file because whatever reason, they didn't have a special file on those. But nonetheless, those would have had to be described accurately, you know, in that file and billed to a separate file.

Tr., pp. 86-87.

Respondent voluntarily resigned from the Firm on August 16, 2007. Rel. Ex. 35. The Firm commenced remediation measures with each of the clients involved, eventually repaying the clients over \$350,000. Tr., p. 96.

## **RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS**

### **RESPONSE TO OBJECTION A**

#### **THE BOARD DID NOT CONSIDER EVIDENCE ON MATTERS SPECIFICALLY EXCLUDED FROM THE HEARING BY THE PANEL CHAIRPERSON.**

In his first objection, respondent alleges that the Board improperly considered evidence that had been excluded from the hearing by the panel chair. At the outset of the hearing on February 4, 2013, respondent orally argued a motion in limine that had been filed the prior week. Respondent argued that relator's presentation should be limited to the five specific client matters identified in relator's complaint. The panel chair granted respondent's motion, and throughout the hearing, relator complied with the panel chair's order. Respondent acknowledged relator's acquiescence to the order on page 19 of his objections – "Relator presented its case within the limits established by the Panel Chairperson's ruling on the Motion in Limine."

It is difficult for relator to address respondent's objection that the panel and the Board improperly considered evidence outside of the five cases identified in the complaint because respondent does not point to any specific instance in the Findings or the hearing transcript where this occurred and relator can only speculate as to respondent's rationale.

In the Findings, the panel discussed the most pervasive misconduct alleged by relator, which was referred to as "ditto" billing throughout the hearing. Where respondent engaged in ditto billing, he would include duplicative billing on his hand-written timesheets, billing multiple

matters for completing the exact same work on the same day, frequently for the same amount of time, despite the fact that the matters were at different stages in the representation and often involved multiple clients. Tr., p. 406. See, also, Resp. Ex. 20, pp. 16-17. The panel referred to this ditto billing twice in the Findings. Analyzing Johnson's testimony, the panel indicated that:

He also noted a 'disturbing number' of instances where Respondent had recorded the same time entry and narrative on multiple files on the same day using ditto marks. *Id.* at 68, 70. See, e.g., Relator's Ex. 37, BBBB, Bates Stamp 009433-009434. Johnson testified that, in his experience, it 'would be extremely unusual to have the same event happening at five or six files all of the same day.' Hearing Tr., p. 68.

Findings, p. 6, ¶14. Determining that relator had established clear and convincing evidence that respondent violated DR 2-106, the panel indicated "Relator presented evidence that Respondent repeatedly billed multiple files in the same amount of the same day although those files were at different stages of litigation". Findings, pp. 15-16, ¶36. It is only with regards to the ditto billing that there was any reference to any matter other than the five client matters identified in relator's complaint and such reference was solely to explain the type of misconduct that occurred in the five client matters identified in the complaint. At the conclusion of the hearing, relator redacted the names of any other matter from the stipulated exhibits the parties agreed to during the hearing. Respondent's argument that these exhibits should have been removed from the relator's exhibit books and that the panel was precluded from considering them is disingenuous in light of his stipulation to the admission of the exhibits. Tr., pp. 533-534.

The panel found respondent's explanation for his billing practices "incredible." Findings, p. 10, ¶23. The panel clearly did not believe respondent's explanation and found him to lack credibility. Respondent's argument that the panel "obviously" considered evidence other than

that presented to it is specious at best; consequently, the Court should overrule respondent's first objection.

### **RESPONSE TO OBJECTION B**

#### **THE BOARD DID NOT ERR BY CONSIDERING EVIDENCE CONCERNING COVENANT CARE, ONE OF RESPONDENT'S FORMER CLIENTS, BECAUSE RELATOR OFFERED RELEVANT AND ADMISSIBLE EVIDENCE REGARDING COVENANT CARE'S BILLING REQUIREMENTS**

In his second objection, respondent asserts that it was improper for the Board to consider evidence relating to Covenant Care at the hearing because no one from Covenant Care testified and because the panel relied on inadmissible hearsay testimony. Relator established by clear and convincing evidence that respondent's billing practices on *Seigmund v. Edgewood Manor Nursing Home, et al., supra*, constituted misconduct.

Prior to the hearing, Covenant Care declined to participate in the disciplinary proceedings. This decision, however, in no way precluded relator from offering evidence supporting the allegations against respondent as it related to his actions in the *Seigmund* matter, the only Covenant Care matter included in relator's complaint. Certainly, this is not the first case where relator proceeded to hearing minus the testimony of a reluctant witness. The panel, however, determined that relator nevertheless met his burden for establishing misconduct based on the testimony of the other witnesses at the hearing and the admission of a letter from Andrew Torok, General Counsel for Covenant Care, which set forth the billing guidelines for Covenant Care and which was signed by respondent. Rel. Ex. 3. Respondent did not object to the admission or authenticity of this exhibit. During questions, respondent agreed that the Covenant Care guidelines were "what it represents." Tr., p. 420.

Respondent's continued harping that the panel ignored his testimony regarding the third-party administrators ("TPAs") is unpersuasive. While respondent testified at length that the

TPAs actually reviewed and approved the bills and prepared the billing guidelines, his testimony was entirely inconsistent with the testimony of everyone else and “incredible.” Findings, p. 10, ¶23. If respondent truly believed that someone from the TPAs was a necessary witness at the hearing or that documents prepared by the TPAs should have been considered, he should have included such individuals on his witness list and issued a subpoena requiring the witness’s appearance or the production of certain documents at the hearing. He did not do so. He would rather lay blame on relator for failing to offer this evidence.

During his testimony, Johnson explained, **without objection**, the process of contacting each of the clients involved, including Torok, after discovering the billing discrepancies. Tr., pp. 86-89.

... I know that we at least discussed those kind of things with the clients.

As a matter of fact, we were specific in the initial conversations. We gave them a list of the entries or the items that we were concerned about, the dates, and had their corresponding information and, of course, had access to their things. And we did ask them, does this – you know, we discussed the entries and if it was something like that we would say, does anything like this show up on your system and they would say no.

Tr., p. 136. DiMarco, who continues to represent Covenant Care, also testified as to the billing practices for Covenant Care, explaining not only how he recorded his time on Covenant Care matters while respondent was at the firm, but how he does so now. Tr., pp. 337-344. This Court should overrule respondent’s second objection.

**RESPONSE TO OBJECTION C**

**RESPONDENT WAS IN NO WAY DENIED DUE PROCESS BY  
RELATOR OR THE BOARD IN THIS MATTER**

Respondent asserts that he was denied due process in these proceedings, suggesting that relator, Weston Hurd and the clients improperly denied him access to certain materials necessary to defend himself in this action. He further pointed to relator's filing of motions to quash subpoenas issued to three of relator's witnesses as support for his position. Respondent alleges that relator specifically failed to provide to him communications regarding billing and billing guidelines, documents from Serengeti and the other electronic databases, and respondent's calendar. Respondent's objection is baseless.

During discovery, relator provided respondent with every communication regarding billing and each billing guideline in its possession. Relator produced every document received from Weston Hurd to respondent. The fact that relator could not produce all of the documents respondent was seeking was not a violation of due process; relator can only and was only required to produce those materials that were in its possession, custody or control. Civ. R. 35. Relator did not have unfettered access or control over all of the documents maintained by the Firm or the individual clients. Upon receipt of respondent's list of requested items, relator contacted the Firm and was assured that it had provided relator with the entire case files for each of the five matters at issue, including any communications and email communications between respondent and the clients relating to billing and the Serengeti files relating to the Golden Ventures matters at issue.<sup>2</sup> The Firm further assured relator that it did not have any documents in

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<sup>2</sup> The Firm did not provide, nor did respondent request, the medical records for any of the matters included in relator's complaint.

its possession that could exonerate respondent of the charges against him. Likewise, the clients, at relator's request, reviewed their files and provided all communications relating to the matters at issue in their possession to relator, which relator subsequently provided to respondent. Relator identified, in the accounting submitted pursuant to the panel's order, those items requested by respondent that were not in its possession. The idea that relator should have prepared an inventory of documents not in its possession is absurd – how was relator to know what documents were not in its possession? If the requested items had previously been provided to relator, relator gave the materials to respondent.

Respondent's accusation that relator ignored critical documents in this matter, including those that would tend to exonerate respondent, is also baseless. Relator reviewed every document provided to it by the Firm or the clients in this matter. No one other than respondent asserted that there were additional documents or documents that exonerating respondent of the charges against him that relator should have reviewed or obtained. Respondent never identified any of the "missing" documents with any specificity. He neither requested nor subpoenaed the materials from the Firm or the clients. In fact, he offered no evidence that the sought-after materials even existed. Respondent chose to call no witnesses to testify at the hearing.

The panel's decisions to quash three of the subpoenas duces tecum issued by respondent did not deprive respondent of due process. Two of the subpoenas duces tecum issued by respondent were issued to Cappel and DiMarco, days before their depositions were scheduled to occur. The subpoenas duces tecum required these witnesses to bring and produce 49 separate items to their scheduled depositions. Relator prepared and filed a motion to quash the subpoenas on the ground that, under the circumstances, two days was an insufficient amount of time to allow the witnesses to gather and produce the requested documents and items.

The third subpoena duces tecum seeking the production of 49 separate items from Wetzel was issued by respondent less than one week before the hearing in this matter was scheduled to begin. Relator prepared and filed a motion to quash this subpoena because it provided the witness an insufficient amount of time to gather and produce the requested documents.

Civ. R. 45 (C)(3)(a) provides:

On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specific conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply.

The panel chair properly granted relator's motions to quash, noting that "Respondent has had ample time to request these documents in a proceeding that has been pending before this Board since August 2011 ...." See, Appendix C. Nothing prevented respondent from issuing subpoenas to the Firm, the clients or the TPAs. Respondent's argument that he could not subpoena the TPAs because they had not waived the attorney-client privilege is misleading. First, the TPAs were not the client; second, the clients had each submitted waivers permitting respondent to discuss the five client matters identified in relator's complaint. See, Appendix F attached to Respondent's Objections.

This Court should overrule respondent's third objection.

## RESPONSE TO OBJECTION D

### **THE PANEL DID NOT ERR IN DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

In his fourth objection, respondent asserts that the Panel erred by denying his Motion for Summary Judgment. On July 24, 2012, the panel chair denied respondent's motion for summary judgment and the motion to strike. As one basis for her decision, the panel chair referenced BCGD Proc. Reg. 5, noting that it only permits a unanimous panel to dismiss a case and that there are no provisions providing for consideration of a motion by the unanimous panel prior to the hearing. As such, the panel chair determined that Civ. R. 56 (C) and a motion for summary judgment was not practicable and not permitted under the rules. The panel chair did not solely rely on the procedural technicality as the basis for the denial of the motion; she additionally analyzed whether a question of material fact existed and determined that one did exist. See, Appendix B.

This Court has held that any error by a trial court in denying a motion for summary judgment is rendered harmless if a trial on the merits involving the same issues demonstrates that there were genuine issues of material fact and results in judgment in favor of the party against whom the motion for summary judgment was made. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156, 1994-Ohio-362, 642 N.E.2d 615. A reviewing court need not determine whether the trial court committed any error in denying a motion for summary judgment; the reviewing court need only determine whether genuine issues of material fact were raised at trial. *First Merit Bank, N.A. v. Wilson*, 9<sup>th</sup> Dist. No. 23363, 2007-Ohio-3239, at ¶24. Clearly, respondent and relator engaged in a trial on the merits. Accordingly, and despite respondent's contention that there were no genuine issues of material fact, his motion for summary judgment was not an appropriate resolution of this disciplinary case.

To the extent that respondent's motion for summary judgment was decided upon procedural issues and/or pure questions of law, this Court's review of the panel's decisions should de novo. See, e.g., *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 2001-Ohio-1607, 757 N.E.2d 329. In assisting this Court in any review, relator stands by the arguments made in its opposition to the motion for summary judgment and incorporates those arguments and the panel's ruling into this answer by reference.

In support of his objection, respondent cited two Florida cases which, presumably, permitted the parties to pursue a motion for summary judgment in attorney disciplinary cases.<sup>3</sup> Respondent's reliance on these cases is misplaced. In particular, respondent points to *Florida Bar v. Daniel* (Fla. 1993) 626 So.2d 178. In *Daniel*, the Supreme Court of Florida determined that Rule Regulating the Florida Bar 3-7.6(e)(1) provided "once a formal complaint has been filed and forwarded to a referee for hearing, the Florida Rules of Civil Procedure apply except where otherwise provided in the rule." The comparable Ohio rule, however, differs from Florida providing "[t]he Board and hearing panels shall follow the Ohio Rules of Civil Procedure and the Ohio Rules of Evidence *wherever practicable* unless a specific provision of this rule or Board hearing procedures or guidelines provides otherwise." (Emphasis added.) The Panel chair determined that the motion for summary judgment was not practicable in the disciplinary proceeding and properly denied it.

Joseph Stafford raised a similar objection as that raised by respondent in *Disciplinary Counsel v. Stafford*, 131 Ohio St.3d 385, 2012-Ohio-909, 965 N.E.2d 971, objecting that, among other things, the panel chair erred when failing to even consider his motion for summary

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<sup>3</sup> Respondent cites *Florida Bar v. Huggett* (Fla. April 1993), 626 So.2d 1308 as well. The opinion was, however, ordered not to be published and withdrawn from the Bound Volume on September 23, 1993.

judgment. Although this Court declined to comment extensively on Stafford's objection, it noted "we find that Stafford's arguments were largely a distraction from facts and issues that were relevant to a determination whether Stafford had committed misconduct. We conclude that the board did not abuse its discretion by ruling adversely to Stafford on these motions." *Id.* at 399, 985.

The decision of the Supreme Court of Kansas in *In the Matter of David McLane Bryan* (Kan. 2003) 61 P.3d 641, prohibiting the use of a motion for summary judgment in attorney disciplinary proceedings, offers guidance. In *Bryan*, the hearing panel had taken the respondent's motion for summary judgment under advisement, denying the motion upon the completion of the case. The panel's report indicated as a basis for the denial several factors relevant to this proceeding.

... [T]he Hearing Panel finds that Respondent violated multiple disciplinary rules. The stipulation and findings of the panel are dispositive of the motion for summary judgment on a substantive basis.

In addition, however, the Hearing Panel finds that Summary Judgment as contemplated by K.S.A. 60-256(b) and Kan. Sup. Ct. R. 141, is so inconsistent with the procedures established in the Kansas Supreme Court Rules Relating to Discipline of Attorneys that they cannot apply to their proceedings.

...

The Hearing Panel is mindful of Kan. Sup. Ct. R. 224(b) which states 'Except as otherwise provided, the Rules of Civil Procedure apply in disciplinary cases.' ... In the opinion of the Hearing Panel, summary judgment conflicts so dramatically with concepts underlying the Rules Relating to Discipline of Attorneys that the two procedures cannot coexist.

The reasons underlying the Hearing Panel's opinion in this regard are as follows:

...

In contested cases, the Rules Relating to Discipline of Attorneys, without a doubt, contemplate an assessment of the character of the Respondent, as well as the Respondent's conduct. The Hearing Panel believes, in many instances, the nuances necessary to determine if an action constitutes a violation of the disciplinary rules can only be derived from the live testimony of witnesses.

More importantly, Kan. Sup.Ct. R. 211(f) requires the Hearing Panel, in recommending discipline, to consider mitigating and aggravating circumstances. ... This important aspect of the Hearing Panel proceeding cannot be accomplished in the context of a motion for summary judgment. It must be done in person. ...

*Id.* at 660-661. The Kansas Supreme Court held that the Supreme Court Rules provided otherwise by noting that, where the hearing panel recommended discipline, "[t]his court has the duty to examine the evidence and render final judgment. (Citation omitted.) The hearing panel's report is advisory only. (Citation omitted.) ... The filing of a motion for summary judgment is inconsistent with the procedure established by this court for the discipline of attorneys." *Id.* at 661.

Likewise, respondent's motion for summary judgment was procedurally improper, contrary to the express provisions of Gov. Bar R. V and in direct opposition to the goals of the attorney discipline system in the state of Ohio. A de novo review of respondent's motions, relator's responses, the panel's rulings and the Board's report finding that relator presented clear and convincing evidence of misconduct should lead to this Court to conclude that the motion for summary judgment was properly denied. Respondent's objection should be overruled by this Court.

## RESPONSE TO OBJECTION E

### **THE BOARD'S REPORT IS FULLY SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND THE BOARD PROPERLY DETERMINED THAT RESPONDENT VIOLATED THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE OHIO RULES OF PROFESSIONAL CONDUCT AS ALLEGED**

The Board's determination that respondent improperly billed long-term care clients and violated DR 1-102 (A)(4), DR 1-102 (A)(6), DR 2-106 and the corresponding rules of the Ohio Rules of Professional Conduct was fully supported by clear and convincing evidence presented at the hearing. The panel properly determined that "[t]he egregious nature of [his] misconduct also warranted finding that [h]e ... engaged in conduct that adversely reflected on [his] fitness to practice law." Findings, p. 18, ¶43 quoting *Disciplinary Counsel v. Bricker*, 137 Ohio St.3d 35, 2013-Ohio-3998, ¶23.

During the hearing, relator's witnesses testified, contrary to respondent's assertions, that they expected the invoices to accurately describe the work that respondent completed. No one, other than respondent, testified that the narrative descriptions were to be vague and ambiguous or never intended to be read by human eyes. Tr., p. 431; Rel. Ex. 38, p. 139. Goodman, when asked whether he had any expectations regarding how Altercare would be billed by respondent, testified:

A. Well, I think it's twofold. One there were certain expectations that were established through the insurance carrier that anybody providing defense under the policy is made aware of at the beginning of each representation and beyond that it's what any client would expect which is that you're going to get a fair and honest, you know, rendition of the services that were provided.

...

Q. And did you expect that when you would review the bills that the narratives on the bills would be accurate?

A. Yes.

Q. Would you look at the narratives on the bills?

A. Yes.

Tr., pp. 164-165. On cross-examination, Goodman elaborated further:

A. ... I expected him to give us an accurate portrayal of the services provided to the company in those bills.

Q. But you never said that to him in a billing guideline, did you?

A. Why would I need to? I mean, what lawyer represents somebody and doesn't accurately write their information in their bills.

Tr., p. 179.

Killeen echoed Goodman's testimony relating to how respondent should have billed Golden Living.

A. Let me just state it in the general and the particular. In general we used an electronic system by which we could gather the bills in a uniform format, review them, and get them paid, a mutually beneficial system because it made things easy for us to review and pay then you, as a law firm providing services, have better cash flow. The specifics are identified, and they're not peculiar to us. They're pretty much common insurance company, large company defense billing guidelines.

They have to do with, you know, identifying the people that are doing the work, stating the time, stating the precise elements of what you do and not block billing me for a day of ten different tasks. So you make single entries. You make them in chronological order rather than listing them by the names of your staff. Itemize by date and brief description. Disbursements and expenses that are incurred. So they really speak for themselves in the sense of they're pretty specific about how we want you to bill us.

Q. And the requirements that there be a brief description of the work incurred, what is your expectation of that?

A. Well, the expectation is that it is an identification that's sufficient so that I can understand what lawyer did what for me and how long it took because the fulfillment of the pledge that's set

forth on the first page about being economical and efficient, that's the core of my job. So I need to be able to understand whether I am getting partner time spent on partner matters, associate time on associate matters, and whether I am getting efficient work. For instance, if I saw that somebody spent two weeks' worth of time preparing answers to interrogatories, it would raise a concern for me as opposed to if I saw two weeks' worth of time devoted to discrete tasks in getting ready for a month-long trial.

Q. Are the narratives and the descriptions actually looked at?

A. They are. ...

Tr., pp. 231-233. The impact of Killeen's testimony is even more significant, given that prior to becoming vice-president of litigation for Golden Living, he represented long-term care clients as outside counsel and knew how outside counsel billed clients. Tr., pp. 219-220, 296-297.

DiMarco further testified that in billing Golden Living, Altercare and Covenant Care, he "would have a written time sheet and as I would do a task I would write the date, the name of the case, a description of the task that I was doing and the amount of time that it took me to do it.

Tr., p. 339.

Respondent, on the other hand, testified that the bills were intentionally inaccurate. For example, when responding to relator's questions regarding multiple charges that occurred on a February 3, 2006 batch report<sup>4</sup>, respondent testified:

Q. Okay. But you do see that you charged ten clients with the same thing?

A. Well, I would have to see the actual bill, but I'll take your word for it.

Q. Well, your time sheet had ten clients being charged with the same thing?

A. Okay.

Q. This is a typewritten form of your time sheet, correct?

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<sup>4</sup> A batch report was the typed version of respondent's hand-written time sheets.

A. Sure.

Q. Okay. And that it was all on February 3, 2006.

A. Okay.

Q. And that it was all for .60 of an hour?

A. Again – yeah. Go ahead.

Q. Okay. So all of that is accurate on this?

A. I don't know if it's accurate. I mean, it is what it is.

Q. Okay. So were you talking with opposing counsel regarding status of discovery hearings on all of these matters or is this one of the matters, for instance, that you would have been -- it would have been a reporting day?

A. It might have been a seminar day for all of these clients. That's what it looks like to me, but I don't know the answer to the --

...

Q. But there's no way to know that by looking at this?

A. By looking at that, you're absolutely right. Vic and Nancy did the same thing, as I said.

Tr., pp. 638-640; see, also, Rel. Ex. 37-MMM, 11-C, 12-C, 17-H, 27-L and 31-G.

Documentation supporting respondent's bills - copies of correspondence or communications, draft pleadings or filed documents, hand-written notes - was noticeably absent from each of the five case files at issue in relator's complaint. Respondent billed his clients for drafting pleadings, completing discovery and preparing trial materials. The files do not, however, contain drafts of the pleadings and, in two cases, no corresponding pleading was filed in court and the only discovery documents in the files were prepared by someone other than respondent. As an explanation for why the file contained little documentation, respondent testified that the clients instructed him to destroy his handwritten notes in the case files. Tr., pp.

