2018 Annual Government & Administrative Practice Seminar

June 1, 2018
University of Nebraska College of Law, Lincoln, NE
The NSBA Government & Administrative Practice Section presents
2018 Annual Government & Administrative Practice Seminar

Friday, June 1, 2018
8:30 am - 12:15 pm
1:00 pm - 3:00 pm

University of Nebraska College of Law
1875 N 42nd Street, Lincoln

NE MCLE Accreditation
Morning Session
#157745 (Regular/live)
#157746 (Distance learning)
3.5 CLE hours

Afternoon Ethics Session
#157750 (Regular/live)
#157751 (Distance learning)
2.0 CLE ethics hours

IA MCLE Accreditation
Morning Session
#296855 (Regular/live)
#296856 (Distance learning)
3.5 CLE hours

Afternoon Ethics Session
#296841 (Regular/live)
#296840 (Distance learning)
2.0 CLE ethics hours

Attend live or via live webcast
Morning Session
$227 - Regular registration
$175 - NSBA dues-paying member
Free - Law students
Afternoon Ethics Session
Free

www.nebar.com

Morning Session: 8:30 am - 12:15 pm
3.5 CLE hours

8:30 am
Caselaw Update: Cases That Matter for State and Local Governments
Stephanie Caldwell, Nebraska Attorney General’s Office

This session will provide government practice attorneys with an overview of recent case law which affects state and local government.

9:00 am
Tips & Tools for Managing Government Employee Performance Issues
Jennifer A. Huxoll, Nebraska Attorney General’s Office

This session will provide attorneys with legal considerations when dealing with government employee performance issues. This session will provide attorneys with:
1. An overview of applicable federal and state laws
2. Examples of mistaking potentially discriminatory activities as performance issues
3. Available options for addressing performance issues (e.g., Formal Rules, Contracts, Internal Policies and Procedures, Job Descriptions)
4. Tools for addressing performance issues (e.g., the Work Expectation Memorandum, Performance Evaluations, Discipline)
5. How to document performance issues in order to defend employee claims

10:00 am
How to Win Employment Lawsuits Before They Are Filed
Pam Bourne, Woods & Aitken LLP

Sexual harassment in the workplace occurs no matter where you work, including in state and local government. This session will provide an overview of the various laws which prohibit harassment, discrimination and retaliation on the basis of sex while facilitating a discussion on policy development, investigation strategies and effective training for public employers.

11:00 am
Break

11:15 am
Sexual Harassment, Discrimination and Retaliation: A Primer for Public Employers
David Kramer, Baird Holm LLP

Sexual harassment in the workplace occurs no matter where you work, including in state and local government. This session will provide an overview of the various laws which prohibit harassment, discrimination and retaliation on the basis of sex while facilitating a discussion on policy development, investigation strategies and effective training for public employers.

12:15 pm
Lunch (Included with your registration if you are attending BOTH the morning and afternoon sessions.)
Afternoon Ethics Session: 1:00 pm - 3:00 pm
2 CLE ethics hours

1:00 pm
Employment Law and Our Duty as Lawyers to Identify and Report Cognitive Decline, Substance Abuse or Mental Illness
Chris Aupperle, Director, Nebraska Lawyers Assistance Program
Jason Jackson, Chief Human Resources Officer, Nebraska Governor’s Office

This session will provide government and administrative practice attorneys an overview of:
• Ethics rules surrounding competence issues and attorney wellness
• Unique ethics issues of law related to government employment specifically and the employer-employee relationship generally
• NLAP, its mission, and how it can help attorneys navigate these issues

2:15 pm
Ethical Considerations for Government and Administrative Practice Attorneys
Kent Frobish, Assistant Counsel for Discipline

This session will provide government and administrative practice attorneys with the ethical considerations they need to consider before serving on boards, commissions, or advisory committees or providing pro bono services. This session will also provide government and administrative practice attorneys with guidance on whom to contact if they have a question about an ethical issue and the role the Counsel for Discipline as it relates to government and administrative practice.

3:00 pm  Adjourn
**Faculty Bios**

**Stephanie Caldwell, Nebraska Attorney General’s Office:** Stephanie Caldwell is an Assistant Attorney General in the Civil Litigation Section. She practices civil defense work and represents the State of Nebraska, its agencies and employees in civil cases including: tort claims, civil rights litigation declaratory judgment, and appellate work. Ms. Caldwell is also Legal Counsel for the Nebraska State Claims Board. She has worked for the Attorney General’s Office since 2004 and serves as a faculty member and presenter for the National Association of Attorneys General Training and Research Institution. Ms. Caldwell received her Juris Doctor from the University of Nebraska College of Law.

**Jennifer A. Huxoll, Nebraska Attorney General’s Office:** Jennifer A. Huxoll is an Assistant Attorney General for the Transportation Bureau, assisting the Nebraska Department of Transportation in the areas of Labor and Employment, Environmental Law, Eminent Domain, Contract Preparation and Dispute, and Legislative Review. She currently serves as Vice-Chair of the Nebraska State Bar Association Labor Relations and Employment Law Section. Ms. Huxoll is a graduate of the University of Nebraska College of Law and is admitted to practice before the Nebraska Supreme Court, State Courts, and the United States Federal District Court for the District of Nebraska.

**Pam Bourne, Woods & Aitken LLP:** Pam Bourne represents management exclusively on workplace legal issues. Her main focus is on preventative employment law issues. Ms. Bourne’s goal is to help clients prevent employment claims from arising and to advise on HR strategies that will result in a sound defense position should a claim occur. In connection with this goal, she provides day-to-day counseling on a variety of employment issues (e.g., hiring, E-Verify, I-9 compliance, discipline, discharge, performance evaluations, employment-related contracts, FMLA, ADAAA, harassment, discrimination, wage/hour, state employment laws, and other areas). Ms. Bourne also prepares and assists clients in developing HR policies and handbooks and conducts training for clients on a broad range of topics (e.g., how to avoid harassment and retaliation claims). In addition, she frequently defends employers in connection with employment-related claims filed with government agencies. Ms. Bourne received her Juris Doctor from the University of Nebraska College of Law.

**David Kramer, Baird Holm LLP:** David J. Kramer represents both public and private sector clients. In the public sector, he provides general counsel services to both elected officials and their administrations. Mr. Kramer routinely deals with federal and state constitutional issues, due process proceedings, open meetings, parliamentary procedure, public records, public employment, school funding, student rights and student discipline, government contracting and procurement, regulatory compliance, capital improvement planning, bond financing, special education, and technology. He is one of a handful of lawyers in Nebraska who practice before the Commission of Industrial Relations where he can provide political subdivisions with assistance in comparability analysis, collective bargaining, contract administration and litigation. Mr. Kramer assists private sector clients with traditional labor and general employment law, employment-related litigation, strategic planning and government relations, primarily at the state and local levels. Mr. Kramer received his Juris Doctor from Georgetown University Law Center.

**Chris Aupperle, Director, Nebraska Lawyers Assistance Program, NSBA:** Chris Aupperle assumed the role of Nebraska Lawyers Assistance Program (NLAP) Director in May of 2017. Prior to joining NLAP, Chris worked in both private practice and as in-house counsel in Omaha. He has been a member of the NLAP Committee since 2001 and previously served as chair of the NLAP Committee. He also serves on the Advisory Committee for the Independence Center at Bryan Medical Center in Lincoln. Chris is a graduate of Creighton University School of Law.

**Jason Jackson, Chief Human Resources Officer, Nebraska Governor’s Office:** Jason Jackson is an attorney and United States Naval Academy graduate serving in the administration of Nebraska Governor Pete Ricketts as Chief Human Resources Officer. In this capacity, Mr. Jackson acts as executive coach to cabinet officers and leads strategic talent initiatives focused on making the state workforce more customer focused and efficient. Prior to joining the Ricketts' Administration, Mr. Jackson worked in HR in the software industry, where over a six-year period he led the transformation of a "start-up" HR shared services organization into an industry leader in employee satisfaction. Mr. Jackson received his Juris Doctor from Thomas Jefferson School of Law.
Kent Frobish, Assistant Counsel for Discipline

Kent L. Frobish is Assistant Counsel for Discipline for the Nebraska Supreme Court. His office investigates and prosecutes violations of the Nebraska Rules of Professional Conduct. Kent joined the Office of Counsel for Discipline in 1996. He has briefed and argued to the Nebraska Supreme Court over 80 lawyer disciplinary cases. Kent is a frequent speaker at CLE events and seminars. Prior to working with Counsel for Discipline Kent was in private civil practice in Lincoln. He received his J.D. from the University of Kansas in 1983.
Caselaw Update: Cases That Matter for State and Local Governments

Stephanie Caldwell
Nebraska Attorney General’s Office

June 1, 2018
University of Nebraska College of Law, Lincoln, NE
Caselaw Update

CASES THAT MATTER FOR STATE AND LOCAL GOVERNMENTS

Stephanie Caldwell
Nebraska Attorney General's Office

Decisions Involving Public Records Requests

- Aksamit Resource Mgmt. v. Nebraska Public Power Dist., S-17-333
- State of Nebraska ex rel. Les W. Veskm, M.D. v. Corey Steel, S-16-118
- Steckelberg v. Nebraska State Patrol, S-15-879
- State ex rel. Unger v. State, S-15-808

Aksamit
- Proprietary or commercial information

Veskm
- Judicial deliberate privilege

Steckelberg
- Personnel record exemption

Unger
- Disclosure of PRs
Farmers and farm-management customers of grain warehouse that failed (PEI) and closed brought action under STCA
PSC performed compliance reviews of PEI
2014, PSC terminated PEI’s grain warehouse & grain dealer licenses
Appellants filed claim against PSC alleging their losses resulted from PSC’s negligent failure to perform its obligations under Nebraska law

- Neb. Rev. Stat. § 81-8,219
- STCA Exceptions (14)
- Limited waiver of immunity
Amend v. Nebraska Public Service Commission
Nebraska Supreme Court, S-16-0698
January 12, 2018

• Neb. Rev. Stat. § 81-8,219(8)

• any claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order.

HOLDING:

• Appellants’ negligence claims are grounded in a state agency’s alleged failure to suspend or revoke a license and that the Legislature has preserved sovereign immunity for such conduct.

Kisela v. Hughes
United States Supreme Court
Opinion: April 2, 2018

• Civil Case
• 42 U.S.C. § 1983
• Qualified Immunity
Police officers responded to report woman was engaging in erratic behavior with a knife.

Upon arrival, officers saw Hughes holding a large kitchen knife in confrontation with another woman.

2 commands to drop knife.

4 shots fired.

Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Reasonableness is judged against the backdrop of the law at the time of the conduct.

Case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.

Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.
Keela v. Hughes
United States Supreme Court
Opinion: April 2, 2018

• HOLDING: “This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment”

• Controversial Dissent by Justices Sotomayor & Ginsburg
Tips & Tools for Managing Government Employee Performance Issues

Jennifer A Huxoll
Nebraska Attorney General’s Office

June 1, 2018
University of Nebraska College of Law, Lincoln, NE
MANAGING GOVERNMENT EMPLOYEE PERFORMANCE: TIPS AND TOOLS

So many Laws, so little time...

- ADA - Disability
- ADEA - Age
- FMLA - Serious Medical Condition
- PDA - Pregnancy
- Title VII - Race, Sex, Color, Religion, National Origin
- Section 1983 - Violations of Constitutionally Protected Rights (Equal Protection, Due Process)
- Nebraska Fair Employment Practices Act (FEPA) - Race, Color, Religion, Sex, Disability, Marital Status, or National Origin
- Veterans and Service Members
- National Labor Relations Act
- And, and, and.....

What’s a manager to do?

Typical starting point:

- We tend to approach performance issues by starting at the end.
- We list all the reasons why we “can’t” or “shouldn’t” act.
- Tend to kick the can down the road, and “plan to deal with it” later.
- Common Examples:
  - We might be sued if we take action
  - Employee has been doing this for years and no one has dealt with it
  - Employee is historically unpleasant when approached about performance issues
  - I don’t know how to do this/I’ll figure it out later/It’s not so bad/I can live with it
Flip the Script

Recommended alternative:

- Start by framing the performance issue and working forward.
- Accept you have two choices:
  1) Be unhappy with the performance issue and LIVE with it OR
  2) Be unhappy with the performance issue BUT DEAL with it

TIP: Only choice #2 moves you forward.

“Red Flag” Moments

- When potentially discriminatory conduct masquerades as a performance issue
- Common theme: Performance wasn’t an issue before. Why now?
- Examples: “He/She was a good employee until ….”
  - She started missing work all the time for doctor appointments (FMLA/ADA?)
  - He started taking a lot of time off work to take his wife to the doctor (FMLA?)
  - She got pregnant/had kids (Sex discrimination, Pregnancy?)
  - He joined that new “church” (Religious discrimination?)
  - She got all “sensitive” about everything (Sex, race, national origin?)
  - He couldn’t take a joke anymore (Sex, race, national origin?)
  - She joined the military (Protected military/veteran?)
  - He started organizing everyone to ask for more money (Labor Relations?)
  - She got a new (younger) supervisor (Age?)

“Red Flag” Moments (cont.)

Sneaky “Red Flag” moments:

- Version of “He/She was a good employee until…” but harder to catch.
- Supervisor has noticed the performance issue, but doesn’t make the connection to the underlying, potentially protected issue.
- Examples:
  - An undisclosed ADA or FMLA covered medical condition begins impacting performance (the employee hasn’t shared the medical issue)
  - Sexual/racial/national origin/religious/etc. harassment occurring outside the view of the supervisor but begins impacting performance
  - You might hear things such as:
    - “It’s like she’s no longer committed to being part of the team”
    - “He used to be on time, but in the last couple months he’s late all the time
    - “She used to be so reliable, but lately she’s been missing a lot of deadlines”
What’s a manager to do?

• Does a red flag moment mean you are stuck—unable to move forward on performance?
• Not necessarily.
• Recommendation:
  • Expand your inquiry to make sure you fully understand the dynamic in play.
  • Perform additional investigation before moving forward on performance.
  • Gut check. Does it feel like you are proceeding in good faith?
  • Call an expert—this might be a good time to contact an attorney who specializes in Employment Law.

TIP: You may end up disciplining someone OTHER than the person you were originally considering, and that’s ok. Your goal is to address performance issues that are impacting your team, however they shake out.

Step 1: Understanding the Issue

• DO:
  • Schedule 30 minutes on your calendar to organize your thoughts.
  • Make a list:
    • Go to “30,000 feet” and get out of the weeds.
    • How would you see the performance issue?
    • Write down the performance issue(s), in YOUR own words.
    • Explore the details:
      • What did you notice the issue(s)?
      • How often is it creating an issue for you? For your team?
      • Is it affecting morale on your team?
      • Is it affecting productivity?
      • Are you dealing with everyone on the team who has this issue, or just this individual?

TIP: This exercise is highly recommended. It helps you get to the root of the performance issue, and also helps you identify red flag issues.

Step 1: Understanding the issue (cont.)

• Next: take your concept of the performance issue and translate it into a more formal “performance issue.”

• For example, would you consider the issue to be:
  • Insubordination
  • Failure to maintain appropriate relationships with co-workers/clients
  • Inefficiency/reliability in the performance of assigned work
  • Failure to follow applicable work rules, policies, procedures

• Resources to assist you include:
  • The employee’s job description
  • Formal Handbooks
  • Labor Contracts
  • Formal Rules and Regulations
  • Formal Policies and Procedures
  • Prior directives given by you or others
Step 1: Understanding the issue (cont.)

- Examples from State of NE, Classified System Personnel Rules and Regulations (2006), Chapter 14, Section 003:
  - 003.03 – Inefficiency, incompetence or negligence in the performance of duties.
  - 003.10 – Failure to maintain satisfactory working relationships with the public or other employees.
  - 003.15 – Acts or conduct (on or off the job) which adversely affects the employee's performance and/or the employing agency's performance or function.
  - 003.16 – Workplace harassment based, in whole or in part, on race, color, sex, religion, age, disability or sexual orientation, which manifests itself in the form of unwelcome sexual advances, requests for sexual favors, verbal or physical conduct of a sexual nature.

  \[\text{NOTE: the above only officially apply to State Rules covered employees, but are offered as a tool to help you formalize your thoughts.}\]

Step 2: Communicating the issue

- Now you’re ready to communicate with the Employee to address the problem.

  - Reminder: Don’t begin at the end (i.e."We need to fire")

  - Formal Discipline may not be your only option.
    - Your primary goal is to improve performance.
    - Like Supervisors, most employees wish to avoid the unpleasantness of formal discipline.
    - Firing/Replacement is expensive and time-consuming.

  - Never underestimate the power of communication.

Step 2: Communicating the issue (cont.)

- Level 1: TALK.
  - You’ve written down your thoughts to define the issue; next, have a conversation with the employee about your concerns and expectations.
  - Concepts:
    - "Perhaps we have had a misunderstanding..."
    - "I want to be clear about my expectations for performance..."
  - Goal is a meeting of the minds and improvement of performance.
  - Follow up with an email summarizing the concerns you discussed.
  - Ask for an email in reply, confirming the employee’s understanding.

  \[\text{TIP: The email serves as documentation the employee was given a fair opportunity to address a concern, should you later need to move to discipline.}\]
Step 2: Communicating the issue (cont.)

• Level 2: Written “Performance Expectations” or “Performance Plans”
  • In format of a “Memorandum” to the Employee from the Supervisor
  • Different from “Performance Review”; Expectations/Plans identify specific problems and proposed solutions, rather than addressing overall performance
  • Goal is still a meeting of the minds/improvement of performance, so watch your tone.
  • Concepts: “There’s been a problem with performance…”
  “Your job responsibilities include…”
  “It is expected that you…”
  • Often signed by the Employee and the Supervisor, and kept by the Supervisor with a copy to the Employee
  • Not considered formal discipline, and in State government, not grievable

Step 2: Communicating the issue (cont.)

(Performance Expectations, cont.)

• Key parts of a Performance Expectation/Plan:
  • Identify the issues and provide specifics where possible.
  • Identify the reason it has become an issue.
  • Identify the expectation.
  • Outline the plan for improvement.

• Documentation tips:
  • Employee’s signature is encouraged, but not required.
  • If not signing, document delivery of the plan by email and ask the employee to confirm receipt by reply.
  • Again, the Performance Expectation/Plan will serve as documentation, should you later need to move to discipline.

Step 2: Communicating the issue (cont.)

• Level 3+: Performance “Reviews”
  • Different from Performance Expectations/Performance Plans.
  • Performance Reviews generally consider an employee’s overall performance.
  • Often analyze performance using pre-populated fields and goals that may not fit your performance issue.
  • They are also unappreciated by Managers and Employees alike, and can become an ineffective/inaccurate representation of an employee’s performance issues.
  • Many entities are updating their Performance Review tools, and some of the new tools are much more flexible.
  • BE MINDFUL - If not taken seriously, Performance Reviews can become a problem when/if you need to progress to formal Disciplinary Action.
  • “Meets or Exceeds Expectations” across the board - WHAT!!!!!!
  • Meet Exhibit “A”
  • TIP: Be sure to find a way to document your performance issue during Performance Reviews, even if you have pre-populated fields and questions. If necessary, attach a Performance Plan
**Step 2: Communicating the issue (cont.)**

- **Level 3: Formal Discipline**
  - Numerous different frameworks for discipline within governmental entities. Due to complexity, this presentation can only address common themes/concepts in Discipline.
  - Most common options for Discipline:
    - Written Warning, Probation, Probation + Suspension, Termination.
    - Also consider referrals to EAP, Anger Management, Internal/External Training, when appropriate.
    - TIP: If an external program external occurs, provide reasonable but firm timelines for completion, and require as a term of Discipline that the Employee provide documentation of completion.
  - Often, frameworks make some reference to the concept of “progressive” discipline.
  - BUT, Progression is generally not a firm requirement.
  - For example, can skip Written Warning and go right to Probation or Termination if conduct and circumstance warrant.
  
  (*State employees, see NAPE/AFSCME Labor Contract, Article 10, or State Personnel Rules, Ch. 14)

**Step 3: Understand your process**

- If you’re considering formal discipline, you must know the applicable Rules, Contracts or Handbook under which you’ll be required to proceed:
  - Is this employee subject to:
    - A formal Handbook
    - A Labor Contract
    - Formally adopted Rules and Regulations (Ex: State Classified System Personnel Rules)
    - Or “at will”/discretionary employee

**Step 3: Understand your process (cont.)**

- Most government entities provide a three-step approach to Disciplinary Action:
  - Step 1: Provide a written statement of the disciplinary issue, including sufficient information that the Employee may understand the allegations against him/her.
  - Step 2: Provide for a meeting to review the allegations with the Employee to give him/her an opportunity to be heard.
  - Step 3: Impose Discipline via a written Disciplinary Action document which includes a reiteration of the allegations which were substantiated, and an explanation of the consequence, i.e. Written Warning, Probation, Probation+, Termination.
Step 3: Understand your process (cont.)

• Most governmental positions are protected by minimum due process rights to grieve Disciplinary Actions imposed.

• Example: STATE Employees
  - NAPE/AFSCME Labor Contract (July 1, 2017 to June 30, 2019), Article 4, Section 4.5 et seq.
  - Step 1: Review by Agency Administrator; Step 2: mini-hearing, followed by choice of arbitration or hearing before State Personnel Board (SPB); Step 3: Arbitration/Thirdparty-neutral reception; SPB decision/appellate to District Court (with limited exception).

• State of NE, Classified System Personnel Rules and Regulations (2006), Ch. 15, Section 008 et seq.
  - Step 1: Review by Supervisor; Step 2: Review by Agency Administrator; Step 3: Hearing before State Personnel Board; SPB decisions are appealable to District Court (de novo on the record).

• State Discretionary Employees are not afforded the same rights in Discipline, but their situations may still require due process analysis. See Myers v. NEOC, 255 Neb. 156 (1998).

Contact Information

Jennifer Huxoll
Assistant Attorney General
Nebr. Dept. of Transportation (NDOT)
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(402)479-4611
Jennifer.Huxoll@Nebraska.gov
Memo

To: Employee Joe
From: Supervisor Jane
cc: (As needed to upper level staff)
Date: May 19, 2018
Re: Performance Expectations and Improvement Plan

The purpose of this memo is to communicate to you my performance expectations, and to establish a plan for dealing with concerns which have arisen.

Recently, it has come to my attention that you have failed to meet deadlines provided to you. Specifically, you were to provide me with a report on Project X by May 10, 2018, and on Project Y by May 15, 2018. It is now May 19th and you have not provided the reports, and have not come to me to request an extension or to provide an explanation. Unfortunately, this also happened in April, 2018, with regard to Project J, which we discussed via email on April 30, 2018.

I would like to remind you that your timely delivery of reports to supervisory staff is an essential function of your position, and is set out in your job descriptions. Timely delivery of reports is a matter of significant importance to me. If you fail to meet your deadline, I am often unable to meet my responsibilities to take that information to the rest of my management team for consideration and decision-making. In fact, it has been necessary for me to reschedule meetings due to the fact that you have not provided me with reports in a timely manner. I am hopeful that by communicating my expectations to you, and encouraging better communication in the future, we can avoid further issues of this nature.

