

State of Michigan
Attorney Discipline Board

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Grievance Administrator,
Michigan Attorney Grievance Commission,

Petitioner,

ADB Case No. 09-48-GA

v

Wilson A. Copeland, P-23837,

Respondent.

Petitioner's Brief in Support of Petition for Review

Statement of Appeal

The hearing panel's conclusions of law are erroneous and not supported by the record. The charged misconduct is supported by the evidentiary record. The hearing panel erred in dismissing the formal complaint.

Standard of Review

On review, the Attorney Discipline Board must determine whether a hearing panel's factual findings have proper evidentiary support on the whole record. *Grievance Administrator v August*, 438 Mich 296; 475 NW2d 256 (1991).

Statement of Proceedings

On May 9, 2009, Petitioner filed a one-count formal complaint against Respondent. Petitioner alleged that Respondent, during the course of representing the City of Detroit as outside counsel in a whistleblower action, assisted in negotiating and drafting secret settlement documents for the purpose of concealing text messages transmitted by former Detroit Mayor Kwame Kilpatrick and his former Chief of Staff, Christine Beatty, which messages revealed Mr. Kilpatrick and Ms. Beatty had perjured themselves during the course of the whistleblower trial. The formal complaint alleged that Respondent participated in concealing both the text messages and the settlement documents from the Detroit City Council and the Detroit Free Press.

The formal complaint charged Respondent with failing to keep his client reasonably informed about the status of the matter, failing to explain the matter to his client to the extent necessary to permit the client to make informed decisions regarding the representation, assisting another in unlawfully concealing a document or other material having potential evidentiary value, violating the MRPC or knowingly assisting or inducing another to do so, prejudicing the proper administration of justice, exposing the legal community to obloquy, contempt, censure, or reproach, and engaging in conduct contrary to justice, ethics, honesty, or good morals, in violation of MRPC 1.4(a) and (b), 3.4(a), 8.4(a) and (c) and MCR 9.104(A)(1)-(4).

Respondent filed an answer to the formal complaint on or about June 9, 2009. Respondent admitted that he had participated in settlement negotiations

and signed an initial settlement document. Respondent denied that he helped to draft subsequent settlement documents, and denied concealing the documents or the text messages.

A pre-trial conference was held on July 1, 2009. A pre-trial hearing was held on August 20, 2009. At the pre-trial hearing, the panel heard arguments regarding whether to allow expert witness testimony in the case. The panel ruled that expert testimony would be allowed, but would be limited to testimony regarding municipal practice and that experts would not be allowed to testify regarding the ultimate issue of whether Respondent's actions amounted to misconduct.

Misconduct hearings were conducted on January 6, January 7, January 11, 2010. Petitioner called as witnesses Respondent, Attorney Ellen Ha, Attorney William Mitchell and City Councilman Kwame Kenyatta. Respondent testified on his own behalf and also called as witnesses Attorney Morly Witus and Attorney Ken Lewis. At the conclusion of witness testimony, the parties presented closing arguments and the panel took the matter under advisement.

On April 27, 2010, the panel issued its report on misconduct and an order dismissing the formal complaint in its entirety. Petitioner filed a petition for review on May 17, 2010. For the reasons set forth below, Petitioner requests that this Board reverse the dismissal and remand this matter to the panel for a hearing on sanctions.

Statement of Facts

Respondent was retained by the City of Detroit for legal representation in the case of *Gary A. Brown and Harold C. Nelthrope v. City of Detroit (Brown Nelthrope)* in May of 2004. (1/6/10 Tr. p. 49). Respondent's client, the City of Detroit, included the Detroit City Council. (1/6/10 Tr. p. 53). The City was also represented by Law Department counsel Valerie Colbert-Osameude. (1/6/10 Tr. p. 54). The case involved allegations by two former police officers that they had been wrongfully discharged by the City as a result of reporting the wrongdoing of their superiors, and specifically for investigating the improper activities of former mayor Kwame Kilpatrick. (1/6/10Tr. p. 55-56).