453-454. DiMarco, respondent's colleague working on the exact same matters and, until he became partner, under respondent's supervision, never destroyed his notes and was never directed to do so by respondent or anyone else. Tr., pp. 373, 454-455. As the panel noted, "...despite his adamant and repeated claims that his long-term clients demanded secrecy in their billing and files, Respondent never conveyed any of that information to DiMarco. Findings, p. 11, ¶25.

Respondent's suggestion that relator never spoke with Steven Brigance, whom respondent asserts had approved and encouraged his billing practices, is incorrect. Once respondent identified Brigance as a witness, relator spoke to him on numerous occasions. After relator filed an amended witness list identifying Brigance as possible witness, respondent filed a motion in limine attempting to preclude relator from calling Brigance. In the response to the motion in limine, relator informed respondent that it had previously spoken with Brigance. Had respondent successfully offered hearsay testimony of what Brigance either had or had not told him, relator was prepared to call Brigance as a rebuttal witness, but ultimately found that it was unnecessary.

The panel was not confused by respondent's testimony regarding the TPAs and the purported billing system that he described; rather, the panel did not believe him. As the trier of fact, the panel was in the best position to consider the evidence and weigh the credibility of the witnesses. This Court has stated on multiple occasions, "[c]ontrary to respondent's arguments, it is of no consequence that the board's findings of fact are in contravention of respondent's or any other witness's testimony. 'Where the evidence is in conflict, the trier of facts may determine what should be accepted as the truth and what should be rejected as false.'" *Disciplinary Counsel v. Zingarelli*, 89 Ohio St.3d 210, 217, 2000-Ohio-140, 729 N.E.2d 1167 (Citations

omitted.) Similarly, this Court has held that the Board is “well within its authority to credit the witnesses and exhibits it did over respondent’s explanations and excuses[.]” *Stark Cty. Bar Assn. v. Watterson*, 103 Ohio St.3d 322, 331, 2004-Ohio-4776, 815 N.E.2d 386. In *Watterson*, this Court stated:

Respondent objects at length to the board’s findings of fact and law. We are not persuaded by his arguments. This record contains testimony *or* documentary proof to establish all of respondent’s misconduct and the underlying facts. And by adopting the panel’s findings wholesale, the board was well within its authority to credit the witnesses *and* exhibits it did over respondent’s explanations and excuses for his excessive fees and neglect. See *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117, ¶8 (“we ordinarily defer to a panel’s credibility determinations in our independent review of professional discipline cases unless the record weighs heavily against those findings”).

*Id.* (Emphasis added.)

The Court should overrule respondent’s fifth objection.

### **RESPONSE TO OBJECTION F**

#### **THE BOARD’S RECOMMENDED SANCTION OF AN INDEFINITE SUSPENSION IS NOT UNDULY HARSH**

As his final objection, respondent argued that the Board’s recommended sanction, an indefinite suspension, was unduly harsh. Relator disagrees and believes that an indefinite suspension is supported by case precedent.

Although relator recommended that respondent be suspended for two years, relator believes in and supports the panel’s reasoning in recommending an indefinite suspension. The panel eloquently explained:

The Supreme Court of Ohio has upheld indefinite suspension recommendations in similar cases where attorneys have deceived either their clients or their firms over an extended period of time in

order to reap a financial benefit. (Citations omitted.) It is the panel's assessment that Respondent's conduct, in conjunction with all of the aggravating factors weighing against him, warrants the same sanction that the Court upheld in each of the aforementioned cases. For a significant amount of time, Respondent was the only attorney working on the long-term [care] client files who had access to the billing records. The evidence was such that Respondent took advantage of that fact, by changing and padding the bills to which he alone primarily had access. When Respondent's actions finally came to light, Respondent denied any wrongdoing. Respondent repeatedly claimed that his clients requested that he bill that way due to the uniqueness of long-term care practice. The clients, however, refused to corroborate Respondent's version of the events. It is the panel's finding that '[Respondent's] explanation lacks credibility, and his self-serving statements and misrepresentations are indicative of a calculated attempt to avoid accepting responsibility for his misconduct.' *Wrentmore*, 2013-Ohio-5041, at ¶23.

Findings, pp. 18-19, ¶44, quoting *Cleveland Metropolitan Bar Assn. v. Wrentmore*, 138 Ohio St.3d 16, 3 N.E.3d 149, 2013-Ohio-5041.

James Tyner Crowley, a partner at the law firm of Thompson, Hine & Flory in Cleveland, Ohio, was indefinitely suspended for improperly charging over a period of approximately two years at least ten different clients for expenses incurred in their representation by, first, submitting requests for cash advances to pay for legitimate expenses and then, subsequently, submitting credit card receipts for those same expense and requesting repayment. *Disciplinary Counsel v. Crowley*, 69 Ohio St.3d 554, 1994-Ohio-214, 634 N.E.2d 1008. Similarly, Mark J. Yajko was indefinitely suspended from the practice of law after misappropriating law firm funds totaling \$21,402.57 for his own use. *Disciplinary Counsel v. Yajko*, 77 Ohio St.3d 385, 1997-Ohio-263, 674-N.E.2d 684. In an effort to deceive his law firm, Yajko deposited only partial retainers and fees received from firm clients into the firm's account, keeping the remaining money for himself. See, also, *Toledo Bar Assn. v. Crossmock*, 111 Ohio St.3d 278, 2006-Ohio-5706, 855 N.E.2d 1215 [attorney indefinitely suspended converting law firm funds for his own

personal use]; *Disciplinary Counsel v. Trieu*, 132 Ohio St.3d 299, 2012-Ohio-2714, 971 N.E.2d 918 [attorney indefinitely suspended for accepting retainers in six client matters and failing to remit the retainers to his employer law firm]; and *Cleveland Metropolitan Bar Assn. v. Wrentmore*, 138 Ohio St.3d 16, 3 N.E.3d 149, 2013-Ohio-5041 [attorney indefinitely suspended after handling client funds as well as failing to pay for several Continuing Legal Education seminars that he had attended].

Respondent offered no mitigating evidence at his hearing and the panel found that the only mitigating factor applicable was lack of a prior disciplinary history. Findings, p. 16, ¶40. The panel found several aggravating factors, including a dishonest and selfish motive, a pattern of misconduct, multiple offenses, financial harm to both his clients and the Firm, a failure to make restitution, and a refusal to acknowledge the wrongful nature of his actions, as respondent maintained that he did nothing wrong. Findings, pp. 16 and 17, ¶41. "... Respondent repeatedly violated the ethical rules over a period of time with multiple clients, attempted to hide his misconduct from his firm, and cost both his firm and his clients exorbitant amounts of time and money ...." *Id.*

Contrary to respondent's position, the lack of mitigating factors and the presence of significant aggravating factors cited in *Akron Bar Assn. v. Carr*, 135 Ohio St.3d 390, 2013-Ohio-1485, 987 N.E.2d 666, are analogous to this matter. Carr had, among other things, improperly billed his client \$70,000 for work completed between March 2009 and January 2010 on a federal tax lawsuit. "The board found that the fees were excessive – mostly because Carr's billing invoices did not match his work product." *Id.* at 392, 668. Carr's hearing panel found no mitigating factors applicable in his case and determined that five of the aggravating factors listed in BCGD Proc. Reg. 10(B)(1) applied, including a prior disciplinary offense, dishonest or selfish

motive, lack of cooperation in the disciplinary process, submission of false statements or other deceptive practices during the disciplinary process and a refusal to acknowledge the wrongful nature of his conduct. *Id.* at 393, 669. In ordering Carr indefinitely suspended, this Court noted “[h]aving considered Carr’s conduct, the profusion of aggravating factors, the absence of any mitigating factors and the sanctions previously imposed for comparable conduct, we agree with the board that the appropriate sanction is an indefinite suspension.” *Id.* at 394, 669.

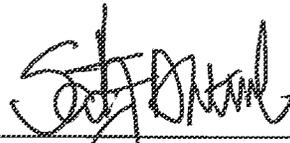
Respondent asserted that the panel failed to consider several mitigating factors in his case. Respondent’s position that he had no dishonest or selfish motive is flawed. Johnson specifically testified as to the correlation between the number of hours an attorney billed and the amount of pay that the attorney received. “Basically we had an 85/15 system. ... 15 percent of [the fees] would go to the originator. ... And then the 85 percent would go to the lawyer who actually did the work. And if you both originated it and brought in the work, you would get 100 percent of that dollar after expenses obviously.” *Tr.*, p. 99. Additionally, to suggest that respondent made a good faith effort to rectify the consequences of his misconduct because he attempted to explain to Weston Hurd how they misinterpreted or misunderstood the long-term care clients’ billing procedures emphasizes respondent’s lack of appreciation for his actions. The explanation respondent has provided for his actions both to Weston Hurd during its investigation and to the Board was implausible and was specifically rejected by the panel and the Board as lacking credibility. Respondent’s choice to voluntarily stop practicing law after his resignation from the Firm is not a mitigating factor.

The Court should overrule respondent’s final objection and impose an indefinite suspension against him as recommended by the Board.

## CONCLUSION

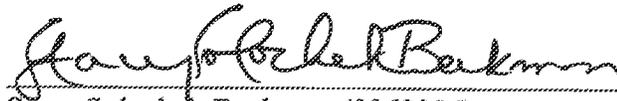
Respondent engaged in improper billing over a number of years, undetected until after the associate in his practice, DiMarco, became partner. Had DiMarco not discovered the billing discrepancies, neither the firm, nor the client, would have ever been aware that respondent was engaged in fraudulent billing. Respondent's actions deceived the clients and, contrary to respondent's argument, no client would ever encourage his attorney to bill him in a deceptive and misleading manner. Relator established by clear and convincing evidence that respondent violated the disciplinary rules as charged. After considering the evidence presented in this matter, the mitigating and aggravating factors as well as the Court's prior decisions in similar cases, relator requests that this Court overrule respondent's objections and adopt the Board's recommendation and indefinitely suspend respondent from the practice of law.

Respectfully submitted,



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Scott J. Drexel (0091467)  
Disciplinary Counsel  
*Relator*



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*Counsel of Record for Relator*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Relator's Answer to Respondent's Objections was served via U.S. Mail, postage prepaid, upon respondent's counsel, Kenneth R. Donchatz, Anspach, Meeks & Ellenberger, LLP, 175 S. Third Street, Suite 285, Columbus, Ohio 43215, and George D. Jonson, Montgomery, Rennie & Jonson, LPA, 36 East 7th Street, Suite 2100, Cincinnati, OH 45202, and upon Richard A. Dove, Secretary, Board of Commissioners on Grievances and Discipline, 65 S. Front Street, 5<sup>th</sup> Floor, Columbus, Ohio 43215 this 8<sup>th</sup> day of April 2014.

  
Stacy Solochek Beckman  
*Counsel for Relator*

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

11-072  
RECEIVED  
Scan-518-558  
FEB 08 2014

Disciplinary Counsel  
Supreme Court of Ohio

In re: :  
Complaint against : Case No. 11-072  
Scott Clifford Smith : Findings of Fact,  
Attorney Reg. No. 0039828 : Conclusions of Law, and  
Respondent : Recommendation of the  
Disciplinary Counsel : Board of Commissioners on  
Relator : Grievances and Discipline of  
the Supreme Court of Ohio

OVERVIEW

{¶1} This matter was heard on February 4, 5, and 6, 2013, in Cleveland before a panel consisting of Judge Beth Whitmore, David Tschantz, and Sharon Harwood, chair. None of the members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Stacy Solocheck Beckman appeared on behalf of Relator. Kenneth Donchatz appeared on behalf of Respondent.

{¶3} On July 29, 2011, Relator filed a complaint for disciplinary action against Respondent. The complaint alleged that Respondent engaged in unethical billing practices with regard to three clients in five specific cases over the course of several years. Specifically, the complaint alleged that Respondent had billed the clients for: (1) work performed by another member of his firm; (2) work that was never performed by anyone at the firm; and (3) time in excess of the time actually expended on a particular matter. The complaint further alleged that

Appendix A

Respondent frequently had “billed identical charges in the same amount of time on the same day to multiple cases and clients.”

{¶4} The complaint charged Respondent with the following violations: DR 1-102(A)(4) and Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; DR 1-102(A)(6) and Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer’s fitness to practice law]; and DR 2-106 and Prof. Cond. R. 1.5(a) [illegal or clearly excessive fee].

{¶5} On September 23, 2011, Respondent filed an answer to the complaint and raised multiple affirmative defenses. On April 23, 2012, Respondent filed a motion for summary judgment based on his ninth affirmative defense, which was that he was not being afforded an opportunity to adequately defend himself “because certain documents that could exonerate him [had] not been reviewed or produced by the participants in [the] case.” Respondent’s Motion for Summary Judgment, p. 1. The crux of his argument was that he would be unable to prove that his clients had consented to the specific billing practices he employed in long-term care cases because the clients were refusing to disclose privileged documents and conversations pertaining to their billing guidelines. On May 10, 2012, Relator responded in opposition to Respondent’s motion, and on July 24, 2012, the chair denied the motion. A formal hearing was held on February 4, 5, and 6, 2013, in Cleveland, Ohio.

{¶6} Based on the evidence presented, the panel finds Respondent engaged in professional misconduct and recommends he be indefinitely suspended from the practice of law.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶7} Respondent was admitted to the practice of law in the state of Ohio on May 16, 1988, after graduating from Case Western Reserve School of Law. Respondent is subject to the

Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio.

{¶8} Respondent worked for a Michigan law firm and clerked for a federal judge before joining Weston Hurd LLP as an associate in January 1989. In 1996, Respondent became a partner at Weston Hurd. Respondent later became the firm's managing partner in 2004 or 2005 and remained so until he resigned in August 2007. Prior to this matter, Respondent did not have any disciplinary history.

{¶9} During his tenure at Weston Hurd, Respondent developed a long-term care practice in addition to the general corporate practice he had with the firm. Hearing Tr. 483; Relator's Ex. 38, pp. 15-16. Respondent's first long-term care client was a client named Beverly Enterprises (aka Golden Living). Hearing Tr. 482; Relator's Ex. 38, pp. 15-16; Killeen Deposition, pp. 10-11. Respondent later took on additional long-term care clients, including Altercare and Covenant Care. Hearing Tr. 163, 556, 563. Although Respondent remained the primary contact for each of the three foregoing clients, several other individuals worked with Respondent on the long-term care cases. Those individuals were Victor DiMarco (another attorney), Nancy Sustar (a nurse-paralegal), Karen Stencil (DiMarco and Sustar's secretary), and Sandy Juba (Respondent's secretary). Hearing Tr. 330, 567, 569.

{¶10} The attorneys at Weston Hurd tracked their billing time on handwritten sheets. Hearing Tr. 306. The handwritten time sheets included both the increment of time expended on an item and a narrative description of the work performed during that increment. *Id.* Approximately once a week, the secretaries for the attorneys would collect the handwritten sheets and create a batch report, which was "[a] computer generated summary of the handwritten time charges." *Id.* Batch reports were then compiled on a monthly basis for each client and recorded in a billing information memorandum ("BIM"), aka a "proforma." *Id.* at 119-120, 306.

The billing attorney, which was the attorney who had originally secured the client, would then review the BIM for that client, make any changes or adjustments, and return the BIM to the accounting department. *Id.* at 119-120, 306. The accounting department would then generate an invoice to send to the client and retain the BIMs in-house. *Id.* at 307.

{¶11} As an associate attorney, DiMarco was not permitted to review the BIMs for any of Respondent's long-term care clients because only Respondent was the billing attorney for those clients. Hearing Tr. 340-341. Once DiMarco became a partner in 2007, however, he had access to all of the firm's BIMs, including the BIMs for the long-term care clients. *Id.* at 349. In March 2007, DiMarco was informed by another member of the long-term care practice group that Respondent was "stealing some of [his] time" and "taking credit for work that [he] did." *Id.* at 350; Respondent Ex. 21, p. 33. Consequently, DiMarco requested the billing records from the accounting department to verify the accusation. Hearing Tr. 350; Respondent Ex. 21, p. 34. DiMarco described what he saw in Respondent's billing records as "unbelievable," "frightening," and "fraudulent." Hearing Tr. 350; Respondent Ex. 21, p. 34. Realizing the magnitude of the problems he had discovered in Respondent's billing records, DiMarco alerted Harry Sigmier, a member of the firm's management committee and its financial partner at the time. Hearing Tr. 46, 352; Respondent Ex. 21, p. 35; Respondent Ex. 20, p. 10. Sigmier, in turn, brought the problem to the attention of Carolyn Cappel, the firm's then assistant managing partner. Hearing Tr. 352; Respondent Ex. 20, p. 10. Sigmier and Cappel reviewed a large sampling of Respondent's handwritten time sheets and decided that further action was warranted. Cappel, in particular, stated that she "found the time charges to be repetitive, excessive, [and] unusual." Respondent Ex. 20, p. 19. On April 23, 2007, Sigmier and Cappel contacted Tim Johnson, the firm's risk management partner, and notified him of the problem. Hearing Tr. 46.

(¶12) Several members of Weston Hurd's management committee ultimately decided to consult outside ethics counsel to oversee their handling of the situation. Hearing Tr. 49-50; Respondent Ex. 20, pp. 19-20. Mary Cibella, the outside consultant the firm hired, advised that the firm "needed to match [Respondent's] time charges and [BIMs] to actual paper files to verify \* \* \* whether or not that which was being claimed to have been done was, in fact, done or appeared in the paper file." Respondent Ex. 20, p. 20. The firm selected five files, two open files and three closed files, to review in-depth and cross-reference with the BIMs that Respondent had approved. Hearing Tr. 50-51; Respondent Ex. 20, pp. 20-21; Respondent Ex. 22, pp. 9-10. The five files were: (1) *Seigmund v. Edgewood Manor Nursing Home, et al.*, Ottawa County Court of Common Pleas, Case No. 06-CV-087; (2) *Maxey, et al. v. Altercare of Canton*, Stark County Court of Common Pleas, Case No. 2006-CV-03231; (3) *Lawson v. Altercare of Wadsworth Center for Rehabilitation & Nursing Care, Inc.*, Medina County Court of Common Pleas, Case No. 05-CIV-0980; (4) *Hanson, et al. v. Valley View Nursing & Rehabilitation Center, et al.*, Summit County Court of Common Pleas, Case No. CV-2005-03-1379; and (5) *Heppner, et al. v. Beverly Enterprises-Ohio, Inc., et al.*, Lake County Court of Common Pleas, Case No. 05-CV-002059. Of the five cases, two were Beverly Enterprises' (*Hanson* and *Heppner*), two were Altercare's (*Maxey* and *Lawson*), and one was Covenant Care's (*Seigmund*).

(¶13) Cappel and Johnson independently reviewed the time charges for each of the five foregoing cases in conjunction with the paper files for those cases and highlighted any charges that they deemed "suspicious." Hearing Tr. 52, 60; Respondent Ex. 20, p. 22. They also contacted the firm's IT Department to search for any electronic work product that might exist on the firm's Microsoft Directory for each of the five cases. Hearing Tr. 61-62. After their

independent review of the files and billing records, the two compared their findings with one another and shared them with Cibella, who also reviewed the five files in conjunction with Respondent's billing records. Hearing Tr. 71-72; Respondent Ex. 20, p. 23.

{¶14} Johnson described several of the problems he, Cappel, and Cibella found in Respondent's billing records. He noted that Respondent used "the same terminology \* \* \* over and over again for a lot of these different entries," but that entries would either be "at the wrong point in the litigation" or "clearly excessive time for what the activity was." Hearing Tr. 54. He described the entries as "just a hodge-podge of words" and "lumping a bunch of different things together" that "didn't make any sense." *Id.* at 147. He also noted a "disturbing number" of instances where Respondent had recorded the same time entry and narrative on multiple files on the same day using ditto marks. *Id.* at 68, 70. *See, e.g.*, Relator's Ex. 37, BBBB, Bates Stamp 009433-009434. Johnson testified that, in his experience, it "would be extremely unusual to have the same event happening at five or six files all on the same day." Hearing Tr. 68. Additionally, Respondent's billing records contained at least one entry where Respondent crossed out DiMarco's initials on an entry, wrote in his own initials so as to claim credit for the work noted on the entry, and increased the time increment billed for that activity. Relator's Ex. 12, J, Bates Stamp 011943. Randy Wetzel, the firm's Director of Administration and Finance, testified that it was against firm policy to change a bill to reflect a different attorney's initials and "if that [did] happen, normally that's brought to someone's attention." Hearing Tr. 320.

{¶15} After the firm conducted several management committee meetings and received further advice from Cibella, the firm decided to hold a meeting with Respondent. Hearing Tr. 71-73; Respondent Ex. 20, pp. 23-24. The meeting took place at the end of July 2007. At the meeting, Respondent was given access to the five files that Johnson, Cappel, and Cibella had

reviewed and a list of questions about the files that Cibella had proposed. Hearing Tr. 73-74; Respondent Ex. 20, pp. 24-27; Relator's Ex. 33. Johnson and Cibella also then met with Respondent over the course of two days in early August 2007 to conduct an in-depth review of his billing charges. Hearing Tr. 76; Respondent Ex. 22, pp. 27-29. The thrust of the explanation that Respondent gave to the firm and to Johnson and Cibella when he met with them was that long-term care client billing is unique and his long-term care clients had sanctioned his billing practices. Hearing Tr. 77-79. According to Johnson, Respondent admitted his time entries "were not accurate," but claimed that the inaccuracy "was okay with the clients because they were trying to bury time for other things." Hearing Tr. 79-80. While the five selected client files were available for purposes of cross-referencing between time entries and work product when Johnson and Cibella met with Respondent, Johnson testified that "[v]ery little [cross-referencing] happened because it became pretty obvious as we went into the process [of] the entries, [that] there wasn't going to be anything in [the files]." *Id.* at 81.