From this point forward, you will be expected to:

1. Communicate with me via email at the time each of your projects is assigned (or in the next 5 days for projects already assigned) to set a timeline for delivery, with identified goals and dates for completion.
2. One week prior to a deadline for a Project Report, provide me with an email explaining where you are at towards meeting your identified goals and meeting completion dates, as well as identifying whether you will need an extension. If you will require an extension, please be prepared to provide a valid reason why.
3. Ask for help early if questions or issues arise, and bring it to my attention if a major issue arises which could jeopardize your timeline for meeting a deadline. Please schedule a time to speak with me, if you are having a difficult time catching me in my office to discuss a problem.
4. Deliver all assigned Project Reports on time by the established (or extended) deadline.
If you would like to discuss this matter further, or have additional ideas for improving your ability to deliver project reports on time, please let me know. The above-noted performance plan is effective immediately.

/s/ __________________________ / s/ __________________________
Supervisor Jane          Employee Joe

Commented [JH6]: Encouraged to have the employee sign, but it is not required. It demonstrates the communication was received and understood.
How to Win Employment Lawsuits Before They Are Filed

Pam Bourne
Woods & Aitken, LLP

June 1, 2018
University of Nebraska College of Law, Lincoln, NE
PROACTIVE HIRING STRATEGIES

- Screen applications
  - Is the application filled out completely?
  - Why did the applicant leave previous jobs?
  - Has the applicant changed jobs frequently?
  - Did the applicant provide appropriate supervisory references?

- Develop hiring criteria
- Evaluate all applicants’ qualifications against the hiring criteria
  - Check the box
PROACTIVE HIRING STRATEGIES

- Thoroughly explain and document performance expectations
  - Some potential bad hires will self-select out

- Ensure supervising manager (if different than Elected Official) is involved in the hiring process

- Prepare for all interviews
  - Focus not only on technical skill set but also behavior skill set
  - For example:
    - Describe a situation where you had a conflict with another employee in the workplace.
    - Give me an example of a mistake you made on the job or unacceptable performance on your part and what you did about it.
    - What three things motivate you the most to do the best job?
PROACTIVE HIRING STRATEGIES

- Check references and request a reference liability waiver
  - Don’t ask any questions that you are prohibited from asking the applicant during the interview

PROACTIVE HIRING STRATEGIES

- Ensure hiring forms are current:
  - Example:
    - New Form I-9 became mandatory on September 18, 2017
    - Don’t ask for Social Security number on Employment Application

PROACTIVE HIRING STRATEGIES

- Ensure required workplace notices are updated
  - Example:
    - FMLA policy
    - EEO is the Law poster
    - FMLA poster
    - FLSA poster
    - E-Verify poster
PROACTIVE DISCIPLINE STRATEGIES

- Ensure your employee handbook is up to date and reflects reality
- Among others, it is strongly recommended that each handbook contain the following policies:
  1. “at-will” policy
  2. EEO policy
  3. anti-harassment policy
  4. reasonable accommodation policy
  5. workplace violence prevention policy

- Does your discipline and termination policy reflect accurate expectations of employee behavior?
- Do supervisors lead by example?
- Did the employee sign an acknowledgement form?
PROACTIVE DISCIPLINE STRATEGIES

Communicate effectively with employees to prevent surprises that often lead to claims
  • Give clear expectations
  • Provide feedback
Ensure fairness

PROACTIVE DISCIPLINE STRATEGIES

1. Did the employee know what was expected?
2. Was the employee put on notice of the consequences for not meeting expectations?
3. Was the employee given a reasonable period of time to meet those expectations?
4. Did the employer adequately evaluate the situation (by evaluating the performance against expectations and by appropriate investigation)?

PROACTIVE DISCIPLINE STRATEGIES

5. Did the employer communicate deficiencies to the employee?
6. Did the employer give the employee an “opportunity to explain his/her position” before consequences were imposed?
7. Were the consequences imposed appropriate to the circumstances (did the punishment fit the crime)?
PROACTIVE DISCIPLINE STRATEGIES

- Consistency is key!
  1. Is the adverse action consistent with the employer’s own policies?
  2. Is the adverse action consistent with the other documentation?
  3. Is the adverse action consistent with past practices (or are there legitimate business reasons for deviating from past practice)?
  4. Is the adverse action consistent with how other similar-situated employees have been treated in the past?
  5. Is the adverse action consistent with the employment laws?

PROACTIVE DISCIPLINE STRATEGIES

- Document, Document, Document!
  - Ensure your documentation is:
    - Accurate
    - Specific
    - Objective
    - Timely
    - Legible
    - Signed and Dated

Document not only the bad, but also the good. It adds credibility and undermines discrimination allegations.

PROACTIVE DISCIPLINE STRATEGIES

- Conduct supervisor annual training on harassment, discrimination, and retaliation issues
  - Sign in sheet
PROACTIVE DISCIPLINE STRATEGIES

- When an employee engages in protected activity:
  - Remind supervisors of their anti-retaliation obligations
  - Remind employees about the anti-retaliation policy and complaint procedure

- Conduct thorough and objective investigations
  - Bring in an outside investigator when necessary.
  - Be willing to acknowledge that what an employee says may be true.
  - Always get both sides of the story. Never assume you know all the facts.

- Verify whether the employee has engaged in any protected activity within the last year.
- Evaluate the risk of a potential retaliation claim.
What is protected activity?
For example:
- filing or being a witness in an EEO charge, complaint, investigation, or lawsuit
- communicating with a supervisor or manager about employment discrimination, including harassment
- answering questions during an employer investigation of alleged harassment
- refusing to follow orders that would result in discrimination
- resisting sexual advances, or intervening to protect others
- requesting accommodation of a disability or for a religious practice
- asking managers or co-workers about salary information to uncover potentially discriminatory wages

Engaging in protected activity does not shield an employee for discipline or discharge. However, discipline or discharge cannot be motivated by retaliatory reasons.

For example, depending on the facts, it could be retaliation if an employer acts because of an employee’s protected activity to:
- reprimand the employee or give a performance evaluation that is lower than it should be
- transfer the employee to a less desirable position
- engage in verbal or physical abuse
- threaten to make, or actually make reports to authorities (such as reporting immigration status or contacting the police)
PROACTIVE TERMINATION STRATEGIES

- increase scrutiny
- spread false rumors, treat a family member negatively (for example, cancel a contract with the person’s spouse) or
- make the person’s work more difficult (for example, punishing an employee for an EEO complaint by purposefully changing his work schedule to conflict with family responsibilities)

PROACTIVE TERMINATION STRATEGIES

- Ensure that progressive discipline and documentation has been done or that there is a very good reason for not being followed
  - Example: Violence in the workplace

PROACTIVE TERMINATION STRATEGIES

- Ensure that your prior documentation is consistent with your communicated reason for discharge.
- One of the most difficult situations to defend in litigation is when an employee is terminated for poor performance and their recent performance reviews are better than average (or better than similar employees who were not terminated).
PROACTIVE TERMINATION STRATEGIES

Ensure consistency!
• If one employee is terminated for making sexually explicit comments to a co-worker, another employee who later conducts himself or herself in a similar fashion should likewise be terminated.

PROACTIVE TERMINATION STRATEGIES

Be honest when discharging an employee
• Don’t say “layoff” when it is truly a discharge!

“We have decided to lay you off as we no longer need your position”

PROACTIVE TERMINATION STRATEGIES

Don’t rely solely on the “at-will” status!
PROACTIVE TERMINATION STRATEGIES

- Have empathy! Treating people with respect, even on their way out, goes a long way to avoiding lawsuits.

PROACTIVE TERMINATION STRATEGIES

- Terminate employees effectively:
  - Consider allowing employees to look for alternative work while they still work for you.
  - Consider a separation agreement to limit future potential liability. Much easier to pay an employee a few weeks’ severance, than to deal with a timely and costly lawsuit.

PROACTIVE TERMINATION STRATEGIES

- Document steps you took to help to correct an employee’s deficiencies and/or to develop necessary skills (technical or behavior)
  - Example:
    - Additional OTI training
    - Third party training
### PROACTIVE TERMINATION STRATEGIES

- **Consider conducting exit interviews**
  - An exit interview is an invaluable tool for determining the cause for staff turnover, identifying and correcting potential compliance problems, and refuting improper conduct allegations.
  - Explore all the reasons that prompted the employee’s departure.
  - Explore whether the employee observed or witnessed anything they believe to be inappropriate, unethical or illegal.

### PROACTIVE COMPENSATION STRATEGIES

- **Conduct a wage and hour audit**
  - Ensure that:
    - All employees are properly classified.
    - All nonexempt employees are receiving proper compensation for hours worked.
    - All nonexempt employees record their work hours.

### PROACTIVE STRATEGIES FOR MAINTAINING A HARASSMENT-FREE WORKPLACE
# MeToo Movement
- Harvey Weinstein
- "Silence Breakers" by Time Magazine
- Time's Up defense fund
- Matt Lauer
- Judges Chambers
- Virtually Every Workplace

**PROACTIVE STRATEGIES FOR MAINTAINING A HARASSMENT-FREE WORKPLACE**

Sexual harassment in the workplace often goes unreported

What has changed?
- Increased media focus
- Victims are willing to report harassment
- Companies are taking complaints more seriously to avoid media exposure, liability and legal fees
PROACTIVE STRATEGIES FOR MAINTAINING A HARASSMENT-FREE WORKPLACE

- EEOC best practices for preventing and addressing workplace harassment
  - Committed leadership;
  - A strong and comprehensive anti-harassment policy;
  - A trusted and accessible complaint system; and
  - Regular and effective anti-harassment training.

QUESTIONS?

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Sexual Harassment, Discrimination and Retaliation: A Primer for Public Employers

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Workplace Discrimination, Harassment and Retaliation

David J. Kramer
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Why are we discussing this?

Three good questions/answers to consider:
1. What does it take to be a great workplace?
   Many things, but professionalism is a must.
2. What kind of environment do we need to get there?
   An environment which includes respect and dignity for
   all employees in the organization at all times.
3. What is an impediment to creating that environment?
   Today, we will discuss discrimination, harassment and
   retaliation.

Background

• Workplace discrimination, harassment and retaliation remains persistent
  problem in the workplace
• Too often goes unreported
• Compelling case for stopping and prevent discrimination, harassment
  and retaliation

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Goals

- Overview of laws that make discrimination, harassment and retaliation unlawful
- Review the forms and types of discrimination, harassment and retaliation
- Understand the consequences of discrimination, harassment and retaliation
- Review sample policy against discrimination, harassment and retaliation
- Discuss what employees can do

Key Points About Discrimination, Harassment and Retaliation

1. It has no place in your workplaces and should be prohibited by policy
2. Employees should never accept it from others
3. Employees should never want to be seen as a harasser
4. It isn’t enough to ignore bad conduct by others – employees need to report it

Laws Prohibiting Discrimination, Harassment and Retaliation

- Title VII of Civil Rights Act, prohibits “illegal discrimination” including harassment, if based on race, color, religion, sex, national origin, pregnancy
- Age Discrimination in Employment Act, protects individuals who are 40 years of age or older
Laws Prohibiting Discrimination, Harassment and Retaliation

- **Americans with Disabilities Act**, prohibits discrimination against qualified individuals with disabilities
- **Genetic Information Nondiscrimination Act**, prohibits discrimination based on genetic information, including family medical history

Laws Prohibiting Discrimination, Harassment and Retaliation

- **Title IX**, prohibits discrimination on the basis of sex in any federally funded education program or activity
- **Nebraska Fair Employment Practice Act**, prohibits discrimination on the basis of race, sex, religion, nationality, pregnancy, disability, marital status
- **Nebraska Age Discrimination in Employment Act**, prohibits discrimination on the basis of age

Types of Workplace Harassment

- **Quid Pro Quo** – a form of sex harassment - applies where one employee (typically a manager) offers some job-related benefit in exchange for sexual-related favors
- **Hostile Environment** – a form of harassment that applies not only to sex - but to all protected classes (sex, race, national origin, religion, disability, age, etc.) - by far, the most prevalent form of unlawful harassment
**What Can Constitute Harassment?**

- Hostile environment sex harassment can take many forms, including:
  - Sexual touching, grabbing, caressing
  - Frequent non-sexual physical contact
  - Staring, leering, taunting
  - Talking about sex or telling “dirty” jokes
  - Repeated requests for dates (whether in person, by text, e-mail, or phone)

**What Can Constitute Harassment? (cont.)**

- Hostile environment harassment based on personal characteristics (sex or otherwise) can include:
  - Making/forwarding jokes, pictures or cartoons
  - Commenting about others’ personal characteristics within earshot of others
  - Text messages, Facebook posts, etc. about others’ personal characteristics, even if done outside of work hours
  - Persistent unwanted attention, such as teasing

**What Can Constitute Harassment? (cont.)**

- Using terms with a personal characteristic connotation (e.g., bitch, boy, geezer, faggot, cracker, pussy, cripple, queer, old man/woman)
- Using terms with a cultural connotation (e.g., rice eater, camel jockey, taco bender, Buckwheat)
- Potentially, any action or comment if the purpose or effect may be to intimidate, embarrass, or denigrate on the basis of a personal/cultural trait
The Bottom Line

- The perpetrator’s harmless intent makes absolutely no difference—the issue is whether a reasonable person in the victim’s position would find the behavior unwelcome.

Who Can Be Accused of Harassment?

- Supervisors
- Subordinates
- Co-workers
- Clients/Custumers/Vendors/Visitors
- Students

Who Can Experience Harassment?

- Direct targets of harassment
- Bystanders/Witnesses to harassment
- Employees
- Men/Women
- Supervisors/Managers
What Are Negative Consequences of Harassment?
- Impact on the victim
  - Creates uncomfortable work environment
  - Harms physical health
  - Harms psychological health
  - Adversely effects job performance
  - Lowers job satisfaction

What Are Negative Consequences of Harassment?
- Impact on the harasser
  - Harms professional reputation
  - Harms personal reputation
  - Jeopardizes employment status
  - Leads to other negative personal consequences (including liability)

What Are Negative Consequences of Harassment?
- Impact on the employer
  - Reduces productivity
  - Creates unprofessional work environment
  - May result in damage to your reputation
  - Wastes significant resources
Overarching Goal

• Create a culture of dignity and respect where:
  – every supervisor accepts and openly supports the employer’s anti-discrimination and anti-harassment policies; and
  – every employee recognizes behavior that they see which might rise to the level of discrimination or harassment and is willing to report it, without fear of retaliation.

Our Duty as an Employer

• Setting the right tone
• Treating others with respect and dignity
• Knowing your policies
• Responding properly to complaints
• Assisting with investigations of misconduct
• Not retaliating

Setting the Right Tone

• Setting the right tone involves —
  – Avoiding conduct that may lead to liability;
  – Serving as a role model for other employees;
  – Being sensitive to the potential effects of power disparity;
  – Keeping in mind that actions matter more than intentions; and
  – Abiding by appropriate workplace behavior — even at off-site functions.
Know Your Policies!

- Employer does not tolerate any form of illegal or objectionable harassment
- An employee may inform an individual if he or she finds that person's conduct unwelcome, offensive, in poor taste or inappropriate
- An employee who has experienced or witnessed harassment must immediately notify his or her Supervisor or Human Resources

Sample Policy

Sample Policy (continued)

Sample Policy

Sample Policy (continued)
Sample Policy (continued)

promotes retaliation, intimidation, threats, coercion, or discrimination against any person for opposing discrimination, including harassment, or for participating in the discrimination complaint process or making a complaint, testifying, assisting, or participating in any manner, in an investigation, proceeding, or hearing. Retaliation is a form of discrimination.

Sample Policy (continued)

- Grievance Procedure
- Remedies
- Confidentiality
- Training
- Designated Compliance Administrators
- Preventive Measures

Title IX

- Separate Policy advised!
- Includes a separate grievance process
- Title IX Officer is specifically identified
What is Retaliation?

• When the employer discriminates against the employee for exercising his or her rights.
  – Unfavorable personnel action

Illegal vs. Inappropriate

• Employer may impose discipline for harassment or discrimination regardless of whether the conduct amounts to a violation of the law

Summary

• Discrimination, Harassment and Retaliation can be against anyone, in any protected class
• Train your managers and workforce!
  – Managers are on the front lines, and are held to the highest standard
Conclusion

• How management responds to inappropriate conduct will be considered the employer’s response
  – Address inappropriate behavior immediately and/or report it to HR
  – Employer’s responsibilities are the same regardless of who acts inappropriately

Conclusion (continued)

• Not taking action can –
  – Leave the impression that the employer condones such behavior
  – Foster the view that making a complaint would be futile
  – Subjects the employer to litigation and liability

Ask yourself this:

• Will the conduct be considered acceptable, funny, or cute when repeated in front of:
  – Your family and friends?
  – Your children?
  – Senior management?
  – A judge and jury in court?

  Think about it.
Workplace Harassment: Basics-to-Best Practices in the #MeToo Era

A. Introduction

According to the U.S. Equal Employment Opportunity Commission ("EEOC"), workplace harassment remains a persistent problem. Almost fully one-third of the discrimination charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment. This includes, among other things, charges of unlawful harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion.

Workplace harassment often goes unreported. Instead, those who experience harassment avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response is to report the harassment or file a legal complaint. Roughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. Employees who experience harassment often fail to report the harassing behavior or file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.

But things are changing in the #MeToo era. More complaints are being made. Harassment claims are on the rise with the EEOC and state/local discrimination agencies. In Fiscal Year 2017, over 84,000 discrimination complaints were filed with the EEOC and 26,978 alleged harassment complaints. More specifically, 12,428 alleged sex harassment. Of those harassment complaints, 7% settled for $125.5 million (and this does not count cases which bypassed the EEOC and went to court). The majority (68%) were found to have no merit. Interestingly, 16.5% of the sex harassment claims were filed by men.

B. Laws Prohibiting Workplace Harassment

The U.S. Supreme Court held in the landmark case of Meritor Savings Bank v. Vinson (1986) that workplace harassment was an actionable form of discrimination. Therefore, the laws prohibiting harassment are the employment anti-discrimination laws:

- Title VII of the Civil Rights Act of 1964 (race, sex, religion, national origin, pregnancy);
- Age Discrimination in Employment Act; and
- Americans with Disabilities Act.

State laws and local ordinances prohibiting employment discrimination likewise serve as the basis for discrimination claims.
C. Types of Workplace Harassment

Title VII does not proscribe all conduct of a sexual nature in the workplace. Thus it is crucial to clearly define sexual harassment: Only unwelcome sexual conduct that is a term or condition of employment constitutes a violation. 29 C.F.R. § 1604.11(a).

The EEOC's Guidelines define two types of sexual harassment: "quid pro quo" and "hostile environment":

1. "Quid pro quo harassment" occurs when "submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting such individual," 29 C.F.R § 1604.11(a)(2). It applies where one employee (typically a supervisor) offers some job-related benefit, or offers to refrain from taking some adverse employment action, in exchange for sexual-related favors.

2. "Hostile environment" harassment applies not only to sex, but to all protected classes (sex, race, color, national origin, religion, disability, age, etc.). By far, it is the most prevalent form of unlawful harassment. A claim of hostile environment harassment is established by proving the victim was subjected to conduct on the basis of protected class status that:
   - Was sufficiently severe or pervasive;
   - Was unwelcome, both objectively to a reasonable person in the same protected class and subjectively to the victim; and
   - Negatively affected the terms, conditions or privileges of the victim's work.

Examples of hostile environment sex harassment can include unwelcome:

- Sexual touching, grabbing, caressing;
- Talking about sex, including fantasies, history, or sexual preferences;
- Staring, leering, or commenting about anatomy;
- Telling "dirty" jokes;
- Repeated requests for dates;
- Sexual gestures (hand or body), throwing kisses;
- Frequent non-sexual physical contact; and
- Taunting someone because of his or her gender.

Hostile environment harassment based on protected class trait (sex or otherwise) can include:
• Making/forwarding jokes, pictures or cartoons
• Using slang or making offensive comments about someone's trait
• Social media posts about someone's trait, even if done outside of work hours
• Persistent unwanted attention, including pranks because of someone’s trait
• Shunning, ignoring, excluding, or treating someone differently based on their trait

Notably, the perpetrator's "harmless intent" makes absolutely no difference. The issue is whether a "reasonable person in the victim’s position" would find the behavior unwelcome.

Every employee is subject to being harassed based on protected class status as every employee is in at least two protected classes – gender and race. Potential victims include direct targets of harassment, bystanders/witnesses to harassment, subordinates, and supervisors. Perpetrators of harassment include supervisors, co-workers, clients/customers, vendors, and visitors.

D. Employer Liability for Workplace Harassment

If the harassment is committed by a non-supervisor (e.g., a coworker, client/customer, vendor, or visitor), the employer is liable if it knew or should have known of the harassment and failed to take prompt, effective remedial action to stop it.

If the harassment is committed by a supervisor, the initial determination under the court's analysis is whether the supervisor's conduct constituted a “tangible” employment action. “Tangible” employment includes firing, failing to promote, reassigning with significantly different responsibilities, making a decision causing a significant change in an employee's benefits, etc. If so, then the employer will be vicariously liable and no affirmative defense will be available. On the other hand, if no “tangible” employment action occurred, then the employer can avoid liability by establishing a two-pronged affirmative defense in which it proves that:

• It used reasonable care to prevent and promptly correct any harassing behavior, and
• The employee unreasonably failed to use the means available to correct/prevent the harassment.

E. Consequences of Workplace Harassment

Workplace harassment not only negatively effects the victim, but also the employer and the harasser:

- Impact on the victim
  - Creates an uncomfortable working environment
  - Harms mental and/or physical health
  - Reduces job satisfaction
  - Impairs job performance
- Impact on the employer
  - Creates unprofessional work environment
  - Reduces productivity
  - Lowers morale and increases turnover
  - Wastes resources
  - Damage to reputation
- Impact on the harasser
  - Damage to reputation
  - Jeopardizes employment status
  - Damages friendships
  - Damages family relationships
  - Potential civil liability to the victim
  - Potential criminal liability if physical contact involved

Therefore, a compelling business case exists for stopping and preventing harassment. When employers consider the costs of workplace harassment, they often focus on legal costs, and with good reason. But these direct costs are just the tip of the iceberg. Workplace harassment first and foremost comes at a steep cost to those who suffer it, as they experience mental, physical, and economic harm. Beyond that, workplace harassment affects all workers, and its true cost includes decreased productivity, increased turnover, and reputational harm. All of this is a drag on performance – and the bottom-line.

F. Best Practices for Preventing and Addressing Harassment

According to a 2017 EEOC study, four core principles have proven effective in preventing and addressing harassment:

- Committed leadership/demonstrated accountability;
- Strong/comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.
1. **Leadership and Accountability**

   This is the cornerstone of a successful harassment prevention strategy. Leaders must clearly and frequently state that harassment is prohibited, allocate sufficient resources to effective harassment prevention, and actually enforce the harassment policy.