Respondent was retained during the pre-trial stage of the case. (1/6/10 Tr. p. 57). The case had gone to mediation and both parties had rejected a mediation award of approximately \$ 2.5 – 3 million dollars. (1/6/10 Tr. p. 58). Prior to trial, plaintiffs' counsel Michael Stefani had issued subpoenas for the Skytel pager records of Mr. Kilpatrick and Ms. Beatty. (1/6/10 Tr. p. 56). Mr. Kilpatrick's outside counsel Samuel McCargo had filed a motion to quash the subpoenas. Respondent was aware of the dispute over the records, but was not actively involved in the pre-trial litigation regarding that issue. (1/6/10 Tr. p. 61). An order was ultimately signed by the court which required that any Skytel records released pursuant to the subpoena be provided only to the court for *in camera review*. (Pet. Exh 4.)

Prior to trial, Respondent was involved in preparing the mayor for his testimony, both for deposition and for trial. During the course of preparation, the issue of whether the mayor had engaged in an affair came up. The mayor always denied having any affair. (1/7/10 Tr. pp. 76-77).

Just prior to the case going to trial, the attorneys had a final settlement meeting. Attorney Stefani proposed to settle the case for \$4 million. The City rejected that figure. (1/6/10 Tr. p. 64).

The case went to trial in August 2007. During the course of the three-week trial, Respondent participated in witness examination, including the examination of Ms. Beatty. Respondent was present for the examination of Mr. Kilpatrick, but did not participate. Respondent also presented the closing argument for the City of Detroit. (1/6/10 Tr. pp. 65-66). Both Mr. Kilpatrick and Ms. Beatty testified at trial that Mr. Kilpatrick had not fired the plaintiffs. Both Mr. Kilpatrick and Ms. Beatty also testified that they had never been involved in a romantic relationship. (1/6/10 Tr. p. 68). Trial ended on September 11, 2007. The jury returned a verdict of \$6.5 million dollars in favor of the plaintiffs. (1/6/10 Tr. p. 69).

One day later, appellate lawyer Morley Witus was called in to meet with the defense attorneys to give an opinion about a possible appeal. (1/11/10 Tr. p. 8). After listening to the summary of events at trial, Attorney Witus was not optimistic that an appeal would be successful. He stated that he would need additional time to review the transcript prior to giving an opinion. (1/11/10 Tr. pp. 13-14).

On September 19, 2007, Respondent and other defense counsel attended a closed session meeting with City Council. At that meeting, City Council was advised by then Corporation Counsel John Johnson to appeal the verdict. (1/6/10 Tr. p. 70).

Subsequent to the verdict, Attorney Stefani submitted a bill of costs claiming approximately \$1,000,000 in attorney fees. Rather than decide the fee issue, presiding judge Michael Callahan ordered the parties to participate in fee facilitation. Attorney Valdemar Washington was the agreed-upon facilitator. (1/6/10 Tr. p. 71).

The facilitation began on October 17, 2007 shortly after 11:00 a.m. The parties were placed in two separate rooms with Attorney Valdemar facilitating the negotiation. Negotiations stopped a few hours later at a figure of \$450,000. Attorney Stefani would not agree to that amount and defense attorneys were willing to go no higher. (1/6/10 Tr. p. 73).

After negotiations stalled, Attorney McCargo left the defense room. Respondent went to look for him approximately 20-30 minutes later and found Attorney McCargo in the parking lot reading a pleading. The pleading was a supplemental brief which contained ten pages of excerpts from text messages between Mr. Kilpatrick and Ms. Beatty. (Pet. Ex. 8). The excerpts indicated that Ms. Beatty and Ms. Kilpatrick had lied at trial about the reasons for revoking plaintiff Brown's appointment. They also indicated that both had lied at trial when they denied having had a romantic relationship. (Pet. Exh. 8).

In the parking lot, Attorney McCargo told Respondent, "Stefani says he has the text messages and now he wants to talk about Harris." (1/6/10 Tr. p. 74). ("Harris" was a reference to *Walter Harris v. Mayor Kwame Kilpatrick and the City of Detroit, et. al.* Wayne County Circuit Court Case No. 03-337670-NZ, an unrelated wrongful termination case against the City.)