{¶16} After receiving Respondent's explanation, the firm held another management committee meeting in August and decided to contact Respondent's clients. Hearing Tr. 82; Respondent Ex. 22, p. 45; Respondent Ex. 20, p. 29. Johnson testified that the firm wanted to contact Respondent's clients because if the clients did, in fact, approve of Respondent's billing practices, the firm would need to "make sure all of this was memorialized and that everybody was on the same page." Hearing Tr. 82. He elaborated that the firm was "totally client driven" and would have been willing to adapt to the client's billing style so long as there was a "clear understanding between the firm and the client." *Id.* at 148. On August 15, 2007, Johnson advised Respondent that the firm planned to contact his clients. *Id.* at 82; Respondent Ex. 20, p. 29. The following morning, Respondent sent an email in which he tendered his resignation from

the firm, effective August 31, 2007. Hearing Tr. 83; Relator's Ex. 35.

{¶17} After Johnson and Cappel received Respondent's resignation, they proceeded to contact Beverly Enterprises, Altercare, and Covenant Care. Hearing Tr. 84-86; Respondent Ex. 20, p. 33. Johnson testified that all three clients "said the same thing[:] that [they] had billing guidelines and none of what [Respondent] was telling [the firm] was within their knowledge or approved by them or ratified by them or anything else." Hearing Tr. 89. Johnson specified that:

\* \* \*We gave [the clients] a list of the entries or the items that [the firm was] concerned about, the dates, and [the clients] had their corresponding information and, of course, had access to their things. And [the firm] did ask them, does this -- you know, we discussed the entries and if it was something like that we would say, does anything like this show up in your system and they would say no.

Hearing Tr. 136.

{¶18} After speaking with the clients, the firm decided to try to identify the amount in which each client was improperly billed and refund the clients their money. *Id.* at 91. The firm undertook an extensive review of Respondent's files and eventually settled upon a remediation procedure that Respondent's clients endorsed. *Id.* at 92-96. Weston Hurd ultimately repaid Beverly Enterprises, Altercare, and Covenant Care more than \$350,000. *Id.* at 96.

{¶19} Respondent testified in detail about his billing practices both in his deposition and at the hearing before the panel. According to Respondent, long-term care was a "strange practice area \* \* \* with strange requirements." Hearing Tr. 485. Respondent repeatedly claimed that long-term care practice was unique in Ohio because Ohio had a Bill of Rights for long-term care patients that opened the door to punitive damages for any violation(s) of those rights. *Id.* at 395-397; 424; 486-487; Relator Ex. 38, pp. 22-23, 53-54, 87-88, 138, 192-193. Respondent testified that his billing practices were the result of his clients' desire to keep confidential matters from being subject to discovery due to their fear that the plaintiff's bar would use any confidential information it could obtain to pursue punitive damages. Hearing Tr. 393-396, 486-487.

Respondent described his long-term care clients as highly paranoid and secretive.

{¶20} Respondent spent a great deal of time explaining the billing preferences of Beverly Enterprises, including the proprietary systems that Beverly Enterprises used to interface with outside counsel. Beverly Enterprises had two proprietary systems: one for billing (Serengeti) and one that acted as an electronic filing system (PowerBrief) where “[d]iscovery requests, responses, motions, outside counsel valuation opinion[s]” and things of that nature would be posted. Killeen Deposition, pp. 26-27. According to Respondent, his hard copy files at Weston Hurd were barebones files because the majority of his work product was uploaded directly to Serengeti and PowerBrief, systems to which no one else at Weston Hurd had access. Hearing Tr. 508-509. Respondent stated that “no one else was approved to even see these files” because they were “secret files.” *Id.* at 509.

{¶21} Respondent stated that each case he had with Beverly Enterprises had a “matrix,” which Respondent described as “an eight- or nine- or ten- or 11-page document that graphed out \* \* \* each phase of the litigation.” Hearing Tr. 504. According to Respondent, a preapproved budget was assigned to each phase. *Id.* at 505. Respondent stated that, when he billed, he would “bill \* \* \* generically \* \* \* against a preapproved billing entry and a preapproved matrix budget” for one of the litigation phases. *Id.* at 391. Although Respondent’s bills contained narratives describing the work he had performed, Respondent testified that the narratives were generic and unrelated to the actual work he had done because of the fear that any specific narratives might fall into the hands of a plaintiff during discovery and subject his clients to punitive damages. *Id.* at 393-394; Relator Ex. 38, pp. 86-87.

{¶22} Respondent admitted that it would be impossible to “correspond [his work] to a file” because, while he believed the amount of time he billed was accurate, “the narratives and

the dates [attached to that time] were not relevant.” Relator’s Ex. 38, p. 153. In fact, Respondent testified that the work billed to a particular case might not even have been performed on that case. *Id.* at 158. Respondent testified that Beverly Enterprises instructed him to bill to any open files when he performed certain work for them, such as responding to inspections at one of their facilities or conducting a seminar for their employees. Hearing Tr., pp. 405-406, 600-601, 635. When questioned on the accuracy of a specific billing entry, Respondent testified: “I don’t know if it’s accurate. I mean, it is what it is.” *Id.* at 639.

{¶23} Respondent’s explanation for his billing practices is incredible for several reasons. First, despite the fact that his career was on the line, Respondent failed to adequately explain his billing practices to Weston Hurd at the time they investigated him. Respondent submitted exceedingly brief, unhelpful responses when answering the list of questions that Weston Hurd presented him at their meeting with him in July 2007. For instance, one of the written questions asked Respondent: “In each of the 5 files you have billed time for communicating with experts or potential experts. Where is your work product evidencing this work?” Relator’s Ex. 34, Question 3. Respondent answered: “I am constantly looking, searching and researching experts.” *Id.* Respondent never logged onto Serengeti or PowerBrief to show Weston Hurd the work he had performed. When asked why not at the hearing before the panel, Respondent vacillated between stating that his client confidentiality agreements prohibited him from disclosing the electronic content related to their files [Hearing Tr. 457-458], and stating that he did not share the databases with the firm because “[t]here was no communication, it was you’re out of here.” *Id.* at 577. Respondent testified that the firm’s partners called his conduct “criminal and Enron like” and that their behavior caused “an immediate conflict.” *Id.* at 578. Respondent also claimed that he “couldn’t [fill out the interrogatories] in the time that [the firm]

allotted [him].” *Id.* at 575.

{¶24} Second, Respondent could not have billed all three clients at issue in the same manner because only Beverly Enterprises had Serengeti and PowerBrief. John Goodman, Altercare’s general counsel and Respondent’s primary contact there, specifically testified that Altercare did not use an electronic system for billing or for document maintenance. Hearing Tr. 173-174. Incredibly, Respondent claimed that Altercare did have an electronic billing and document management system, but Goodman just did not know about it. *Id.* at 407. According to Respondent, Altercare’s third-party administrator, the entity who primarily handled its billing, set up the electronic systems for Altercare without Goodman’s knowledge. *Id.* at 407-409. Yet, Respondent never subpoenaed any of the third-party administrators. Instead, Respondent testified that he refused to issue subpoenas to them because “this stuff [would] cause irreparable harm and [he was] not going to purposely cause irreparable harm to these clients.” *Id.* at 409. Respondent also avoided answering Relator’s questions at the hearing about why he did not have any notes on the two clients (Altercare and Covenant Care) who did not use Serengeti or PowerBrief. *Id.* at 453-454; 645. According to Respondent, “[w]e used the same formula, we used the same [third-party administrator], [and] we used the same outside counsel” for all three clients. *Id.* at 645.

{¶25} Third, despite his adamant and repeated claims that his long-term care clients demanded secrecy in their billing and files, Respondent never conveyed any of that information to DiMarco. DiMarco testified that he performed work on all five of the files at issue in this case. Hearing Tr. 336-337. Although DiMarco was aware of the Ohio Bill of Rights and the potential for punitive damages in long-term care cases, he could not recall any specific conversations with Respondent where Respondent informed him that long-term care clients had

to be billed differently. *Id.* at 343. DiMarco testified that he billed all three clients (Beverly Enterprises, Altercare, and Covenant Care) in the same manner, by recording “the date, the name of the case, a description of the task that [he] was doing[,] and the amount of time that it took [him] to do it.” *Id.* at 339. He also stated that he maintained hard copy files for all three clients and would maintain his notes in the files. *Id.* at 344-345, 373. DiMarco testified that Beverly Enterprises also had “a computer system which you would download documents to so that their computer file should mirror what our hard copy file was in our office.” *Id.* at 333. As for Altercare and Covenant Care, DiMarco testified that they did not have electronic billing or office systems. *Id.* at 341.

{¶26} Fourth, no one corroborated Respondent’s version of the events. Killeen, the Senior Vice President of litigation for Beverly Enterprises and Respondent’s primary contact there, testified that Beverly Enterprises has billing requirements for outside counsel. Killeen Deposition, p. 20. Killeen specified that the company expects outside counsel to include a brief narrative of the work performed when they bill and that block billing is inappropriate. *Id.* at 20-21. He further testified that the expectation with the billing narrative is that “it is an identification that’s sufficient so that [he can] understand what the lawyer did.” *Id.* at 21. Killeen admitted that there might be limited instances where his company might have instructed an outside attorney to bill to a different file (e.g., for an emergency situation where there was no open file on a matter on which an attorney had to respond). *Id.* at 33. He stated, however, that it would be the company’s expectation that the narrative on the bill would explain that the bill related to another matter so as to “make it plain what [the attorney was] doing.” *Id.*

{¶27} Although Killeen’s predecessor was Respondent’s original contact with Beverly Enterprises, Killeen testified that he was not aware of any instruction to Respondent to use

general billing in the long-term care cases. *Id.* at 49-51. He also testified that the meetings Beverly Enterprises had with its outside counsel were “run [by] a [woman] whose tenure overlap[ped] [his] and [his predecessor’s]” and that, when he asked her if outside counsel were instructed to bill generally, she denied that any such instruction existed. *Id.* at 46. As to punitive damages, Killeen testified that, while the company had experienced problems in other states, he did not “believe [it had] ever been a concern of [his] in Ohio.” *Id.* at 49.

{¶28} Killeen’s predecessor was a man named Steve Brigance. Although Respondent claimed that his billing instructions for Beverly Enterprises came directly from Brigance, Brigance never came forward to dispel any of the allegations against Respondent. In fact, Respondent admitted that he had “tried to get ahold of Brigance for six years [after the allegations from Weston Hurd arose] and [Brigance] refused to return calls.” Hearing Tr. 687. Brigance’s refusal to come to the aid of one of his former outside counsel speaks to the legitimacy of the allegations against Respondent. The panel finds dubious the notation that Brigance would refuse to lend credence to Respondent’s position if he had, in fact, instructed Respondent to bill the way that he did. Moreover, Respondent chose not to subpoena Brigance to testify at the hearing. In fact, Respondent opposed Brigance’s inclusion as a witness when Relator indicated just before the hearing that Relator might call Brigance as a witness.

{¶29} Goodman from Altercare also testified that Altercare expected accurate narratives and “a fair and honest \* \* \* rendition of the services that were provided.” Hearing Tr. 164-165. He testified as to the distinction between confidential work product and an accurate billing description. *Id.* at 179. He specified: “my expectation is that the bills accurately reflect the work being done.” *Id.* at 179. Respondent testified: “I can’t point to a single document where I said – or a single time I said to [Respondent] go ahead and change hours, change who did work or bill

us for things that weren't completed \* \* \*." *Id.* at 180.

{¶30} Although no one from Covenant Care testified, Relator also produced a letter from Covenant Care's general counsel, Andrew Torok. Relator's Ex. 3. The letter, which bears Respondent's signature, sets forth Covenant Care's billing guidelines and includes the guidelines as an attachment. *Id.* The guidelines provide that "[e]ach monthly billing statement must list (1) the name and billing rate of each attorney \* \* \* who worked on the matter, (2) the date each service was performed, [and] (3) a brief description of each service performed \* \* \*." *Id.* The guidelines also provide several examples of proper billing, none of which include general descriptions. *Id.* Further, apart from Relator's Ex. 3, Relator produced testimony that pertained to Covenant Care's billing preferences. Both Cappel and Johnson testified that Weston Hurd contacted Torok as a part of their investigation after Respondent resigned. Hearing Tr. 85; Respondent Ex. 20, p. 33. Both Cappel and Johnson testified that none of the clients they contacted, including Covenant Care, corroborated Respondent's version of the events. Hearing Tr. 87-89; Respondent Ex. 20, p. 39.

{¶31} Respondent attributed the allegations against him to a "very major mistake" on the part of Weston Hurd. Hearing Tr. 682. He insisted that his clients "were represented extremely well" and "got great results" although their defense costs "were some of the lowest in the country." *Id.* at 684. It was Respondent's position that Weston Hurd essentially undertook a witch hunt against him, that Weston Hurd simply failed to understand and accept his explanation of his client's need for secrecy, and that Weston Hurd pursued a grievance against him in order to cover itself against any potential lawsuit by Respondent. *Id.* at 682-685.

{¶32} The evidence here contradicts any conclusion that Weston Hurd engaged in a witch hunt. Weston Hurd's choice to investigate Respondent and bring these allegations to light

damaged the firm in a variety of ways. Apart from the internal strife that occurred among the firm's partners due to the investigation itself, the firm had to disgorge over \$350,000 in profits to Respondent's three clients. The firm also lost one of the clients as a result. DiMarco testified that, while he continued to represent Beverly Enterprises and Covenant Care after Respondent's departure, Altercare terminated its attorney-client relationship with the firm. Hearing Tr. 332. Rather than simply give the managing partner of the firm the benefit of the doubt, Weston Hurd chose to undertake an extensive investigation and, at the end of that investigation, gave Respondent the opportunity to respond to the results of the investigation before any of Respondent's clients were contacted. The panel rejects any contention that this case is the result of a mistake or witch hunt on the part of Weston Hurd.

{¶33} Based upon the exhibits, stipulations, and the record of the hearing, the panel finds by clear and convincing evidence that Respondent has committed the following ethical violations:

{¶34} Respondent violated DR 1-102(A)(4). Respondent admitted that his billing descriptions bore no relation to the work he actually performed on any given case. Relator presented evidence that Respondent routinely billed his long-term care clients for work that did not appear in their files.

{¶35} Respondent violated DR 1-102(A)(6). Respondent repeatedly violated the ethical rules over a period of years with multiple clients, abused his position as a partner at his firm to do so, and attempted to hide his misconduct from his firm—all at great cost and inconvenience to his firm and his clients.

{¶36} Respondent violated DR 2-106. Relator presented evidence that Respondent repeatedly billed multiple files in the same amount on the same day although those files were at

different stages of litigation. Although Respondent claimed that those charges might have related to weekly reports he had to submit to his clients or seminars he might have conducted for his clients, he admitted that it was impossible to tell what any given charge related to, as his narratives bore no relation to the work he performed. Relator presented evidence from all three clients that they expected specific and accurate billing narratives at all times.

{¶37} Respondent violated Prof. Cond. R. 1.5(a). The evidence in support of Respondent's Prof. Cond. R. 1.5(a) violation is the same as the evidence set forth in Respondent's DR 2-106 violation, with the exception of the time frame in which it occurred.

{¶38} Respondent violated Prof. Cond. R. 8.4(c). The evidence in support of Respondent's Prof. Cond. R. 8.4(c) violation is the same as the evidence set forth in Respondent's DR 1-102(A)(4) violation, with the exception of the time frame in which it occurred.

{¶39} Respondent violated Prof. Cond. R. 8.4(h). The evidence in support of Respondent's Prof. Cond. R. 8.4(h) violation is the same as the evidence set forth in Respondent's DR 1-102(A)(6) violation, with the exception of the time frame in which it occurred.

#### MITIGATION, AGGRAVATION, AND SANCTION

{¶40} Respondent did not present any mitigation evidence, but the panel notes the absence of any prior disciplinary record. BCGD Proc. Reg. 10(B)(2)(a).

{¶41} The parties did not stipulate to any aggravating factors in this case, but the panel finds that certain aggravating factors exist. Respondent acted with a dishonest or selfish motive, as he received a financial benefit as a result of submitting fraudulent time entries. BCGD Proc. Reg. 10(A)(1)(b). Moreover, the panel finds that Respondent has engaged in a pattern of

misconduct and has committed multiple offenses given that he submitted the fraudulent time entries to three different clients (Beverly Enterprises, Altercare, and Covenant Care) over the course of several years. BCGD Proc. Reg. 10(A)(1)(c), (d). Respondent's conduct resulted in financial harm to both his clients and his firm, as the firm had to refund a significant amount of money to the three foregoing clients and expend a significant amount of time investigating Respondent's misconduct and compensating his clients for their financial losses. BCGD Proc. Reg. 10(A)(1)(h). To date, Respondent has failed to make any restitution to his firm, as Respondent believes his firm acted improperly in refunding his clients. BCGD Proc. Reg. 10(A)(1)(i). Additionally, to date, Respondent has failed to acknowledge the wrongful nature of his conduct, in spite of the fact that all of his clients have refused to corroborate his description of their billing practices. BCGD Proc. Reg. 10(A)(1)(g).

{¶42} Relator recommended a two-year suspension in this matter, with no time stayed. Conversely, Respondent sought an outright dismissal of the charges for lack of clear and convincing evidence and did not offer an alternative argument if this panel, in fact, determined sufficient evidence existed. The panel agrees with Relator that an actual suspension is warranted in this matter. The panel, however, believes that an indefinite suspension is the more appropriate sanction in this matter. In determining the appropriate sanction, the panel considered the factual findings and mitigating and aggravating factors outlined above.

{¶43} “[A] violation of Prof. Cond. R. 8.4(c) generally requires an actual suspension from the practice of law.” *Akron Bar Assn. v. Gibson*, 128 Ohio St.3d 347, 2011-Ohio-628, ¶10. Indeed, “[d]isbarment is the presumptive sanction for an attorney’s misappropriation of client funds \* \* \*.” *Disciplinary Counsel v. McCauley*, 114 Ohio St.3d 461, 2007-Ohio-4259, ¶22. *See also Cleveland Metro. Bar Assn. v. Wrentmore*, Slip Opinion No. 2013-Ohio-5041, ¶20

("When an attorney has engaged in numerous acts of misconduct in converting law-firm funds and there is significant mitigation, we have held that an indefinite suspension can be appropriate."). Significant mitigating circumstances do not exist in this case. The only mitigating factor that exists is the lack of a prior disciplinary history. Moreover, because Respondent repeatedly violated the ethical rules over a period of time with multiple clients, attempted to hide his misconduct from his firm, and cost both his firm and his clients exorbitant amounts of time and money, "[t]he egregious nature of [his] misconduct also warranted the additional finding that [he] \* \* \* engaged in conduct that adversely reflected on [his] fitness to practice law." *Disciplinary Counsel v. Bricker*, 137 Ohio St.3d 35, 2013-Ohio-3998, ¶23.

{¶44} The Supreme Court of Ohio has upheld indefinite suspension recommendations in similar cases where attorneys have deceived either their clients or their firms over an extended period of time in order to reap a financial benefit. *See, e.g., Wrentmore, supra; Akron Bar Assn. v. Smithern*, 125 Ohio St.3d 72, 2010-Ohio-652; *Toledo Bar Assn. v. Crossmock*, 111 Ohio St.3d 278, 2006-Ohio-5706; and *Disciplinary Counsel v. Yajko*, 77 Ohio St.3d 385, 1997-Ohio-263. It is the panel's assessment that Respondent's conduct, in conjunction with all of the aggravating factors weighing against him, warrants the same sanction that the Court upheld in each of the aforementioned cases. For a significant amount of time, Respondent was the only attorney working on the long-term client files who had access to the billing records. The evidence was such that Respondent took advantage of that fact, by changing and padding the bills to which he alone primarily had access. When Respondent's actions finally came to light, Respondent denied any wrongdoing. Respondent repeatedly claimed that his clients requested that he bill that way due to the uniqueness of long-term care practice. The clients, however, refused to corroborate Respondent's version of the events. It is the panel's finding that "[Respondent's]

explanation lacks credibility, and his self-serving statements and misrepresentations are indicative of a calculated attempt to avoid accepting responsibility for his misconduct.”

*Wrentmore*, 2013-Ohio-5041, at ¶23.

¶45 The panel recommends that Respondent be indefinitely suspended from the practice of law in Ohio and, pursuant to Gov. Bar R. V, Section 10(B), be prohibited from petitioning for reinstatement for at least two years. The panel further recommends that “any future reinstatement be conditioned upon his payment of restitution.” *Disciplinary Counsel v. Weiss*, 133 Ohio St.3d 236, 2012-Ohio-4564, ¶15. The record reflects that Weston Hurd paid Beverly Enterprises, Altercare, and Covenant Care more than \$350,000 as a result of Respondent’s misconduct. The record also reflects that Weston Hurd brought a civil action against Respondent and that the civil action remains unresolved. Because the civil matter remains unresolved, the panel recommends that the amount of Respondent’s restitution not be set at this point in time.

#### BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on January 31, 2014. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Scott Clifford Smith, be indefinitely suspended from the practice of law in Ohio. In addition to the applicable requirements set forth in Gov. Bar R. V, Section 10(E), Respondent’s reinstatement shall be subject to Respondent’s payment of any restitution, relative to the misconduct detailed in this report, that may be ordered or agreed to as a result of civil litigation or that may otherwise agreed to by Respondent and his former law firm. The

Board further recommends that the costs 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.**



**RICHARD A. DOVE, Secretary**

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

FILED

JUL 24 2012

BOARD OF COMMISSIONERS  
ON GRIEVANCES & DISCIPLINE

In re: :  
Scott C. Smith : Case No. 11-072  
Respondent : Entry on Respondent's  
v. : Motion for Summary Judgment  
Disciplinary Counsel : and Denial of Motion to Strike  
Relator :

Respondent filed a motion for summary judgment and protective order on April 23, 2012.

Relator filed responsive pleadings on May 10, 2012 and Respondent replied on May 21, 2012.