2. **Comprehensive and Effective Policy**

   A clear harassment policy that is regularly communicated to all employees is essential. The policy should:
   
   - Apply to employees at every level;
   - Prohibit harassment based on any legally-protected trait (better yet, any trait or characteristic whether legally protected or not);
   - Be easy to understand and include examples;
   - Describe the complaint procedures;
   - State that the employer will promptly, impartially, and thoroughly investigate complaints;
   - State that the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible, consistent with the need to conduct a thorough and impartial investigation;
   - State that the organization will take immediate and proportionate remedial action, up to termination of employment, if it determines that harassment has occurred; and
   - Prohibit retaliation, and state that individuals who report harassing conduct or participate in investigations will not be subjected to any form of retaliation.

3. **Trusted and accessible complaint procedures**

   An effective complaint system welcomes and encourages complaints. The procedures should be responsive to complaints by employees and by others on their behalf. The procedures should also provide multiple avenues of complaint, including an avenue to report complaints regarding supervisors and senior leaders without having to go to or through those individuals. It should also include processes to convey the resolution of the complaint to the complainant and the alleged harasser and, where appropriate, the remedial action taken.
4. **Effective Harassment Training**

A strong policy and an effective complaint system will not be successful if employees are unaware of the policy and complaint system. Therefore, effective harassment training is necessary.

An employer's harassment training must:

- Be championed by senior leaders;
- Be repeated and reinforced on a regular basis;
- Be provided to employees at every level;
- Be provided in a clear, easy to understand manner;
- Be conducted by qualified, live, interactive trainers;
- Describe prohibited harassment and give examples;
- Empower employees to say "stop," and bystanders to intervene and/or report;
- Explain the range of possible consequences for engaging in harassment;
- Encourage employees to report harassing conduct;
- Explain the complaint process;
- Assure employees that if they complain or participate in investigations they will not be subjected to retaliation; and
- Give employees the opportunity to ask questions about harassment, the policy, and options for addressing harassment.

G. **Other Tips for Employers**

Leaders in an organization must lead by example. They never taunt, intimidate, ridicule, or insult anyone based on a personal trait or characteristic, protected or not. They should be observant and listen, recognizing behaviors that could be perceived as harassing – and stopping them immediately. They should also provide an environment that welcomes feedback and encourages dialogue.

Employers should also share the following thoughts and suggestions with employees:

- Be sensitive to others;
- If unsure, don’t do it or say it;
- If you offend, apologize promptly and sincerely;
- You don’t need to taunt, intimidate, ridicule, or insult anyone else in order to have a relaxed and fun work environment;
- Ask yourself this:
- Will your conduct be considered acceptable, cute, or funny when repeated in front of:
o Senior management;
  o Your family and friends?; or
  o A judge and jury in a courtroom?
    ▪ Think about it.

H. **Conclusion: It’s On Us**

Harassment in the workplace will not stop on its own. It is on everyone in the workplace to be part of the fight to stop it. No one can be a complacent bystander and expect workplace cultures to change themselves. For this reason, employers should explore the launch of an "It’s on Us" campaign for their workplaces. Originally developed to reduce sexual violence in educational settings, the It’s on Us campaign is premised on the idea that students, faculty, and campus staff should be empowered to be part of the solution to sexual assault, and should be provided the tools and resources to prevent sexual assault as engaged bystanders. Launching a similar It’s on Us campaign in workplaces transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which both co-workers and supervisors all have roles to play in stopping harassment.
EEOC’s “Promising Practices for Preventing Harassment”

As many employers recognize, adopting proactive measures may prevent harassment from occurring. Employers implement a wide variety of creative and innovative approaches to prevent and correct harassment.

The Report of the Co-Chairs of EEOC's Select Task Force on the Study of Harassment in the Workplace ("Report") identified five core principles that have generally proven effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.

The Report includes checklists based on these principles to assist employers in preventing and responding to workplace harassment. The promising practices identified in this document are based primarily on these checklists. Although these practices are not legal requirements under federal employment discrimination laws, they may enhance employers' compliance efforts.

A. Leadership and Accountability

The cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture in which harassment is not tolerated. This commitment may be demonstrated by, among other things:

- Clearly, frequently, and unequivocally stating that harassment is prohibited;
- Incorporating enforcement of, and compliance with, the organization's harassment and other discrimination policies and procedures into the organization's operational framework;
- Allocating sufficient resources for effective harassment prevention strategies;
- Providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies;
- Allocating sufficient staff time for harassment prevention efforts;
- Assessing harassment risk factors and taking steps to minimize or eliminate those risks; and
Engaging organizational leadership in harassment prevention and correction efforts.

In particular, we recommend that senior leaders ensure that their organizations:

- Have a harassment policy that is comprehensive, easy to understand, and regularly communicated to all employees;
- Have a harassment complaint system that is fully resourced, is accessible to all employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees;
- Regularly and effectively train all employees about the harassment policy and complaint system;
- Regularly and effectively train supervisors and managers about how to prevent, recognize, and respond to objectionable conduct that, if left unchecked, may rise to the level of prohibited harassment;
- Acknowledge employees, supervisors, and managers, as appropriate, for creating and maintaining a culture in which harassment is not tolerated and promptly reporting, investigating, and resolving harassment complaints; and
- Impose discipline that is prompt, consistent, and proportionate to the severity of the harassment and/or related conduct, such as retaliation, when it determines that such conduct has occurred.

In addition, we recommend that senior leaders exercise appropriate oversight of the harassment policy, complaint system, training, and any related preventive and corrective efforts, which may include:

- Periodically evaluating the effectiveness of the organization's strategies to prevent and address harassment, including reviewing and discussing preventative measures, complaint data, and corrective action with appropriate personnel;
- Ensuring that concerns or complaints regarding the policy, complaint system, and/or training are addressed appropriately;
- Directing staff to periodically, and in different ways, test the complaint system to determine if complaints are received and addressed promptly and appropriately; and
- Ensuring that any necessary changes to the harassment policy, complaint system, training, or related policies, practices, and procedures are implemented and communicated to employees.

To maximize effectiveness, senior leaders could seek feedback about their anti-harassment efforts. For example, senior leaders could consider:
• Conducting anonymous employee surveys on a regular basis to assess whether harassment is occurring, or is perceived to be tolerated; and

• Partnering with researchers to evaluate the organization's harassment prevention strategies.

B. Comprehensive and Effective Harassment Policy

A comprehensive, clear harassment policy that is regularly communicated to all employees is an essential element of an effective harassment prevention strategy. A comprehensive harassment policy includes, for example:

• A statement that the policy applies to employees at every level of the organization, as well as to applicants, clients, customers, and other relevant individuals;

• An unequivocal statement that harassment based on, at a minimum, any legally protected characteristic is prohibited;

• An easy to understand description of prohibited conduct, including examples;

• A description of any processes for employees to informally share or obtain information about harassment without filing a complaint;

• A description of the organization's harassment complaint system, including multiple (if possible), easily accessible reporting avenues;

• A statement that employees are encouraged to report conduct that they believe may be prohibited harassment (or that, if left unchecked, may rise to the level of prohibited harassment), even if they are not sure that the conduct violates the policy;

• A statement that the employer will provide a prompt, impartial, and thorough investigation;

• A statement that the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible and permitted by law, consistent with a thorough and impartial investigation;

• A statement that employees are encouraged to respond to questions or to otherwise participate in investigations regarding alleged harassment;

• A statement that information obtained during an investigation will be kept confidential to the extent consistent with a thorough and impartial investigation and permitted by law;

• An assurance that the organization will take immediate and proportionate corrective action if it determines that harassment has occurred; and
• An unequivocal statement that retaliation is prohibited, and that individuals who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation.

In addition, effective written harassment policies are, for example:

• Written and communicated in a clear, easy to understand style and format;
• Translated into all languages commonly used by employees;
• Provided to employees upon hire and during harassment trainings, and posted centrally, such as on the company's internal website, in the company handbook, near employee time clocks, in employee break rooms, and in other commonly used areas or locations; and
• Periodically reviewed and updated as needed, and re-translated, disseminated to staff, and posted in central locations.

C. Effective and Accessible Harassment Complaint System

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

For example, an effective harassment complaint system:

• Is fully resourced, enabling the organization to respond promptly, thoroughly, and effectively to complaints;
• Is translated into all languages commonly used by employees;
• Provides multiple avenues of complaint, if possible, including an avenue to report complaints regarding senior leaders;
• Is responsive to complaints by employees and by other individuals on their behalf;
• May describe the information the organization requests from complainants, even if complainants cannot provide it all, including: the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment;
• May include voluntary alternative dispute resolution processes to facilitate communication and assist in preventing and addressing prohibited conduct, or conduct that could eventually rise to the level of prohibited conduct, early;
• Provides prompt, thorough, and neutral investigations;
• Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;

• Includes processes to determine whether alleged victims, individuals who report harassment, witnesses, and other relevant individuals are subjected to retaliation, and imposes sanctions on individuals responsible for retaliation;

• Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment; and

• Includes processes to convey the resolution of the complaint to the complainant and the alleged harasser and, where appropriate and consistent with relevant legal requirements, the preventative and corrective action taken.

We recommend that organizations ensure that the employees responsible for receiving, investigating, and resolving complaints or otherwise implementing the harassment complaint system, among other things:

• Are well-trained, objective, and neutral;

• Have the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;

• Take all questions, concerns, and complaints seriously, and respond promptly and appropriately;

• Create and maintain an environment in which employees feel comfortable reporting harassment to management;

• Understand and maintain the confidentiality associated with the complaint process; and

• Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

D. Effective Harassment Training

Leadership, accountability, and strong harassment policies and complaint systems are essential components of a successful harassment prevention strategy, but only if employees are aware of them. Regular, interactive, comprehensive training of all employees may help ensure that the workforce understands organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct.

Harassment training may be most effective if it is, among other things:
• Championed by senior leaders;
• Repeated and reinforced regularly;
• Provided to employees at every level and location of the organization;
• Provided in a clear, easy to understand style and format;
• Provided in all languages commonly used by employees;
• Tailored to the specific workplace and workforce;
• Conducted by qualified, live, interactive trainers, or, if live training is not feasible,
designed to include active engagement by participants; and
• Routinely evaluated by participants and revised as necessary.

In addition, harassment training may be most effective when it is tailored to the
organization and audience. Accordingly, when developing training, the daily experiences
and unique characteristics of the work, workforce, and workplace are important
considerations.

Effective harassment training for all employees includes, for example:
• Descriptions of prohibited harassment, as well as conduct that if left unchecked,
might rise to the level of prohibited harassment;
• Examples that are tailored to the specific workplace and workforce;
• Information about employees' rights and responsibilities if they experience,
observe, or become aware of conduct that they believe may be prohibited;
• Encouragement for employees to report harassing conduct;
• Explanations of the complaint process, as well as any voluntary alternative dispute
resolution processes;
• Explanations of the information that may be requested during an investigation,
including: the name or a description of the alleged harasser(s), alleged victim(s),
and any witnesses; the date(s) of the alleged harassment; the location(s) of the
alleged harassment; and a description of the alleged harassment;
• Assurance that employees who report harassing conduct, participate in
investigations, or take any other actions protected under federal employment
discrimination laws will not be subjected to retaliation;
• Explanations of the range of possible consequences for engaging in prohibited
conduct;
• Opportunities to ask questions about the training, harassment policy, complaint system, and related rules and expectations; and

• Identification and provision of contact information for the individual(s) and/or office(s) responsible for addressing harassment questions, concerns, and complaints.

Because supervisors and managers have additional responsibilities, they may benefit from additional training. Employers may also find it helpful to include non-managerial and non-supervisory employees who exercise authority, such as team leaders.

Effective harassment training for supervisors and managers includes, for example:

• Information about how to prevent, identify, stop, report, and correct harassment, such as:
  o Identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment;
  o Easy to understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of;
  o Clear instructions about how to report harassment up the chain of command; and
  o Explanations of the confidentiality rules associated with harassment complaints;

• An unequivocal statement that retaliation is prohibited, along with an explanation of the types of conduct that are protected from retaliation under federal employment discrimination laws, such as:
  o Complaining or expressing an intent to complain about harassing conduct;
  o Resisting sexual advances or intervening to protect others from such conduct; and
  o Participating in an investigation about harassing conduct or other alleged discrimination;

• Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.

To help prevent conduct from rising to the level of unlawful workplace harassment, employers also may find it helpful to consider and implement new forms of training, such as workplace civility or respectful workplace training and/or bystander intervention training. In addition, employers may find it helpful to meet with employees as needed to discuss issues related to current or upcoming events and to share relevant resources.
EXECUTIVE SUMMARY

As co-chairs of the Equal Employment Opportunity Commission’s Select Task Force on the Study of Harassment in the Workplace (“Select Task Force”), we have spent the last 18 months examining the myriad and complex issues associated with harassment in the workplace. Thirty years after the U.S. Supreme Court held in the landmark case of Meritor Savings Bank v. Vinson that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, we conclude that we have come a far way since that day, but sadly and too often still have far to go.

Created in January 2015, the Select Task Force was comprised of 16 members from around the country, including representatives of academia from various social science disciplines; legal practitioners on both the plaintiff and defense side; employers and employee advocacy groups; and organized labor. The Select Task Force reflected a broad diversity of experience, expertise, and opinion. From April 2015 through June 2016, the Select Task Force held a series of meetings...
– some were open to the public, some were closed working sessions, and others were a combination of both. In the course of a year, the Select Task Force received testimony from more than 30 witnesses, and received numerous public comments.

Throughout this past year, we sought to deploy the expertise of our Select Task Force members and our witnesses to move beyond the legal arena and gain insights from the worlds of social science, and practitioners on the ground, on how to prevent harassment in the workplace. We focused on learning everything we could about workplace harassment – from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, and anyone else who had something useful to convey to us.

Because our focus was on prevention, we did not confine ourselves to the legal definition of workplace harassment, but rather included examination of conduct and behaviors which might not be “legally actionable,” but left unchecked, may set the stage for unlawful harassment.

This report is written by the two of us, in our capacity as Co-Chairs of the Select Task Force. It does not reflect the consensus view of the Select Task Force members, but is informed by the experience and observations of the Select Task Force members’ wide range of viewpoints, as well as the testimony and information received and reviewed by the Select Task Force. Our report includes analysis and recommendations for a range of stakeholders: EEOC, the employer community, the civil rights community, other government agencies, academic researchers, and other interested parties. We summarize our key findings below.

Workplace Harassment Remains a Persistent Problem. Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment. This includes, among other things, charges of unlawful harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion. While there is robust data and academic literature on sex-based harassment, there is very limited data regarding harassment on other protected bases. More research is needed.

Workplace Harassment Too Often Goes Unreported. Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint. Roughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.

There Is a Compelling Business Case for Stopping and Preventing Harassment. When employers consider the costs of workplace harassment, they often focus on legal costs, and with good reason. Last year, EEOC alone recovered $164.5 million for workers alleging harassment – and these direct costs are just the tip of the iceberg. Workplace harassment first and foremost comes at a steep cost to those who suffer it, as they experience mental, physical, and economic harm.
Beyond that, workplace harassment affects all workers, and its true cost includes decreased productivity, increased turnover, and reputational harm. All of this is a drag on performance – and the bottom-line.

It Starts at the Top – Leadership and Accountability Are Critical. Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot be overstated – effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. But a commitment (even from the top) to a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation. Accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so). Finally, leadership means ensuring that anti-harassment efforts are given the necessary time and resources to be effective.

Training Must Change. Much of the training done over the last 30 years has not worked as a prevention tool – it’s been too focused on simply avoiding legal liability. We believe effective training can reduce workplace harassment, and recognize that ineffective training can be unhelpful or even counterproductive. However, even effective training cannot occur in a vacuum – it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does not fit all: Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middle-managers and first-line supervisors in particular can be an employer’s most valuable resource in preventing and stopping harassment. New and Different Approaches to Training Should Be Explored. We heard of several new models of training that may show promise for harassment training. “Bystander intervention training” – increasingly used to combat sexual violence on school campuses – empowers co-workers and gives them the tools to intervene when they witness harassing behavior, and may show promise for harassment prevention. Workplace “civility training” that does not focus on eliminating unwelcome or offensive behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally, likewise may offer solutions.

It’s On Us. Harassment in the workplace will not stop on its own – it’s on all of us to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change themselves. For this reason, we suggest exploring the launch of an It’s on Us campaign for the workplace. Originally developed to reduce sexual violence in educational settings, the It’s on Us campaign is premised on the idea that students, faculty, and campus staff should be empowered to be part of the solution to sexual assault, and should be provided the tools and resources to prevent sexual assault as engaged bystanders. Launching a similar It’s on Us campaign in workplaces across the nation – large and small, urban and rural – is an audacious goal. But doing so could transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.
Our final report also includes detailed recommendations and a number of helpful tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated; ensuring employees are held accountable; and assessing and responding to workplace “risk factors” for harassment.

RECOMMENDATIONS

Recommendations Regarding the Prevalence of Harassment in the Workplace

- EEOC should work with the Bureau of Labor Statistics or the Census Bureau, and/or private partners, to develop and conduct a national poll to measure the prevalence of workplace harassment based on sex (including pregnancy, sexual orientation and gender identity), race, ethnicity/national origin, religion, age, disability, and genetic information over time.
- Academic researchers should compile baseline research on the prevalence of workplace harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity.
- EEOC should confer with the Merit Systems Protection Board to determine whether it can repeat its study of harassment of federal employees, and expand its survey to ask questions regarding harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity in the federal government, and to disaggregate sexually-based harassment and gender-based harassment.
- EEOC should work within the structure established by the Office of Personnel Management to offer specific questions on workplace harassment in the Federal Employee Viewpoint Survey.

Recommendations Regarding Workplace Leadership and Accountability

- Employers should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.
- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas for minimizing those risks.
- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.
- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership’s commitment to creating a workplace free of harassment.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.

If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

Recommendations Regarding Harassment Prevention Policies and Procedures

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.
- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.
- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.
- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.
- Employers should periodically “test” their reporting system to determine how well the system is working.
- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.
- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- In unionized workplaces, the labor union should ensure that its own policy and reporting system meet the principles outlined in this section.
- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.
- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective
actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of their policies, reporting systems, investigative procedures, and corrective actions put into place by those employers, in a manner that would allow research data to be aggregated in a manner that would not identify individual employers.

Recommendations Regarding Anti-Harassment Compliance Training

- Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.
- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information – even before such harassment reaches a legally-actionable level.
- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.
- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components. Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or “start up” firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.
- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.
- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.
- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and education programs.

Recommendations Regarding Workplace Civility and Bystander Intervention Training
• Employers should consider including workplace civility training and bystander intervention training as part of a holistic harassment prevention program.
• EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible content of workplace “civility codes.”
• Researchers should assess the impact of workplace civility training on reducing the level of harassment in the workplace.
• EEOC should convene a panel of experts on sexual assault bystander intervention training to develop and evaluate a bystander intervention training module for reducing harassment in the workplace.
• EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the efficacy of workplace civility training and/or bystander intervention training on reducing the level of harassment in the workplace. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.
• Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of workplace civility and bystander intervention trainings in a manner that would allow research data to be aggregated and not identify individual employers.

Recommendations Regarding General Outreach

• EEOC should develop additional resources for its website, including user-friendly guides on workplace harassment for employers and employees, that can be used with mobile devices.
• Non-profit organizations should conduct targeted outreach to employers to explain the business case for strong harassment prevention cultures, policies, and procedures.
• Non-profit organizations (including employee advocacy organizations, business membership associations, and labor unions) should develop easy-to-understand written resources and other creative materials (such as videos, posters, etc.) that will help workers and employers understand their rights and responsibilities.
• EEOC should partner with internet search engines to ensure that a range of EEOC resources appear high on the list of results returned by search engines.

Recommendations Regarding Targeted Outreach to Youth

• EEOC should continue to update its Youth@Work initiative (including its website) to include more information about harassment.
• Colleges and high schools should incorporate a component on workplace harassment in their school-based anti-bullying and anti-sexual assault efforts.
• EEOC should partner with web-based educational websites, such as Khan Academy, or YouTube channels that have a large youth following, to develop content around workplace harassment.
• EEOC should establish a contest in which youth are invited to design their own videos or apps to educate their peers about workplace harassment.

Recommendation Regarding an It’s On Us campaign:

• EEOC assists in launching an “It’s On Us” campaign to end harassment in the workplace.