Respondent knew that the text messages were believed to contain embarrassing information. Respondent believed the information concerned frank and perhaps profane commentary regarding various political leaders and issues. (1/6/10 Tr. pp. 77-78). When Respondent asked Attorney McCargo what he was reading Attorney McCargo told him that Attorney Stefani was going to file a motion to increase his attorney fees based upon the content of the text messages. Attorney McCargo told Respondent that Attorney Stefani claimed that the mayor had not been forthcoming. Respondent assumed that to mean that the mayor had not been truthful in his prior testimony. (1/6/ 10 Tr. pp. 79-80). Respondent was not given the document to read. (1/6/10 Tr. p. 81).

Attorney Colbert-Osamuede subsequently came into the parking lot and discussed the matter with Respondent and Attorney McCargo. After speaking to Respondent and Attorney McCargo, Attorney Colbert-Osamuede immediately called her supervisor, then Corporation Counsel John Johnson. Attorney McCargo called the mayor. (1/6/10 p. 83). Attorney Johnson arrived at the facilitation within an hour of the call. (1/6/10 Tr. p. 87). Once Attorney Johnson arrived, the parties resumed negotiations. (1/6/10 Tr. p. 94). The parties eventually reached a verbal agreement to settle *Brown-Nelthrope*, Attorney

Stefani's fee, and the *Harris* case for the total amount of \$8.4 million. (1/16/10 Tr. pp 94-95).

At approximately five o'clock the parties had to leave the facilitation because the space was going to be used by another group of attorneys. Attorney Washington requested that the parties place their agreement in writing that day. The parties agreed to meet at Attorney Stefani's office later that evening to do so. (1/6/ 10 Tr. p. 95).

The parties arrived at Attorney Stefani's office at approximately 6:30 that evening. Mr. Stefani had started drafting a settlement agreement. (1/6/10 Tr. p. 97). The settlement agreement was a four-page document which included specific provisions about the handling of the text messages, including that the messages be turned over to an attorney designated by the mayor, and that Attorney Stefani would forego filing his supplemental brief and destroy all copies of the brief. The agreement further provided that if any employee of Attorney Stefani or either plaintiff disclosed the existence or contents of the text messages, they would be required to pay liquidated damages to the City of Detroit. The agreement further provided that the parties would stipulate to dismiss the *Brown-Nelthrope* and *Harris* cases and that the City would pay plaintiffs Brown and Nelthrope \$4 million apiece and pay plaintiff Harris \$400,000. The agreement required approval of the monetary terms of the agreement by City Council within 45 days. (Pet. Exh. 9). The non-monetary terms of the agreement, such as the handling of the text messages and certain other documents to be kept private, were not to be considered by City Council.

(1/6/10 Tr. p. 102). Respondent signed the agreement, along with Attorneys McCargo, Stefani and Colbert-Osamuede. (Pet. Exh. 9).

The night of the facilitation, a second document was also created, entitled "Escrow Agreement." (1/6/10 p. 113). The escrow agreement provided that the parties would place the text messages in a bank safe deposit box to be accessed only by the parties and only with both parties present. The escrow agreement was signed by Attorneys McCargo and Stefani. (Pet. Exh. 10).

The evening of the facilitation, Attorney Johnson contacted City Councilman Kwame Kenyatta to report that the case had been settled and that the attorneys were seeking City Council approval of the settlement. Councilman Kenyatta requested that Attorney Johnson present a settlement memorandum to City Council the following morning. (1/7/10 Tr. p 122).

Attorney Colbert-Osamuede appeared at meeting of the City Council internal operations committee on October 18, 2007 to present the settlement memorandum. (1/7/10 Tr. p. 123). The settlement memorandum summarized the facts and proceedings of both cases and included a recommendation that the cases be settled for \$8,000,000 and \$400,000 respectively. The settlement memorandum omitted any discussion of the text messages or their handling by the parties. (Pet. Exh. 12). Respondent did not take part in the drafting of the memorandum or its presentation to City Council. (1/6/10 Tr. p. 116). No discussion of the confidentiality provisions was presented to the committee. (1/7/10 tr. p. 125). The committee determined that more time was needed to evaluate the settlement. Rather than recommend the settlement to the full

council, the committed decided to move the settlement without recommendation. (1/7/10 Tr. p. 124).