Summary judgment is filed pursuant to Civ. R. 56(C). The standard as identified by Respondent is the pleadings, depositions, answer to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

In support, Respondent states the basis of his motion to be a lack of due process in that documents that could exonerate Respondent of charges levied against him have not been produced and thus withheld from him by the grievant, Weston Hurd LLP.

For the reasons as set forth below, the motion for summary judgment and motion to strike is denied and a hearing date will be determined to proceed on the facts in dispute as presented.

Appendix B

## BRIEF DESCRIPTION OF THE SUBJECT OF THE MOTION

Respondent was a managing partner of Weston Hurd in 2007. An emergency management meeting was called to address concerns regarding Respondent's long-term care billing practices. Respondent was not involved in the meeting and suspended from the firm. The matter was investigated by the firm without Respondent's participation with findings of irregularities in regards to Respondent's long term care billings. Respondent asserts that he was forced to leave the firm but further asserts that the conclusions of the investigation was not based upon review of evidence that long-term care used different billing guidelines unique from general litigation cases. Respondent further asserts that documents such as correspondence between Respondent and the clients was not reviewed in the investigation and contained billing instructions and guidance that would have exonerated Respondent. Respondent remains in an unresolved mediation process with the law firm regarding these assertions.

Respondent alleges that Relator has not obtained, reviewed, or produced communication between Respondent and his underlying clients with regard to billing procedures and guidelines for long-term care cases; that the law firm has not produced and did not consider these communications in their investigation; and the underlying clients have not waived their privilege or produced communication with regard to billing procedures and guidelines. Based upon these allegations, Respondent posits that the lack of these documents fulfills the burden that no material facts are at issue in this matter. Respondent further argues for dismissal on the basis that he has been denied access to this information which deprives him of his due process rights to a fair trial and to present evidence under the Fourteenth Amendment to the U.S. Constitution.

All three clients of the firm did provide a form of waiver in 2007, as was provided to the panel chair per her direction in November 2011. Additionally, as exhibits to their motion in

opposition to summary judgment, Relator in their exhibits 2 through 6 has included documentation as to the information produced. Relator has stated that they have produced all documents within their possession.

Should Respondent or Relator wish to include documents as evidentiary exhibits at the time of hearing, this must be done in accordance with the Ohio Rules of Evidence.

### LEGAL ANALYSIS

BCGD Proc. Reg. 2(B) provides that the chairman or a member of the panel shall rule on all motions subsequent to the appointment of a panel. BCGD Proc. Reg. 5 provides that a unanimous panel is required to dismiss a case when the rule permits dismissal. There is no provision within the procedural regulations for consideration of motions by the entire panel before a hearing. Thus a decision pursuant to Civ. R. 56 (C), is not practicable and is not permitted under the applicable rules.

To date, the pertinent witnesses from the firm and companies have not been deposed. Deposition would offer Respondent the opportunity to question these witnesses directly and under oath as to the existence and provision of the information Respondent suggests has been withheld. Additionally, there is no evidence present within the record that Respondent has directly subpoenaed this information from the pertinent witnesses. Within the Respondent's answer to the complaint, he does not affirm or deny multiple allegations of Relator. This does create a question of material fact.

This case is distinguishable from *in re Ruffalo*, 390 U.S. 544 (1968), in that Respondent clearly has notice within the complaint of the charges against him. No charges have been amended as the result of testimony thus denying fair notice to Respondent.

In a disciplinary proceeding, Relator bears the burden of proving an attorney's misconduct "by clear and convincing evidence." Gov. Bar R. V, Section 6(J). Respondent's right to due process and fair hearing are protected by the burden of proof imposed upon Relator by Gov. Bar R. V.

Accordingly for the foregoing reasons,

IT SO ORDERED:

Respondent's motion for summary judgment and motion to strike is denied.



Sharon Harwood, Chair



per authorization

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

FILED

JAN 31 2013

BOARD OF COMMISSIONERS  
ON GRIEVANCES & DISCIPLINE

In re: :  
Scott C. Smith : Case No. 11-072  
Respondent : Entry on Relator's  
v. : Motion to Quash  
Disciplinary Counsel : Subpoena Duces Tecum  
 : Issued to Randy Wetzel  
Relator :

On January 29, 2013, Relator filed a motion to quash the subpoena duces tecum issued to Randy Wetzel. The motion states that a subpoena issued Thursday, January 24, 2013 was not sent to Wetzel or counsel for the Relator until the afternoon of Monday, January 28, 2013. The subpoena in question requires Wetzel to produce documents in response to 49 separate requests and to do so by 10:30 a.m. on Thursday, January 31, 2013. The panel chair finds Relator's contention, that the subpoena fails to allow a reasonable time to comply, well-taken. Moreover, Respondent has had ample time to request these documents in a proceeding that has been pending before this Board since August 2011 and is well-aware that a motion to quash two similar subpoenas was granted on January 23, 2013.

Pursuant to the authority of Civ. R. 45 (C)(3)(a), the motion to quash is granted for failure to allow reasonable time to comply with the document requests within the subpoena duces tecum. The parties are encouraged to be mindful of the upcoming deadlines for the presentation

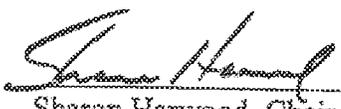
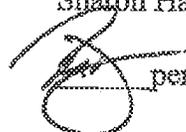
Appendix C

of this case, which will be held on February 4, 5, and 6, 2013 in Cleveland, and to accomplish the depositions if deemed necessary within the appropriate timeframe.

Accordingly for the foregoing reasons,

IT SO ORDERED:

Relator's motion to quash the subpoena duces tecum issued to Randy Wetzel is hereby granted.

  
\_\_\_\_\_  
Sharon Harwood, Chair  
 per authorization

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

Office of Disciplinary Counsel : Board No. 11-072  
Relator :  
v. :  
Scott C. Smith :  
Respondent :

AFFIDAVIT OF SCOTT C. SMITH, ESQ.  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of Ohio }  
                  } ss:  
County of Franklin }

NOW COMES AFFLIANT FIRST BEING DULY CAUTIONED AND SWORN AND  
ATTESTS:

1. My name is Scott C. Smith, and I am an attorney licensed to practice law in the State of Ohio, and my license is in "inactive" status. I am currently in good standing with the Supreme Court of Ohio. I am of legal age, sound mind and am otherwise competent to make this affidavit. I am the Respondent herein, and I have personal knowledge of each fact alleged in this Affidavit.
2. I served as managing partner of the law firm of Weston Hurd LLP from 2005 until August 2007. Prior to that time, I was a partner with the firm from 1996 until August 2007 and an associate with the firm from 1989 to 1996. I was forced to resign from the firm effective August 31, 2007.
3. While at the firm, I developed the long-term care practice group. From the outset, long-term care cases were unique from the general litigation cases and were billed differently from other cases. The clients in the long-term care cases were very concerned with large civil damages awards, particularly punitive damage awards. The concern was that in a punitive damages hearing, attorney invoices and billing would be discoverable and could reveal trial strategies, communications, and information that could lead to punitive damages. Consequently, a unique billing practice developed, including the following:

Appendix D

- a. Use of pre-approved budgets for each phase of litigation, for each case.
- b. Use of general billing descriptions rather than specific billing narratives that were commonplace in other litigation. In fact, narrative specificity, specific identification of task and exact time was not used.
- c. Use of closed, intra-net computerized billing systems, with access to those systems limited to me and a few others. Most notable for this case were intra-net systems called Serengetti, Client Connect and Power Brief.
- d. Use of open case numbers to bill for time spent on cases that were not yet opened.
- e. Use of client approved and identified partners and associates for legal work. The clients were aware that time entries for Weston Hurd partners and associates who were not specifically approved by the client, but whose work was necessary for a case, were billed under my initials or the initials of another client-approved attorney.

4. The clients were experts in long-term care, expert lawyers for each client received bills monthly for each case, were intimately involved in each case and approved each of these billing requirements. My correspondence with the clients regarding these procedures is contained in various guidance documents supplied by the client as as my specific correspondence with the clients. These documents are contained on the various intra-net systems. I do not have access to those systems, and those documents have not been provided to me in discovery.

5. In August of 2007, I was asked to attend a meeting with the management committee of Weston Hurd along with the firm's attorney, Mary Cibella. I believed that the subject of the meeting would be the ongoing crisis within the long-term practice group, which centered around an illicit extra-marital affair between Attorney Victor DiMarco and his paralegal/nurse consultant, Nancy Suster, and the lack of cooperation in these cases between Mr. DiMarco, Ms. Suster and their secretary Karen Stencil with Mr. Smith and his secretary, Sandy Juba. I had discovered that DiMarco and Suster were using out of town trips to carry on their affair, and were not communicating critical information to me or my secretary. To my surprise, the meeting was about my billing practices for long-term care cases, based upon a complaint made by DiMarco, which was supported by Suster. As the meeting progressed, it became obvious to me that Cibella (who had a conflict of interest because she had previously represented me) and the management committee had failed to realize or consider that the long-term care cases were billed under the unique set of guidelines described in the previous paragraph. Instead, Cibella and the management committee applied the billing guidelines for general litigation cases to my time entries for long-term care cases.

6. At this meeting, I was not permitted to review documents, access my computer, access my desk calendar, the draft bills or any other document or record, including the client files. Instead, I was given a set of written questions that I was required to answer within 24 hours. Carolyn Cappel stated that my conduct was "criminal" and Tim Johnson used the term "Enron," creating a perfect conflict between myself, the Firm and its clients. I was later suspended from the firm without being allowed to review or access any of the documents or communications from the clients that would have explained my time entries and billing practices for long-term care cases.

7. After my suspension, I was forced to resign from Weston Hurd and invoked the mediation clause in the Partnership Agreement. As of the date of this affidavit, the mediation is not complete, and I have not reached a final agreement with Weston Hurd. During the mediation, I learned that Weston Hurd, under Mary Cibella's guidance, issued refunds to three Weston Hurd clients: Proclaim America/Altercare, Beverly Enterprises/Golden Ventures, and Covenant Care. The refunds were calculated using the following methodology:

a. Carolyn Cappel and Tim Johnson initially reviewed five long-term care client files in order to indentify "false" time entries.

b. Carolyn Cappel and Tim Johnson then reviewed an additional 11 long term care files in order to locate additional "false" time entries.

c. Carolyn Cappel and Tim Johnson went on to review 34 long term care client files, totaling approximately 156 invoices containing my time entries.

d. Using the results from this review, Cappel and Johnson extrapolated the percentage of allegedly false time entries through all 88 long-term care files I had billed time for while at Weston Hurd.

e. I was not consulted at any time during this review process. I have requested, but have not been allowed to review the allegedly false time entries, the related client files or any documents related to the allegedly false time entries.

8. Both during the mediation and during the discovery phase of this case, in order to support the validity of my time entries and billing practices, I have asked the Relator and Weston Hurd for documents important to my defense, in that those documents contain information that could exonerate me of the charges set forth in the Formal Complaint. But I have never received those documents, including the following:

a. Documents and communications between me and each of the client contained on each of the intra-net systems described in prior paragraphs.

b. Communications and guidance documents regarding billing procedures and instructions for Covenant Care.

c. Communications and guidance documents regarding billing procedures and instructions for Beverly Enterprises/Golden Ventures.

d. Communications and guidance documents regarding billing procedures and instruction for ProClaim America/Altercare.

e. The complete client files, including draft bills, communications and my notes for each of the following cases:

1. James Hanson Jr, et al. v. Valley View Nursing and Rehabilitation Center, et al.
2. John H. Heppner, et al, v. Beverly Enterprises-Ohio, et al
3. Stephen Lawson, et al., v. Altercare of Wadsworth
4. Margaret Maxey, et al., v. Altercare of Canton.
5. Robert Siegment, et al., v. Edgewood Manor Nursing Home et al.
6. Lori Croston et al., v. Beverly
7. Anna Williamson v. Altercare of Bucyrus
8. Sherry Yachanin v. Metrohealth Medical Center
9. Michael DeAngelis v. Altercare of Ohio
10. Errol Crandolph v. Covenant Care dba Fairfield Skilled Nursing & Rehabilitation
11. Claudia Newhard et al. v. Briarfields of Austintown, LLC
12. James Henke v. The Cleveland Clinic Foundation
13. Altercare of Mentor v. Lawrence Erwin
14. Rita Gibbons, et al. v. Hearthstone Assisted Living
15. Edward Schaki v. Broadview Multi-Care Center
16. Virginia Schavone/Country Lawn Medical Record Request
17. Victor Lawrence v. Altercare of Mentor
18. Delores Mans v. Mohammed Kabir, et al.

19. Anthony Trapasso v. Almost Family Adult Daycare
  20. Charles Cool v. Majora Lane Center for Rehabilitation
  21. John Hall v. Evergreen
  22. Frische Mullin, Inc. v. Sandys & Associates, Inc.
  23. Joe Shelton v. Beverly Health & Rehab
  24. Estate of William Magby v. Forest Hills Nursing Home
  25. Dawn Foote v. Healthcare Services Group
  26. Richard Shelar v. Austin woods Nursing Center
  27. Robert Insdterwald v. Hickory Creek nursing Center
  28. William Richards v. OhioHealth Corp.
  29. Blossom Krasnby v. The Greens, et al.
  30. Nickie Clegg v. Summa Helath System Hospital
  31. Robert Evans v. Northern Cincinnati Sports & Physical Therapy
  32. Will Fegley et al v. Longmeadow Care
  33. Robert Morelock v. Beverly Heath & Rehab
  34. Rickey Young v. Lincoln Electric Co
  35. Barbara Wollebaek v. Wrisght Nursing and Rehab Center
  36. Nancy Johnson v. Altercare of Mentor
  37. Heidi Stecher v. Wright Nursing and Rehab Center
- f. Identification of the 34 files reviewed by Cappel and Johnson
  - g. Identification of each of the 88 files used to calculate the total scope of my allegedly false billings.
  - h. My personal desk calendar covering the time I was at Weston Hurd.
  - i. Documents and other communications between me and various attorneys at Weston Hurd who worked on the long-term care cases, regarding billing guidelines and the unique billing criteria for long-term care cases.

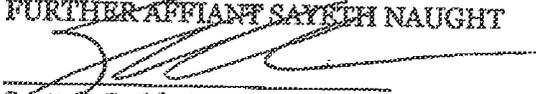
j. Vic DiMarco, Nancy Sustar and Karen Stencil's personnel files and Sandy Suchan's Human Resource file regarding the long term care personnel issues.

k. Weston Hurd's annual billing for each lawyer since 1987.

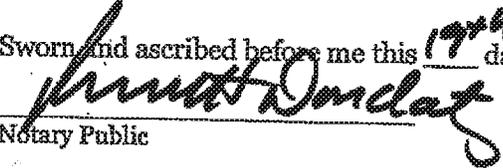
9. As the mediation progressed, my counsel and I were given case files for five of the underlying clients whose bills were in question. Weston Hurd, however, did not provide a waiver of the attorney-client privilege from the underlying clients with regard to those five files. Shortly thereafter, we received a disk containing approximately 20,000 documents from Weston Hurd. But, as with the client files, Weston Hurd did not provide waivers from the clients with regard to those 20,000 documents. When my counsel raised this issue, Weston Hurd attempted to procure proper waivers from the client, albeit after the fact, but the clients have not waived their privilege to non-public documents. The presentation of these 20,000 documents and the necessary public testimony to defend myself against these allegations are in direct conflict with the confidentiality required to prevent exposure to these clients to irreparable harm.

10. I have reviewed the five case files, the approximately 20,000 documents produced by Weston Hurd and the documents produced by the Relator in this case. None of the documents identified in paragraph 8, supra, have been produced by the Relator, Weston Hurd or the underlying clients.

FURTHER AFFIANT SAYETH NAUGHT

  
Scott C. Smith, Esq.

Sworn and subscribed before me this 17<sup>th</sup> day of April, 2012

  
Notary Public

KENNETH R. DONCHATZ  
Attorney at Law  
Notary Public, State of Ohio  
My Commission Has No Expiration  
Section 147.06

Westlaw

626 So.2d 178, 18 Fla. L. Weekly S517  
(Cite as: 626 So.2d 178)

Page 1

P

Supreme Court of Florida.  
THE FLORIDA BAR, Complainant,  
v.  
William F. DANIEL, Respondent.

Nos. 78063, 78065.  
Sept. 30, 1993.

Rehearing Denied Nov. 17, 1993.

Upon referee's recommendations in attorney disciplinary proceeding, the Supreme Court held that: (1) State Bar's unanswered requests for admissions which contain same facts as those alleged in Bar's complaint are properly deemed admitted; (2) failure to get court approval of settlement reached with insurance company for personal injuries sustained by minor warrants 30-day suspension from practice of law; and (3) failure to effect public sale after obtaining judgment in foreclosure for clients warrants 30-day suspension from practice of law.

Suspensions ordered.

West Headnotes

[1] Attorney and Client 45 ⇨48

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k47 Proceedings  
45k48 k. Notice and Preliminary Proceedings. Most Cited Cases

State Bar's unanswered requests for admissions in attorney discipline case which contain same facts as those alleged in Bar's complaint are properly deemed admitted. West's F.S.A. RCP Rule 1.370(a).

[2] Attorney and Client 45 ⇨48

45 Attorney and Client

45I The Office of Attorney  
45I(C) Discipline  
45k47 Proceedings  
45k48 k. Notice and Preliminary Proceedings. Most Cited Cases  
Summary judgment is available in attorney disciplinary proceedings. West's F.S.A. Bar Rule 3-7.6(e)(1); West's F.S.A. RCP Rule 1.510(c).

[3] Attorney and Client 45 ⇨48

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k47 Proceedings  
45k48 k. Notice and Preliminary Proceedings. Most Cited Cases

Attorney and Client 45 ⇨52

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k47 Proceedings  
45k52 k. Charges and Answers Thereto. Most Cited Cases

Sending pleadings and requests for admissions by certified mail to attorney's record State Bar address in accordance with State Bar rule governing process and notice in lieu of process effects proper service in attorney disciplinary proceeding. West's F.S.A. Bar Rule 3-7.11(b, c).

[4] Constitutional Law 92 ⇨4273(3)

92 Constitutional Law  
92XXVII Due Process  
92XXVII(G) Particular Issues and Applications  
92XXVII(G)12 Trade or Business  
92k4266 Particular Subjects and Regulations  
92k4273 Attorneys  
92k4273(3) k. Conduct and Discipline. Most Cited Cases

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Appendix E

626 So.2d 178, 18 Fla. L. Weekly S517  
(Cite as: 626 So.2d 178)

Page 2

(Formerly 92k287.2(5))

Attorney's voluntary choice not to take advantage of opportunity to be heard as to appropriate costs to be assessed against attorney in attorney disciplinary hearing does not violate due process. West's F.S.A. Bar Rule 3-7.6(k)(1)(E); U.S.C.A. Const.Amend. 14.

[5] Attorney and Client 45 ⇌59

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k47 Proceedings  
45k59 k. Costs. Most Cited Cases

Constitutional Law 92 ⇌2500

92 Constitutional Law  
92XX Separation of Powers  
92XX(C) Judicial Powers and Functions  
92XX(C)2 Encroachment on Legislature  
92k2499 Particular Issues and Applications  
92k2500 k. In General. Most Cited Cases

(Formerly 92k70.1(7.1))

Charge of \$500 to be taxed in attorney disciplinary proceeding for administrative costs, as provided for in State Bar rule governing contents of referee's report, was not unconstitutional on ground that it was policy matter reserved for legislative branch of government. West's F.S.A. Bar Rule 3-7.6(k)(1)(E); West's F.S.A. Const. Art. 5, § 15.

[6] Constitutional Law 92 ⇌2374

92 Constitutional Law  
92XX Separation of Powers  
92XX(B) Legislative Powers and Functions  
92XX(B)2 Encroachment on Judiciary  
92k2374 k. Practice of Law. Most Cited Cases  
(Formerly 92k57)  
Supreme Court has exclusive authority to adopt rules addressing all aspects of attorney disciplinary

process, including costs that can be assessed against respondent in attorney disciplinary proceeding. West's F.S.A. Bar Rule 3-7.6(k)(1)(E); West's F.S.A. Const. Art. 5, § 15.

[7] Attorney and Client 45 ⇌48

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k47 Proceedings  
45k48 k. Notice and Preliminary Proceedings. Most Cited Cases  
(Formerly 92k230.3(9))

Attorney and Client 45 ⇌52

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k47 Proceedings  
45k52 k. Charges and Answers Thereto. Most Cited Cases  
(Formerly 92k230.3(9))

Constitutional Law 92 ⇌3684(3)

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(E) Particular Issues and Applications  
92XXVI(E)12 Trade or Business  
92k3681 Licenses and Regulation  
92k3684 Attorneys and Paralegals  
92k3684(3) k. Discipline. Most Cited Cases  
(Formerly 92k230.3(9))

Constitutional Law 92 ⇌4273(3)

92 Constitutional Law  
92XXVII Due Process  
92XXVII(G) Particular Issues and Applications  
92XXVII(G)12 Trade or Business  
92k4266 Particular Subjects and Regulations

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(Cite as: 626 So.2d 178)

Page 3

92k4273 Attorneys

92k4273(3) k. Conduct and  
Discipline. Most Cited Cases  
(Formerly 92k287.2(5))

Due process and equal protection do not require that complaint and State Bar's requests for admissions in attorney disciplinary proceeding be "filed" in Supreme Court before attorney is served with them. West's F.S.A. Bar Rules 3-7.11(b, c), 3-7.4(j), 3-7.6(g)(5)a (1991); West's F.S.A. RCP Rules 1.050, 1.070; U.S.C.A. Const.Amend. 14.

[8] Attorney and Client 45 ⇌ 47.1

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k47 Proceedings

45k47.1 k. In General. Most Cited

In attorney disciplinary proceeding, Rules of Civil Procedure only attach after appointment of referee and then apply only if no provision in rule governing procedures before referee applies. West's F.S.A. Bar Rule 3-7.6(e)(1).