MEMBERS OF THE SELECT TASK FORCE
ON THE STUDY OF HARASSMENT IN THE WORKPLACE

Chai R. Feldblum, Commissioner, U.S. Equal Employment Opportunity Commission

Victoria A. Lipnic, Commissioner, U.S. Equal Employment Opportunity Commission Co-Chairs

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Joseph M. Sellers, Partner, Cohen Milstein LLC

Angelia Wade Stubbs, Associate General Counsel, AFL-CIO

Rae T. Vann, General Counsel, Equal Employment Advisory Council

Patricia A. Wise, Partner, Niehaus, Wise & Kalas; Co-Chair, Society for Human Resource Management Labor Relations Special Expertise Panel
## Chart of Risk Factors for Harassment

### And Responsive Strategies

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<thead>
<tr>
<th>Risk Factor</th>
<th>Risk Factor Indicia</th>
<th>Why This is a Risk Factor for Harassment</th>
<th>Risk Factor-Specific Strategies to Reduce Harassment*</th>
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<tbody>
<tr>
<td>Homogenous workforce</td>
<td>Historic lack of diversity in the workplace</td>
<td>Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. Employees in the majority might feel threatened by those they perceive as &quot;different&quot; or &quot;other,&quot; or might simply be uncomfortable around others who are not like them.</td>
<td>Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity. Pay attention to relations among and within work groups.</td>
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<tr>
<td>Workplaces where some employees do not conform to workplace norms</td>
<td>&quot;Rough and tumble&quot; or single-sex-dominated workplace cultures Remarks, jokes, or banter that are crude, &quot;raunchy,&quot; or demeaning</td>
<td>Employees may be viewed as weak or susceptible to abuse. Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.</td>
<td>Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership. Pay attention to relations among and within work groups.</td>
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<td>Cultural and language differences in the workplace</td>
<td>Arrival of new employees with different cultures or nationalities Segregation of employees with different cultures or nationalities</td>
<td>Different cultural backgrounds may make employees less aware of laws and workplace norms. Employees who do not speak English may not know their rights and may be more subject to exploitation. Language and linguistic characteristics can play a role in harassment.</td>
<td>Ensure that culturally diverse employees understand laws, workplace norms, and policies. Increase diversity in culturally segregated workforces. Pay attention to relations among and within work groups.</td>
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<td><strong>Coarsened Social Discourse Outside the Workplace</strong></td>
<td>Increasingly heated discussion of current events occurring outside the workplace</td>
<td>Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.</td>
<td>Proactively identify current events-national and local-that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace.</td>
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<td><strong>Young workforces</strong></td>
<td>Significant number of teenage and young adult employees</td>
<td>Employees in their first or second jobs may be less aware of laws and workplace norms. Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable.</td>
<td>Provide targeted outreach about harassment in high schools and colleges. Provide orientation to all new employees with emphasis on the employer’s desire to hear about all complaints of unwelcome conduct. Provide training on how to be a good supervisor when youth are promoted to supervisory positions.</td>
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<td><strong>Workplaces with “high value” employees</strong></td>
<td>Executives or senior managers. Employees with high value (actual or perceived) to the employer, e.g., the “rainmaking” partner or the prized, grant-winning researcher</td>
<td>Management is often reluctant to jeopardize high value employee’s economic value to the employer. High value employees may perceive themselves as exempt from workplace rules or immune from</td>
<td>Apply workplace rules uniformly, regardless of rank or value to the employer. If a high-value employee is discharged for misconduct, consider publicizing that fact</td>
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| Workplaces with significant power disparities | Low-ranking employees in organizational hierarchy  
Employees holding positions usually subject to the direction of others, e.g., administrative support staff, nurses, janitors, etc.  
Gendered power disparities (e.g., most of the low-ranking employees are female) | Supervisors feel emboldened to exploit low-ranking employees.  
Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies).  
Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation. | Apply workplace rules uniformly, regardless of rank or value to the employer.  
Pay attention to relations among and within work groups with significant power disparities. |
| Workplaces that rely on customer service or client satisfaction | Compensation directly tied to customer satisfaction or client service | Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior. | Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct. |
| Workplaces where work is monotonous or tasks are low-intensity | Employees are not actively engaged or "have time on their hands"  
Repetitive work | Harassing behavior may become a way to vent frustration or avoid boredom. | Consider varying or restructuring job duties or workload to reduce monotony or boredom.  
Pay attention to relations among and within work groups with monotonous or low-intensity tasks. |
| Isolated workplaces | Physically isolated workplaces  
Employees work alone or have few opportunities to interact with others | Harassers have easy access to their targets.  
There are no witnesses. | Consider restructuring work environments and schedules to eliminate isolated conditions.  
Ensure that workers in isolated work environments |
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<td></td>
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<td>understand complaint procedures.</td>
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<td>Create opportunities for isolated workers to connect with each other (e.g., in person, on line) to share concerns.</td>
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<td>Workplaces that tolerate or encourage alcohol consumption</td>
<td>Alcohol consumption during and around work hours.</td>
<td>Alcohol reduces social inhibitions and impairs judgment.</td>
<td>Train co-workers to intervene appropriately if they observe alcohol-induced misconduct. Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed. Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.</td>
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<td>Decentralized workplaces</td>
<td>Corporate offices far removed physically and/or organizationally from front-line employees or first-line supervisors</td>
<td>Managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules. Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.</td>
<td>Ensure that compliance training reaches all levels of the organization, regardless of how geographically dispersed workplaces may be. Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction. Develop systems for employees in geographically diverse...</td>
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Employment Law and Our Duty
as Lawyers to Identify and Report
Cognitive Decline, Substance Abuse or Mental Illness

Chris Aupperle, Director
Nebraska Lawyers Assistance Program

Jason Jackson, Chief Human Resources Officer
Nebraska Governor’s Office

June 1, 2018
University of Nebraska College of Law, Lincoln, NE
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1. Intro
1.1. Intro Topic – Examining attorney duty to report ethical violation of another attorney, particularly in the context of an employment relationship. What is the duty? What are the exceptions to the rule? How other laws (HIPAA, ADA, FMLA, etc.) may create a conflict with the duty to report.

1.2. How might the duty arise in the context of employment?
   1.2.1. Disclosure by attorney during performance review
      1.2.1.1. Observation or disclosure by co-worker, supervisor or subordinate
      1.2.1.2. Successor counsel on a matter
      1.2.1.3. Co-Counsel
      1.2.1.4. Conversation with friend/colleague

1.3. Neb follows ABA model rules related to duty to Report and exception to disclosure (Model Rule 8.3)

2. Duty to Disclose (25)

2.1. Rule 3-508(a) – Duty to disclose
   2.1.1. Lawyer knows another lawyer has committed a violation of the Rules of Prof Conduct
      2.1.1.1. Degree of certainty required

Discuss State Ethics Opinions:

Nebraska Ethics, Op. 89-4 – states that “knowledge” requires more than a mere suspicion of a violation of the ethical rules.

Maine Ethics, Op. 100 (1989) - “The lawyer has no duty to report the other lawyer's misconduct to disciplinary authorities unless the lawyer himself has knowledge, based on a substantial degree of certainty, that the lawyer has committed an offense that raises a substantial question regarding his honesty, trustworthiness, or fitness to practice law.”

New Mexico Ethics, Op.1988-8 (undated) - This “substantial basis” test for knowledge of misconduct is intended to be greater than a “mere suspicion” or “probable cause” test. While no duty to report arises without a substantial basis
for knowledge of misconduct, a lawyer may choose to report information of misconduct to the appropriate professional authority.

New York City Ethics, Op. 635 (1992) – acts of malpractice may, but do not necessarily rise to the level of a violation that requires reporting.

D.C. Bar, Op. 246 (Revised 1994) - A lawyer is compelled to report “only if she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts.”

Discuss Cases:

Skolnick v. Altheimer & Gray, 191 Ill.2d 214 (2000) – When a lawyer is aware of potential misconduct that rises above a mere suspicion, the lawyer must bring the matter to the attention of the disciplinary committee.

In re Riehlmann, 891 So. 2d 1239, 1247 (2005) - Holding that knowledge does not require absolute certainty of a violation has occurred but requires more than a mere suspicion. The lawyer is not required to conduct an investigation, rather the lawyer should report the violation to disciplinary counsel for investigation. “We hold that a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question.”

Attorney U v. Mississippi Bar, 678 So. 2d 963, 970-72 (Miss. 1996) – Would a reasonable lawyer under the circumstances have formed a firm opinion that the conduct in question had more likely occurred than not occurred.

2.1.2. The violation raises a substantial question as to lawyer’s
2.1.2.1. honesty
2.1.2.2. trustworthiness
2.1.2.3. fitness as a lawyer in other respects
   2.1.2.3.1.1. Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation. (Rule 3-501.1)
   2.1.2.3.1.2. Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client. (Rule 3-501.3)
   2.1.2.3.1.3. Misconduct: It is professional misconduct for a lawyer to:
      2.1.2.3.1.3.1. Violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so or do so through the acts of another;
2.1.2.3.1.3.2. Commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

2.1.2.3.1.3.3. Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

2.1.2.3.1.3.4. Engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers, or court personnel on the basis of the person’s race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.

2.1.2.3.1.3.5. State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

2.1.2.3.1.3.6. Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law or

2.1.2.3.1.3.7. Willfully refuse as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by Nebraska law.

Discuss ABA Ethics Opinions:


Discuss Cases:
Suppressing Exculpatory Evidence – In re Riehlmann, 2004-0680 (La. 1/19/05), 891 So. 2d 1239, 1241 (2005) finding attorney violated Rule 8.3 when he failed to report his friend, a prosecutor, who confessed to him that he suppressed important exculpatory evidence.

Theft of Client Funds – In re Himmel, 125 Ill.2d 531 (1988), finding that respondent who succeeded as legal counsel for personal injury client committed a violation of duty to report when he discovered that prior counsel converted funds from client settlement and respondent did not report prior counsel.

Embezzlement of Funds – In re Ethic Advisory Panel Opinion No. 29-1 (RI 1993) – Holding that successor counsel may not report knowledge of prior attorney’s embezzlement of funds when successor attorney learned of embezzlement through representation of client and client would not consent to disclosure.

2.1.3. The Lawyer shall inform appropriate professional authority

2.1.3.1. Client’s filing of a grievance with discipline does not relieve attorney of duty to report. In re Himmel, 125 Ill.2d 531 (1988).

2.1.3.2. Is reporting to a trial court is sufficient to meet duty to report to discipline?
2.1.3.3. Is reporting to a government agency ethics office sufficient? NY Ethics Op. 1120 (2017)

2.2. Rule 3-508(c) – Exceptions to duty to disclose
   2.2.1. Does not require disclosure of information otherwise protected by Rule 501.6
   2.2.2. Information gained by lawyer or judge while participating in approved lawyer’s assistance program

2.3. Rule 501.6(a) – Confidentiality of Information
   2.3.1. Lawyer shall not reveal
   2.3.2. Information relating to the representation of a client
   2.3.3. Unless:
       2.3.3.1. Client gives consent
       2.3.3.2. Disclosure is impliedly authorized in order to carry out representation
       2.3.3.3. Disclosure is permitted by 3-501.6(b)
   2.3.4. Rule 3-501.6(b) – further exceptions to confidentiality of information
       2.3.4.1. Prevent a client from committing a crime
       2.3.4.2. Prevent reasonably certain death or substantial bodily harm
       2.3.4.3. For lawyer to secured advice on compliance with Rules of Prof Conduct
       2.3.4.4. To establish a claim or defense on behalf of the lawyer in controversy between lawyer and client
       2.3.4.5. To establish a defense in criminal or civil matter against lawyer based on conduct in which client was involved
       2.3.4.6. To respond to allegations in any proceeding concerning the lawyer’s representation of the client
       2.3.4.7. Comply with other law or court order
       2.3.4.8. Lawyer seeking help from LAP gets same confidentiality protection

3. Other ethical considerations when a lawyer is supervising another lawyer
   3.1. Responsibilities of a partner or supervisory lawyer. (Rule 3-505.1)
       3.1.1. A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
       3.1.2. A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
       3.1.3. A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional conduct if:
           3.1.3.1. The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
           3.1.3.2. The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
4. **Other Privacy Laws that may come in conflict with Duty to Report**

4.1. **General Rule**: Employers should not reveal medical information to third parties without consent unless there is a legitimate business reason to do so. –US EEOC

4.1.1. **ADA & Nebraska Fair Employment Act**: Prevents discrimination against employees on the basis of a mental or physical disability.

4.1.2. **Discrimination** - General rule: No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

4.1.3. **FMLA**: Obligates employers to provide up to 12 weeks of job protected leave under qualifying circumstances. Imposes same confidentiality requirements as the ADA.

4.1.4. **HIPAA**: Prevents the unauthorized disclosure of PPI by covered entities, specifically health insurers.

4.1.5. **Public records law, PERSONNEL RULES & LABOR CONTRACT**

4.1.5.1. Medical records and personnel files are public records, but may be withheld from public records requests under Nebraska’s public records statute.

4.2. **What to do if faced with a conflict between Duty to Report and confidentiality rules regarding lawyer/employee records?**

Haven vs. Hill Betts & Nash (NY 2012) – Not a discipline case but discusses duty to report. This is an employment discrimination case by former employee with bipolar disorder against former law firm. The law firm reported former employee to disciplinary counsel for attempting to bill unauthorized expenses (limos, alcohol, adult movies and call to an escort service) to a client. Former employee alleged it was done in retaliation for client’s assertion of his discrimination claim. Court found that it was the duty of the law firm had a duty to report and the report was timely to gaining knowledge of the facts.

5. **NLAP Exceptions to 3-508(a) and 3-501.6(b). How can NLAP help in these situations?**

6. **Q&A (5 min)**
§ 3-501.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.
Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(b).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

§ 3-501.1 Comment 6 amended June 28, 2017.
§ 3-501.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated
to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).
§ 3-501.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

2. to secure legal advice about the lawyer's compliance with these Rules;

3. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to 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; or

4. to comply with other law or a court order.

(c) The relationship between a member of the Nebraska State Bar Association Committee on the Nebraska Lawyers Assistance Program or an employee of the Nebraska Lawyers Assistance Program and a lawyer who seeks or receives assistance through that committee or that program shall be the same as that of lawyer and client for the purposes of the application of Rule 1.6.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful
conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply 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 situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the 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. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

**Authorized Disclosure**

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure Adverse to Client**

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. A lawyer may disclose information relating to the representation necessary to prevent a client from committing a crime. Paragraph (b)(1) also recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take
action necessary to eliminate the threat. For example, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[8] 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 reasonably believed necessary to establish a defense. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. 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 also applies, of course, where a proceeding has been commenced.

[9] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not
authorized by other law or that the information sought is protected against disclosure by the
taxpayer-client privilege or other applicable law. In the event of an adverse ruling, the lawyer
must consult with the client about the possibility of appeal to the extent required by Rule 1.4.
Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the
court's order.

[12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the
disclosure is necessary to accomplish one of the purposes specified. Where practicable, the
lawyer should first seek to persuade the client to take suitable action to obviate the need for
disclosure. In any case, a disclosure adverse to the client's interest should be no greater than
the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be
made in connection with a judicial proceeding, the disclosure should be made in a manner
that 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.

[13] Paragraph (b) permits but does not require the disclosure of information relating to a
client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(4)
. In exercising the discretion conferred by this Rule, the lawyer may consider such factors as
the nature of the lawyer's relationship with the client and with those who might be injured by
the client, the nature of the future crime, the lawyer's own involvement in the transaction and
factors that may extenuate the conduct in question. A lawyer's decision not to disclose as
permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however,
by other Rules. Some Rules require disclosure only if such disclosure would be permitted by
paragraph (b). See Rules 1.2(f), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires
disclosure in some circumstances regardless of whether such disclosure is permitted by this
Rule. See Rule 3.3(c).

Withdrawal

[14] If the lawyer's services will be used by the client in materially furthering a course of
criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After
withdrawal, the lawyer is required to refrain from making disclosure of the client's confidences,
except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d)
prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also
withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an
organization, the lawyer may be in doubt whether contemplated conduct will actually be
carried out by the organization. Where necessary to guide conduct in connection with this
Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Acting Competently to Preserve Confidentiality

[15] A lawyer must act competently to safeguard information relating to the representation of a
client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3.

[16] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[17] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

§ 3-505.1. Responsibilities of a partner or supervisory lawyer.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.
[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.
[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).
§ 3-508.3. Reporting professional misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.
[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.
§ 3-508.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law or

(g) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by Nebraska law.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer
is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(f) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

ETH 89-4.

Nebraska Ethics Advisory Opinions

1989.

ETH 89-4.

1989

OPINION NO. 89-4

Ethics Opinions -- NSBA

AN ATTORNEY POSSESSING UNPRIVILEGED KNOWLEDGE OF A VIOLATION OF THE CODE OF PROFESSIONAL RESPONSIBILITY HAS A DUTY TO REPORT THE VIOLATION TO THE COUNSEL FOR DISCIPLINE. AN ATTORNEY DOES NOT HAVE A MANDATORY OBLIGATION TO REPORT A MERE SUSPICION OF A CODE VIOLATION.

FACTS

The Advisory Committee has received a number of inquiries regarding the obligation of an attorney to report ethical misconduct by another attorney to the Counsel for Discipline.

QUESTION PRESENTED

DR 1-103(A) of the Code of Professional Responsibility provides:

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

DR 1-102 states:

(A) A lawyer shall not:

1. Violate a Disciplinary Rule.

2. Circumvent a Disciplinary Rule through actions of another.

3. Engage in illegal conduct involving moral turpitude.

4. Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
5. Engage in conduct that is prejudicial to the administration of justice.

6. Engage in any other conduct that adversely reflects on his fitness to practice law.

As indicated, the mandatory obligation of DR 1-103(A) applies only if the knowledge of the attorney is unprivileged. Information received from a client may not necessarily fit within the definition of privileged communication.

For example, in the case of In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (Ill. 1988), an attorney was requested by his client to not report the misconduct of another attorney to disciplinary authorities. The court held that attorney Himmel had an obligation to report the misconduct. The court found that the information which indicated misconduct by the other attorney had been disclosed to Himmel by the client in the presence of third parties (the client's mother and fiance) and had been discussed (with the consent of the client) with an insurance company, its lawyers and the offending attorney. The court concluded that the information possessed by Himmel was not protected by the attorney-client privilege and Himmel therefore had an obligation to report the misconduct.

Assuming that the information is not privileged, in order for there to be a duty to report, the attorney must have "knowledge" of a disciplinary violation. EC 1-4 provides:

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

The "knowledge" requirement of DR 1-103(A) has been held to mean that a lawyer must possess more than a suspicion.

Alabama Ethics Opinion 85-95 (9-18-85) held that a lawyer must report to proper authorities the unethical conduct of opposing counsel if, after thorough investigation, a lawyer firmly believes that opposing counsel clearly violated one or more of the disciplinary rules. The ethics opinion went on to state that if a lawyer merely suspects opposing counsel has violated the Code, he has no duty to report the alleged misconduct.

Several other opinions have taken the position that a suspicion of misconduct is not enough to make the reporting of an alleged violation mandatory, but that it "may" be reported even if only based on a mere suspicion. See, New York Ethics opinion 80-42 (undated) and Cleveland Ethics Opinion 85-1 (3-29-85).

The Bar Association of the State of New Mexico has also passed on a similar issue regarding
when a lawyer should report an alleged violation. The opinion stated that "the duty to report serious misconduct is mandatory and arises when a lawyer has a substantial basis for believing a serious ethical violation has occurred, regardless of the source of that information. This substantial basis rest for knowledge of misconduct is intended to be greater than a mere suspicion or probable cause test." The opinion concluded that there was no duty to report information which lacked a substantial basis for knowledge, although a lawyer may choose to do so. See, New Mexico State Bar Ethics Opinion 1988-8.

CONCLUSION

An attorney possessing unprivileged knowledge of a violation of the Code of Professional Responsibility has a duty to report the violation to the Counsel for Discipline. An attorney does not have a mandatory obligation to report a mere suspicion of a Code violation.
Advisory Opinion 1988-8

Background:

1. The requesting attorney, while representing a party in an arbitration proceeding, received sworn statements from employees of his client that the opposing counsel had offered a cash "donation" to such employees if they would shade or slant testimony in favor of the position of the opposing attorney's client.

2. The requesting attorney states that he has no other facts to either support the sworn statements or to refute the sworn statements, and has no facts which would independently reflect adversely upon the credibility of the two witnesses who provided the sworn statements.

3. The conversations relative to the offer to pay the cash donation were not overheard by the requesting attorney, nor any attorney associated with him, were not sound recorded, and were not set forth in any writing signed by the other attorney, or identifiable as in the handwriting of the other attorney.

Opinion:

At the time the information in question was obtained by the attorney requesting this advisory opinion, the old Model Code provision, DR 1-103, was in effect. Since January 1, 1987, the new Model Rule, Rule 8.3 (adopted in New Mexico as Rule 16-803) has been in effect. Both rules refer to "knowledge" of a violation, such that we believe the same analysis applied to both provisions, insofar as defining "knowledge." The Model Rules, and particularly Rule 8.3 (New Mexico Rules of Professional Conduct Rule 16-803) does add the clear requirement that the knowledge of violation must be reported only if it is a serious violation, specifically, a violation which "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

First, we conclude that knowledge of an attempt by an attorney to influence testimony of witnesses in a legal proceeding, including an arbitration proceeding, by offer of monetary reward, meets the seriousness requirement of Rule 16-803. See Opinion 85-6, Committee on Ethics of the Maryland State Bar Association, at ABA/BNA Manual on Professional Conduct 801:4348; and also see In re Ayala, 102 N.M. 214, 693 P.2d 580 (1984).

The core issue, necessary to render this opinion, is what quality or quantity of information must come to the attention of a lawyer before the duty to inform the appropriate professional authority is triggered. Stated otherwise, what constitutes "knowledge" of an ethical violation by another attorney? Before specifically addressing that issue, we make several observations.

1. The duty to inform as adopted in New Mexico is mandatory as recommended by the American Bar Association. (Not all jurisdictions have adopted the mandatory language "shall inform;" rather have adopted the precatory language "should" inform. See report on West Virginia's adoption of model Rule 8.3, ABA/BNA Lawyers Manual on Professional Conduct, Current Reports, p. 1129, Jan. 22, 1986).

2. The mandatory duty to inform, of course, implicates an ethical breach by an attorney whose mandatory duty is not performed.

3. There is a further ramification; a lawyer who knows another lawyer has failed in a mandatory duty to inform would conceivably be under a duty to inform on the lawyer neglecting this duty.

4. We recognize that a good deal of uneasiness exists in the legal profession, and among commentators, as to the imposition of a duty upon a lawyer to be an "informer." Such a duty goes far beyond the duty of an ordinary citizen, who, with few exceptions, has no legal duty to report a crime, even a crime committed in the citizen's presence. We are thus aware that in some quarters, the lawyer's duty to inform has been likened to "gestapo tactics" or as a "big brother" provision. 1986 Duke L.J., the Lawyer as Informer, 491-547.

5. Some jurisdictions have not merely removed the mandatory aspect of the duty to inform, they have rejected a duty to report in toto. See Opinion 440-51, Ethics Committee of the Los Angeles County Bar Association, ABA/BNA Lawyers' Manual on Professional Conduct, 901:1701.
On the other hand, we note that:

a. The New Mexico Supreme Court has created a reason process machinery for investigating and resolving reports of alleged ethical impropriety. Rules Governing Discipline, 17-101 to 17-316.

b. The proceedings before the Disciplinary Board are confidential, unless and until they become matters of public record before the Supreme Court (and other very limited exceptions). Rules Governing Discipline, Rule 17-304.

Having this background and proper context for the request, we address what constitutes "knowledge" of a violation which will trigger the duty to inform the appropriate professional authority.1

The comments to the Model Rules, the articles of commentators, case law and ethics opinions have been fully reviewed and we find very little assistance in ascertaining the proper standard for a definition of "knowledge." The commentators do recognize that although the comments to the Model Rules speak of "actual knowledge" (see New Mexico Rules of Professional Conduct, Terminology Judicial Pamphlet 16, at pp. 4,5) actual knowledge is itself a phrase lacking in clarity. See 1986 Duke L.J., supra, pp. 506-509, and see 20 Ariz. L. Rev. 509, note, The Lawyer's Duty to Report Professional Misconduct, n.13, p. 510. The ethics opinions merely distinguish between "suspicion" and "knowledge," defining neither. See ABA/BNA Manual, 801:4871, 801:6952.

Lawyers are naturally reluctant to inform on a fellow lawyer unless the facts are clear. See numerous articles cited in ABA/ BNA Lawyers' Manual on Professional Conduct, at 101:202. But, lawyers have neither the time nor the investigative resources to investigate, and to actually confront another attorney. (Compare duties of investigation upon attorneys, imposed by Rule 11 FRCP). The standard to be applied might arguably be "personal," "reasonable belief" or some other standard. It is certainly something beyond "mere satisfaction" and should be greater than a probable cause standard. It is the opinion of the committee that a "substantial basis" standard is appropriate. Thus, when a lawyer possesses knowledge that creates a substantial basis for believing that a serious ethical violation has occurred, the lawyer has a duty to report that violation to the appropriate professional authority. We rely on the test contained within rule 16-803 that a violation raises a "substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer to arrive at this standard of knowledge necessary to report a violation.

It is our further opinion that the attorney, whether obtaining information directly or from third party sources:

a. need not actually confront the implicated attorney or attorneys with the information obtained (but would certainly not be prohibited from doing so);

b. need not independently investigate the existence in fact of a violation;

c. may state, in informing the Disciplinary Board, disciplinary counsel, or other authority that he or she makes no statement that a violation has in fact been committed; rather, that he or she is merely informing the authority as mandated by Rule 16-803; but

d. should make the statement that he or she has not subjective awareness, in fact, of probable falsity of the information furnished.