Also on October 18, 2007, Respondent called Attorney Stefani and left a voicemail message regarding the safe deposit box. Not hearing back from Attorney Stefani, Respondent e-mailed him later that day requesting that they transfer the messages to the safe deposit box that afternoon. (1/6/10 Tr. p. 114). Respondent called the bank to get information regarding obtaining a safe deposit box. He also instructed his associate to contact the bank to find out how to get a box with dual keys. (1/6/10 Tr. p. 115). The parties eventually secured a box at Comerica Bank. (Pet Exh. 17).

Respondent then contacted Attorney William Mitchell. (1/6/10 Tr. P. 117). Attorney Mitchell was a personal friend of Respondent who had an extensive background in criminal defense as well as general litigation. (1/7/10 Tr. p. 6). Respondent and Attorney McCargo met with Attorney Mitchell on October 19, 2007. The purpose of the meeting was advise Attorney Mitchell of the issues that had arisen during the facilitation and to inquire if Attorney Mitchell would be able to meet with the mayor. (1/7/10 Tr. p. 10). A subsequent meeting was attended by the mayor and Attorneys McCargo, Copeland and Mitchell days later. The attorneys and the mayor discussed the fact that excerpts of text messages had been presented by Attorney Stefani at the facilitation. A question arose as to whether Attorney Stefani really had the text messages in light of the protective order which had been previously issued by the court. (1/7/10 Tr. p.

12). Within a few days of the second meeting, Attorney Mitchell began to represent the mayor. (1/6/10 Tr. p. 120).

On October 22, 2007, Ellen Ha, the Law Department's supervising attorney with regard to FOIA matters, received a Freedom of Information Act (FOIA) request for the settlement agreements in the *Nelthrope-Harris* and *Brown* cases. (1/6/10 Tr. p. 152). Ms. Ha spoke to Attorney Johnson and Attorney Colbert-Osamuede about the request. She was not provided with the settlement documents which had been generated following the facilitation. Attorney's Ha's understanding from speaking with Attorney Johnson and Attorney Colbert-Osamuede was that there were no settlement documents to be provided. (1/6/10 Tr. p. 154).

On October 23, 2007, the settlement was approved at a meeting of the full City Council. (1/7/10 Tr. p. 127).

On October 29, 2007, Attorney Ha responded to the Free Press indicating that there was no settlement agreement, as the parties were still working out the details of the agreement. (Pet. Exh. 19).

On November 1, 2007, the mayor signed a notice indicating that Attorney Mitchell was the designated attorney representative to receive delivery of the text messages from Attorney Stefani. (Pet. Exh. 23).

On or about November 1, 2007, a separate set of settlement documents was drafted. The set included 1) a Settlement Agreement and Release, which outlined a release of the claims against the defendants and 2) a Confidentiality Agreement, which encompassed the privacy terms and provisions of the original

October 17, 2007 Settlement Agreement regarding the text messages. (Pet Exhs. 20-21). The Settlement Agreement and Release made no reference to the text messages or the Confidentiality Agreement. Respondent signed the Settlement Agreement and Release.

Ms. Ha subsequently received a second FOIA request from the Free Press . (1/6/10 tr. p. 156). The second request, dated November 13, 2007, specifically sought production of all settlement documents, including those labeled "confidential". (Pet Exh. 24). After receiving the second request, Attorney Ha was provided a copy of the Settlement Agreement and Release for the *Harold-Nelthrope* and *Brown* cases, but was not provided the Confidentiality Agreement. (1/6/10 Tr. p. 157). Attorney Ha sent a second response to the Free Press which attached only the Settlement Agreement and Release for each case. (1/6/10 Tr. p. 159).

In Mid-November, Attorney Mitchell traveled to Skytel's headquarters in Mississippi to meet with Skytel representatives and determine if Skytel had in fact released the messages to Attorney Stefani. Attorney Mitchell was able to determine that the messages had been released to Attorney Stefani as claimed. (1/7/10 Tr. p. 17).