[9] Attorney and Client 45 ⇌ 48

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k47 Proceedings

45k48 k. Notice and Preliminary  
Proceedings. Most Cited Cases

Constitutional Law 92 ⇌ 4273(3)

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and  
Applications

92XXVII(G)12 Trade or Business

92k4266 Particular Subjects and  
Regulations

92k4273 Attorneys

92k4273(3) k. Conduct and

Discipline. Most Cited Cases  
(Formerly 92k287.2(5))

Attorney was not denied due process in attorney disciplinary proceeding when referee failed to give him ten days notice of final hearing on State Bar's motions for summary judgment and motions to deem matters admitted; attorney received notice of hearing more than a week prior to hearing and was aware of notice of hearing for some period of time. West's F.S.A. Bar Rule 3-7.11(c); U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 ⇌ 4273(3)

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and  
Applications

92XXVII(G)12 Trade or Business

92k4266 Particular Subjects and  
Regulations

92k4273 Attorneys

92k4273(3) k. Conduct and  
Discipline. Most Cited Cases  
(Formerly 92k287.2(5))

Reasonable notice is all that is necessary to afford due process in disciplinary proceedings. West's F.S.A. Bar Rule 3-7.11(c).

[11] Attorney and Client 45 ⇌ 54

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k47 Proceedings

45k54 k. Trial or Hearing. Most Cited  
Cases

Failure of referee to render his decision in attorney disciplinary proceeding within six months of order assigning referee did not render referee's final reports invalid, in absence of allegation of prejudice to attorney from delay; determination of appropriate discipline was postponed to allow for thorough argument on issue of discipline and attorney then sought premature review of referee's initial reports, thus further delaying proceedings.

626 So.2d 178, 18 Fla. L. Weekly S517  
(Cite as: 626 So.2d 178)

[12] Attorney and Client 45 ⇨47.1

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k47 Proceedings  
45k47.1 k. In General. Most Cited  
Administrative Procedure Act has no  
application in attorney disciplinary cases. West's  
F.S.A. § 120.50 et seq.; West's F.S.A. Const. Art. 5,  
§ 15.

[13] Attorney and Client 45 ⇨59.13(3)

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k59.1 Punishment; Disposition  
45k59.13 Suspension  
45k59.13(2) Definite Suspension  
45k59.13(3) k. In General. Most

Cited Cases

(Formerly 45k58)

Failure to get court approval of settlement  
reached with insurance company for personal  
injuries sustained by minor warrants 30-day  
suspension from practice of law. West's F.S.A. Bar  
Rules 4-1.3, 4-1.4(a, b), 4-1.5(a), 4-1.15(b, d),  
4-3.2, 5-1.1.

[14] Attorney and Client 45 ⇨59.13(3)

45 Attorney and Client  
45I The Office of Attorney  
45I(C) Discipline  
45k59.1 Punishment; Disposition  
45k59.13 Suspension  
45k59.13(2) Definite Suspension  
45k59.13(3) k. In General. Most

Cited Cases

(Formerly 45k58)

Failure to effect public sale after obtaining  
judgment in foreclosure for clients warrants 30-day  
suspension from practice of law. West's F.S.A. Bar  
Rules 4-1.3, 4-1.4(a), 4-3.2.

\*180 John F. Harkness, Jr., Executive Director,  
John T. Berry, Staff Counsel, and James N.  
Watson, Jr., Bar Counsel, Tallahassee, for  
complainant.

William F. Daniel, pro se.

PER CURIAM.

William F. Daniel seeks review of the referee's  
reports in these consolidated disciplinary  
proceedings finding him guilty of misconduct and  
recommending concurrent thirty-day suspensions.  
We have jurisdiction <sup>FN1</sup> and approve the referee's  
findings and recommended discipline.

FN1. Art. V, § 15, Fla.Const.

Two complaints were filed against Daniel.  
Case no. 78,065 deals with Daniel's failure to get  
court approval of a settlement that was reached  
with an insurance company for personal injuries  
sustained by a minor.<sup>FN2</sup> Daniel was charged with  
violating the following Rules Regulating The  
Florida Bar: rule 4-1.3 (a lawyer shall act with  
reasonable diligence and promptness in  
representing a client); rule 4-1.4(a) (a lawyer shall  
keep a \*181 client reasonably informed about the  
status of a matter and promptly comply with  
reasonable requests for information); rule 4-1.4(b)  
(a lawyer shall explain a matter to the extent  
reasonably necessary to permit the client to make  
informed decisions regarding the representation);  
rule 4-1.5(a) (an attorney shall not collect an illegal  
or prohibited fee); rule 4-1.15(b) (upon receiving  
funds or other property in which a client or third  
person has an interest, a lawyer shall promptly  
notify the client or third person; a lawyer shall  
promptly deliver any funds or other property that  
the client or third person is entitled to and, upon  
request by client or third party shall promptly  
render a full accounting regarding such property);  
rule 4-1.15(d) (a lawyer shall comply with The  
Florida Bar Rules Regulating Trust Accounts); rule  
4-3.2 (a lawyer shall make reasonable efforts to  
expedite litigation consistent with the interests of

the client); and rule 5-1.1 (money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose).

FN2. In case no. 78,065, the referee found the following facts to be proven:

Respondent was retained by Jenea [sic] Dubois regarding personal injuries her minor daughter, Crystal Nicole Dubois, suffered in an automobile accident on June 19, 1986. During October 1988, Respondent reached a settlement of the Dubois' claims with Allstate Insurance Company through their Tallahassee counsel, Lauchlin Waldoch. On October 14, 1988, Allstate's counsel, Lauchlin Waldoch wrote to Respondent regarding the settlement and advised him that since the claimant was a minor, the settlement should require court approval and the appointment of a guardian of the property. On or about October 27, 1988 Respondent filed a petition in Leon County Circuit Court seeking approval of the settlement regarding the claim of the minor client, Nicole Dubois. Respondent failed to schedule a court date for the petition to approve the settlement and never obtained court approval of the settlement. On May 15, 1989, Lauchlin Waldoch forwarded Respondent a letter regarding the settlement and included an original release and settlement agreement with a check from Allstate Insurance Co. for \$7,500.00. In Lauchlin Waldoch's letter of May 15, 1989, she requested that Respondent maintain the settlement funds in his trust account until such time as the release was executed and returned.

On May 31, 1989, Respondent had Richard Dubois and Jeana Dubois execute the settlement and release

document. At the time Richard Dubois and Jeana Dubois executed the release to Allstate on May 31, 1989, Respondent had not yet obtained court approval of the settlement. After the release was executed, Respondent failed to forward the document to Lauchlin Waldoch. On June 14, 1989, Respondent deposited the Allstate settlement check for the Dubois claim into his trust account. On June 19, 1989, Respondent wrote himself a check on his trust account for \$5,000.00, representing attorney fees in the Dubois claim.

During May and July, 1989 Jeana Dubois attempted without success to contact Respondent to determine when the settlement was to be finalized. Jeana Dubois executed a power of attorney in favor of Richard Dubois on July 18, 1989 to effectuate the settlement of Nicole Dubois' settlement. Richard Dubois attempted to contact Respondent regarding Nicole's settlement, and Respondent failed to return his calls. Richard Dubois subsequently hired other counsel, Bradley Monroe, to assist in getting Respondent to finalize the settlement with Allstate. Bradley Monroe received fees of \$500.00 from Richard Dubois for his services. On September 13, 1989, Bradley Monroe forwarded Respondent a power of attorney authorizing Respondent to pay the settlement proceeds to Richard Dubois. On September 21, 1989, Respondent executed a trust account check to Richard Dubois in the amount of \$2,500.00 representing the initial settlement proceeds for Nicole Dubois. At the time Respondent executed trust account checks to Richard Dubois and himself, Respondent had still not obtained court approval of the

settlement. Respondent's original petition for approval had been dismissed for failure to prosecute. Despite disbursing the settlement proceeds Respondent had failed to return the executed release to Allstate's attorney, Lauchlin Waldoch. On October 13, 1991, Lauchlin Waldoch filed a separate petition for approval of the settlement between Nicole Dubois and Allstate. On December 5, 1989, the court approved the settlement between Nicole Dubois and Allstate.

Case no. 78,063 deals with Daniel's failure to effect a public sale after obtaining a judgment in foreclosure for his clients.<sup>FN3</sup> Daniel was charged with violating rules 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); and 4-3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client) of the Rules Regulating The Florida Bar.

FN3. The referee made the following findings of fact in case no. 78,063:

On or about September 19, 1983, Respondent was retained by George G. and Margarete B. Miller (The Millers) to initiate foreclosure proceedings on their behalf concerning two mortgages given by Big Bend Housemovers, Inc. (Big Bend). Respondent requested and received a retainer fee of \$690.00 from the Millers to institute foreclosure proceedings. The mortgages held by the Millers related to two tracts of land purchased by Big Bend on or about December 3, 1982. On or about December 1, 1982, Big Bend executed a quit claim deed to Hassler Construction, Inc. (Hassler). The Millers were notified

of the change of ownership by letter from Hassler on or about June 3, 1983.

On or about September 22, 1983, Respondent filed a complaint to foreclose the above referenced mortgages against Big Bend and Hassler. A final Hearing was held on the foreclosure complaint on May 3, 1984. On June 11, 1984 a final judgment and default for foreclosure was entered by Circuit Judge Victor Cawthon against Big Bend and Hassler. The June 11, 1984 final judgment provided that unless sums due were not [sic] paid the property should be sold at public sale at 11:00 a.m. on July 11, 1984. Respondent failed to perfect the public sale ordered for July 11, 1984 after Big Bend and Hassler failed to pay the sums due on the mortgage. Respondent later filed a Motion for an Amended Final Judgment to obtain a new sale date on or about January 7, 1985.

On or about January 22, 1985, a final hearing was held on Respondent's Motion for Amended Final Judgment. On January 22, 1985 Respondent wrote the Millers advising them that the Court had granted a new public sale date for February 20, 1985, at 11:00 a.m. Respondent failed to take the necessary steps to perfect the public sale set for February 20, 1985. After Respondent failed to perfect the public sale the Millers sought a title search on the mortgaged property from Premier Title and Abstract, Inc. (Premier). On or about March 22, 1985 the Millers were notified by Premier that subsequent to the original public sale date of July 11, 1984, there were four outstanding judgments against Hassler, an assignment of mortgage from Big Bend

to Citizens Commercial Bank, two federal tax liens against Hassler and property taxes for 1984 were outstanding. Respondent failed to ascertain the existence of these liens prior to filing either the original complaint or the Motion for Amended Final Judgment. Respondent failed to name any of the outstanding lienholders in any of the pleadings in this matter.

The Millers sought the help of other counsel in an attempt to complete the foreclosure begun by Respondent. On June 2, 1985, Attorney W. Kirk Brown wrote Respondent on behalf of the Millers asking that he conclude the foreclosure proceedings. Further, Respondent failed to respond to the letter of Mr. W. Kirk Brown. Respondent failed to complete the foreclosure proceedings for which he was retained by the Millers. As of July 1990, the sale had not been perfected. Respondent never asked the court for permission to withdraw from this matter. Respondent failed to advise the Millers as to the consequences of not taking this property to public sale.

Copies of the complaints and requests for admissions were sent by certified mail to Daniel's record Bar address on June 10, 1991, and were signed for by Daniel on June 17, 1991. After receiving no response from Daniel to either the complaints or the requests for admissions, the Bar filed a motion to deem matters admitted and motions for summary judgment. Copies of the motions also were sent to Daniel's record Bar address by certified mail, but were returned unclaimed.

A hearing on the Bar's motions was held on January 14, 1992. Daniel made a special appearance to contest jurisdiction, maintaining that the referee lacked jurisdiction because, among other

things, the Bar had not served him with a "filed" copy of the complaints. After finding that the Bar had effected proper service of its complaints and requests for admissions, as well as its motions for summary judgment, the referee heard arguments.

Because Daniel failed to respond to the Bar's requests for admissions all matters for which an admission was requested were deemed admitted. Based upon the admitted facts, the referee found Daniel guilty of the misconduct charged in both complaints. The referee deferred argument on the appropriate discipline and entered initial reports as to his findings of fact and determinations of guilt. On March 30, 1992, Daniel petitioned this Court for review of the initial reports. On June 18, 1992, the petition was dismissed as premature.

A hearing to determine the appropriate disciplinary sanctions was held on December 8, 1992. Daniel renewed his objection to the referee's jurisdiction to hear the cases. After making the objection, Daniel left the hearing without making any argument as to the appropriate discipline and before the Bar presented its argument as to discipline. On January 22, 1993, the referee issued final reports recommending concurrent thirty-day suspensions<sup>FN4</sup> and assessing Daniel costs.

FN4. The Bar recommended the concurrent thirty-day suspensions and does not seek harsher discipline before this Court.

[1] Daniel raises the same claims in connection with both cases. Daniel's first contention is that there is no evidence to support the referee's findings of fact. When Daniel failed to respond to the Bar's requests for admissions, the requests which contained the same facts as those alleged in the Bar's complaints were properly deemed admitted. Fla.R.Civ.P. 1.370(a); see *The Florida Bar v. Greene*, 515 So.2d 1280 (Fla.1987). The matters deemed admitted pursuant to rule 1.370(a) clearly serve as substantial competent evidence supporting the referee's findings.

[2] Daniel's next assertion, that entry of summary judgment is not authorized in disciplinary proceedings, is likewise without merit. Under Rule Regulating The Florida Bar 3-7.6(e)(1), once a formal complaint has been filed and forwarded to a referee for hearing, the Florida Rules of Civil Procedure apply except where otherwise provided in the rule. Florida Rule of Civil Procedure 1.510(c) provides for summary judgment where, as here, it is shown there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

[3] We also reject Daniel's challenge to the summary judgments based on the Bar's alleged failure to serve Daniel with the motions for summary judgment. The motions for summary judgment, the complaints, and requests for admissions, were sent by certified mail to Daniel's record Bar address, in accordance with Rule Regulating The Florida Bar 3-7.11(b), (c). Such was all that was required to effect proper service. See *The Florida Bar v. Bergman*, 517 So.2d 11 (Fla.1987). Moreover, it is apparent from the record that Daniel had actual notice of the proceedings against him.

[4] Daniel next maintains that the referee's findings as to costs deprived him of due process and that Rule Regulating The Florida Bar 3-7.6(k)(1)(E) is unconstitutional. Daniel's contention that he was not given an opportunity to challenge or refute the costs that were assessed against him is totally without merit. Daniel appeared at the December 8, 1992 hearing at which the appropriate discipline and costs were to be addressed. However, after renewing his objection to the referee's jurisdiction, Daniel voluntarily excused himself from the hearing. \*183 After Daniel left, Bar counsel made a brief argument as to the appropriate discipline and submitted a memorandum addressing discipline and costs. Daniel clearly was afforded an opportunity to be heard; the fact that he voluntarily chose not to take advantage of that opportunity does not offend due

process.

[5][6] We also reject Daniel's contention that the \$500 charge for administrative costs provided for in rule 3-7.6(k)(1)(E) is unconstitutional because it is "a policy matter reserved for the legislative branch of the government." Under article V, section 15 of the Florida Constitution this Court has exclusive jurisdiction to discipline persons admitted to the practice of law. It follows that this Court has exclusive authority to adopt rules addressing all aspects of the disciplinary process, including the costs that can be assessed a respondent.

[7] Daniel raises numerous arguments <sup>FN5</sup> to support his final claim that he was denied due process and equal protection throughout these proceedings. First, he maintains that he was never properly served with the complaint and the requests for admissions because neither was served after the complaint was "filed" in this Court. Rule Regulating The Florida Bar 3-7.4(j) (1990), <sup>FN6</sup> which was in effect at the time these proceedings were initiated, provides in pertinent part:

FN5. A number of these arguments were raised in prior claims and will not be addressed a second time.

FN6. Current rule 3-7.4(k) is substantially the same.

When a formal complaint by a grievance committee is not referred to the designated reviewer, or returned to the grievance committee for further action, the formal complaint shall be promptly forwarded to and reviewed by bar headquarters staff counsel who shall file the formal complaint, furnish a copy of the formal complaint to the respondent, and a copy of the record shall be made available to the respondent at his or her expense.

Rule Regulating The Florida Bar 3-7.6(g)(5)a, (1990), <sup>FN7</sup> provides:

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(Cite as: 626 So.2d 178)

FN7. Current rule 3-7.6(g)(5)(A) is substantially the same.

Any pleading filed in a case prior to appointment of a referee shall be filed with the Supreme Court of Florida and shall bear a certificate of service showing parties upon whom service of copies has been made.

Neither of these rules requires that a complaint be filed with this Court prior to its service on the respondent. In fact, it would appear that rule 3-7.6(g)(5) provides for service of the complaint prior to or contemporaneous with the filing of the complaint in this Court.

[8] Daniel's reliance on Florida Rules of Civil Procedure 1.050 and 1.070 to support his position that he was not properly served is misplaced because the Florida Rules of Civil Procedure only attach after the appointment of a referee and then apply only if no other provision in the rule provides otherwise. Rule Reg. Fla. Bar 3-7.6(e)(1). Moreover, as noted above, it is Rule Regulating The Florida Bar 3-7.11 (b), (c) that provides the procedure for effecting proper service in disciplinary proceedings.

[9][10] Daniel next maintains that he was denied due process when the referee failed to give him ten days notice of the final hearing on the Bar's motions for summary judgment and motions to deem matters admitted. Reasonable notice is all that is necessary to afford due process in disciplinary proceedings. Rule Reg. Fla. Bar 3-7.11(c). Daniel acknowledges receiving the notice of hearing more than a week prior to the hearing and that he "was aware of the notice of hearing for some period of time." Because Daniel was given adequate notice of the proceedings against him the referee properly denied Daniel's motion to dismiss and motion for a continuance to give him time to respond to the motion for summary judgment.

We also find no merit to Daniel's apparent challenge to the consolidation of the disciplinary cases before the referee. He cites no authority to

support his position and alleges no prejudice from the consolidation.

[11] Daniel also contends that the referee's final reports are defective because the \*184 referee failed to render his decision within six months of the June 19, 1991 order assigning a referee. At the January 14, 1992 hearing, the determination of appropriate discipline was postponed to allow for thorough argument on the issue of discipline. Daniel then sought premature review of the referee's initial reports, thus further delaying the proceedings. Daniel has alleged no prejudice from the delay; and under the circumstances, we do not believe that the delay in the filing of the final reports should render them invalid.

[12] Daniel also faults the referee with failing to accord him the "procedural mandates" of The Administrative Procedure Act, Chapter 120, Florida Statutes. In light of this Court's exclusive jurisdiction over Bar disciplinary matters under Article V, section 15 of the Florida Constitution, the Administrative Procedure Act has no application in such cases.

Daniel's arguments that the referee did not have jurisdiction over the proceedings against him because Chapter 20, Florida Statutes grants jurisdiction of professional practices to the Department of Professional Regulation and that the Rules Regulating the Florida Bar are unconstitutional as an invalid exercise of legislative power also are totally without merit. Art. V, § 15, Fla. Const.; Rules Reg. Fla. Bar 3-1.2, 3-3.1.

[13][14] Having found substantial competent evidence to support the referee's findings in both cases and no merit to Daniel's other claims, we approve the referee's findings and recommended discipline. Accordingly, William F. Daniel is suspended from the practice of law for a period of thirty days in each case. The suspensions shall run concurrently and shall be effective thirty days from the filing of this opinion to enable Daniel to close out his practice and protect the interests of his

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clients. If Daniel notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Daniel shall accept no new business from the date of this opinion. Judgment for costs in the amount of \$1,574.54 is hereby entered against Daniel, for which sum let execution issue.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD,  
SHAW, GRIMES, KOGAN and HARDING, JJ.,  
concur.

Fla., 1993.  
The Florida Bar v. Daniel  
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END OF DOCUMENT

Westlaw

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C

Supreme Court of Kansas.  
 In the Matter of David McLane BRYAN,  
 Respondent.

No. 89,105.  
 Jan. 24, 2003.

In attorney disciplinary proceeding, the Supreme Court held that: (1) as a matter of first impression, a motion for summary judgment is not authorized in attorney disciplinary proceedings; (2) attorney impermissibly disclosed confidences of former client; and (3) public censure was warranted as disciplinary sanction.

Publicly censured.

West Headnotes

[1] Attorney and Client 45 ⇨57

45 Attorney and Client  
 45I The Office of Attorney  
 45I(C) Discipline  
 45k47 Proceedings  
 45k57 k. Review. Most Cited Cases  
 Interpretation of the Rules of Professional Conduct is a question of law over which the Supreme Court has unlimited review.

[2] Attorney and Client 45 ⇨44(1)

45 Attorney and Client  
 45I The Office of Attorney  
 45I(C) Discipline  
 45k37 Grounds for Discipline  
 45k44 Misconduct as to Client  
 45k44(1) k. In General. Most Cited  
 Cases

Attorney's disclosure to store manager and to loss prevention manager at store at which former client worked, that former client "has a history of making false claims such as" the stalking

allegations she was making against attorney, was beyond the disclosure of client confidences that was reasonably necessary to vindicate attorney, as to former client's alleged defamation of attorney by accusing him of stalking. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 1.6(b)(3).

[3] Attorney and Client 45 ⇨44(1)

45 Attorney and Client  
 45I The Office of Attorney  
 45I(C) Discipline  
 45k37 Grounds for Discipline  
 45k44 Misconduct as to Client  
 45k44(1) k. In General. Most Cited

Cases

Attorney was not required to commence a defamation lawsuit against former client, before attorney could make disclosures of client confidences that were reasonably necessary to vindicate attorney as to former client's allegedly defamatory accusation, to her employer, that he was stalking her. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 1.6(b)(3).