By stating (d) above, we are in effect holding that an attorney who has a "subjective awareness, in fact, of probable falsity," need not inform the appropriate authority of the information in question. By combing this requirement with a negation of a duty to confront the attorney or attorneys implicated, and the negation of a duty to independently investigate, we intend to remove any argument that subjective awareness, in fact, of probable falsity, may exist if confrontation or independent investigation has not occurred. The term "subjective awareness, in fact, of probable falsity"2 we borrow from the law of defamation, but we eliminate from argument any case law, in defamation cases or otherwise, which would suggest that failure to confront or failure to investigate would, standing alone, create subjective awareness of probable falsity.

We find nothing in Rule 16-803 of the Rules of Professional Conduct which would require an attorney to inform, to furnish that information to the appropriate professional authority in the form of a "complaint." To the contrary, Rule 16-803 merely requires the attorney to inform. The Disciplinary Board is required to appoint a chief disciplinary counsel and "such other assistant counsel as may be required." Rules Governing Discipline, Rule 17-105A. The Disciplinary Board may also
employ investigators. Rule 17-105D. Chief disciplinary counsel has the authority to initiate investigations by his own complaint, Rule 17-105B(2), as well as a complaint of "any person." Therefore, when informing the Disciplinary Board of information required by Rule 16-803, the format need not be in the form of a complaint.

We believe that the test for the duty to inform here adopted is not so rigorous as to set an impracticable standard of knowledge. At the same time, we have attempted to set the standard well beyond mere suspicion and above probable cause. By clarifying that information is not tantamount to a complaint, by negating a duty to confront the other attorney, by negating a duty to independently investigate, and by emphasizing the role of the Disciplinary Board, disciplinary counsel and the confidentiality of their proceedings, we have sought to mitigate the big brother stigma which has traditionally rendered the duty to inform as the least observed of the ethical rules governing lawyers.

Summary of opinion:

1. Rule 16-803 of the Rules of Professional Conduct requires a lawyer having "knowledge" that another lawyer has committed a violation of the Rules of Professional Conduct to inform the appropriate professional authority, provided the violation is such that it "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

2. An attempt by an attorney to influence testimony by offer of monetary payment for such testimony is a violation which "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

3. The quality and quantity of information which will constitute "knowledge" of a serious violation is such information, whether obtained by the senses as personal knowledge, or obtained from third persons, which would create a substantial basis for believing that the violation had been committed.

4. When information is obtained from third persons, a substantial basis for believing a violation had been committed would not exist if the lawyer receiving that information possessed a subjective awareness, in fact, of probable falsity of the information.

5. A lawyer obtaining information from third persons concerning an alleged serious ethical violation by another attorney is not required to confront the accused attorney with the information, but he may do so.

6. Even if an attorney is not ethically required to report a violation, because a substantial basis is lacking, he nevertheless may report the information obtained to the appropriate professional authority.

1 The appropriate professional authority could be the disciplinary board; it might be a judicial body before whom a matter is pending. See ABA/BNA Lawyers' Manual, 101:202, 203.

2 "Subjective awareness, in fact, of probable falsity," precludes a claim of privilege against suit for defamation by a public official or a public figure. St. Amant v. Thompson, 390 U.S. 727 (1968). The awareness of probable falsity is not only required to be a subjective awareness, it is awareness in fact, of probable falsity, not merely whether a reasonable man "should" have entertained doubt as to truth. See Sanford, Libel and Privacy, § 1.2 n.15, p. 6. The test is employed where the credibility of a source of information is reasonably subject to disbelief, but only when doubted in fact. A fabricated source, an unverified anonymous telephone call, inherently improbable information or other obvious reasons to doubt veracity of an informant or the accuracy of reports, will constitute circumstantial proof of subjective awareness of probable falsity.
Ethics Opinion 246

A Lawyer’s Obligation to Report Another Lawyer’s Misconduct

A lawyer suing another lawyer for malpractice on behalf of a client is required by Rule 8.3 to report to bar disciplinary authorities the conduct that is the subject of the malpractice action, if she has sufficient knowledge of the pertinent facts, if her knowledge is not protected as a client confidence or secret, and if the conduct of the other lawyer both constitutes a violation of an ethical rule and raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness in other respects.

Where a lawyer learns of another lawyer’s misconduct in the course of representing her client, and the information about the misconduct constitutes a confidence or secret within the meaning of Rule 1.6, that Rule prohibits her reporting it without the client’s consent. If, after having been made fully aware of any possible adverse consequences for his ultimate recovery, the client does consent, then neither Rule 1.6 nor Rule 1.3(b)(2) bars reporting. On the facts of this case, the Committee is unable to conclude that the misconduct at issue (failure to comply with the statute of limitations and representation of conflicting interests) gives rise to an obligation under Rule 8.3 to report.

Applicable Rules

- Rule 1.3(b)(2) (Diligence and Zeal)
- Rule 1.6 (Confidentiality of Information)
- Rule 8.3 (Reporting Professional Misconduct)

Inquiry

The inquirer represents a client in his malpractice claim against another D.C. lawyer, arising out of the latter’s representation of him in connection with a 1990 automobile accident. The malpractice claim is based on the lawyer’s failure to file suit within the applicable two-year limitations period, and also on a putative conflict of interest in the lawyer’s simultaneous representation in the same matter of certain members of the client’s immediate family. The inquirer wishes to know whether the conduct that is the subject of the malpractice action gives rise to an obligation on her part under Rule 8.3 to report the lawyer to bar disciplinary authorities in the District. The inquirer expresses some concern that subjecting the other lawyer to disciplinary prosecution could limit his ability to pay any judgment that may ultimately be obtained against him in the malpractice action. On the facts presented, we cannot conclude that the inquirer has an obligation to report under Rule 8.3.

Procedural History

The Committee originally approved an opinion in response to this inquiry in April 1994. Subsequently, Bar Counsel raised certain questions relating to the interaction of Rules 8.3 and 1.6, particularly with respect to what information should be regarded as “secret” under Rule 1.6(b). After further deliberation, the Committee has concluded that its initial resolution of the apparent conflict between the two Rules in question is compelled by their language. Accordingly, notwithstanding the legitimate policy concerns raised by Bar Counsel, we are constrained to reaffirm the conclusions of the earlier opinion. This revised opinion elaborates further on the issues raised by Bar Counsel.

Discussion

A lawyer’s obligation to report misconduct by another lawyer arises under Rule 8.3(a) when the lawyer “has knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects...” If the Rule applies, then failure to report would itself be an ethical violation.

A 1992 opinion of the New York State Bar Association’s Committee on Professional Ethics, Opinion No. 635 (“New York State Bar Opinion”), outlines the following four step process for determining whether mandatory reporting is required, which we adopt.

1. Knowledge

Consistent with the interpretation given the reporting requirement in other jurisdictions, we believe Rule 8.3(a) should be read to require a lawyer to report misconduct only if she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts.

Although absolute certainty is not required, see Rotunda, The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel, 1988 Ill. L. Rev. 977, 986, a “mere suspicion” that misconduct has occurred does not give rise to an obligation to report.

New York State Bar Opinion, id. at 4. See also New York City Ethics Opinion 1990-3; Alabama Ethics Opinion 85-95; Arizona
See also Doe v. Federal Grievance Committee, 847 F.2d 57 (2d Cir. 1988).

2. Client Confidences or Secrets

Next, the lawyer must consider whether the knowledge of misconduct she possesses is a client’s “confidence” or “secret” as those terms are defined in Rule 1.6.\(^2\) If information is protected by Rule 1.6, it is specifically exempted from the mandatory reporting requirement of Rule 8.3(a). See Rule 8.3(c).\(^2\) We believe the exemption in Rule 8.3(c), read together with Rule 1.6 itself, means that a lawyer may not report misconduct where this would entail a disclosure of information protected by Rule 1.6.\(^4\) Rule 1.3(b)(2) may also preclude reporting if it would “prejudice” or “damage” the client, even if the client does not object.\(^5\)

Under Rule 1.6, information gained by a lawyer “in the professional relationship,” even if not privileged, may be protected as a “secret,” in which case it may not be disclosed without the client’s consent. See note 2, supra. Comment [6] of Rule 1.6 confirms that the Rule’s protection extends “not merely to matters communicated in confidence by the client (i.e., confidences) but also to all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (i.e., secrets).” Comment [6] goes on to explain:

This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge. It reflects not only the principles underlying the attorney-client privilege, but the lawyer’s duty of loyalty to the client. [Emphasis added.]

In the instant case, because the information about the other lawyer’s failure to file within the limitations period and his possible conflict of interest came to the lawyer “in the course of the professional relationship,” it falls within the definition of a “secret” under Rule 1.6 either if the client requests that it be “held inviolate” or if its disclosure would be “likely to be detrimental to the client.” As Comment [6] makes clear, the information does not lose its protected status as a “secret” simply because “others share the knowledge.”

Even if it could be argued that the client’s direction to disclose the information in public court filings removes it from the Rule’s definition of information “that the client has requested to be held inviolate,” the information still may be entitled to protection as a client “secret” if its disclosure would be “detrimental to the client,” without regard to its already having been made public. Thus, if reporting the other lawyer’s misconduct to disciplinary authorities may lessen the client’s ultimate chances of recovery, the lawyer may be constrained by Rule 1.6 from doing so.

We have considered an argument that the client waived any expectation of confidentiality under Rule 1.6 respecting the other lawyer’s misconduct when he authorized his lawyer to file a lawsuit about it, because he had in effect consented to disclosure, at least to the extent that the facts had been made a matter of public record in the court filings. See Rule 1.6(d)(1). We believe, however, that the mere fact that certain information has in this fashion been made a matter of public record by the lawyer at the client’s direction does not permit the lawyer to disregard altogether her confidentiality obligations to the client under Rule 1.6 where disclosure in another forum is at issue. In a word, we believe that a client’s consent to disclosure under Rule 1.6(d) may be a limited one, and that the client retains the option, even where information has been disclosed for one purpose at his own direction, to limit whether and to what extent his lawyer otherwise discloses it.\(^6\)

This construction of Rule 1.6 is confirmed by Comment [6], which points out that the Rule reflects “not only the principles underlying the attorney-client privilege, but the lawyer’s duty of loyalty to the client.” Thus, even if the client has authorized the lawyer to file a lawsuit charging another lawyer with malpractice, this does not mean that the client cannot expect the lawyer to keep the matter confidential for other purposes.

In the instant context, our conclusion respecting the interaction of Rules 1.6 and 8.3 means that a client may ask his lawyer not to file a misconduct charge with disciplinary authorities where doing so would require the lawyer to disclose information gained in the professional relationship, even though he has previously authorized the lawyer to file a malpractice action based on that same conduct, and the lawyer has done so. Under these circumstances, the lawyer is under no obligation under Rule 8.3(a) to report the other lawyer and indeed would be precluded from doing so by Rule 1.6.\(^2\)

Of course, if the client consents to disclosure, Rule 1.6 would pose no bar to reporting. And, in this regard, we note that the commentary to Rule 8.3 states that a lawyer should “encourage” a client to consent to disclosure, unless this would “substantially prejudice” the client’s interests. See also Rule 1.3(b)(2), note 5 supra. Accordingly, before seeking the client’s consent, the lawyer has an obligation to disclose to the client her concerns about the effect reporting may have on his chances of ultimate recovery. The possibility that reporting would prejudice the client’s case should be brought to his attention in seeking his consent to disclosure. If the client does consent, after having been made fully aware of the possible adverse consequences for his ultimate recovery, neither

https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion246.cfm
Rule 1.6 nor Rule 1.3(b)(2) bars reporting under Rule 8.3(a).

3. Violation of a Disciplinary Rule

Once the lawyer has concluded that she “knows” the relevant facts, and that her reporting will not require disclosure of information protected by Rule 1.6, she must satisfy herself that the conduct in question rises to the level of a disciplinary violation. Here, for example, the inquirer must believe that the other lawyer engaged in conduct clearly violative of her ethical obligation to represent a client competently and diligently, as required by Rules 1.1 and 1.3. Willful or unexcused failure to file within the applicable limitations period may well constitute a basis for sanctioning a lawyer for incompetence or neglect, or for prejudicing the client during the course of the professional relationship. So may representation without regard to or in spite of conflicts of interest among her clients. On the other hand, conduct that is merely negligent may not involve an ethical violation, particularly if there are circumstances that would excuse or explain the negligence. If the inquirer has doubts as to whether a disciplinary rule has been violated by the other lawyer, apart from the alleged malpractice claim, she probably does not have the requisite degree of certainty to activate her own ethical obligation to report under Rule 8.3(a).

4. Substantial Question as to Honesty, Trustworthiness or Fitness to Practice Law

Finally, even if a lawyer concludes that she has the requisite knowledge of another lawyer’s clear violation of the Disciplinary Rules, and that she may reveal that knowledge without violating Rule 1.6, she is required by Rule 8.3(a) to do so only if the violation “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. . . .” This “significant limitation” on the reporting requirement means that “not all violations of the disciplinary rules must be reported, only the most serious ones.” New York State Bar Opinion, supra at 8. The commentary to the Rule further expalciates the basis for this limitation:

If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

Whether a particular violation of the disciplinary rules meets the “substantial question” test must be determined on a case-by-case basis, using “a measure of judgment” rather than a clear litmus test. Advisory opinions from other jurisdictions are somewhat helpful in this regard but suggest no bright line test. Compare Arizona Op. 87-26 (failure to file tax returns should have been reported), Alabama Op. 90-97 (same for misappropriation of escrow funds), and New Mexico Op. 1988-8 (same for attempt to bribe witnesses) with Illinois Op. 90-36 (threats to bring criminal charges to gain advantage in a civil suit need not be reported), Virginia Op. 962 (1987) (same for attempt to persuade clients to change wills to detriment of Society for the Prevention of Cruelty to Animals), and Pennsylvania Opinion 88-225 (same for failure to comply with statute of limitations).

It would seem reasonable to conclude that a one-time negligent failure to comply with a limitation period, without more, would not evidence a lack of fitness to practice law. Similarly, simultaneous representation of several family members with allegedly conflicting interests in a personal injury context would not seem on its face necessarily to present a clear and serious violation of the disciplinary rules. In the end, however, it is for the inquiring lawyer to determine, in light of all the facts of the situation as she knows them, whether in her judgment a particular disciplinary violation raises a “substantial question” about another lawyer’s fitness, so as to trigger her own ethical obligation to report it. It is and should be a solemn and unenviable task.

We note that the mere filing of the malpractice lawsuit does not relieve the inquirer from any independent obligation she may have under Rule 8.3(a) to report the conduct at issue to bar disciplinary authorities. This obligation is not satisfied by whatever public notice may be implied from filing suit in court. On the other hand, as noted previously, the fact that the lawyer has filed a lawsuit over another lawyer’s misconduct does not relieve her of her obligations to keep client confidences under Rule 1.6, and in these circumstances the client’s wishes still control.

Conclusion

On the facts outlined in the instant inquiry, we cannot determine conclusively whether all or indeed any of the four elements necessary to trigger the reporting requirement under Rule 8.3(a) are present in this case. The inquirer must herself decide, based upon the guidance herein provided, whether she has sufficient knowledge of the other lawyer’s misconduct, whether that knowledge may be disclosed consistent with Rule 1.6 and Rule 1.3(b)(2), and whether the conduct at issue in the malpractice action also constitutes a clear violation of the ethics rules. Finally, assuming the inquirer concludes that a violation of the Rules has occurred, she must also decide whether the violation is sufficiently serious as to raise a substantial question about the other lawyer’s fitness to practice law.

We stress that Rule 8.3(a) deals only with situations in which a lawyer is obligated to report another lawyer’s misconduct, so that her failure to report will itself violate the Rules of Professional Conduct and subject her to disciplinary action. The Rule neither limits the circumstances in which a lawyer is permitted to make such a report (except where Rule 1.6 precludes disclosure), nor defines those situations in which reporting might be appropriate if not mandatory. In this regard, the New York State Bar Opinion,
supra at 4, notes:

A lawyer is always free to report evidence of what might constitute improper conduct by another attorney, subject to the obligations to protect client confidences and secrets. The lawyer need not have actual proof of misconduct; a good faith belief or suspicion that misconduct has been committed is a sufficient basis for making a report.

It should go without saying, of course, that it would be improper for a lawyer to make a report of misconduct and subject another lawyer to investigation without having a reasonable basis for doing so, or solely to gain a tactical advantage in a matter. See D.C. Bar Op. 220 (1991) (threats to file disciplinary charges solely to gain advantage in a civil matter violate Rule 8.4(g)). The inquirer did not ask the Committee's views about whether or not it would be permissible or appropriate in these circumstances for her to report the other lawyer's conduct, and we express none.

Revised: October 18, 1994

April 1994

1. In Doe, the Court of Appeals, in analyzing the analogous disclosure obligation under Rule 3.3(b) to reveal fraud to a tribunal, stated that a lawyer must disclose information he "reasonably knows to be a fact" and which "clearly establishes" the existence of a fraud. The court stated that "proof beyond a moral certainty" is not required, but that a lawyer "must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention." 847 F.2d at 62.

2. Rule 1.6 defines client "confidences" and "secrets" as follows:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental to the client.

3. Rule 8.3(c) provides:

This rule does not require disclosure of information otherwise protected by Rule 1.6.

4. A similar conclusion respecting the interaction of Rules 1.6 and 8.3(a) has been reached in several other jurisdictions. See, e.g., In re Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I. 1993) (lawyer prohibited by Rule 1.6 from reporting fact that client's former lawyer had embezzled and subsequently repaid a substantial amount of his client's money); Ariz. Bar Ass'n Ethics Op. No. 90-13 (1990) (information about a client's rape by another lawyer may not be disclosed in the face of the client's explicit instruction not to report); Md. State Bar Ass'n Comm. on Ethics, Op. No. 89-46 (1989) (client instruction not to report breach of fiduciary duty precludes reporting); Conn. Bar Ass'n Comm. on Professional Ethics, Informal Op. 89-14 (1989) (in-house corporate lawyer may not disclose other corporate lawyer's misconduct if disclosure could be adverse to corporation's interests); Wis. State Bar Comm. on Professional Ethics, Formal Op. E-89-12, (1989) (disclosure prohibited if it would entail revelation of any client information, whether or not it would prejudice client). But see In re Himmel, 533 N.E.2d 70 (III. 1989) (lawyer's failure to report another lawyer's embezzlement of client funds was grounds for suspension even though his knowledge of the embezzlement may have been protected as a client "secret"; reporting rule exempted only "privileged information"); Md. State Bar Ass'n Comm. on Ethics, Op. No. 89-36 (Feb. 14, 1989) (lawyer representing other lawyers must report their misconduct if he has actual knowledge thereof which has already been revealed to a court and, therefore, is a matter of public record); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 83-23 (1988), (lawyer who receives communication directly from another party to a pending litigation alleging unethical conduct by that party's lawyer must report the information to the disciplinary board of the Pennsylvania Supreme Court. Confidentiality does not apply, as the information came from another party to the litigation, not from the lawyer's client.).

5. Rule 1.3(b) states:
A lawyer shall not intentionally: . . . (2) prejudice or damage a client during the course of the professional relationship.

6. We recognize that there is some support in the case law for an argument that a client waives his right to assert attorney/client privilege to the limited extent that specific facts are disclosed in public pleadings, filed by his lawyer at his direction. See, e.g., Industrial Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Corp., 953 F.2d 1004 (5th Cir. 1992). However, we do not believe the case law interpreting the attorney/client privilege controls an attorney’s ethical obligation to report another lawyer to disciplinary authorities against her client’s wishes, since, as is made clear by Comment [6] to Rule 1.6, the protection afforded a client’s confidences by Rule 1.6 is broader than that accorded by the evidentiary privilege, and “reflects not only the principles underlying the attorney-client privilege, but the lawyer’s duty of loyalty to the client.”

7. We express no views on the desirability of this outcome as a matter of policy, although we appreciate the concerns expressed by Bar Counsel noted earlier in this opinion. See Procedural History, supra at 62. These same concerns were expressed by the Rhode Island Supreme Court in In re Ethics Advisory Panel Opinion No. 91-1, supra, 627 A.2d at 323 (allowing Rule 1.6 to “trump” the obligation to report misconduct represents “a failure of the legal profession to regulate itself effectively,” and “fuels the perception that . . . the legal profession is engaged in a coverup of attorney misconduct.”). See also Olsson, Reporting Peer Misconduct: Lip Service to Ethical Standards Is Not Enough, 31 Ariz. L. Rev. 657, 675 (1989). We are aware that some jurisdictions have promulgated a confidentiality rule that allows disclosure in a broader set of circumstances than is permitted under the District of Columbia’s version of Rule 1.6. See 2 Hazard & Hodes, The Law of Lawyering, §§ AP4:103-AP4:105 at 1259-1266. However, given the broad protection afforded client confidences under the District’s Rule 1.6, we feel constrained here to conclude as we do. The same result would appear to obtain under the ABA Model Rules, notwithstanding the different wording of Model Rule 1.6.
ETH 1120
Ethics Opinion 1120
New York Ethics Opinion
New York State Bar Association Committee on Professional Ethics
April 12, 2017
Topic: Reporting Misconduct

Digest: If a lawyer for a government agency knows of a violation of the Rules by another agency lawyer, and the wrongdoer's conduct raises a substantial question as to the wrongdoer's honesty, trustworthiness or fitness to practice law, the government lawyer must report the information to a tribunal or other authority authorized to investigate and act on the conduct, unless the information constitutes confidential client information, and the agency does not consent to its disclosure. If a report to a tribunal or other authority is required, the lawyer must determine if the government agency's ethics office is a "tribunal" or "other authority empowered to investigate or act upon such violation." If the ethics office is not a tribunal or such other authority, the government lawyer may report initially to the ethics office of the government agency, but the lawyer may not defer to a decision by the ethics office not to report unless the reporting obligation involves an "arguable question of professional duty" and the decision of the ethics office not to report is a reasonable resolution.

Rules: 1.0(w), 1.6, 5.2, 8.3(a) & (b)

FACTS

1. The inquirer represents a government agency (the "Agency") in federal administrative and court proceedings. The inquirer has come to know of a violation of the New York Rules of Professional Conduct (the "Rules") by another lawyer at the Agency that the inquirer believes raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer.

2. The Agency has an internal process by which violations of the Rules must be reported first to an internal ethics office for review. The inquirer reported the facts to the internal ethics office but, although a reasonable period of time has elapsed, the internal ethics office has not responded to the inquirer's inquiries as to the status of its review of the report.

QUESTION

3. If a lawyer for a government agency reports misconduct by another agency lawyer that meets the reporting requirements of Rule 8.3(a) to an internal ethics office of the lawyer's employer, has the lawyer satisfied the requirements of Rule 8.3(a)?

OPINION

4. Rule 8.3(a) provides:
(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

However, under Rule 8.3(c), this reporting obligation does not require the disclosure of "confidential information" otherwise protected by Rule 1.6, i.e., information gained from any
source during or relating to the representation of a client (a) that is protected by the attorney-client privilege, (b) that is likely to be embarrassing or detrimental to the client if disclosed, or (c) that the client has requested to be kept confidential.