The *Brown-Nelthrope* case was dismissed by stipulation on December 19, 2007 (Pet. Exh. 27). Immediately after the hearing granting the dismissal, representatives for the parties met at the bank and transferred the text messages to Attorney Mitchell. (1/7/10 Tr. p. 21). Attorney Mitchell immediately contacted the mayor and delivered the messages to him. (1/7/10 Tr. pp. 21-22).

On or about January 3, 2008, the City received a lawsuit which had been filed by the Free Press alleging that the City was violating the Freedom of Information Act by withholding settlement documents of the *Brown-Nelthrope* and *Harris* cases. (1/6/10 Tr. pp. 160-161). The Free Press also issued a subpoena for the Skytel text message records. Attorney Colbert-Osamuede filed a motion to quash the subpoena. (1/6/10 Tr. p. 162).

During January of 2008, Respondent attended three separate meetings with Attorney Ha and other defense counsel regarding the FOIA litigation. (1/6/10 Tr. p. 126).

The first meeting was held to prepare for the hearing on the motion to quash the Free Press subpoena. (1/6/10 Tr. p. 163). At that meeting, neither Respondent nor any of the other counsel present informed Attorney Ha of the October 17, 2007 Settlement Agreement, the Escrow Agreement, or the November 1, 2007 Confidentiality Agreement. (1/6/10 Tr. pp. 163-164).

On January 23, 2008, the Free Press published extensive excerpts from the text messages which revealed that the mayor and Ms. Beatty had lied at trial about the firing of the plaintiffs and about having a romantic relationship. (1/6/10 Tr. p. 163).

Following the publication, Respondent attended a second meeting with Ms. Ha and other defense counsel. (1/6/10 Tr. p. 164). The attorneys again discussed the motion to quash the subpoena. Attorney Ha believed that the subpoena was now moot because the messages had been published. Attorney

Ha briefly left the meeting to contact opposing counsel regarding dismissing the case, as it was now clear the Free Press had possession of the records it was seeking. Opposing counsel refused to stipulate to a dismissal. (1/6/10 Tr. p. 165). Attorney Ha returned to the meeting. She reported to the defense attorneys that the Free Press was not dismissing the case, and was in fact filing a motion to expedite discovery. Attorney Ha again was not advised of any additional settlement documents. (1/6/10 p. 167).

On January 25, 2008, the court held a hearing on the Free Press' motion to expedite discovery. At that hearing, Attorney Stefani stated that he could not discuss the settlement because of a confidentiality agreement. As a result, Judge Robert Colombo, Jr. ordered Attorney Stefani to submit to a deposition regarding the settlement documents. (1/6/10 Tr. p. 168).

Following the hearing, Respondent attended a third meeting with Attorney Ha and the other defense attorneys which was held at Respondent's office. Attorney Ha asked directly if there was a confidentiality agreement and requested that it be produced. Attorney Ha was not provided with the Confidentiality Agreement. (1/6/10 Tr. pp. 171-172).

On January 30, 2007, Attorney Ha attended the deposition of Attorney Stefani. While taking Attorney Stefani's deposition, Attorney Ha learned for the first time that there were additional settlement documents which had not been provided to her, and subsequently, not produced to the Free Press. (1/6/10 Tr. p. 174).

Argument

The hearing panel's conclusions of law are erroneous and not supported by the record. The charged misconduct is supported by the evidentiary record. The hearing panel erred in dismissing the formal complaint.

A. The hearing panel erred in finding that Respondent's conduct did not violate MRPC 1.4(a) and (b).

Petitioner charged Respondent with failing to keep the client reasonably informed about the status of the matter, in violation of MRPC 1.4(a) and with failing to explain the matter to the client to the extent necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b).

The hearing panel concluded that Respondent did not violate his duties under these rules. Specifically, the hearing panel found that Respondent was retained as special trial counsel whose engagement was limited to trial work and possible resolution post-trial. The panel found Respondent did not have direct communication with City Council; rather communication with City Council was handled by Law Department counsel who acted as a liaison. The panel found that this communication relationship was consistent with the past practice of the Law Department and City Council. (April 27, 2010 Report of Tri-County Hearing Panel No. 2, pp. 2-3). The panel acknowledged that City Council was entitled to know of the existence and terms of the Confidentiality Agreement prior to

approving the settlement. But the panel concluded that the duty to communicate the terms of the settlement did not extend to Respondent, but instead stopped with Law Department attorneys Johnson and Colbert-Osamuede.