[4] Attorney and Client 45 ⇨44(1)

45 Attorney and Client  
 45I The Office of Attorney  
 45I(C) Discipline  
 45k37 Grounds for Discipline  
 45k44 Misconduct as to Client  
 45k44(1) k. In General. Most Cited

Cases

Attorney violated ethical rule regarding protection of client confidences, though the information that attorney disclosed to defense counsel, in an action in which former client was a plaintiff and attorney represented another plaintiff, was available from the public record in attorney's defamation lawsuit against former client. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 1.6(b)(3).

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[5] Privileged Communications and Confidentiality 311H  $\Leftrightarrow$ 112

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk112 k. Construction. Most Cited Cases (Formerly 410k198(1))

The attorney-client privilege is narrowly defined by the courts because it works to deprive the factfinder in a case of otherwise relevant information.

[6] Attorney and Client 45  $\Leftrightarrow$ 32(13)

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k32 Regulation of Professional Conduct, in General

45k32(13) k. Client's Confidences, in General. Most Cited Cases

The attorney's ethical requirement of confidentiality is interpreted more broadly than the attorney-client privilege. K.S.A. 60-426; Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 1.6.

[7] Attorney and Client 45  $\Leftrightarrow$ 44(1)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k44 Misconduct as to Client

45k44(1) k. In General. Most Cited

Cases

Attorney violated ethical rule regarding protection of client confidences by disclosing, in connection with motion to sever his current client's sexual harassment action from that of his former client, the existence of his defamation case against former client and why it could damage his current client's case; such disclosure was not reasonably necessary to vindicate attorney's interests, because attorney could have withdrawn from representation

of current client without disclosing former client's confidences. K.S.A. 60-426; Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 1.6(b)(3).

[8] Attorney and Client 45  $\Leftrightarrow$ 44(1)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k44 Misconduct as to Client

45k44(1) k. In General. Most Cited

Cases

Attorney violated the ethical rule prohibiting attorneys from attempting to violate ethical rules, where attorney, who was representing two plaintiffs in an action in which his former client was also a plaintiff, offered to disclose negative information about former client to defense counsel if defense counsel and attorney could reach a settlement agreement regarding the two remaining plaintiffs. K.S.A. 60-426; Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rules 1.6, 8.4(a).

[9] Attorney and Client 45  $\Leftrightarrow$ 57

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k47 Proceedings

45k57 k. Review. Most Cited Cases

The Supreme Court has the duty in attorney disciplinary cases to examine the evidence and determine for itself the judgment to be entered.

[10] Attorney and Client 45  $\Leftrightarrow$ 57

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k47 Proceedings

45k57 k. Review. Most Cited Cases

A hearing panel's report in an attorney disciplinary proceeding is advisory only; however, it will be given the same dignity as a special verdict by a jury or the findings of a trial court and will be

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adopted where amply sustained by the evidence, or where it is not against the clear weight of the evidence, or where the evidence consists of sharply conflicting testimony.

[11] Attorney and Client 45 ⇌ 57

45 Attorney and Client  
 45I The Office of Attorney  
 45I(C) Discipline  
 45k47 Proceedings  
 45k57 k. Review. Most Cited Cases  
 The Supreme Court is to examine disputed findings of fact in an attorney disciplinary proceeding and determine whether they are supported by the evidence.

[12] Attorney and Client 45 ⇌ 48

45 Attorney and Client  
 45I The Office of Attorney  
 45I(C) Discipline  
 45k47 Proceedings  
 45k48 k. Notice and Preliminary Proceedings. Most Cited Cases  
 The filing of a motion for summary judgment is not authorized, in attorney disciplinary proceedings. Sup.Ct. Rules, Rules 211, 224(b); Rules Civ.Proc., K.S.A. 60-256(a).

[13] Attorney and Client 45 ⇌ 59.8(1)

45 Attorney and Client  
 45I The Office of Attorney  
 45I(C) Discipline  
 45k59.1 Punishment; Disposition  
 45k59.8 Public Reprimand; Public Censure; Public Admonition  
 45k59.8(1) k. In General. Most Cited Cases  
 (Formerly 45k58)  
 Public censure was appropriate disciplinary sanction for attorney's conduct in engaging in sexual relationship with client and thereby creating a conflict of interest, revealing client confidences, attempting to reveal client confidences to former

client's litigation adversary, and failing to take steps to extent reasonably practicable to protect client's interests after termination of representation. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rules 1.6(a), 1.7(b), 1.16(d), 8.4(a).

\*642 Stanton A. Hazlett, disciplinary administrator, argued the cause and was on the brief for petitioner.

Michael D. Hufft, of Hufft & Maginn, P.C., Kansas City, argued the cause and was on the brief for respondent, and David M. Bryan, respondent, argued the cause pro se.

ORIGINAL PROCEEDING IN DISCIPLINE  
 PER CURIAM:

On October 15, 1999, a complaint was filed on behalf of Helene Eichenwald with both the Kansas and Missouri Disciplinary Administrators against David Bryan. The Kansas Disciplinary Administrator filed a formal complaint against Bryan on May 16, 2000. Bryan filed an answer to the complaint in June 2000.

The Disciplinary Administrator filed an amended complaint on October 12, 2000. The amended complaint alleged that Bryan violated Kansas Rules of Professional Conduct (KRPC) 1.6 (2002 Kan. Ct. R. Annot. 358) (confidentiality of information); 1.7 (2002 Kan. Ct. R. Annot. 361) (conflict of interest); 1.9 (2002 Kan. Ct. R. Annot. 370) (conflict of interest; former client); 1.16 (2002 Kan. Ct. R. Annot. 395) (declining or terminating representation); 4.4 (2002 Kan. Ct. R. Annot. 430) (respect for rights of third persons); and 8.4 (2002 Kan. Ct. R. Annot. 449) (misconduct).

Bryan filed a motion for summary judgment and a memorandum in support of the motion in February 2002. The Disciplinary Administrator responded by requesting that the motion be stricken from the record and that the Disciplinary Administrator's office not be required to respond to the motion. Bryan replied, arguing against the Disciplinary Administrator's requests.

At the March 19, 2002, hearing before the three-member panel of the Kansas Board for Discipline of Attorneys, there were no objections to the notice of the hearing; to the date, time, or place of the hearing; to the composition of the panel; or to the jurisdiction of the panel. The hearing panel reserved ruling on Bryan's motion for summary judgment. The parties stipulated to facts, which included Bryan's stipulation to a violation of KRPC 1.7(b). Exhibits were also received into evidence by the hearing panel from both parties without objection.

The hearing panel, after hearing the arguments of the parties and after reviewing the stipulated facts and the exhibits admitted \*643 into evidence, made the following findings of fact:

"1. David M. Bryan (hereinafter 'the Respondent') is an attorney at law, Kansas Attorney Registration No. 17585. The Respondent's last registration address with the Clerk of the Appellate Courts of Kansas is ... Overland Park, Kansas.... In October, 1995, the Respondent was admitted to the practice of law in the state of Missouri. Thereafter, on May 21, 1996, the Respondent was admitted to the practice of law in the state of Kansas.

"2. In 1991 or early 1992, Helene Eichenwald, Marla Worthington, and Ms. Fuller, employees of Krigel's, Inc. in Kansas City, Missouri, retained attorney Stephen Bradley Small to represent them in employment discrimination cases based upon sexual harassment.

"3. In January, 1994, Ms. Eichenwald, Ms. Worthington, and Ms. Fuller terminated Mr. Small. Thereafter, they retained the law firm of McAnany, Van Cleave & Phillips to represent them in their sexual harassment case against Krigel's, Inc. After retaining the McAnany firm, the plaintiffs were made aware that a problem had arisen with the statute of limitations on the plaintiffs' supplemental state law claims.

"4. The Respondent met Ms. Eichenwald in July, 1994. At the time, the Respondent was a second year law student at the University of Missouri Kansas City, School of Law. Also at that time, the Respondent served as a law clerk for attorney Barry R. Grissom. The Respondent suggested to Ms. Eichenwald that she and the other plaintiffs in the sexual harassment case meet with Mr. Grissom to discuss the possibility of a legal malpractice action against Mr. Small.

"5. In December, 1994, Ms. Eichenwald, Ms. Worthington, and Ms. Fuller retained Mr. Grissom to pursue a legal malpractice action against Mr. Small.

"6. In September, 1995, Ms. Eichenwald's lawsuit against Mr. Small was filed in the United States District Court for the District of Kansas. The Respondent assisted Mr. Grissom with Ms. Eichenwald's case in the capacity of a law clerk.

"7. Meanwhile, Ms. Eichenwald, Ms. Worthington, and Ms. Fuller continued to pursue their Title VII sexual harassment claims against Krigel's, Inc. Eventually, on October 12, 1995, the case was settled and Ms. Eichenwald prevailed.

"8. After his admission to the Missouri bar in October, 1995, the Respondent continued to work on Ms. Eichenwald's legal malpractice case. At the same time, the Respondent and Ms. Eichenwald began a romantic relationship. The relationship between the Respondent and Ms. Eichenwald escalated into a sexual relationship in July, 1996. Although Mr. Grissom remained as counsel for Ms. Eichenwald, during their personal relationship, the Respondent was also actively involved in representing Ms. Eichenwald.

"9. In August, 1996, Ms. Eichenwald told the Respondent that she was going to marry an individual named John Opel. At that time, the sexual relationship between the Respondent and

Ms. Eichenwald ceased, but the two continued to see one another on numerous occasions. In December, 1996, the Respondent learned that the engagement between Ms. Eichenwald and John Opel had been broken. In January, 1997, the Respondent and Ms. Eichenwald resumed their sexual relationship.

"10. In March, 1997, the Respondent learned that Ms. Eichenwald was still seeing John Opel. The sexual relationship between the Respondent and Ms. Eichenwald ended, but the Respondent and Ms. Eichenwald still continued to see one another. The Respondent continued to pursue Ms. Eichenwald romantically. In conversations and letters, the Respondent expressed a desire to have a relationship with Ms. Eichenwald. At the time, the Respondent was still one of the attorneys representing Ms. Eichenwald in her lawsuit against Mr. Small.

"11. In the fall of 1997, the Respondent and Ms. Eichenwald resumed their romantic relationship. In November, 1997, Ms. Eichenwald determined that she wanted the Respondent to be her sole counsel. In conversations and letters from November, 1997, to February, 1998, the Respondent \*644 expressed his feelings for Ms. Eichenwald and his jealousy of John Opel. At those times, the Respondent was Ms. Eichenwald's sole counsel in her case against Mr. Small.

"12. On or about February 21, 1998, the Respondent learned that Ms. Eichenwald was once again seeing John Opel.

"13. Because the Respondent resented the fact that Ms. Eichenwald was again seeing Mr. Opel, on February 25, 1998, the Respondent sent Ms. Eichenwald a letter terminating his representation of her. The letter contained allegations of theft and fraud. The tone of the letter was unprofessional, rude, and written to embarrass Ms. Eichenwald. Pertinent sections of the letter are set forth below:

"... Frankly, I no longer believe any of the allegations you are making in this case, or those you have made in any of your other cases. During the course of this long litigation several things have arisen which have a direct bearing on your truthfulness as a person. I can no longer ignore or rationalize them. Among them are:

'Your termination from Sacks Fifth Avenue. As you remember, I investigated this incident at your request. It was then, and still is, obvious that you intentionally attempted to deceitfully manipulate the Saks' return policy for your own financial gain. This is theft, no doubt brought on by what I perceive to be an ever-present belief on your part that you will never get caught because you are far too clever for everyone else. You are not.

'Also, there is the matter of your illegal and fraudulent acquisition of unemployment benefits during the time you were actually employed as a nanny by the Shimshaks. This is a crime, punishable by restitution, fines and even jail time. At that time you were obtaining these benefits, you could not possibly have thought this was legal. This was only brought to my attention before your deposition, when you figured out that defense counsel might possibly find out and use this against you. Only then, and upon my demand, did you cease this fraud upon the state.

'These things, as well as the fact that I have personally witnessed you display a constant repeating pattern of deception during the course of this litigation toward virtually everyone you know, compel me to believe that your allegations of sexual harassment and for the supposed damage you sustained therefrom are all complete fabrications, invested [*sic*] for your financial gain. During the more than three years I represented you, I have defended your honesty countless times in social gatherings when others who knew you attempted to

enlighten me about your propensity for lying. Now I am forced to accept the fact that I was wrong about you, and everyone else was right. It is impossible for me to represent you when faced with the fact that I actually agree with your opponent Mr. Small that you are a "horribly untruthful person."

The Respondent included the following paragraph as a footnote to the letter:

'I would be allowed to make public this letter, and anything else I know about your character, under either of two circumstances. First, I could use it as a defense in the event that you sued me, second, as a defense if you made a complaint to the Disciplinary Council. In either case, it would become a matter of public record, which could be used against you in any other action in which it was determined to be relevant evidence. Although I have done nothing to warrant either of these actions, I will not be surprised to see either one, given your track record in these areas.'

"14. After the Respondent terminated his representation of Ms. Eichenwald, it was necessary for her to obtain new counsel. She again retained Mr. Grissom and Mr. Grissom assumed sole responsibility for representing Ms. Eichenwald in the malpractice case against Mr. Small. The Respondent continued to represent Ms. Worthington and Ms. Fuller.

"15. In April, 1999, by court order Ms. Eichenwald's malpractice case was consolidated \*645 with Ms. Worthington's case. The court further ordered a compulsory and shared settlement conference with magistrate Sarah Hays.

"16. On May 2, 1999, the Respondent visited Ms. Eichenwald at her place of employment, Nordstrom, Inc., and explained that they were both ordered by the court to appear at the settlement conference. From February 25, 1998

until May 2, 1999, there had been no contact of any kind between the Respondent and Ms. Eichenwald.

"17. During the spring and summer, 1999, the Respondent made numerous shopping visits to Nordstrom, but did not contact Ms. Eichenwald.

"18. On September 9, 1999, Ms. Eichenwald sent the Respondent a letter asking him not to come to Nordstrom anymore because it made her uncomfortable. A copy of Ms. Eichenwald's letter was sent to the Nordstrom store manager and the Nordstrom security manager.

"19. On September 10, 1999, the Respondent learned that Ms. Eichenwald had told others that the Respondent was stalking her, that he was dangerous, and that he was in need of mental health care.

"20. Also on September 10, 1999, the Respondent sent a letter to Mr. Grissom, and included the following paragraphs:

'The point of this letter is to tell you that I may have to defend myself against your client's accusations by making public certain things I know about her which will damage her credibility in the extreme. I have never discussed them with you, or Rachelle, because I was trying to get out of representing her without needlessly hurting her sister's feelings or damaging Helene's reputation, but I can't do that now. I fired your client in March of 1998, but I never told you why. Attached is the termination letter from my office to your client, explaining the reasons why I felt I had to fire Helene. There are other good reasons which I did not put in the letter, but also are extremely damaging to her credibility and admissible in court. If I have to respond to any allegations made against me by Helene, the things in that letter are going to have to go public, which means they will be in the possession of the attorneys for Stephen Small.... I can't think of

any reason why I shouldn't sue Helene for defamation and put a stop to this, except that her case and Marla Worthington's are consolidated and that might hurt my client too. That's the problem.

'You need to tell Helene to shut her mouth, because if she doesn't she's going to destroy her own case against Steve Small, and maybe Marla Worthington's case too. I will, of course, move the court to "unconsolidate" the cases based upon this conflict, and I will then explain to the Court and Jay Barton that Ms. Eichenwald has now accused me of stalking her at her place of employment. This will immediately tip the other side that something good is there for Steve Small, and I can be deposed about it since I was not her counsel at the time of the incident.'

"21. On September 11, 1999, the Respondent wrote a letter to Nordstrom store manager Kris Allen and Nordstrom Loss Prevention Manager Jennifer Knipp stating, among other things, the following:

'Additionally, I happen to know that Ms. Eichenwald has a history of making false claims such as those she is making against me, and this will all come out in court. During the seven years that I have known Ms. Eichenwald, there has rarely been a period of time when she didn't claim that someone was after her, following her, or stalking her. One particularly telling example of this trait is a police report Ms. Eichenwald filed with the Prairie Village Police Department in 1996. In this police report, Ms. Eichenwald seriously claimed that while she was away from home, some man must have stood at her front door and masturbated on her front door window, in front of passing traffic and four feet off the ground. The police officer and I both tried to tell her that this was impossible and ridiculous, but she insisted that this was what happened. Claims like these \*646 make Ms. Eichenwald feel

important because they increase concern for her among others, and get her more attention. Ms. Eichenwald likes that very much, and does whatever she can to insure it continues. Believe me, there is not now, nor has there ever been, anyone stalking or harassing Ms. Eichenwald.'

"22. On September 13, 1999, the Respondent sent a letter to Ms. Eichenwald. In the letter the Respondent acknowledged that Ms. Eichenwald had made allegations that the Respondent was stalking her and that she was in fear for her safety. The Respondent demanded that Ms. Eichenwald retract these allegations. The threatened consequences of failing to retract these statements were set out in that letter by the Respondent as follows:

'When I fired you as my client in February of 1998, I told you why I was firing you and warned you that my February 25, 1999 letter could become public if you made any accusations against me. In spite of this clear warning, you have been unable to control yourself. I am no longer going to quietly sit back and let you ruin my reputation. Now, only two things can happen. You will write a retraction of the allegations you have recently made against me and telling everybody that it was all a big mistake and an overreaction by you. You will send it to all those to whom you have made any defamatory allegations.

' *If you do not send these written retractions, I have no choice but to file a lawsuit against you for defamation. When I file this lawsuit against you, several things will happen. First, all the allegations in the petition will become public record and in the possession of the attorneys for Mr. Small. I have checked all the ethical rules, and because of your allegations against me I am now entitled to release the February 1999 termination letter I sent you. This too, will come into the possession of Mr. Small's attorneys who will make ample use of it to destroy your credibility....'*

"23. Ms. Eichenwald, in a note sent *via* facsimile, informed the Respondent that she was unable to retract her 'feelings.' She offered, though, to resolve the issues through mediation.

"24. On September 16, 1999, the Respondent wrote to Ms. Eichenwald refusing to submit the dispute to mediation and again demanding that she retract her allegations against him. Additionally, in that letter, the Respondent reiterated his position regarding his authority to release confidential information:

'As far as releasing any formerly privileged information to whomever might have a use for it, I am on firm legal footing. Kansas Rules of Professional Conduct 1.6(b)(2) states that:

"A lawyer may reveal such [privileged] information to the extent the lawyer reasonably believes necessary: ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client...."

"25. Ms. Eichenwald declined to retract her statements as requested by the Respondent. On September 27, 1999, the Respondent filed suit against Ms. Eichenwald in the District Court of Johnson County, Kansas, case number 99C12748, alleging defamation, invasion of privacy, and tortious interference with a business relationship.

"26. On September 29, 1999, the Respondent wrote a letter to counsel for Mr. Small. The letter confirmed a prior conversation between the Respondent and defense counsel, James Barton. In that conversation the Respondent offered to provide defense counsel with negative information regarding Ms. Eichenwald, if they could reach a settlement agreement regarding Bryan's two remaining clients in the malpractice litigation.

"27. On September 30, 1999, the Respondent self-reported his romantic and sexual relationship

with Ms. Eichenwald to Stanton A. Hazlett, Disciplinary Administrator. In his letter, the Respondent denied that he engaged in misconduct and informed Mr. Hazlett that he expected Ms. \*647 Eichenwald to file a disciplinary complaint against him.

"28. On October 6, 1999, Lynne J. Bratcher filed a complaint with the Disciplinary Administrator. Thereafter, on November 1, 1999, the Respondent provided his written response to Ms. Bratcher's complaint. In addition to his complaint, the Respondent provided a large volume of personal information regarding Ms. Eichenwald that was unnecessary to respond to the complaint, including a copy of a petition to foreclose on Ms. Eichenwald's grandmother's house.

"29. In October, 1999, counsel for Mr. Small independently obtained a copy of plaintiff's Petition for Damages in *Bryan v. Eichenwald* and obtained negative information about Ms. Eichenwald disclosed by the Respondent in his petition. Counsel for Mr. Small later subpoenaed and deposed the Respondent, and obtained additional negative information about Ms. Eichenwald by the Respondent. The Respondent was listed as a witness for Mr. Small in his defense against Ms. Eichenwald's malpractice claim. (The Respondent previously informed counsel for Mr. Small of the existence of *Bryan v. Eichenwald*.)

"30. On October 25, 1999, the Respondent filed a motion to sever Ms. Worthington's case from Ms. Eichenwald's case. Paragraphs 5 and 6 of that motion were as follows:

'5. Because of the allegations made in *Bryan v. Eichenwald*, Mr. Bryan may become a witness for defendant Stephen Bradley Small in his case against Ms. Eichenwald.

"6... Any attack on Ms. Eichenwald's credibility could also unfairly influence the

jury against Ms. Worthington.'

After counsel for Mr. Small objected to the Respondent's motion to sever, the Respondent, on November 8, 1999, filed a reply. That pleading contained the following assertions:

'3. Since the termination of Mr. Bryan's representation of Ms. Eichenwald in her case against her former counsel Mr. Small, Ms. Eichenwald has now been sued by her other former counsel, Mr. Bryan for making defamatory claims of stalking and threats against Mr. Bryan, claims very similar to those Ms. Eichenwald previously made against both Mr. Shine and Mr. Stein in the *Krigel's* case. Because Mr. Bryan is suing his former client, it remains to be determined what information Mr. Bryan will be allowed to use to prove his case against Ms. Eichenwald. A ruling of the Court in *Bryan v. Eichenwald* on this issue could have an adverse effect on Ms. Eichenwald's credibility. It is unfair and prejudicial to make Ms. Worthington suffer for any credibility problems that may arise for Ms. Eichenwald.

....

'5. The stalking and harassment charges made by plaintiff Eichenwald against her former counsel, and plaintiff Worthington's current counsel Mr. Bryan, could become part of Mr. Small's defense in this case. Should this happen, plaintiff Worthington's case against Mr. Small would be unfairly prejudiced by the credibility problems Ms. Eichenwald may have.