5. Thus, in determining whether the inquirer has a reporting obligation under Rule 8.3, the following elements must be satisfied:

(i) There must be a violation of the Rules by the wrongdoer, (ii) The inquirer must know of the violation,[1] (iii) The wrongdoer's conduct must raise a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law, and (iv) Disclosure of the wrongdoer's conduct must not reveal client confidential information, unless the client consents to such disclosure.

6. Here, the inquirer advises that the first three elements have been satisfied. That leaves the fourth element, which raises two issues: (1) whether the facts known by the inquirer constitute confidential information of the client, and, if not (2) whether the inquirer's report to the government agency's internal ethics office satisfies the requirement of the Rule that the lawyer report knowledge of another lawyer's misconduct to a "tribunal or other authority empowered to investigate or act upon such violation."

**Client Confidential Information**

7. Our opinions make clear that a lawyer's obligation to report misconduct is limited by the lawyer's obligation to protect client confidential information, unless the lawyer has obtained the informed consent of the client to disclosure of otherwise confidential information. See, e.g._______ N.Y. State 649 (1993) (where one lawyer knows that another lawyer who is executor for an estate proposes to engage or has engaged in wrongdoing, whether the first lawyer must disclose the wrongdoing depends on whether the information is legally privileged or whether applicable law requires disclosure of an otherwise protected "secret"), N.Y. State 635 (1992) (before reporting misconduct, lawyer must consider whether any knowledge that would be included in the report is a client confidence or secret). See also_______ N.Y. City 2017-2 (reporting duty is limited by the lawyer's duty not to reveal client confidences without the client's informed consent after full disclosure, including disclosure that, once a report of misconduct is made to the disciplinary agency, the disciplinary agency may unilaterally decide to release the client's information without the client's knowledge or further consent).

8. Under Rule 1.6, information constitutes "confidential information" of the client if it was gained from any source (whether from the client or elsewhere) during or relating to the representation of the client and (a) the information is protected by the attorney-client privilege, (b) it is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested that it be kept confidential. Here, the client is the Agency. If disclosure of the wrongdoing would be embarrassing or detrimental to the Agency, or if the Agency has requested that the information not be disclosed, then there is an apparent tension between the goals of Rule 1.6 and 8.3: (1) the obligation of all lawyers to assist courts and disciplinary authorities in policing members of the bar, and (2) the obligation to maintain the confidentiality of client information. In addition, government lawyers (such as the inquirer here) also have a duty to seek justice. See_______ Rule 3.8, Cmt. [6B]. However, since Rule 8.3 specifically exempts information protected as confidential, the Rules themselves resolve the tension in favor of confidentiality. See_______
Rule 1.6, Cmt. [2] ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. . . . The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.").

9. The definition of "confidential information" allows the client to ask the lawyer to treat information as "confidential information" for any reason. However, it is not always clear in an organizational context who speaks for the client. Here, the inquirer must determine whether the ethics office has the authority to speak for the client in asking that the information be kept confidential. If the ethics office does have that authority, that determination will be binding on the inquirer. While the Agency is not required to provide the inquirer with reasons for a determination that its information should be treated as "confidential information," there are many benign reasons why the Agency might do so, at least at this point. For example, the information may be protected by law as private information; or the Agency may have referred the matter to a prosecutor, whose investigation is confidential and protected by law.

*Tribunal or Other Authority Empowered to Investigate or Act on Violations*

10. Under Rule 8.3(a), if a report of misconduct is required, it must be made to a tribunal or to "other authority empowered to investigate or act upon such violation."

11. The term "tribunal" is defined in Rule 1.0(w) as follows:

(w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. [Emphasis added.]

The Agency here may act in an adjudicative capacity when determining litigated matters before the Agency. That would probably be the case, for example, if an administrative law judge or similar "neutral" quasi-judicial officer in the Agency hears a matter. If so, then a report to the administrative law judge about a lawyer for a party would satisfy Rule 8.3's requirement to report to a "tribunal." However, the inquiry here does not state that the Agency's ethics office meets the definition of a tribunal, and it seems more likely that it does not constitute a tribunal within the meaning of Rule 1.0(w). However, this is a factual question that the inquirer must determine.

12. In N.Y. State 822 (2008), we discussed what might constitute "other authority" to which a report might be made, in the context of DR 1-103(A), the predecessor to Rule 8.3(a). We noted that the phrase "investigate or act" in that disciplinary rule suggested that the tribunal or authority must be a court of competent jurisdiction or a body having enforceable subpoena powers. This would include a grievance or disciplinary committee operating under the powers granted by the Appellate Division of the State Supreme Court under Section 90 of the New York Judiciary Law and related court rules. We therefore said the report could be filed with the grievance committee in the Appellate Department in which litigation is pending or with the grievance committee in the Department where the wrongdoer is admitted or where the prohibited conduct occurred. See
also _______ Nassau County 98-12 (if reporting is required, the lawyer may report to the court or to a grievance committee); N.Y. City 1995-5 (a lawyer should report misconduct to the appropriate disciplinary or grievance committee).

13. Here, as with the question whether the Agency's internal ethics office is a tribunal, the question whether the Agency's ethics office qualifies as "other authority empowered to investigate or act upon" a violation of the Rules is a factual question that the inquirer must determine.

**Timing of Report**

14. If a report under Rule 8.3 is required, the Rule does not specify the timing of the required report. In N.Y. State 822 (2008), we said: "The report need not be made immediately or without some reasonable effort at remediation, particularly where the consequences of reporting the violation may be more harmful to the lawyer's client than some alternative course of action." See *U.S. v. Cantor* _____, 897 F.Supp. 110 (S.D.N.Y. 1995) ("DR 1-103 must be read to require reporting ... within a reasonable time under the circumstances"); N.Y. City 1990-3 ("While it may be permissible in certain limited circumstances to postpone reporting for a brief period of time, we reiterate our caution that 'once a lawyer decides that he or she must disclose under DR 1-103(A), any substantial delay in reporting would be improper'""). Evaluation of the timing of a required report will entail considering the facts and circumstances of the underlying misconduct, whether there is ongoing harm to any affected person, and whether the misconduct can be remedied or mitigated, among other factors.

15. Thus, we believe that the inquirer's initial reporting to the ethics office is consistent with Rule 8.3. However, making a report to the internal ethics office does not automatically relieve the inquirer of the responsibility for making the report required by Rule 8.3 or ensuring that the Agency's ethics office makes such a report when the requirements of the Rules are met.

16. Rule 5.2(b) provides that a subordinate lawyer "does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." The inquirer believes that a violation of the Rules that meets the requirements of Rule 8.3(a) has occurred, and the Agency apparently has not stated that the facts surrounding the wrongdoer's conduct constitute confidential information. Nevertheless, it is possible that the ethics office, after investigation, may conclude that the wrongdoer's conduct need not be reported to a tribunal or other authority, or may decide that the information necessary to make a report is "confidential information" within the meaning of Rule 1.6(a). In order for the inquirer to rely on the decision of the Agency's ethics office in matters of professional responsibility, the question of a duty to report must be "arguable" and the resolution by the ethics office not to report must be "reasonable."

**CONCLUSION**

17. If a lawyer for a government agency knows of a violation of the Rules by another agency lawyer, and the wrongdoer's conduct raises a substantial question as to the wrongdoer's honesty, trustworthiness or fitness to practice law, the government lawyer must report the information to a tribunal or other authority authorized to investigate and act on the conduct, unless the information constitutes confidential client information, and the agency does not consent to its disclosure. If a report to a tribunal or other authority is required, the lawyer must determine if the government
agency's ethics office is a "tribunal" or "other authority empowered to investigate or act upon such violation." If the ethics office is not a tribunal or such other authority, the government lawyer may report initially to the ethics office of the government agency, but the lawyer may not defer to a decision by the ethics office not to report unless the reporting obligation involves an "arguable question of professional duty" and the decision of the ethics office is a reasonable resolution.

Notes:
[1] As we said in N.Y. State 635 (1992) and N.Y. State 480 (1978), the lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct. A mere suspicion of misconduct is not sufficient.
ATTORNEY DISCIPLINARY PROCEEDINGS.

[2004-0680 La. 1] PER CURIAM.

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Michael G. Riehlmann, an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS

Respondent is a criminal defense attorney who was formerly employed as an Assistant District Attorney in the Orleans Parish District Attorney's Office. One evening in April 1994, respondent met his close friend and law school classmate, Gerry Deegan, at a bar near the Orleans Parish Criminal District Court. Like respondent, Mr. Deegan had been a prosecutor in the Orleans Parish District Attorney's Office before he "switched sides" in 1987. During their conversation in the bar, Mr. Deegan told respondent that he had that day learned he was dying of colon cancer. In the same conversation, Mr. Deegan confided to respondent that he had suppressed exculpatory blood evidence in a criminal case he prosecuted while at the District Attorney's Office. Respondent recalls that he was "surprised" and "shocked" by his friend's revelation, and that he urged Mr. Deegan to "remedy" the situation. It is undisputed that respondent did not report Mr. Deegan's disclosure to anyone at the time it was made. Mr. Deegan died in July 1994, having done nothing to "remedy" the situation of which he had spoken in the bar.

[2004-0680 La. 2] Nearly five years after Mr. Deegan's death, one of the defendants whom he had prosecuted in a 1985 armed robbery case was set to be executed by lethal injection on May 20, 1999. In April 1999, the lawyers for the defendant, John Thompson, discovered a crime lab report which contained the results of tests performed on a piece of pants leg and a tennis shoe that were stained with the perpetrator's blood during a scuffle with the victim of the robbery attempt. The crime lab report concluded that the robber had Type "B" blood. Because Mr. Thompson has Type "O" blood, the crime lab report proved he could not have committed the
robbery; nevertheless, neither the crime lab report nor the blood-stained physical evidence had been disclosed to Mr. Thompson's defense counsel prior to or during trial. Respondent claims that when he heard about the inquiry of Mr. Thompson's lawyers, he immediately realized that this was the case to which Mr. Deegan had referred in their April 1994 conversation in the bar. On April 27, 1999, respondent executed an affidavit for Mr. Thompson in which he attested that during the 1994 conversation, "the late Gerry Deegan said to me that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant."

In May 1999, respondent reported Mr. Deegan's misconduct to the ODC. In June 1999, respondent testified in a hearing on a motion for new trial in Mr. Thompson's armed robbery case. During the hearing, respondent testified that Mr. Deegan had told him that he "suppressed exculpatory evidence that was blood evidence, that seemed to have excluded Mr. Thompson as the perpetrator of an armed robbery." Respondent also admitted that he "should have reported" Mr. Deegan's misconduct, and that while he ultimately did so, "I should have reported it sooner, I guess."

On September 30, 1999, respondent gave a sworn statement to the ODC in which he was asked why he did not report Mr. Deegan's disclosure to anyone at the time it was made. Respondent replied:

I think that under ordinary circumstances, I would have. I really honestly think I'm a very good person. And I think I do the right thing whenever I'm given the opportunity to choose. This was unquestionably the most difficult time of my life. Gerry, who was like a brother to me, was dying. And that was, to say distracting would be quite an understatement. I'd also left my wife just a few months before, with three kids, and was under the care of a psychiatrist, taking antidepressants. My youngest son was then about two and had just recently undergone open-heart surgery. I had a lot on my plate at the time. A great deal of it of my own making; there's no question about it. But, nonetheless, I was very, very distracted, and I simply did not give it the important consideration that it deserved. But it was a very trying time for me. And that's the only explanation I have, because, otherwise, I would have reported it immediately had I been in a better frame of mind. [emphasis added]

DISCIPLINARY PROCEEDINGS

Formal Charges

On January 4, 2001, the ODC filed one count of formal charges against respondent, alleging that his failure to report his unprivileged knowledge of Mr. Deegan's prosecutorial misconduct violated Rules 8.3(a) (reporting professional misconduct), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct. The ODC subsequently amended the formal charges to delete the alleged violation of Rule 8.4(c).

On March 5, 2002, respondent answered the amended formal charges and admitted some of the factual allegations therein, but denied that his conduct violated the Rules of Professional Conduct. Specifically, respondent asserted that Rule 8.3(a) "merely requires that an attorney possessing [emphasis added] unprivileged knowledge of a violation of this Code shall report such
knowledge to the authority empowered
to investigate such acts. It is undisputed that respondent did report his knowledge of Deegan's statements to Thompson's attorneys, with the clear understanding that this information would be reported to the District Attorney and the Court, undeniably authorities empowered to investigate Deegan's conduct."

Formal Hearing

When this matter proceeded to a formal hearing before the committee, respondent testified that his best recollection of his conversation with Mr. Deegan in 1994 "is that he told me that he did not turn over evidence to his opponents that might have exculpated the defendant." Nevertheless, when asked whether he recognized during the barroom conversation that Mr. Deegan had violated his ethical duties, respondent replied, "Well, certainly." Respondent admitted that he gave the conversation no further thought after he left the bar because he was "distracted" by his own personal problems.

Hearing Committee Recommendation

In its report filed with the disciplinary board, the hearing committee concluded that respondent did not violate Rule 8.3(a), but that he should be publicly reprimanded for his violation of Rule 8.4(d).

Considering the evidence presented at the hearing, the committee made a factual finding that during the 1994 barroom conversation, Mr. Deegan explained to respondent that he did not turn over evidence in a case that might have exculpated a defendant, but "equivocated on whether the evidence proved the innocence of a [2004-0680 La. 5] defendant." Moreover, the committee found there is no clear and convincing evidence that Mr. Deegan identified John Thompson by name in the disclosure to respondent in 1994. The committee believed respondent's testimony that he did not draw a connection between Mr. Deegan's 1994 statements and the Thompson case until 1999, when he heard about the inquiry of Mr. Thompson's lawyers.

Based on its factual findings, the committee found that respondent did not violate Rule 8.3(a) because he did not have "knowledge of a violation" that obligated him to report Mr. Deegan to the ODC or to any other authority. The committee pointed out that it believed respondent's testimony that Mr. Deegan made equivocal statements in 1994 that did not rise to the level of a "confession" that Deegan had actually suppressed the crime lab report nine years earlier. The committee found Mr. Deegan qualified his statement that the evidence "might" have exculpated the defendant, and furthermore, agreed that if the evidence did not tend to negate the defendant's guilt, Mr. Deegan would have had no obligation to turn over that evidence under Brady. Consequently, the committee determined that respondent would have had no violation to report. The committee found Mr. Deegan's statements at most suggested a potential violation of the ethical rules, but the committee declined to construe Rule 8.3(a) to require a lawyer to report a potential violation of an ethical rule by another lawyer.

Although the committee did not find that respondent violated Rule 8.3(a), the committee found he violated Rule 8.4(d), which imposes a "broader obligation to ensure that justice is fairly administered," by his "complete inaction after the barroom disclosure." The committee found
respondent's conversation with Mr. Deegan "was [2004-0680 La. 6] of sufficient importance that not pursuing Deegan for a disclosure or to rectify the situation, failing to investigate further, and ultimately not taking any affirmative action for five years constituted conduct that hindered the administration of justice." The committee determined
the baseline sanction for such conduct by respondent is a reprimand.

As aggravating factors, the committee recognized respondent's experience in the practice of law (admitted 1983) and the vulnerability of the victim, Mr. Thompson. In mitigation, the committee acknowledged the absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems (including the terminal colon cancer of his best friend, Mr. Deegan; marital problems; and the health problems both he and his son were experiencing), timely good faith effort to rectify the consequences of Mr. Deegan's misconduct, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceeding, character and reputation, and remorse.

In light of the mitigating factors present, and finding that a suspension would serve no useful purpose in this case, the committee recommended the imposition of a public reprimand.

Both respondent and the ODC filed objections to the hearing committee's recommendation.

Disciplinary Board Recommendation

The disciplinary board adopted the hearing committee's factual findings but rejected its application of Rule 8.3(a) of the Rules of Professional Conduct. The board determined that a finding of a violation of Rule 8.3(a) requires clear and convincing evidence that an attorney (1) possessed unprivileged knowledge of an [2004-0680 La. 7] ethical violation and (2) failed to report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. Concerning the knowledge requirement, the board considered various legal authorities interpreting both Louisiana Rule 8.3(a) and Model Rule 8.3(a), and determined that a lawyer's duty to report professional misconduct is triggered when, under the circumstances, a reasonable lawyer would have "a firm opinion that the conduct in question more likely than not occurred." See Attorney U v. Mississippi Bar, 678 So.2d 963 (Miss.1996); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § cmt. I (2000). The board explained that the requisite knowledge under Rule 8.3(a) is "more than a mere suspicion, but less than absolute or moral certainty."

Employing this analysis, the board concluded the committee erred in its finding that respondent had no duty to report because Mr. Deegan's statements were equivocal. The board found respondent must have understood from his 1994 conversation with Mr. Deegan that Mr. Deegan had suppressed Brady evidence:

If Respondent did not understand from his conversation with Deegan that Deegan has suppressed evidence that he was obligated to produce, why was Respondent shocked and surprised? Why did Respondent tell Deegan that what he had done was "not right" and that Deegan had to "rectify" the situation? Respondent never changed his testimony in this respect. Obviously, if Respondent understood from his conversation with Deegan that Deegan had done nothing wrong, there would have been no occasion for Respondent to say that it was "not right" or that Deegan had to "rectify" what he had done. The Committee makes no attempt to explain these circumstances which are
wholly inconsistent with the Committee's theory. This uncontradicted circumstantial evidence cannot be ignored. Indeed, if Deegan believed he had done nothing wrong, why did Deegan even bother to bring the matter up nearly ten (10) years after Thompson was convicted? More importantly, why did he bring it up in the same conversation that he disclosed to Respondent that he (Deegan) had terminal colon cancer?

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[2004-0680 La. 8] The board concluded that a reasonable lawyer under the circumstances would have formed a firm opinion that Mr. Deegan had wrongfully failed to disclose the blood evidence, and that respondent did in fact form such an opinion because he advised Mr. Deegan that what he (Deegan) did was "not right" and that he (Deegan) had to "rectify" the situation. Accordingly, the board found respondent had sufficient knowledge of misconduct by Mr. Deegan to trigger a duty to report the misconduct to the disciplinary authorities.

The board then turned to a discussion of whether respondent's failure to report Mr. Deegan's misconduct for more than five years after learning of it constituted a failure to report under Rule 8.3(a). The board acknowledged that Rule 8.3(a) does not provide any specific time limit or period within which the misconduct must be reported. Nevertheless, the board reasoned that Rule 8.3(a) serves no useful purpose unless it is read to require reporting to an appropriate authority within a reasonable time under the circumstances. See United States v. Cantor, 897 F.Supp. 110 (S.D.N.Y.1995); Douglas R. Richmond, The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation, 12 GEO. J. LEGAL ETHICS 175, 200 (1999). Therefore, absent special circumstances, the board determined that a lawyer must report his knowledge of misconduct "promptly." Applying these principles to the instant case, the board determined respondent's disclosure in 1999 of misconduct he discovered in 1994 was not timely and did not satisfy the requirements of Rule 8.3(a).

The board also found that respondent's conduct violated Rule 8.4(d) because his inactivity following Mr. Deegan's disclosure was prejudicial to the administration of justice.

[2004-0680 La. 9] The board found respondent knowingly violated a duty owed to the profession, and that his actions resulted in both actual and potential injury to Mr. Thompson. The board noted that if respondent had taken further action in 1994, when Mr. Deegan made his confession, Mr. Thompson's innocence in connection with the armed robbery charge may have been established sooner. The board also observed that negative publicity attached to respondent's actions, thereby causing harm to the legal profession. The board determined the baseline sanction for respondent's conduct is a suspension from the practice of law. [2]

The board adopted the aggravating and mitigating factors cited by the hearing committee, except that the board refused to credit respondent with the mitigating factor of making a timely good faith effort to rectify the consequences of Mr. Deegan's misconduct.

Considering the prior jurisprudence, [3] the board determined that some period of suspension is appropriate for respondent's conduct. In light of the significant mitigating factors in this matter, the board recommended that respondent be suspended from the practice of law for six months. One board member dissented and would recommend a suspension of at least one year.
and one day.

[2004-0680 La. 10] Both respondent and the ODC filed objections to the disciplinary board's recommendation. Accordingly, the case was docketed for oral argument pursuant to Supreme Court Rule XIX, 11(G)(1)(b).

DISCUSSION

In this matter we are presented for the first time with an opportunity to delineate the scope of an attorney's duty under Rule 8.3 to report the professional misconduct of a fellow member of the bar. Therefore, we begin our discussion with a few observations relating to the rule and its history.

The American legal profession has long recognized the necessity of reporting lawyers' ethical misconduct. When the American Bar Association adopted its first code of ethics in 1908, Canon 29 of the Canons of Professional Ethics, entitled "Upholding the Honor of the Profession," encouraged lawyers to "expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, ..." Charles W. Wolfram, Modern Legal Ethics 683 n. 16 (1986). More than sixty years later, the ABA enacted Disciplinary Rule 1-103(A) of the Model Code of Professional Responsibility, the predecessor of the current Rule 8.3(a) of the Model Rules of Professional Conduct. Both the 1969 Code, in DR 1-103(A), and the 1983 Model Rules, in Rule 8.3(a), make it clear that the duty to report is not merely an aspiration but is mandatory, the violation of which subjects the lawyer to discipline. [4] See Ronald D. Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1988 U. ILL. L.REV. 977, 980-81 (1988).

This court first adopted Rule 8.3 on December 18, 1986, effective January 1, 1987. Louisiana's rule is based on ABA Model Rule 8.3; however, there are several differences between the Model Rule and the Louisiana Rule that was in effect in 2001, at the time the formal charges were filed in this case. [5] Most significantly, Model Rule 8.3 requires a lawyer to report the misconduct of another lawyer only when the conduct in question "raises a substantial question" as to that lawyer's fitness to practice. Louisiana's version of Rule 8.3 imposed a substantially more expansive reporting requirement, in that our rule required a lawyer to report all unprivileged knowledge of any ethical violation by a lawyer, whether the violation was, in the reporting lawyer's view, flagrant and substantial or minor and technical. A task force of the Louisiana State Bar Association concluded that it was inappropriate to put a lawyer "in the position of making a subjective judgment" regarding the significance of a violation, and felt it was preferable instead "to put the burden on every lawyer to report all violations, regardless of their nature or kind, whether or not they raised a substantial question as to honesty, trustworthiness, or fitness." See Report and Recommendation of the Task Force to Evaluate the American Bar Association's Model Rules of Professional Conduct, at p. 24 (November 23, 1985).

We now turn to a more in-depth examination of the reporting requirement in Louisiana. At the time the formal charges were filed in this case, Louisiana Rule 8.3(a) provided:

[2004-0680 La. 12] A lawyer possessing unprivileged knowledge of a violation of this code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
Thus, the rule has three distinct requirements: (1) the lawyer must possess unprivileged knowledge of a violation of the Rules of Professional Conduct; (2) the lawyer must report that knowledge; and (3) the report must be made to a tribunal or other authority empowered to investigate or act on the violation. We will discuss each requirement in turn.

**Knowledge**

In its recommendation in this case, the disciplinary board did excellent work in collecting and analyzing the cases and legal commentary interpreting the knowledge requirement of Rule 8.3(a). We need not repeat that analysis here. Considering those authorities, it is clear that absolute certainty of ethical misconduct is not required before the reporting requirement is triggered. The lawyer is not required to conduct an investigation and make a definitive decision that a violation has occurred before reporting; that responsibility belongs to the disciplinary system and this court. On the other hand, knowledge requires more than a mere suspicion of ethical misconduct. We hold that a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question.