The panel's conclusion is not supported by any law. There is no caselaw or authority that holds that by virtue of the fact that the City had in-house co-counsel on the case, Respondent was somehow absolved of his duty to communicate. The duties created by the MRPC, including the duty to communicate, apply to all lawyers, regardless of whether they are in-house or outside counsel.

The scope of Respondent's service to the City was specifically set forth in his contract for professional legal services, which Respondent signed. The scope of services clause provided that Respondent was to act for and assist the City in its defense of the *Brown-Nelthrope* case through legal representation, including trial and appeal. (Pet Exh. 1, p. 13). Although the scope of Respondent's representation was limited to the *Brown-Nelthrope* matter, the contract does not limit his duties of communication in any way. In fact, the contract specifically sets forth Respondent's duty to communicate with the client. Section 4.04(a)(b) of the contract requires that "[R]espondent shall inform the City of all material and significant developments in the subject matter of the contract." (Pet. Exh. 1 pp. 2-3).

The settlement terms included in the original settlement agreement and the subsequent Confidentiality Agreement were both material and significant. The Confidentiality Agreement included a clause which provided that should the

confidentiality terms be breached, the City stood to receive liquidated damages totaling \$2,666,666. This was a significant amount totaling approximately 31% of the total settlement amount. City Council was not even advised of these possible liquidated damages. It was also not advised that the basis for Attorney Stefani's attorney fee claim (which the City was charged with paying) was the personal misconduct of the mayor.

The panel noted that when the opportunity to communicate with City Council was at hand, Respondent was not present, as he had not been invited to appear before City Council. (Report of Tri-County Hearing Panel No. 2, p. 3). Notwithstanding the liaison relationship with corporation counsel, Respondent was never foreclosed from communicating with City Council. Indeed, there were procedural mechanisms in place for Respondent to communicate with City Council regarding the settlement. Respondent was able to attend scheduled meetings of City Council, which are open and public. Additionally, Respondent could request to appear before City Council in a closed session. (1/7/10 Tr. p. 119). Closed sessions are specifically available to both corporation counsel and outside counsel to meet and discuss issues pertaining to litigation. Closed session meetings are privileged and confidential and not open to the public. (1/7/10 Tr. p. 120). Respondent could have requested a closed session meeting to advise City Council about the confidentiality terms of the settlement. Although there was traditionally a liaison relationship between outside counsel and corporation counsel, it was not unheard of for outside attorneys to meet with or

appear before City Council. (1/7/10 Tr. p. 133). Respondent never availed himself of any opportunity to advise City Council regarding the settlement.

In fact, City Council did not fully learn of the terms of the settlement until they were made public by the newspapers months later. (1/7/10 Tr. p. 128). Councilman Kenyatta was concerned that significant facts regarding the settlement had been kept from City Council. He felt that he had inadequate communication with Respondent in this matter. He stated that he would have wanted to be informed about the text messages, the confidentiality agreement, the escrow agreement, and the safe deposit box prior to making a decision regarding settlement. (1/7/10 Tr. p. 129). Councilman Kenyatta noted that *Brown-Nelthrope* was a high-profile case with multi-million dollar exposure for the City. (1/7/10 Tr. 132). Councilman Kenyatta testified that full knowledge of the facts may ultimately have changed the outcome of the settlement, in that although City Council may have approved a payment to the plaintiffs' it likely would not have approved the additional amounts for Attorney Stefani's fee and for the safe deposit box. (1/7/10 Tr. p. 144).

The comments to MRPC 1.4 provide that a client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation. In cases of settlement, the client should promptly be informed of its substance. Where there is time to explain a settlement proposal, the lawyer should review all important provisions with the client before proceeding to an agreement (emphasis added). Rather than receiving full information about a significant case, City Council had its ability to make an

informed decision effectively taken away from it because of the conduct of Respondent and the other attorneys in this matter.