....

'7. It is unfair and prejudicial to Plaintiff Worthington's case to have it associated in any way with Ms. Eichenwald. Ms. Eichenwald does not appear on plaintiff Worthington's rule 26 disclosure statement filed with this Court on October 1, 1999, and plaintiff Worthington has

never intended to use any testimony from Ms. Eichenwald to support her claims in this case. Plaintiff Worthington plans to file a Motion in Limine regarding Ms. Eichenwald. It is prejudicial and fundamentally unfair to plaintiff Worthington to have her claim rest on the credibility of Ms. Eichenwald.'

"31. Following a finding of probable cause against the Respondent, the case file in this disciplinary proceeding became public record pursuant to Kan. Sup.Ct. R. 222(d). Counsel for Mr. Small obtained a copy of the entire disciplinary file, including\*648 information relating to the representation of Ms. Eichenwald by the Respondent. (The Respondent previously informed counsel for Mr. Small of the disciplinary case.)

"32. In December, 1999, the Respondent discovered information that gave rise to a cause of action against Ms. Eichenwald's employer, Nordstrom, Inc., for negligent supervision of its employee, Ms. Eichenwald. The Respondent contacted Nordstrom's counsel and offered to forego a lawsuit against Nordstrom in exchange for Ms. Eichenwald's termination and a letter of apology. Nordstrom refused.

"33. In December, 1999, the Respondent voluntarily dismissed his lawsuit in the District Court of Johnson County, Kansas. Through counsel, the Respondent refiled his case in the United States District Court for the District of Kansas. This case was entitled *David M. Bryan v. Helene Eichenwald and Nordstrom, Inc.*, No. 99-2543-CM, 2001 WL 789401.

"34. Both Ms. Eichenwald and Nordstrom attempted to invoke claims of attorney-client privilege as to negative information about Ms. Eichenwald which the Respondent possessed. All parties submitted an agreed-upon Motion for Protective Order. The Court denied this motion and no protective order was ever entered.

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"35. On June 24, 2000, the court in *Bryan v. Eichenwald, et al.*, issued an order in which it denied Ms. Eichenwald's attempt to invoke the attorney-client privilege and the rule of confidentiality as to negative information in the possession of the Respondent. The court ruled that such information could be properly disclosed by the Respondent to assert either a claim or defense regarding the allegations made against the Respondent by Ms. Eichenwald in the *Bryan v. Eichenwald* case.

"36. After a lengthy briefing of all issues, the court in *Bryan v. Eichenwald, et al.*, issued an order denying the motions for summary judgment filed by both Ms. Eichenwald and Nordstrom, Inc., stating in pertinent part, 'a reasonable fact finder could conclude that Nordstrom should have foreseen that plaintiff's reputation would be injured by such statements.'

"37. Following denial of defendants' motions for summary judgment the parties settled in the case. Ms. Eichenwald and Nordstrom paid the Respondent \$16,000.00. Additionally, Ms. Eichenwald provided the Respondent with a written apology."

The hearing panel also made conclusions of law. The majority of the panel found that Bryan had violated KRPC 1.6(a), 1.7(b), 1.16(d), and 8.4(a). Panel member M. Warren McCamish dissented from some of the panel's findings and did not agree with the finding that Bryan violated KRPC 8.4(a). The hearing panel, after considering aggravating and mitigating factors, unanimously recommend published censure. Bryan took exception to the hearing panel's findings of fact and conclusions of law.

Bryan argues the hearing panel erred in (1) interpreting KRPC 1.6; (2) making findings of fact; and (3) refusing to consider Bryan's motion for summary judgment.

#### KRPC 1.6

[1] Interpretation of the Kansas Rules of Professional Conduct is a question of law over which this court has unlimited review. *State v. Dimaplas*, 267 Kan. 65, Syl. ¶ 1, 978 P.2d 891 (1999); *Baugh v. Baugh*, 25 Kan.App.2d 871, 875, 973 P.2d 202 (1999).

KRPC 1.6 states:

"(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

"(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) to comply with requirements of law or orders of any tribunal; or

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to \*649 establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." (Emphasis added.)

Bryan contends the hearing panel erred in interpreting KRPC 1.6 in the following ways: (1) in finding that in order for disclosures of confidential information to be appropriate under KRPC 1.6(b)(3), there must be a formal proceeding initiated; (2) in failing to find that Bryan's disclosures of information to Grissom and Nordstrom employees prior to filing suit against Eichenwald for defamation were reasonable under the circumstances; (3) in finding that Bryan was not authorized to reveal the fact he possessed negative information regarding Eichenwald's credibility and

the existence of the defamation suit after it was filed; and (4) in finding that Bryan's duty to his former client outweighed his duty to his current client.

First, it is important to note that the panel made the following conclusions of law:

"1. The Disciplinary Administrator alleged that the Respondent violated KRPC 1.6.... The purpose behind KRPC 1.6 is to encourage clients to fully and frankly communicate with their lawyers, even when to do so is embarrassing or legally damaging. Kansas Comment to KRPC 1.6 . 'The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source....' *Id.* Finally, '[t]he lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation.' *Id.* See also *Harris v. The Baltimore Sun Co.*, 330 Md. 595, 608, 625 A.2d 941 (1993) (Rule '1.6 should be read to prohibit to those needless revelations of client information that incur some risk of harm to the client.').

"2. In determining whether the Respondent violated KRPC 1.6(a), we must first look to see whether he revealed information relating to the representation of Ms. Eichenwald. An important aspect of this analysis is the meaning and scope of the word 'reveal.' While there appears to be no recognized legal definition of 'reveal,' Black's Law Dictionary, 5th Edition (1979) defines 'disclose' and 'disclosure.' 'Disclose' is defined as "[t]o bring into view by uncovering; to expose; to make known; to lay bare; to reveal to knowledge; to free from secrecy or ignorance, or make known." *Id.*, p. 417. 'Disclosure' is defined as "[r]elevation; the impartation of that which is secret or not fully understood." *Id.*

"3. If it is determined that the Respondent revealed information relating to the representation of Ms. Eichenwald, then we must

look to see whether the Respondent's conduct falls within one of the exceptions found at KRPC 1.6(b)(3).... Each of the three instances where disclosure is permitted by KRPC 1.6(b)(3), requires that the disclosure be made in some type of legal forum: to establish a claim, to establish a defense, or to respond to allegations in any proceeding. *Id.* The rule does not permit disclosure of information relating to the representation in any other setting.

"4. In this case, there appear to be five instances where the Respondent may have revealed information relating to the representation of Ms. Eichenwald: (a) letter of September 10, 1999, to Mr. Grissom, (b) letter of September 11, 1999, to Kris Allen and Jennifer Knipp, (c) telephone conversation with James P. Barton, Jr. shortly before September 29, 1999, (d) motion to sever, filed October 25, 1999, and (e) reply, filed November 8, 1999. In order to determine whether the Respondent violated KRPC 1.6, the facts involved in each disclosure must be closely examined.

*"Letter of September 10, 1999, to Mr. Grissom*

"5. On September 10, 1999, the Respondent wrote Mr. Grissom, counsel for Ms. Eichenwald, a letter threatening to publicly reveal damaging information regarding Ms. Eichenwald. Enclosed with this letter, was a copy of the Respondent's February 25, 1998, letter to Ms. Eichenwald. In the Respondent's February 25, 1998, letter, the Respondent accused Ms. \*650 Eichenwald of theft, fraud, and untruthfulness. While the Kansas Rules of Professional Conduct required the Respondent to make every effort to avoid revealing information relating to the representation of a client, the Respondent voluntarily did the opposite. By providing Mr. Grissom with the February 25, 1998, letter to Ms. Eichenwald with his September 10, 1999, letter, the Respondent voluntarily revealed information relating to the representation of Ms. Eichenwald, in violation of KRPC 1.6(a). The question then

becomes whether the disclosure was permitted by KRPC 1.6(b).

"6. An Oregon disciplinary case, decided under the Disciplinary Rules of the Code of Professional Conduct, addressed that issue. *In re Huffman*, 328 Or. 567, 983 P.2d 534 (1999). In that case, Huffman was charged with violating DR 4-101(B) for writing a letter, to the client's new counsel, that contained disclosures that were embarrassing and detrimental to the client.

"7. The Oregon version of DR 4-101(B) was similar to KRPC 1.6 and provided as follows:

'(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of the lawyer's client.
- (2) Use a confidence or secret of the lawyer's client to the disadvantage of the client.
- (3) Use a confidence or secret of the lawyer's client for the advantage of the lawyer.

....

'(C) A lawyer may reveal:

....

(4) Confidences or secrets necessary to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client....'

*Id.* at 579, 983 P.2d 534 The court held as follows:

'... We find that the disclosures were both embarrassing and likely to be detrimental to [the client]. The fact that the [Respondent] made the disclosures to [the client]'s new lawyer does not alter the embarrassing and detrimental character of the disclosures.

'We reject the [Respondent]'s contention that his conduct falls under the exception in DR 4-101(C)(4). That exception is limited, by its terms, to disclosures that are *necessary* to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. The [Respondent] already had established his claims against [his client], and there was no pending action against the accused by [the client] that required the accused to assert a defense. The disclosures were not required for the assertion of the accused's legal claims that his judgments against [the client] were valid. The [Respondent]'s letter was little more than a veiled attempt to intimidate [the client] and [his new attorney] in order to deter them from challenging the [Respondent]'s judgments. The [Respondent] was not entitled to reveal [the client]'s secrets under DR 4-101(C)(4).'

*Id.* at 581, 983 P.2d 534. In the instant case, the disclosures made to Mr. Grissom were not authorized by KRPC 1.6(b).

"8. First, the disclosures were not made to establish a claim or defense in any civil or criminal case. At the time the Respondent made the disclosures to Mr. Grissom, there was no pending action between the Respondent and Ms. Eichenwald.

"9. Second, the disclosures were not made to respond to allegations in any proceeding. Certainly, at the hearing on this matter, the Respondent argued that the disclosures were made in response to allegations made by Ms. Eichenwald and in an attempt to protect his reputation in the legal community. However, there was no 'proceeding' as required by KRPC 1.6(b). The disclosures were simply made to embarrass Ms. Eichenwald before her new attorney.

"10. Because the disclosures made to Mr. Grissom were not necessary to establish a claim

or defense or to respond to \*651 allegations in any proceeding, the Hearing Panel concludes that the Respondent revealed information relating to the representation of Ms. Eichenwald in violation of KRPC 1.6(a).

*"Letter of September 11, 1999, to Kris Allen and Jennifer Knipp*

"11. On September 11, 1999, the Respondent wrote a letter to Nordstrom store manager Kris Allen and Nordstrom Loss Prevention Manager Jennifer Knipp. Including a specific example, the Respondent disclosed to Mr. Allen and Ms. Knipp that the Respondent has a history of making false claims and accusations of stalking.

"12. The Respondent's disclosure that Ms. Eichenwald has a history of making false claims amounts to revealing information relating to the representation of Ms. Eichenwald. And, because the disclosures were not authorized by KRPC 1.6(b), the Hearing Panel concludes that the Respondent violated KRPC 1.6(a).

*"Telephone Conversation with James P. Barton, Jr. Shortly Before September 29, 1999*

"13. Prior to September 29, 1999, the Respondent offered to provide Mr. Barton, counsel for Mr. Small, with negative information relating to the representation of Ms. Eichenwald. The Respondent made the offer to Mr. Barton conditioned upon reaching a settlement agreement beneficial to Ms. Worthington and Ms. Fuller and detrimental to Ms. Eichenwald. The offer to provide information, in violation of KRPC 1.6(a), was refused by Mr. Barton.

"14. KRPC 8.4(a) provides that it is professional misconduct to '[v]iolate or attempt to violate the rules of professional conduct.' *Id.* In the criminal law setting, the Kansas legislature has defined 'attempt' as 'any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime.' K.S.A. 21-3301(a).

Thus, to find that the Respondent attempted to violate KRPC 1.6(a), the Hearing Panel would have to find that the Respondent committed an overt act toward the violation of KRPC 1.6(a). In this case, during the telephone conversation with Mr. Barton, the Respondent offered to provide Mr. Barton with information in violation of KRPC 1.6(a). The offer of information is an overt act done toward the perpetration of a violation of KRPC 1.6(a).

"15. By offering to reveal information relating to the representation of Ms. Eichenwald, the Respondent, again, sought to do the opposite of what the Kansas Rules of Professional Conduct require him to do. The Respondent's ethical obligation to Ms. Eichenwald continued after she ended their personal relationship. The Respondent's ethical obligation to Ms. Eichenwald continued after he 'fired' her as a client. The Respondent's ethical obligation to Ms. Eichenwald was to make every effort to avoid revealing information relating to her representation. Because the Respondent attempted to violate KRPC 1.6(a) by offering to reveal information relating to the representation of Ms. Eichenwald to Mr. Barton, the Hearing Panel concludes that the Respondent violated KRPC 8.4(a).

*"Motion to Sever, Filed October 25, 1999 and Reply, Filed November 8, 1999*

"16. On October 25, 1999, the Respondent filed a motion to sever Ms. Worthington's case from Ms. Eichenwald's case. After counsel for Mr. Small objected to the Respondent's motion to sever, the Respondent, on November 8, 1999, filed a reply. In paragraphs five and six of the motion and in paragraphs three, five, and seven of the reply, the Respondent disclosed the existence of *Bryan v. Eichenwald* and alleged that Ms. Eichenwald's credibility could be attacked by calling him as a witness.

"17. Clearly, the inclusion of this information in the pleadings constitutes a violation of KRPC

1.6(a) in that it amounts to revealing information relating to the representation of Ms. Eichenwald.

"18. Thus, the Hearing Panel must consider whether the Respondent was authorized\*652 to disclose the information relating to the representation of Ms. Eichenwald in the motion to sever. At the hearing on this matter, the Respondent argued that in order to protect Ms. Worthington's cause of action, he had to file the motion to sever. Additionally, the Respondent argued that in order to be successful in obtaining a severance of the cases, he had to disclose the existence of *Bryan v. Eichenwald* and Ms. Eichenwald's credibility problems. Unfortunately, the Respondent's legal analysis was wide of the mark.

"19. KRPC 1.6(a) prohibits the Respondent from disclosing the information relating to the representation of a client, unless it falls within one of the clearly delineated exceptions.... The Respondent was not authorized to reveal the existence of *Bryan v. Eichenwald* and the fact that he possessed negative information regarding Ms. Eichenwald's credibility because the disclosure was not made to (1) establish a claim or a defense in behalf of the Respondent in a controversy with Ms. Eichenwald, (2) establish a defense to a criminal charge or a civil claim against the Respondent based upon conduct in which Ms. Eichenwald was involved, or (3) respond to allegations in a proceeding regarding the Respondent's representation of Ms. Eichenwald.

"20. The Respondent made the disclosures in the pleadings to alert Mr. Small and his counsel to the existence of *Bryan v. Eichenwald* and to put them on notice that the Respondent had information regarding Ms. Eichenwald's credibility. The Kansas Rules of Professional Conduct do not authorize the disclosure of information relating to the representation of a client in this regard. Accordingly, the Hearing Panel concludes that the Respondent violated

KRPC 1.6(a).

"21. The Respondent stipulated that he violated KRPC 1.7(b). That subsection provides:

'(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.'

The Respondent engaged in a personal relationship with his client, Ms. Eichenwald. The Respondent's stormy relationship with Ms. Eichenwald materially limited his representation of Ms. Eichenwald as well as his representation of Ms. Worthington. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.7(b).

"22. The Disciplinary Administrator also alleged that the Respondent violated KRPC 1.16(d). That subsection provides:

'Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.'

The Respondent failed to take the steps necessary to protect the interests of Ms. Eichenwald when he disclosed confidential information to Mr. Grissom, Mr. Allen, and Ms. Knipp, when he filed the motion to sever and the reply, and when he offered to provide counsel for Mr. Small with evidence. Such evidence could have been, and in reality was, used to Ms. Eichenwald's legal detriment. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.16(d).

"23. KRPC 1.6 is designed to shield clients from the improper disclosure by their lawyers of information relating to \*653 their representation. Instead of recognizing KRPC 1.6 as a shield for Ms. Eichenwald, the Respondent repeatedly threatened to improperly use the exceptions to that rule against Ms. Eichenwald. Throughout his communications to Ms. Eichenwald, beginning with his termination letter of February 25, 1998, and continuing through the September, 1999, correspondences, the Respondent threatened to disclose information, including his February 25, 1998, letter, containing allegations of theft and fraud, to 'whomever might have a use for it.'

....

"25. The facts of the instant case in that regard are quite similar to the facts in *In re Boelter*, 139 Wash.2d 81, 985 P.2d 328 (1999), where a Respondent wrote the following letter to his client:

'[I]f we are not paid in full by October 15, 1991, we will file suit for the fees. You should understand that if we are forced to file suit, you forgo the attorney-client privilege and I would be forced to reveal that you lied on your statements to the IRS and to the bank as to your financial condition. This would entail disclosure of the tapes of our conversations about your hidden assets. There is a federal statute 18 U.S.C. § 1001 which provides for up to one year in jail for

such perjury. The choice is yours.'

*Id.* at 90, 985 P.2d 328. In that case, the Washington hearing panel found that the letter constituted a violation of rule 8.4(c) because it amounted to a misrepresentation of the applicability of rule 1.6. The court went on to examine the scope of rule 1.6 as follows:

'... However, he would certainly not, as he claimed in his October 1991 letter to Withey, have been "forced to reveal that you lied on your statements to the IRS and to the bank as to your financial condition." ... It is a leap in logic even to claim that such a disclosure could reasonably be made voluntarily, ...'

*Id.* at 91, 985 P.2d 328. In the instant case, the Respondent was not required or authorized to reveal the information relating to the representation of Ms. Eichenwald, other than to establish his claim for defamation. Clearly, the Respondent either misinterpreted KRPC 1.6 or misrepresented KRPC 1.6. If the latter is true, then the Respondent, although not charged with such a violation, would be guilty of a violation of KRPC 8.4(c). The Hearing Panel, however, points out these matters not to find an uncharged violation, but rather to instruct the Respondent that his understanding of KRPC 1.6 is wrong."

The hearing panel also noted in a footnote to Conclusion of Law ¶ 18 that Bryan completely ignored the fact that he had a continuing ethical obligation to Eichenwald. The panel noted that in order to comply with the KRPC while protecting the interests of Eichenwald and Worthington, Bryan should have withdrawn from representation of Worthington or, alternatively, filed a motion to sever that did not disclose information relating to the representation of Eichenwald.

The hearing panel made the following recommendation:

"In making this recommendation for discipline,

the Hearing Panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

*" Duties Violated.* The Respondent violated his duty to his clients to avoid a conflict of interest and to protect confidential information. Additionally, the Respondent violated his duty to the legal profession to maintain personal integrity.

*" Mental State.* The Respondent knowingly violated his duties.

*" Injury.* In this case, Ms. Eichenwald suffered an actual injury. The Respondent repeatedly provided information relating to the representation to others. The disclosure of this information caused actual injury to Ms. Eichenwald. Although impossible\*654 to quantify, the legal profession also suffered an actual injury as a result of the Respondent's misconduct.

*" Aggravating or Mitigating Factors.* Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found the following aggravating factors present:

*" Selfish Motive.* The Respondent's motive to commit the misconduct was based purely on selfishness and vindictiveness. This case ... exemplifies why it is inappropriate to become involved with a client.

*" Refusal to Acknowledge the Wrongful Nature of his Conduct.* While the Respondent admits that he violated KRPC 1.7, he adamantly denies that

disclosing information relating to Ms. Eichenwald was inappropriate or in violation of the Kansas Rules of Professional Conduct. Certainly, with the passage of time the Respondent should be able to step back from the personal situation he found himself in and acknowledge that he should not have disclosed information regarding Ms. Eichenwald to others.

*"Mitigating circumstances* are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found the following mitigating circumstances present:

*" Absence of a Prior Disciplinary Record.* The Respondent has not previously been disciplined.

*" Inexperience in the Practice of Law.* The Respondent was admitted to the practice of law in Missouri in 1995 and in Kansas in 1996. At the time of the misconduct, the Respondent was a new lawyer. However, the inexperience in the practice of law did not contribute to the misconduct in this case. The misconduct in this case is based completely on the poor judgment of the Respondent.

*" Previous Good Character.* At the hearing on this matter, counsel for the Respondent, Mr. Hufft informed the Hearing Panel that the Respondent is a good attorney.

"In addition to the above-cited factors, the Hearing Panel has thoroughly examined and considered Standard 4.32 and Standard 7.2. Standard 4.32 provides that '[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.' Standard 7.2 provides that '[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or

potential injury to a client, the public, or the legal system.’

“Although the ABA Standards seem to indicate that the Respondent should be suspended from the practice of law, the Hearing Panel unanimously recommends that the Respondent be censured by the Kansas Supreme Court. The Hearing Panel makes this recommendation based upon the recommendation of the Disciplinary Administrator. The Hearing Panel further recommends that the censure be published in the Kansas Reports.”

*Formal Proceeding Requirement*

[2][3] Bryan contends that the hearing panel erred in finding that before disclosures of information obtained during representation may be appropriate under KRPC 1.6(b)(3), there must be a formal proceeding initiated. In support of his contention, Bryan cites to numerous authorities for the proposition that the lawyer’s right to respond in self-defense arises when the assertion against the lawyer has been made and that the lawyer need not wait until an action or proceeding has been commenced to respond.

The Disciplinary Administrator agrees with Bryan’s interpretation of KRPC 1.6 in that an attorney does not have to wait until the commencement of an action or proceeding before using information to protect himself or herself and concedes that the hearing panel’s finding that Bryan violated KRPC 1.6 because there was no pending action between Bryan and Eichenwald was in error. See Conclusions of Law ¶¶ 3, 8, 9, 10. The Disciplinary Administrator maintains, however, that the panel’s finding that Bryan violated KRPC 1.6 was also based upon its finding that the disclosures were made simply to embarrass Eichenwald. In making this assertion, the Disciplinary Administrator is referring to Conclusion of Law ¶ 9.