**When to Report**

Once the lawyer decides that a reportable offense has likely occurred, reporting should be made promptly. Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 298 (Winter 2003). The need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. *Id.* This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented.

**Appropriate Authority**

Louisiana Rule 8.3(a) requires that the report be made to "a tribunal or other authority empowered to investigate or act upon such violation." The term "tribunal or other authority" is not specifically defined. However, as the comments to Model Rule 8.3(a) explain, the report generally should be made to the bar disciplinary authority. Therefore, a report of misconduct by a lawyer admitted to practice in Louisiana must be made to the Office of Disciplinary Counsel.

**DETERMINATION OF RESPONDENT'S MISCONDUCT AND APPROPRIATE DISCIPLINE**

Applying the principles set forth above to the conduct of respondent in the instant case, we find the ODC proved by clear and convincing evidence that respondent violated Rule 8.3(a). First, we find that respondent should have known that a reportable event occurred at the time of his 1994 barroom conversation with Mr. Deegan. Stated another way, respondent's conversation with Mr. Deegan at that time gave him sufficient information that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question more [2004-0680 La. 14] likely than not occurred. Regardless of the actual words Mr. Deegan said that night, and whether they were or were not "equivocal," respondent understood from the conversation that Mr. Deegan had done something wrong.
Respondent admitted as much in his affidavit, during the hearing on the motion for new trial in the criminal case, during his sworn statement to the ODC, and during his testimony at the formal hearing. Indeed, during the sworn statement respondent conceded that he would have reported the matter "immediately" were it not for the personal problems he was then experiencing. Respondent also testified that he was surprised and shocked by his friend's revelation, and that he told him to remedy the situation. There would have been no reason for respondent to react in the manner he did had he not formed a firm opinion likely than not occurred. The circumstances under which the conversation took place lend further support to this finding. On the same day that he learned he was dying of cancer, Mr. Deegan felt compelled to tell his best friend about something he had done in a trial that took place nine years earlier. It simply defies logic that respondent would now argue that he could not be sure that Mr. Deegan actually withheld Brady evidence because his statements were vague and non-specific.

We also find that respondent failed to promptly report Mr. Deegan's misconduct to the disciplinary authorities. As respondent himself acknowledged, he should have reported Mr. Deegan's statements sooner than he did. There was no reason for respondent to have waited five years to tell the ODC about what his friend had done.

In his answer to the formal charges, respondent asserts that he did comply with the reporting requirement of Rule 8.3(a) because he promptly reported Mr. Deegan's misconduct to the District Attorney and the Criminal District Court through the attorneys for the criminal defendant, John Thompson. Respondent has misinterpreted Rule 8.3(a) in this regard. The word "tribunal" must be read in the context of the entire sentence in which it appears. The proper inquiry, therefore, is what authority is "empowered" to act upon a charge of attorney misconduct. In Louisiana, only this court possesses the authority to define and regulate the practice of law, including the discipline of attorneys. La. Const. art. V, 5(B); In re Bar Exam Class Action, 99-2880 (La.2/18/00), 752 So.2d 159, 160. In turn, we have delegated to disciplinary counsel the authority to investigate and prosecute claims of attorney misconduct. Supreme Court Rule XIX, 4. Furthermore, while a trial court bears an independent responsibility to report attorney misconduct to the ODC, see Canon 3B(3) of the Code of Judicial Conduct, only this court may discipline an attorney found guilty of unethical behavior. Therefore, respondent is incorrect in arguing that he discharged his reporting duty under Rule 8.3(a) by reporting Mr. Deegan's misconduct to Mr. Thompson's attorneys, the District Attorney, and/or the Criminal District Court. It is undisputed that respondent did not report to the appropriate entity, the ODC, until 1999. That report came too late to be construed as "prompt." [6]

Having found professional misconduct, we now turn to a discussion of an appropriate sanction. In considering that issue, we are mindful that the purpose of disciplinary proceedings is not primarily to punish the lawyer, but rather to maintain the appropriate standards of professional conduct, to preserve the integrity of the legal profession, and to deter other lawyers from engaging in violations of the standards of the profession. In re: Vaughan, 00-1892 (La.10/27/00), 772 So.2d 87; In re: Lain, 00-0148 (La.5/26/00), 760 So.2d 1152; Louisiana State Bar Ass'n v. Levy, 400 So.2d 1355 (La.1981). The discipline to be imposed depends upon the facts of each.

Respondent's actions violated the general duty imposed upon attorneys to maintain and preserve the integrity of the bar. In re: Brigandi, 02-2873 (La.4/9/03), 843 So.2d 1083 (citing Louisiana State Bar Ass'n v. Weysham, 307 So.2d 336 (La.1975)). While we adhere to our observation in Brigandi that an attorney's failure to comply with the reporting requirement is a "serious offense," in the instant case, we find that respondent's conduct was merely negligent. Accordingly, Standard 7.3 of the ABA's Standards for Imposing Lawyer Sanctions provides that the appropriate baseline sanction is a reprimand. [7]

The only aggravating factor present in this case is respondent's substantial experience in the practice of law. As for mitigating factors, we adopt those recognized by the disciplinary board, placing particular emphasis on the absence of any dishonest or selfish motive on respondent's part. Notwithstanding these factors, however, respondent's failure to report Mr. Deegan's bad acts necessitates that some sanction be imposed. Respondent's knowledge of Mr. Deegan's conduct was sufficient to impose on him an obligation to promptly report Mr. Deegan to the ODC. Having failed in that obligation, respondent is himself subject to punishment. Under all of the circumstances presented, we conclude that a public reprimand is the appropriate sanction.

Accordingly, we will reprimand respondent for his actions.

Conclusion

Reporting another lawyer's misconduct to disciplinary authorities is an important duty of every lawyer. Lawyers are in the best position to observe professional misconduct and to assist the profession in sanctioning it. While a Louisiana lawyer is subject to discipline for not reporting misconduct, it is our hope that lawyers will comply with their reporting obligation primarily because they are ethical people who want to serve their clients and the public well. Moreover, the lawyer's duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, briefs, and oral argument, it is ordered that Michael G. Riehlmann, Louisiana Bar Roll number 2072, be publicly reprimanded. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

VICTORY, J., dissents and assigns reasons.

VICTORY, J., dissenting.

I dissent from the majority opinion and would impose a harsher sanction on Respondent.

Notes:
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requires the State to disclose to the defendant in a criminal case evidence that is favorable to the accused and is material to guilt or punishment.

[2] See Standard 7.2 of the ABA's Standards for Imposing Lawyer Sanctions, which suggests that a suspension 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.

[3] The cases cited by ODC and the committee include In re: Leitz, 98-3014 (La.1/8/99), 728 So.2d 835 (attorney suspended for sixty days for failing to supervise law partner or law firm's trust account, which permitted partner to convert third-party funds); In re: Toups, 00-0634 (La.11/28/00), 773 So.2d 709 (attorney publicly reprimanded for failing to report another attorney's unethical conduct); and In re Himmel, 125 Ill.2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790 (1988) (attorney suspended for one year for failing to report another attorney's conversion of client's settlement funds). In addition, the board considered In re: Brigandi, 02-2873 (La.4/9/03), 843 So.2d 1083 (attorney suspended for two years, with all but six months deferred, for misconduct including failing to report another attorney's solicitation activities).

[4] DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Model Rule 8.3(a) provides that "A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

[5] We made significant changes to Rule 8.3 effective March 1, 2004, long after the formal charges were filed against respondent.

[6] Although our primary focus is on Rule 8.3(a), we also note that respondent's conduct violated Rule 8.4(d).

[7] Standard 7.3 provides that a reprimand is generally appropriate when a lawyer negligently 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.
ATTORNEY U
v.
THE MISSISSIPPI BAR.
No. 92-BA-01201-SCT.
Supreme Court of Mississippi.
June 20, 1996

James A. Becker, Jr., Leah D. McDowell, C. Maison Heidelberg, Watkins & Eager, Jackson, Myles A. Parker, Jackson, for Appellant.
Michael B. Martz, Jackson, Charles J. Mikhail, Pascagoula, for Appellee.

En Banc.

ON PETITION FOR REHEARING
JAMES L. ROBERTS, Jr., Justice, for the Court: [1]

INTRODUCTION
The petitions for rehearing are granted. Original opinions are withdrawn and these opinions are substituted therefor. This case is reversed and rendered, as it is now determined that all issues are finalized.

In this matter we are presented with the opportunity to define the point at which a member of the bar has sufficient knowledge concerning an unprofessional act of another member of the bar to be compelled to report that knowledge to the disciplinary authority. The range to be considered stretches from "any information" to "personal knowledge" sufficient to qualify one as a witness under our rules of evidence. M.R.E. 602. We opt for a line short of the latter but considerably beyond the former. In the instant case, wherein the charged lawyer's client related a story concerning his relationship with another lawyer which indicated fee-splitting, we are unable to conclude that the line was crossed. Further, we find that supplemental additional information within the record reflects that the previously remanded issue regarding improper "threats of a bar complaint to exact a settlement" was originally dismissed by the Committee on Professional Responsibility and never forwarded to the Complaint Tribunal due to the Committee's finding of a lack of probable cause to support said violations. Accordingly, we now determine this lengthy matter concluded.

I.

Pulmonary Function Laboratory (PFL) began performing pulmonary function testing and other similar services for clients of Attorney S in 1988. The details of their agreement are unclear. At the time this action was commenced there still existed a dispute between William T. McNeese, part owner of PFL, and S as to the exact financial agreement between the two of them.

In the summer of 1989, a dispute arose between S and McNeese over the amount of money S was to pay PFL. To aid them in settling this dispute, both parties obtained legal counsel with S
hiring Frank Trapp and McNeese hiring attorney U. According to U, soon after he began representing McNeese, McNeese brought him a writing which he said was a proposed contract which provided for a splitting of legal fees between PFL and, at that time, an unidentified attorney. The terms of the proposed contract, as alleged by McNeese, provided that McNeese and S were to split evenly $175 of a $400 fee for each client. U advised McNeese that the proposed agreement, as written, was unenforceable because it violated the Rules of Professional Conduct. U then prepared for his client McNeese a "substitute contingent fee agreement to be used between PFL and individuals it tested and for whom it performed other services who could not afford to pay for them, not with the attorney."

In September, 1989, McNeese told U that PFL had been operating under an oral fee-splitting agreement with S for several months and that S was now denying the existence of the agreement and disputing the amounts owed PFL under it. McNeese also told U "that Trapp was representing S in this dispute; and that Trapp, on behalf of S, had suggested a flat fee arrangement, though the parties were not able to agree on the amount."

There followed a series of letters between U and Frank Trapp. In a letter to Trapp dated October 10, 1989, U wrote the following:

I am advised that since February 19, 1988, 1,061 clients of Mr. [S's] have been given pulmonary function tests by Pulmonary Function Lab, and that all of these clients were referred to Mr. [S] by the lab. Pulmonary Function Laboratory had agreed with Mr. [S] to finance the testing for Mr. [S], that is, to perform the testing and to pay any medical cost involved for x-rays, physical examinations by physicians, as well as any cost involved in further evaluation or medical consultation, further x-ray readings, further physical examinations, etc. In return for handling the financing of the medical end of the cases, Pulmonary Function Laboratory was to receive one-half of any fees realized by Mr. [S] from the cases, as well as reimbursement of some of the medical costs. At that time, of course, Pulmonary Function Laboratory neither knew, nor had reason to know, of the provisions of Rule 5.4(a) of the Mississippi Rules of Professional Conduct. Mr. [S] now claims that since the Rules of Professional Conduct applying to him as a lawyer prohibit such fee-sharing, he will be unable to fulfill his obligations to Pulmonary Function Laboratory under that agreement.

In order to resolve this controversy, Pulmonary Function Laboratory is willing to do the following:
1. It will waive any claim it may have against Mr. [S] under the verbal contract.
2. Subject to a payment schedule to be agreed upon by the parties, for a flat fee of $4,000 per patient, less a credit of $200 for each patient already tested, Pulmonary Function Laboratory will....

The letter then goes on to list several services that PFL was to provide under this new proposed agreement. It concludes by saying:

Pulmonary Function Laboratory feels that under this proposal, their compensation will be significantly less than it would have been under the verbal fee sharing arrangement, but will compensate them to some extent for the risk they took in financing Mr. S's venture into asbestos litigation. I have advised Pulmonary Function Laboratory of the availability of the complaint
proceedings available through the Mississippi State Bar Association. Unless something can be worked out along the lines of this proposal, it is the intention of Pulmonary Function Laboratory to seek relief through whatever legal avenues are available to it.

(Emphasis supplied.)

U again wrote Trapp on October 27, 1989:

PFL has advised me that they have had discussions with Mr. [S] and that he has agreed to pay a flat testing fee of $4,000 per client, less a credit of $200 for each client already tested by PFL. He has also agreed to renegotiate a twenty-five percent contingent fee with each of his clients previously tested by PFL. Under this flat fee arrangement, once PFL has performed the first retesting on a client, Mr. [S] will be liable for the entire fee in accordance with the payment schedule set forth below. This flat fee is not contingent on the retested person's remaining a client of Mr. [S]'s. For the agreed flat fee, PFL will....

The letter again enumerates the services mentioned in the letter of October 10, 1989, and proposes a fee payment schedule.

On November 8, 1989, Frank Trapp wrote U:

This letter is written in response to your October 10, 1989 and October 27, 1989 letters. It also is to confirm my conversation

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with you and [your associate] on October 31, 1989.

First I would reiterate, on behalf of my client, [S], that, without admitting or conceding any arrangement ever existed, he does renounce, declare void and disclaim any arrangement with Pulmonary Functions Laboratory (the "Lab") or Bill McNeese to (1) share legal fees or (2) pay compensation or give anything in connection with the referral of clients who had tests performed at the Lab. Under no circumstances shall Mr. [S] pay the Lab or Mr. McNeese any part of his legal fees. Mr. [S] shall not pay the Lab or Mr. McNeese any compensation or give anything of value for any matter that has transpired before the date of this letter, except the $400.00 fee which his clients agreed to pay to the Lab for their testing and diagnosis.

....

As we discussed in our meeting, the arrangement as characterized by Mr. McNeese could be held to violate criminal laws. To reiterate, Mr. [S], without admission or concession to the existence of such an arrangement, has now specifically renounced and disclaimed any such arrangement. Again, no payment will be made beyond the $400.00 which each client of Mr. S who was tested by the Lab had agreed to pay to the Lab....

In order to avoid any appearance of continuing any improper conduct, Mr. S makes absolutely no commitment or promise of future use of the Lab....

U responded on November 17, 1989:

PFL has advised me that they have no intention of renouncing the fact that there was a fee-sharing arrangement between them and Mr. S. Further, PFL will do no further retesting on any of Mr. S's clients until a flat fee agreement has been negotiated and signed.

As you know, I have advised PFL of its options, including the availability of the complaint proceedings available through the Mississippi State Bar Association. Again, unless something can
be worked out along the lines of a negotiated flat fee arrangement, it is the intention of PFL to seek relief through whatever legal avenues are available to it.

Please discuss this with Mr. S and inform us of his decision. If we have not received a response from Mr. S by November 27, 1989, our clients will perform no further retesting on Mr. S's clients and will pursue whatever legal remedies it considers appropriate.

U again wrote Trapp on December 1, 1989:

[My associate] has passed on to me the substance of your various recent telephone conversations. Bill McNeese informs me that the services offered by Mobile Diagnostic Center in no way compare with the nature and extent of the diagnostic and interpretive services offered by Pulmonary Function Lab. Pulmonary Function Lab is not willing to do the retesting for the $435.00 you mentioned to [my associate]. They are willing to extend their retesting period for two years, but the flat fee for providing their services still remains significantly above the figure mentioned by Mobile Diagnostic Center.

This matter has now drug [sic] on for some time. We have been instructed to obtain the necessary forms from the Mississippi State Bar Association for Pulmonary Function Laboratory to proceed with a bar complaint against Mr. S.

(Emphasis supplied.)

The final letter was sent by Trapp to U on December 6, 1989.

I am in receipt of your letter of December 1, 1989. In that letter, you unilaterally announce that Bill McNeese's retesting would only be done at a significant sum above the competitive quote of $423.00 given by a pulmonologist. You did not specify what that "significant" figure is. Also, your letter again couples the demand with a reference to filing a bar complaint.

Mr. McNeese charges the clients of Paul Minor and other lawyers less than the $400.00 fee paid for the initial testing. I ask you: How can Mr. [S] justify having his clients pay a $4,000.00 or other "significantly" higher fee when his clients can obtain the equivalent services for $423.00? It was at [your associate's] request that we obtained written verification of that quote. Having complied with her request, how can we now ignore that quote?

Everyone recognizes the arrangement alleged by Mr. McNeese would be an unenforceable contract. Moreover, that alleged arrangement runs afoul with the spirit of the runner and champerty statutes. Thus it is clear Mr. McNeese's demand for $4,000.00 per client is either (1) to pay blackmail to keep Mr. McNeese from filing a complaint with the bar association or (2) to pay Mr. McNeese for allegedly referring clients to Mr. [S]. In either case, the payment would be illegal.

Over the past several weeks, I had talked with [your associate] about the situation. I reiterated Mr. [S]'s disavowal of the arrangement alleged by Mr. McNeese....

Your letter of December 1, 1989 is a unilateral rejection of our good faith effort to come up with a fair fee schedule. Your letter does not state what figure you are referring to that is "significantly above the [$423.00 quote]." I can only assume it is another effort to extract some excessive fee from Mr. [S]. Any payment on that basis would not be legitimate. I cannot advise my client to agree with any fee schedule which is only a guise for an illegal payment.
U did not reply to this letter. In January, 1990, McNeese filed a bar complaint against S. One year later, in January of 1991, S filed a bar complaint against U. U never filed a bar complaint against S.

S's complaint against U was investigated by the bar's Assistant General Counsel who found that "the evidence does not establish 'probable cause' that S violated Rules 1.16(a) (mandatory withdrawal), 1.2(d) (counseling a client to engage in, or assist a client in conduct the lawyer knows is criminal or fraudulent), or 8.4(d) (conduct prejudicial to the administration of justice)." Accordingly, the issue of "threats of a bar complaint to exact a settlement" was determined to be lacking probable cause, thus without merit, and was not forwarded to a Complaint Tribunal to pursue formal charges as required by Smith v. Mississippi State Bar, 475 So.2d 148, 149-50 (1985) and Rule of Discipline 7.1. As the Court is "bound by its own disciplinary rules," The Mississippi Bar v. Attorney G, 630 So.2d 344, 348 (1994), we are unable to properly address the issue of "threats of a bar complaint to exact a settlement" because the Complaints Committee did not file a Formal Complaint with the Clerk of this Court as required by Disciplinary Rule 8(a) and Attorney G.

On March 20, 1992, the Committee on Professional Responsibility of the Mississippi Bar issued a directive to General Counsel to "prepare and file a Formal Complaint against U, in accordance with the provisions of Rule 8 of the Rules of Discipline for the Mississippi State Bar." The complaint was duly filed and the issue joined. This Formal Complaint concerned the alleged failure of U to report professional misconduct.

A motion styled Complainant's Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment was filed by the Mississippi Bar on September 4, 1992. This motion asked the Complaint Tribunal to grant either a Motion for Judgment on the Pleadings under M.R.C.P. Rule 12(c) or a Motion for Summary Judgment under M.R.C.P. Rule 56 on the grounds that:

1. The material facts alleged in the Bar's Formal Complaint ... are admitted by [U] in his Answer and Defenses, ... except that he denies personal knowledge of certain facts and denies characterizations by the Bar of the contents of certain letters attached as exhibits to the Formal Complaint, as is more fully argued in the Bar's Memorandum Brief accompanying this Motion; or

2. The pleadings ... and the affidavits of Mr. [U] ... and William T. McNeese, ... show that there is no genuine issue as to any material fact and that the Bar is entitled to a judgment in its favor as a matter of law, as is more fully argued in the Bar's Memorandum Brief accompanying this Motion.

Affidavits by U and McNeese accompanied the Mississippi Bar's motion. In his affidavit, dated February 18, 1991, U stated:

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2. When my firm and I were first engaged by Mr. Bill McNeese of Pulmonary Function Laboratory (PFL) we were asked to review a proposed fee splitting agreement between PFL and one or more unidentified attorneys. This was in August 1989. I did not learn at that time that PFL was supposedly operating with any attorney under any such agreement.

3. We expressed our professional opinion about the agreement furnished to us by PFL for
review. We prepared a substitute agreement for a contingent fee arrangement between PFL and certain individuals for whom PFL proposed to do testing and to render other services.

4. Thereafter, in September, 1989, I learned for the first time that PFL was (and had been for several months) operating under an oral fee-splitting arrangement with [S]. At about that same time I learned that Mr. [S] was disputing the amount he owed PFL and was disputing the enforceability of the alleged agreement with PFL. Several months later in 1990, I learned that Mr. [S] had supposedly prepared the agreement which McNeese brought to our firm in August, 1989.

7. At all times material hereto, I have been told by PFL and its principals that PFL had an agreement with [S] pursuant to which PFL was to refer persons it tested to [S] for representation in asbestosis claims, was to perform services in addition to mere testing, and was not to be paid for its services until the persons being tested received payment of settlements.

12. I never threatened or coerced either Mr. [S] or his attorney. I never sought to extort anything from either of them. I never told Mr. Trapp or Mr. [S] of any intent to file a bar complaint except as stated in my letters which are exhibits to the complaint.

13. I certainly never personally threatened or otherwise said that I would file a bar complaint against Mr. [S] because I have never known to my personal knowledge that he committed any violation of the Rules of Professional Conduct. In any event, PFL, the party claiming such conduct on the part of Mr. [S], filed a complaint against him within ninety (90) days of telling me of its complaint against Mr. [S].

14. I have not sought at any time material hereto to induce anyone to commit any crime or to violate the Rules of Professional Conduct of the Mississippi State Bar and I have not done so myself.

Parts of McNeese's affidavit, dated February 14, 1991, are also quite illuminating:

2. In August, 1989, on behalf of PFL, a general partnership, I retained [U's firm] to assist the laboratory in formulating a proposed contingency fee contract to be executed between the laboratory and its clients who desired pulmonary function testing, but could not afford to pay for it. I presented the attorneys with a sample contract which they thought was prepared by PFL. I did not tell the attorneys until later that, in fact, the suggested contract had been prepared by Mr. [S].

3. A month or so after retaining [the firm] for that purpose, I later consulted with Mr. [U] and [an associate of the firm] with regard to a dispute between PFL and Mr. [S], an attorney representing some asbestosis claimants, on whom pulmonary function testing had been performed by PFL. That was the first time they were told of Mr. [S]'s involvement in any contract with PFL....

4. In the course of my discussions with Mr. [U] and [the associate] about the ethical prohibitions of Mr. [S] entering into a fee-splitting arrangement with PFL, as PFL contended he had done, Mr. [U] advised me that if, in fact, such an agreement had existed, it might be the basis for a complaint with the Mississippi State Bar Association against Mr. [S] by PFL.