It is irrelevant that City Council did not specifically ask to be made aware of non-monetary terms of the settlement, or that corporation counsel has not traditionally provided that type of information in its settlement recommendations. The duty to communicate imposed by MRPC 1.4 is imposed on the attorney, not on the client. As a result, even where an attorney does not receive a request for information from the client, the attorney is bound to provide the information necessary to keep the client reasonably informed, and to permit the client to make informed decisions. *Grievance Administrator v. Hayim Gross*, 97-138-GA; 97-164-FA (1999).

Respondent was bound by his contract with the city and by his ethical duties to fully advise City Council of all the material terms of the settlement. Because he failed to do so, Respondent's conduct violated MRPC 1.4(a) and (b).

B. The Hearing Panel erred in finding that Respondent's conduct did not violate 3.4(a).

Petitioner charged Respondent with assisting another in unlawfully concealing a document or other material having potential evidentiary value, in violation of MRPC 3.4(a). The hearing panel dismissed the charge without discussion.

MCL § 750.483 prohibits a person from knowingly and intentionally removing, altering, concealing, destroying or otherwise tampering with evidence to be offered in a present or future official proceeding.

In the instant case Respondent knowingly and intentionally facilitated the concealment of the text messages, which were material which had potential evidentiary value in a future proceeding.

First, Respondent signed off on the initial settlement agreement providing for the concealment of the messages. Respondent then obtained the safe deposit box and helped facilitate the transfer of the messages to the bank. Finally, Respondent contacted Attorney Mitchell. Attorney Mitchell was essentially charged with first, determining the authenticity of the text messages, and second, securing and containing the messages. The purpose of Attorney Mitchell's contacts with Skytel and his trip to Mississippi was to ensure that the messages were not released any further than they already had been. Once the messages were released from Attorney Stefani to Attorney Mitchell, Attorney Mitchell immediately transported them to the mayor. The messages were never disclosed to Judge Callahan, even though they showed that perjured testimony had been offered in the trial he presided over. Respondent stated that he knew from his discussion with Attorney McCargo that the messages contained evidence that the mayor had been less than forthcoming during his testimony. Respondent knew or should have known that the messages, as they contained evidence of perjury, could potentially be marshaled as evidence in a future proceeding against the mayor. As such, Respondent had a duty not to conceal

the messages, or to assist in their concealment. Petitioner established by a preponderance of the evidence that Respondent did assist in such concealment, in violation of MRPC 3.4(a).

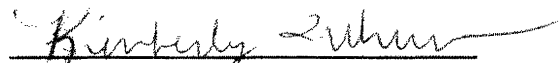
Respondent also assisted in concealing the October 17, 2007 Settlement Agreement and the November 1, 2007 Confidentiality Agreement from the Free Press. By early January 2008, Respondent knew that the Free Press was seeking these documents through FOIA. Respondent continued to assist in a defense strategy that involved concealing the documents not only from the Free Press, but also from Attorney Ha. It was not until Attorney Stefani alluded to the documents in open court and Attorney Ha specifically asked if a confidentiality agreement existed that Respondent suggested release of the document. However, Respondent and other defense counsel still did not release the document to Attorney Ha. Attorney Ha testified that the October 17, 2007 Settlement Agreement and the November 1, 2007 Confidentiality Agreement should have been produced pursuant to the Free Press' FOIA requests (1/11/10 Tr. pp. 175-176).

Respondent knew or should have known that the settlement documents had potential evidentiary value in the Free Press proceeding. As such, Respondent had a duty not to conceal the settlement documents, or to assist in their concealment. Petitioner established by a preponderance of the evidence that Respondent did assist in such concealment, in violation of MRPC 3.4(a).

Conclusion

The Hearing Panel's conclusions of law are erroneous. The evidence supports a finding of misconduct against Respondent. Wherefore, Petitioner respectfully requests the Board reverse the hearing panel's order of dismissal, enter an order finding misconduct, and remand the matter to the hearing panel to determine the appropriate level of discipline to impose upon Respondent.

Dated: June 21, 2010



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