The Disciplinary Administrator asserts that the hearing panel’s finding that Bryan violated KRPC

1.6 was correct because Bryan disclosed confidential information beyond what was necessary and allowed under KRPC 1.6(b)(3). To support this argument, the Disciplinary Administrator relies upon the Comment to KRPC 1.6, which states in part:

“Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer’s right to respond arises when an assertion of such complicity has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer’s ability to establish the defense, the lawyer should advise the client of the third party’s assertion and request that the client respond appropriately. *In any event, disclosure should be not greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.*” (Emphasis added.)

In his reply brief, Bryan asserts that his disclosures of confidential information to Grissom and Nordstrom employees were reasonable. He first argues that these disclosures were reasonable as a matter of law because the United States District Court of Kansas in *Bryan v. Eichenwald*, 2001 WL 789401 (D.Kan.2001), determined that Eichenwald could not prevent Bryan from disclosing formerly

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confidential negative information in self-defense, and later determined, in denying Eichenwald's motion for summary judgment, that Bryan's claims were supported in fact and in law.

Additionally, Bryan argues that the hearing panel based its finding that he violated KRPC 1.6 solely upon the lack of a formal proceeding at the time of disclosure. In support, Bryan relies upon a footnote in the panel's decision in which the panel stated that the disclosure made by Bryan of information gained during his representation of Eichenwald in filing his defamation suit was "clearly permitted by KRPC 1.6(b)(3)." Bryan accuses the Disciplinary Administrator of attempting to read into the panel's decision an additional finding that disclosure was beyond what was reasonable. Thus, Bryan asserts that the panel made no finding as to the reasonableness of the disclosures and that the matter should be dismissed because the disclosures were reasonable as a matter of law and clearly reasonable under the facts of the case. Furthermore, Bryan contends the final hearing report does not contain the necessary factual findings to support the violations found by the panel. Alternatively, Bryan asserts that he is entitled to another hearing before an impartial panel to determine whether his disclosures were reasonable.

In reviewing the conclusions of law of the panel, it is difficult to conclude that Bryan's disclosures to Grissom and the Nordstrom employees were reasonable; therefore, they constituted violations of KRPC 1.6. We note that the panel relied upon the erroneous belief that a formal proceeding was necessary before disclosures in self-defense could be made under KRPC 1.6. Under the circumstances, however, the disclosures to both Grissom and the Nordstrom employees exceeded\*656 that which was reasonably necessary for him to defend against Eichenwald's allegations.

#### *Post-Filing Disclosures*

[4] Bryan next takes issue with the panel's conclusion in Conclusion of Law ¶ 19 that he was

not authorized to reveal the existence of his defamation suit against Eichenwald and that he possessed negative information regarding Eichenwald's credibility. In essence, Bryan argues that once this information was found to have been properly disclosed, all subsequent disclosures were appropriate. Bryan asserts that information previously disclosed to the general public in court pleadings does not retain any confidentiality that would prohibit subsequent disclosure of that information. In support, he cites *State v. Spears*, 246 Kan. 283, 287, 788 P.2d 261 (1990), where this court recognized that under K.S.A. 60-426 a partial waiver of the attorney-client privilege constitutes a complete waiver of the privilege as to the entire subject matter. Bryan contends that the Disciplinary Administrator is "picking and choosing" and is incorrectly fixed on the "use" of the information that was properly disclosed rather than the fact the information had been properly disclosed. The Disciplinary Administrator disagrees with Bryan's assertions that he was entitled to reveal the information because it was already a matter of public record, distinguishing *Spears* from the facts of this case.

*Spears* involved attorney-client privilege rather than the ethical rule on confidentiality. The Comment to KRPC 1.6 states:

"The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the

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representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”

[5][6] The attorney-client privilege is narrowly defined by the courts because it works to deprive the factfinder in a case of otherwise relevant information. See *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 373, 22 P.3d 124 (2001). The ethical requirement of confidentiality is, however, interpreted broadly, with the exceptions being few and narrowly limited. Thus, Bryan's reliance upon *Spears* is misplaced.

The Disciplinary Administrator contends that even though Bryan was entitled to place into the public record this same information in filing his defamation suit, Eichenwald had an expectation of confidentiality that would prohibit Bryan from divulging the information in her malpractice action against Small. The Disciplinary Administrator cites for support *NCK Organization Ltd. v. Bregman*, 542 F.2d 128 (2d Cir.1976), (*ORG*), and *Kaufman v. Kaufman*, 63 A.D.2d 609, 405 N.Y.S.2d 79 (1978).

In *ORG*, defense counsel was disqualified after the plaintiff filed a motion to disqualify. Defense counsel had previously conferred with an individual who was the former vice president and former in-house counsel for the plaintiff, who later also became counsel for the defendant, regarding the defendant's contract rights against the plaintiff. The defendant's contract rights were the subject of the dispute between the plaintiff and the defendant. The *ORG* court held:

“The confidential nature of the information to which [the attorney] had access in his fiduciary capacity as house counsel is not dependent upon whether it was secret from or known to [the defendant] as a corporate officer and director. As the court, strictly to be sure, explained in *Emle Industries, Inc. v. Patentex, Inc.*, [478 F.2d 562, 572-73 (2d Cir.1973)], quoting from H. Drinker,

Legal Ethics 135 (1953):

\*657 ‘(T)he client's privilege in confidential information disclosed to his attorney “is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.”’

“The Code itself in Ethical Consideration (EC) 4-4 notes that

‘(t)he attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge....’

“Even if, as [the attorney] asserted, all confidential information to which he as house counsel had access was independently known to [the defendant] from his own employment or from another source, *ORG*'s privilege in this information as disclosed to its attorney ... is not thereby nullified.” 542 F.2d at 133.

In *Kaufman*, the plaintiff in a matrimonial proceeding contended that the defendant's attorney had a conflict of interest. Defense counsel had previously represented the plaintiff in a different matrimonial proceeding and was privy to all the facts and circumstances surrounding the plaintiff's financial and matrimonial problems. The *Kaufman* court dismissed the attorney's claim that all the information he received was from public records, relying upon *ORG*, and remanded the issue for an evidentiary hearing on whether there was a conflict of interest. 63 A.D.2d at 610.

Bryan argues that these cases have no application to the facts of this case because neither case involves the self-defense exception to

confidentiality or the rights of and obligations to an innocent third party such as Worthington. Bryan contends that it is "absurd" to think that Eichenwald maintained an expectation of confidentiality after he filed open court pleadings in the defamation action against Eichenwald. Bryan asserts that in this case Eichenwald's privilege of confidentiality was "nullified" by the exceptions set out in KRPC 1.6(b)(3).

Although *ORG* and *Kaufman* involve different facts, the cases are relevant because they address the survival of the ethical duty of confidentiality in instances where the information was available through other sources. The Comment to KRPC 1.6 states: "A lawyer may not disclose [information relating to the representation] except as authorized or required by the Rules of Professional Conduct or other law." Bryan's disclosures in the motion and reply involved information related to the representation but were not reasonably necessary to defend against his claim of defamation.

#### *Duty to Current Client*

[7][8] Alternatively, Bryan asserts that even if disclosure of this information was restricted, the attorneys for Small were persons having a need to know under the Comment to KRPC 1.6 and, therefore, the disclosures were reasonable. Bryan supports his position by claiming that if the case by Eichenwald and Worthington against Small remained consolidated, his being called to testify against Eichenwald would negatively impact not only Eichenwald, but also Worthington. Thus, he asserts that his disclosures were necessary to allow the action to be severed. Bryan asserts that the hearing panel's comment that he should have either withdrawn from the representation of Worthington or filed a motion to sever that did not disclose the protected information was unrealistic. Bryan contends that withdrawal would not have altered the result because he would have been obligated to disclose to Worthington's new counsel the existence of his defamation case against Eichenwald and why it could damage Worthington's case. Bryan points

out that this same disclosure would not have been a violation of the KRPC if the new attorney in Worthington's case had obtained this information from the public record of the defamation suit and cited it as grounds in support of a motion to sever. Additionally, Bryan argues that a motion to sever that did not disclose information relating to his representation would have failed because \*658 there was no other ground for severance to be granted.

The Disciplinary Administrator noted that the release of confidential information to protect one's self is quite different from the release of information to the disadvantage of your former client and to the advantage of your current client. The Disciplinary Administrator agrees with the hearing panel's conclusion that Bryan should have withdrawn from representation of Worthington rather than disclose confidential information regarding his former client.

In his reply brief, Bryan contends the hearing panel's and the Disciplinary Administrator's conclusions amount to a determination that Eichenwald's "already nullified claims of confidentiality outweigh Ms. Worthington's Constitutional right to a fair trial."

The duty of confidentiality continues after the lawyer-client relationship has terminated. Comment to KRPC 1.6. Bryan's withdrawal from representation of Worthington would not have required Bryan to disclose the basis for the withdrawal as Bryan contends. Bryan could have served the interests of both Worthington and Eichenwald by withdrawing from the representation of Worthington, rather than serving the interest of Worthington at Eichenwald's detriment.

The court notes the dissent to the final hearing report in which M. Warren McCamish dissented from the panel's finding that Bryan's disclosures in the motion to sever and reply were a violation of KRPC 1.6. McCamish dissented from Conclusions of Law ¶¶ 16-20 in making this determination. The

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basis for his dissent on this ground was that he did not believe that Bryan's disclosure of information in the motion to sever and in the reply violated KRPC 1.6. Instead, McCamish viewed the disclosure as being a disclosure of publicly available information and a disclosure that was engaged in to fulfill Bryan's duty to his current client, Worthington.

We find that Bryan violated KRPC 1.6 in making the disclosures to Grissom, the Nordstrom employees, and in the litigation against Small because some of the disclosures were not reasonably necessary to defend against Eichenwald's accusations. We conclude that Bryan was in fact attempting to violate KRPC 1.6 in offering to disclose "negative information." Therefore, we also agree with the hearing panel's finding that Bryan violated KRPC 8.4(a).

#### FINDINGS OF FACT

[9][10][11] This court has the duty in attorney disciplinary cases to examine the evidence and determine for itself the judgment to be entered. *In re Rausch*, 272 Kan. 308, 320, 32 P.3d 1181 (2001); *In re Carson*, 252 Kan. 399, 406, 845 P.2d 47 (1993). Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence. Supreme Court Rule 211(f) (2002 Kan. Ct. R. Annot. 260); *In re Seck*, 263 Kan. 482, 489, 949 P.2d 1122 (1997); *In re Smith*, 243 Kan. 584, 585, 757 P.2d 324 (1988). A hearing panel's report is advisory only, however, it will be given the same dignity as a special verdict by a jury or the findings of a trial court and will be adopted where amply sustained by the evidence, or where it is not against the clear weight of the evidence, or where the evidence consists of sharply conflicting testimony. *In re Wall*, 272 Kan. 1298, 38 P.3d 640 (2002); *In re Carson*, 252 Kan. at 406, 845 P.2d 47. Thus, this court is to examine disputed findings of fact and determine whether they are supported by the evidence. See *In re Seck*, 263 Kan. at 489, 949 P.2d 1122.

Bryan challenges the hearing panel's findings that were contrary to the stipulated facts. Bryan

specifically takes issue with Findings of Fact ¶¶ 13, 23, 28, and Conclusion of Law ¶ 15. Furthermore, Bryan contends that the panel considered numerous matters that were irrelevant and which affected its impartiality, thus denying him his right to due process as guaranteed by both the United States and Kansas Constitutions.

We note that in addition to the stipulated facts, the hearing panel also received into evidence both parties' exhibits without objection. Thus, the hearing panel had additional facts contained in the exhibits at its disposal in reaching its findings of fact in this case. Therefore, as long as the panel's findings were supported by the evidence before it, the \*659 fact the findings are contrary to the stipulated facts is irrelevant.

The Disciplinary Administrator contends that Bryan's position on this issue is not relevant to the court's decision in this case. However, in order to determine whether Bryan's claim has merit, each individual fact Bryan takes issue with must be examined.

#### *Finding of Fact ¶ 13*

Bryan contends that the parties stipulated that Bryan had terminated his relationship with Eichenwald because he believed that she had lied to him, that he no longer believed her, and that he had stopped representing her because a conflict of interest became apparent. He asserts that the language of Finding of Fact ¶ 13 is contrary to the stipulated facts. He takes issue with the following language in this finding of fact: "Because the Respondent resented the fact that Ms. Eichenwald was again seeing Mr. Opel, on February 25, 1998, the Respondent sent Ms. Eichenwald a letter terminating his representation of her."

Stipulated Fact ¶ 9 states:

"On or about February 21, 1998, Respondent learned that Ms. Eichenwald was once again seeing John Opel. Respondent concluded that Ms. Eichenwald had lied to him. Further, he decided

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that he had to quit representing her in any litigation.”

The Disciplinary Administrator asserts that the finding of fact was not contrary to the evidence before the hearing panel, relying upon the following statement of Bryan at the hearing:

“Now, as far as the letters I sent—well, first off, I’m sorry about the February 25th, 1998 letter, because that letter and the decision to terminate her as my client is clearly based on anger over her seeing another man, and I understand that and that’s not right.”

Thus, Finding of Fact ¶ 13 is supported by the evidence that was before the hearing panel.

*Finding of Fact ¶ 23*

Bryan contends that the hearing panel’s finding that Eichenwald offered to resolve the issues through mediation was an invention of the panel. Bryan asserts that Eichenwald’s offer to mediate was not sincere and was an attempt to bolster her claim that Bryan was stalking her and would jump at any opportunity to meet face-to-face with her. Bryan admits that most of the evidence as to Eichenwald’s insincerity is not in the record.

The record indicates that Eichenwald offered to mediate the matter and discuss it with a neutral party in order to keep the matter out of court. Bryan responded to Eichenwald’s offer by stating:

“Please be advised that there will be no mediation of any kind, and no meetings between us. There is nothing for us to discuss with any neutral party. I find it curious that after you have told everyone that I’m stalking and you are in danger from me, you now want to have a face-to-face meeting with me.”

In response to a question by a panel member as to why he did not accept Eichenwald’s offer to mediate, Bryan responded that he did not consider it to be a serious offer, that he believed she had been encouraged by someone else to make the

offer, and that he believed that agreeing to meet with her would be construed as further evidence of his alleged obsession with her.

The hearing panel’s finding is supported by the evidence. The panel did not find that the offer by Eichenwald was in fact sincere, just that she made the offer. Furthermore, the disclosure that resulted from the filing of the lawsuit is not at issue. Thus, whether or not Bryan should have accepted the offer to mediate is irrelevant.

*Finding of Fact ¶ 28*

Bryan contends that this finding of fact is “despicable.” He argues that the panel’s finding amounts to a finding that he provided extensive information (e.g., copy of petition to foreclose on Eichenwald’s grandmother’s house) because he was obsessed with or is still obsessed with Eichenwald. He asserts that he disclosed everything because he was unsure of what information might be necessary to adequately respond to the investigation.\*660 Bryan notes that this appears to be the first case in which an attorney was found at fault for disclosing too much information to the investigator in a disciplinary case, thus punishing him for his cooperation. Additionally, Bryan points out that he had previously stated in the investigation that he had spoken with Eichenwald at her place of employment only once and that the discussion included, among other things, the foreclosure. Thus, he asserts that the existence of the foreclosure bolsters his credibility on this claim.

The Disciplinary Administrator asserts that the finding of the panel was supported by evidence and that it is easy to conclude that the irrelevant items in Bryan’s response were included only to embarrass Eichenwald and to place that information into the public record.

We need not address whether this finding is supported by the evidence because it is irrelevant. This finding had no effect upon the panel’s conclusions regarding discipline.

*Conclusion of Law ¶ 15*

Bryan takes issue with this conclusion because the evidence before the hearing panel was that he, rather than Eichenwald, had ended the relationship. Bryan admits that this finding is irrelevant; however, he asserts that the panel included the finding because it would be impossible for Bryan to be a "stalker" if he were the one that ended the relationship. The Disciplinary Administrator agrees with Bryan that this issue is irrelevant.

The evidence before the panel was that Eichenwald ended the personal relationship with Bryan prior to Bryan terminating the lawyer-client relationship on February 25, 1998, because the termination letter was in response to her "seeing another man." However, as the parties agree, the identity of the person who broke off the relationship is irrelevant in this disciplinary proceeding. Thus, this court will not address whether this finding is supported by the evidence.

**SUMMARY JUDGMENT**

Bryan contends the hearing panel erred in failing to consider his motion for summary judgment that was filed prior to the hearing in this matter. The Disciplinary Administrator's office objected to the filing of the summary judgment motion and requested that the motion be stricken from the record and that it not be required to respond. The record does not indicate that the panel made any determination as to whether the Disciplinary Administrator's office was required to respond to the motion.

At the hearing, the panel reserved ruling on the motion for summary judgment. In the final hearing report, the panel denied Bryan's motion for summary judgment, stating:

"Prior to the hearing, on February 13, 2002, the Respondent filed a motion for summary judgment. Thereafter, on February 21, 2002, the Disciplinary Administrator objected to the motion for summary judgment on procedural grounds. At the outset of the hearing, the Hearing

Panel informed the parties that it was taking the motion under advisement and would issue a ruling in the Final Hearing Report.

"Included in the Stipulated Facts is an admission by the Respondent of a violation of KRPC 1.7(b). Further, as noted below, the Hearing Panel finds that Respondent violated multiple disciplinary rules. The stipulation and findings of the panel are dispositive of the motion for summary judgment on a substantive basis.

"In addition, however, the Hearing Panel finds that Summary Judgment as contemplated by K.S.A. 60-256(b) and Kan. Sup.Ct. R. 141, is so inconsistent with the procedures established in the Kansas Supreme Court Rules Relating to Discipline of Attorneys that they cannot apply to these proceedings.

"The Respondent cites K.S.A. 60-256(b), Kan. Sup.Ct. R. 141, and Internal Operating Rules §§ D.1 and D.2. as procedural authority for the motion.

"The Hearing Panel is mindful of Kan. Sup.Ct. R. 224(b) which states: 'Except as otherwise provided, the Rules of Civil Procedure apply in disciplinary cases.' Clearly, K.S.A. 60-256(b) is part of the Rules of Civil Procedure. However, in the opinion of the Hearing Panel, summary judgment conflicts so dramatically with concepts underlying the Rules Relating to Discipline of Attorneys that the two procedures cannot coexist.

"The reasons underlying the Hearing Panel's opinion in this regard are as follows:

"Internal Operating Rule § D.4, limits discovery to an extent that precludes developing a complete record, upon which, summary judgment could be considered.

"In contested cases, the Rules Relating to Discipline of Attorneys, without a doubt, contemplate an assessment of the character of the

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Respondent, as well as the Respondent's conduct. The Hearing Panel believes, in many instances, the nuances necessary to determine if an action constitutes a violation of the disciplinary rules can only be derived from the live testimony of witnesses.

"More importantly, Kan. Sup.Ct. R. 211(f) requires the Hearing Panel, in recommending discipline, to consider mitigating and aggravating circumstances. The mitigating and aggravating circumstances set forth in the ABA Standards for Imposing Lawyer Sanctions clearly require the Hearing Panel to assess the Respondent as a person as well as an attorney. This important aspect of the Hearing Panel proceeding cannot be accomplished in the context of a motion for summary judgment. It must be done in person. Accordingly, the Hearing Panel denies the Respondent's motion for summary judgment."

Bryan cites in his brief to numerous internal operating procedures of the Disciplinary Administrator's office that he believes expressly allow for the filing of virtually any pretrial motion. Furthermore, Bryan contends that the hearing panel should have solely considered the uncontroverted facts that accompanied the motion for summary judgment, which he contends were not at odds with the stipulated facts, in determining whether there was a violation of any rule under the facts of the case. The Disciplinary Administrator contends the findings of the panel are correct.

[12] The propriety of a motion for summary judgment in disciplinary proceedings appears to be an issue of first impression. Bryant notes that pursuant to Supreme Court Rule 224(b) (2002 Kan. Ct. R. Annot. 301), "[e]xcept as otherwise provided, the Rules of Civil Procedure apply in disciplinary cases." Bryan further points out that the Kansas Rules of Civil Procedure, K.S.A.2001 Supp. 60-256(a), allow a party "seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may ... move with or without supporting affidavits for a summary

judgment in the party's favor as to all or any part thereof."

Bryan fails to note that Supreme Court Rule 211 (2002 Kan. Ct. R. Annot. 260) does provide otherwise. Under Rule 211, the hearing panel's decision not to recommend discipline or to dismiss the complaint is final if not appealed by the Disciplinary Administrator. If, however, the hearing panel recommends discipline, the final hearing report of the panel is submitted to this court for consideration and disposition. Supreme Court Rule 211(f). This court has the duty to examine the evidence and render final judgment. *In re Rausch*, 272 Kan. at 320, 32 P.3d 1181. The hearing panel's report is advisory only. *In re Wall*, 272 Kan. at 1298, 38 P.3d 640. Rule 211 provides the procedure to be followed by the panel. The filing of a motion for summary judgment is inconsistent with the procedure established by this court for the discipline of attorneys. Thus, K.S.A.2001 Supp. 60-256(a) is not applicable to disciplinary proceedings.

[13] The hearing panel's findings of fact are supported by clear and convincing evidence. Bryan violated KRPC 1.6(a), 1.7(b), 1.16(d), and 8.4(a), and the hearing panel's recommendation for discipline, published censure, is adopted.

IT IS THEREFORE ORDERED that the respondent, David McLane Bryan, be and he is hereby disciplined by published censure in accordance with Supreme Court Rule 203(a)(3) (2002 Kan. Ct. R. Annot. 224) for his violations of the KRPC.

\*662 IT IS FURTHER ORDERED that this order be published in the official Kansas Reports and the costs of this action be assessed to the Respondent.

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