5. At no time prior to PFL filing a bar complaint against Mr. [S] did Mr. [U] encourage PFL to file such a bar complaint, nor did Mr. [U] advise PFL that it should use the threat of a bar complaint
as a means of forcing Mr. [S] to resolve the differences between [sic] he and PFL.

6. Once PFL realized that it had the basis for a bar complaint against Mr. [S], it was my intention to file such a bar complaint....

7. The first suggestion to PFL that a flat fee agreement might be entered into between Mr. [S] and PFL, in lieu of the prior contingency fee agreement, was made to me by the attorney for Mr. [S]. The $4,000.00 flat fee proposal made on behalf of PFL to Mr. [S] suggested in Mr. [U]'s letter to Mr. Frank Trapp of October 27, 1989, was in lieu of the former agreement and was for services to be provided by PFL over and above the usual pulmonary function testing provided in such cases.

(Emphasis original.)

U filed a cross-motion for summary judgment. In it, he stated that he "did not have knowledge that S or any other attorney had violated the Rules of Professional Conduct. He further stated that he had no knowledge of a violation of the Rules of Professional Conduct by another attorney that "raised a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" and that he had no duty to inform the appropriate professional authority of S's alleged conduct.

The day after he submitted his cross-motion for summary judgment, U submitted an affidavit in support of this motion dated September 9, 1992. In it he stated:

2. I make the following statements so the record in this matter will be perfectly clear. (a) I do not now, nor have I ever had, personal knowledge that Mr. S engaged in any conduct which violated any of the Mississippi Rules of Professional Conduct. (b) My only knowledge of Mr. S's conduct is what my client told me. (c) When I first confronted Mr. S's attorney with the "facts" as recited to me by my client, that attorney vehemently denied that his client had engaged in any conduct which constituted a violation of the Mississippi Rules of Professional Conduct. (d) Mr. S's attorney had persisted in that denial and, so far as I know, persists in that denial.

3. I have never been told, nor have I otherwise learned, that Mr. S is alleged to have engaged in any conduct prohibited by the Mississippi Rules of Professional Conduct, except his alleged (but steadfastly denied) violation of Rule 5.4(a).

A hearing was held on this matter before the Complaint Tribunal on September 25, 1992. The Tribunal unanimously found that there was no genuine issue of material fact and that U had violated Rule 8.3(a) and 8.4(a) of the Rules of Professional Conduct. U's cross-motion for summary judgment was denied. The Bar's motion was treated as one for summary judgment and granted. Based on its conclusion that a violation had occurred the Tribunal imposed a sanction of public reprimand.

U filed a Notice of Appeal to this Court on November 24, 1992.

II.

a.

This Court conducts a: de novo review in a bar disciplinary matter which necessarily includes a review of the sanctions
imposed. Hoffman v. MS State Bar Association, 508 So.2d 1120, 1124 (Miss.1987); Myers v. Mississippi State Bar, 480 So.2d 1080, 1089 (Miss.1985). Deference is accorded the findings of the Complaint Tribunal but this Court "has the non-delegable duty of ultimately satisfying itself as to the facts, and reaching such conclusions and making such judgments as it considers appropriate and just."

Mississippi State Bar v. Varnado, 557 So.2d 558, 559 (Miss.1990).

Furthermore, although "Bar disciplinary proceedings are quasi-criminal in nature," Attorney Q v. Mississippi State Bar, 587 So.2d 228, 231 (Miss.1991), "[t]he beyond-a-reasonable doubt standard does not apply; rather, we require an intermediate level of certainty regarding the facts at issue, to-wit; a clear and convincing evidence standard." Id. at 232.

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b. 

Rule 8.3(a) of the Mississippi Rules of Professional Conduct reads:

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

M.R.P.C. Rule 8.3(a).

The central issue here is whether the attorney in question had sufficient knowledge of another attorney's misconduct to require his reporting it to the proper authority. Proper determination of this issue is hampered by Rule 8.3(a)'s failure to define "knowledge." The Official Comment adds nothing at all. "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct...." M.R.P.C. Rule 8.3(a), Official Comment. The Terminology section of the Rules does not define "knowledge" but it does define similar terms. " 'Knowingly,' 'Known', or 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." M.R.P.C. Terminology. Nowhere, however, is "actual knowledge" defined. Black's Law Dictionary defines "actual" in part as "a legal term in contradistinction to virtual or constructive...." Black's Law Dictionary (4th ed.1968). The term can be definitively viewed only as something other than constructive or imputed knowledge. Black's relates definitions of the term "knowledge" ranging from "acquaintance with fact or truth" to "information and circumstances which engender belief to moral certainty or induce state of mind that one considers that he knows." Id.

This question has rarely been addressed by the courts, and this is the first instance for this Court. We have found but three cases discussing the duty to report, Matter of Lefkowitz, 105 A.D.2d 161, 483 N.Y.S.2d 281 (A.D. 1 Dept.1984); In re Himmel, 125 Ill.2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790 (1988); and In re Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I.1993). Unfortunately, all fail to discuss "knowledge."

Various state bar associations through their Ethics Opinions treated the subject. The Maine Professional Ethics Commission of the Board of Overseers of the Bar wrote in 1989, "The lawyer has no duty to report the other lawyer's misconduct to disciplinary authorities unless the lawyer
himself has knowledge, based on a substantial degree of certainty, that the lawyer has committed an offense that raises a substantial question regarding his honesty, trustworthiness, or fitness to practice law.” Maine Ethics, Op. 100 (1989). The Advisory Committee of the Nebraska State Bar Association has also addressed this issue, writing, “[B]ecause knowledge in the reporting rule means more than a suspicion, a lawyer need not report mere suspicions of code violations.” Nebraska Ethics, Op. 89-4, (undated). That opinion does not, however, reach the issue as to what must be reported.

According to the Advisory Opinions Committee of the State Bar of New Mexico:

The duty to report misconduct is mandatory and arises when a lawyer has a substantial basis for believing a serious ethical violation has occurred, regardless of the source of that information. This "substantial basis" test for knowledge of misconduct is intended to be greater than a "mere suspicion" or "probable cause" test. While no duty to report arises without a substantial basis for knowledge of misconduct, a lawyer may choose to report information of misconduct to the appropriate professional authority.


The Committee on Professional Ethics of the Association of the Bar of the City of New York gives one of the stricter definitions of knowledge stating, "The degree of certainty required to constitute knowledge under the rule must be greater than a mere suspicion; the reporting lawyer must be in possession of facts that clearly establish a violation of the disciplinary rules." New York City Ethics, Op. 1990-3 (1990). In contrast, the guidelines given by the Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association appear more subjective--"If the lawyer believes that opposing counsel's conduct raises a substantial question about his honesty, trustworthiness, or fitness to practice, then the lawyer should report the other lawyer's misconduct to the disciplinary counsel." Pennsylvania Ethics, Op. 89-247 (undated). It is unclear from the materials available, however, whether the word "believed" refers to the legal conclusion whether the conduct is a violation or to the factual conclusion whether the conduct occurred.

Just recently the District of Columbia Bar adopted the position that a lawyer is compelled to report "only if she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts." D.C. Bar, Op. 246 (Revised 1994).

An excellent discussion of "knowledge" in the context of the Rules of Professional Conduct can be found in The Law of Lawyering by Geoffrey C. Hazard, Jr., and W. William Hodes. Section 402 states:

In the final analysis, all conclusions about someone else's state of mind must be derived from circumstantial evidence. Where a rule provides that a lawyer "reasonably should have known," the reference is to circumstances that would lead to awareness on the part of reasonable people with a lawyer's training. But circumstantial evidence must also be the basis for inferring a lawyer's actual knowledge or belief, where that is the relevant legal standard. It is impossible to look into a lawyer's head, and it is unacceptable simply to take his word for his state of mind when the probity of his own conduct is at issue. As the Terminology section points out, a person's belief or
knowledge "may be inferred from circumstances."

This practical method of proof has enormous significance. Even where a violation requires "knowledge," the circumstances may be such that a disciplinary authority will infer that a lawyer must have known. In such a case the lawyer will be legally chargeable as if actual knowledge had been proved. In terms of what can be proved, the "knows" standard thus begins to merge with the "should have known" standard, for often it will be impossible to believe that a lawyer lacked knowledge unless he deliberately tried to evade it. But one who knows enough to evade legally significant knowledge already knows too much.


Hazard and Hodes write of a lawyer's unbelief as opposed to his knowledge:

Although his professional role may require a lawyer to take a detached attitude of unbelief, the law of lawyering does not permit a lawyer to escape all accountability by suspending as well his intelligence and common sense.

... [A]ll authorities agree ... that there comes a point where only brute rationalization, moral irresponsibility, and pure sophistry can support the contention that the lawyer does not "know" what the situation is.

Id., at § 403.

Here is the Hazard and Hodes pragmatic approach to knowledge:

[A] lawyer's conduct will be assessed according to a legal standard that assumes a lawyer can "know" the truth of a situation, even if he cannot be absolutely sure. Even the criminal law, after all, does not require absolute certainty; it requires only a conclusion that is beyond a reasonable doubt. As noted in § 402, the law of lawyering as set forth in the Terminology section of the Rules of Professional Conduct permits a disciplinary authority to "infer from circumstances" that a lawyer knows what a reasonable person would know. More than this, the law takes account of a lawyer's legal training and experience in assessing his or her state of mind. A lawyer is an adult, a man or a woman of the world, not a child. He or she is also better educated than most people, more sophisticated and more sharply sensitized to the legal implications of a situation. The law will make inferences as to a lawyer's knowledge with those considerations in mind.

Looking forward into his professional conduct as it proceeds, a lawyer must imagine how his conduct will appear to others, later looking back at it. And he must imagine the inferences that will be drawn as to what he must have known at the time. In pragmatic terms, this is what a lawyer knows.

Id., at § 404.

U would have this court define "actual knowledge" as "personal knowledge". Only if a lawyer had such knowledge as would enable him to testify as a witness that a another lawyer had violated the Rules of Professional Conduct would he have to inform the proper authorities. We believe that a higher standard may be fairly inferred to be required. That standard must be an objective one, however, not tied to the subjective beliefs of the lawyer in question. The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred and that the conduct, if it did occur,
raises a substantial question as to the purported offender's honesty, trustworthiness or fitness to practice law in other respects.

c. The circumstances under consideration here reflect that U's client told him of an arrangement which appeared to be fee splitting. The record tells us nothing concerning corroboration of the client's story or of the client's trustworthiness. The other party to the purported arrangement denies that it existed. These circumstances do not dictate a firm opinion on the part of a reasonable lawyer that the conduct in fact occurred.

It is suggested that the fact that the lawyer relied upon what he was told by his client to assert the client's claim is significant. The fact that in one of the affidavits U states that he "learned" of the fee splitting arrangement is also fastened upon as supportive of a finding of a violation. A moment's reflection would reveal the fallacy of these arguments.

It is not for the lawyer to believe or disbelieve the client. Ultimately, it is for the fact-finder, either judge or jury. A lawyer must be free to assert his client's claims, at least until there is evidence apparent that the client is lying. The state of mind necessary to assert the claim, however, falls well short of that required for a "firm opinion" as to whether specific conduct occurred. We must allow lawyers at least this degree of detachment if we are to assure the competent and vigorous representation essential to our adversary system of justice.

As to the affidavit, the argument is semantical. It is clear from all that has been introduced in this case, that the evidence of an improper arrangement is confined to the unsworn description of a client. U clearly denied knowing of such an arrangement by any other means. Indeed, in the same paragraph in which he said he "learned" he referred to it as an "alleged" agreement. This is clearly not an admission of personal knowledge. Neither is it an admission of a firm opinion.

As measured by the standard we announce here, the proof falls short of that necessary to demonstrate by clear and convincing evidence that lawyer U had sufficient evidence before him such that any reasonable lawyer would have formed a firm opinion that the conduct alleged by his client had in fact occurred.

Because we conclude that the evidence was insufficient to support a finding of "knowledge" we need not reach the issue whether the alleged entry into a fee-splitting arrangement, which was apparently renounced before any fees were actually split, was conduct bearing on S's honesty, trustworthiness or fitness to practice law. We pause only to note that a lawyer is not obliged to report every transgression of our disciplinary rules, only the most serious of them. M.R.P.C. Rule 8.3(a), Comment.

Whether a particular violation of the disciplinary rules meets the "substantial question" test must be determined on a case-by-case basis, using "a measure of judgment" rather than a clear litmus test. Advisory opinions from other jurisdictions are somewhat helpful in this regard but suggest no bright line test. Compare Arizona Op. 87-26 (failure to file tax returns should have been reported), Alabama Op. 90-97 (same for misappropriation of escrow funds), and New Mexico Op.1988-8 (same for attempt to bribe witnesses); with Illinois Op. 90-36 (threats to bring criminal charges to gain advantage in a civil suit need not
be reported), Virginia Op. 962 (1987) (same for attempt to persuade clients to change wills to
detriment of Society for the Prevention of Cruelty to Animals), and Pennsylvania Op. 88-225
(same for failure to comply with statute of limitations).


There are cases and opinions from other jurisdictions dealing with the question of fee-splitting. Where substantial sanctions are imposed, the fee-splitting transgression is usually attended by other misconduct. It should suffice to say, however, that the sanction to be imposed in a particular case will depend upon all of the attendant circumstances. *State Bar of Texas v. Faubion*, 821 S.W.2d 203 (Tex.Ct.App.1991); *In the Matter of an Anonymous Member of the South Carolina Bar*, 295 S.C. 25, 367 S.E.2d 17 (1988); *The Florida Bar v. Stafford*, 542 So.2d 1321 (Fla.1989); *In the Matter of Elias Quintana*, 104 N.M. 511, 724 P.2d 220 (1986); *In re Clarence A. Potts*, 301 Or. 57, 718 P.2d 1363 (1986); *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass. v. Lawler*, 342 N.W.2d 486 (Iowa 1984); *Office of Disciplinary Counsel v. Jackson*, 536 Pa. 26, 637 A.2d 615 (1994); *In the Matter of Charles E. Houston*, 314 S.C. 94, 442 S.E.2d 175 (1994); and *In the Matter of Theodore Friedman*, 196 A.D.2d 280, 609 N.Y.S.2d 578 (1994).

III.

Having found that U never had a Formal Complaint filed with the Clerk of this Court to pursue charges against him for violation of M.R.P.C. 1.16(a), or 1.2(d), the issue regarding the "threats of a bar complaint to exact a settlement" was not previously and is not now properly before the Court. Additionally, to institute disciplinary proceedings at the appellate level raises glaring due process concerns. See *In the Matter of Richard Thalheim, Jr., Plaintiff-Appellant*, 853 F.2d 383, 388 (5th Cir.1988); *The Mississippi Bar v. Attorney G*, 630 So.2d 344, 348 (1994). Accordingly, there is no issue requiring remand, and instead the Court is required to render this aspect of the case.

A significant amount of time has elapsed since this dispute began, and this opinion is the final word in the charges, counter-charges, hearings and findings which have occurred. The time has come to put an end to this matter once and for all. We do not in any manner condone the alleged acts of U, but are required to construe the disciplinary rules strictly. Therefore, U will not have any more disciplinary proceedings instigated against him with regard to the issues already addressed by this Court or originally found to be lacking probable cause by the Complaints Committee absent a reinstitution of proceedings by the Bar Complaints Committee. It is hoped that similar cases shall not arise. Those so tempted would be better served by persistent and continual study of the Mississippi Rules of Professional Conduct. The conclusion of this case is based upon its peculiar history, as are all cases, and its very close decision affords little comfort to those who may be similarly situated.

IV.

For the aforementioned reasons, the judgment of the Complaint Tribunal is reversed and this matter is rendered consistent with this opinion.

REVERSED AND RENDERED.

DAN LEE, C.J., PRATHER, P.J., PITTMAN and SMITH, JJ., concur.

MILLS, J., concurs in result only.
BANKS, J., concurs in part and dissents in part with separate written opinion joined by SULLIVAN, P.J., and McRAE, J.

McRAE, J., dissents with separate written opinion.

BANKS, Justice, concurring in part and dissenting in part:

I agree that the reprimand imposed by the complaint tribunal should be rejected for the reasons expressed in my original majority, most of which is reiterated by today's majority. In my view, however, the fact that a complaints committee has failed to authorize a formal complaint on the charge of wrongfully threatening to file a bar complaint in order to gain an advantage is no bar to subsequent proceedings on such a charge. Accordingly, I dissent from today's resolution of this matter and adhere to the views expressed in the original majority opinion.

[1] I would remand the matter for further proceedings, including at least, the presentation of the facts anew to the Committee on Professional Responsibility (hereinafter "CPR").

I cannot quarrel with the pronouncement in Smith v. Miss. State Bar, 475 So.2d 148 (Miss.1985), to the effect that our law allows no appeal from a failure of the CPR (then the State Bar Committee on Complaints) to authorize the filing of a formal complaint. Nor do I question the suggestion that if we are to sanction attorneys for misconduct we must do so in accordance with our rules. Id. at 149-150. Nothing in our Rules of Discipline or in Smith, however, prohibits the reinstitution of proceedings which have not progressed beyond the CPR stage. Clark v. Mississippi State Bar Ass'n, 471 So.2d 352, 357 (Miss.1985) (Prior dismissal of charges by complaints committee is not res judicata because it is not judicial determination on the merits but "rather is analogous to a review by a grand jury.")

There may be due process and fundamental fairness concerns arising out of repeated presentations of charges originally retired to the files but none appear in the instant case. This is not an instance of harassment at the behest of an overzealous bar counsel but rather a resumption of proceedings generated by the presentation of evidences to this Court through a formal complaint on a different charge. This Court hears such matters de novo and is the ultimate authority with regard to lawyer discipline. Its direction to pursue a matter further cannot, without more, be viewed as harassment. On these facts, I see no due process or fundamental fairness violation. To the extent that one can be shown, it should be alleged and supported before a complaint tribunal should a formal complaint be authorized by the Committee on Professional Responsibility.

Finally, I am not impressed with the suggestion that because the conduct in question occurred some time ago, we should simply end it now. It is not unusual for bar proceedings to be extended. See e.g. Barrett v. Mississippi Bar, 648 So.2d 1154 (Miss.1995) (a complaint was filed in 1982 and was resolved by this Court on January 12, 1995); Miss. State Bar v. Blackmon, 600 So.2d 166 (Miss.1992) (proceedings began on April 23, 1986, and were concluded by this Court on April 15, 1992). Indeed we have noted that disciplinary proceedings should be pursued at a cautious pace. Myers v. Mississippi State Bar, 480 So.2d 1080 (Miss.1985). To be sure, it is in the interest of both the public and practitioners that these matters not be unduly prolonged. The mere passage of time, especially during the pendency of complaints, however, has not been and should not be
deemed sufficient to excuse attorney misconduct from the reach of our disciplinary scheme. Barrett v. Mississippi Bar, 648 So.2d at 1160. In Myers we were unclear as to where proceedings should begin on remand to consider previously uncharged conduct. Myers v. Mississippi State Bar, 480 So.2d at 1091. In The Mississippi Bar v. Attorney G, 630 So.2d 344, 348 (Miss.1994), our mandate pretermitted presentation to the CPR and directed a hearing before the complaint tribunal. Our original mandate here remanded the matter to a complaint tribunal. Out of deference to our rules and the due process implications of ignoring them, I am willing to concede that a formal complaint directed by the CPR is the better practice. Technically, then, the majority may be correct. Starting at that point may require no remand. I wish to leave no doubt at all, however, that I consider the charge here discussed alive and well, fully capable of presentation in the manner prescribed by the rules.

SULLIVAN, P.J., and McRAE, J., join this opinion.

McRAE, Justice, dissenting:

The Complaint Tribunal properly found that Attorney U violated Rule 8.3 of the Rules of Professional Conduct. At the very least, the Tribunal's modest sanction of a public reprimand should be affirmed, and the matter referred to the Bar for further action on Attorney U's threatened blackmail of Attorney S. To let Attorney U emerge unscathed and unsanctioned for his misdeeds reflects the majority's unabashed bias in favor of partners in major Jackson law firms.

The majority's finding that Attorney U had no knowledge that Attorney S was engaged in a fee-splitting arrangement with McNeese and PFL is incredible. Rather than insulting our intelligence, the majority should simply repeal a rule it so obviously dislikes. Better yet, why not discard the Rules of Professional Conduct altogether? Accordingly, adopting much of the language used in the original dissent to this opinion as authored by retired Chief Justice Armis Hawkins, I dissent.

We are faced with a most egregious set of facts wherein one attorney attempted to use the threat of a bar complaint to induce another to extract from more than 1,000 asbestosis claimants fees of $4,000.00 apiece for a test that cost other people only about $400.00. Moreover, he used the threat of a bar complaint to sidestep any possible expose to liability for a breach of contract action. Despite this attempt to extort more than four million dollars from our hardworking citizens, the majority pays lip service to our Rules of Professional Conduct and allows the offending attorney, a partner in a distinguished Jackson law firm whose members include a former president of the Bar Association, to walk away without so much as a slap on the hand. Would we be so quick to merely wink at even a minor indiscretion and spare the heavy hand were the offending party a small-town sole practitioner? I fear not.

I.

Admission to the Mississippi Bar carries with it privileges as well as solemn responsibilities. Only Bar members may sign pleadings, represent clients in court, or hold themselves out as attorneys. One of membership's greatest privileges is being a part of a self-regulating profession. Members of the Bar decide who is to be admitted and, when an attorney's conduct warrants it, who is to be sanctioned. Only those worthy of calling themselves lawyers will be allowed to do so.
However, self-regulation is also a duty. Every member of the Bar, whether practicing alone in a small town or a senior partner of a large, prestigious Jackson firm, is entrusted to maintain the profession's high standards. The Rules of Professional Responsibility provide criteria by which we shall conduct ourselves. Nevertheless, without enforcement by the members of the Bar, the Rules are meaningless. Without the Rules, the integrity of the profession collapses.

Rule 8.3(a) provides the linchpin for self-regulation:
A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

The Comment to the Rule explains, "[t]he term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." Furthermore, the Random House Unabridged Dictionary variously defines "knowledge" as "acquaintance with facts, truths or principles, as from study or investigation ..." or "acquaintance or familiarity gained from sight, experience or report ..." or "that which is or may be known; information." The same dictionary defines "inform" as "to impart knowledge of a fact or circumstance." In contrast, it defines "ignorant" as "lacking knowledge or information as to a particular subject or fact" or "uninformed; unaware." Finally, it defines "learn" as "to become informed of or acquainted with."

Rule 8.3(a), which every member of the Bar has sworn to uphold, makes each attorney a policeman of the profession. The rationale behind this rule is simple--no one is better suited to recognize a breach of the Rules or better situated to observe one. The gravamen of Rule 8.3(a) is such that if its precepts are not enforced, the Bar's hallowed concept of self-regulation will become a pathetic mockery. It applies to all who call themselves lawyers--sole practitioners and large firm partners alike. The majority, however, would have us not only reduce the rule to a shadow, but vanish the shadow as well.

Actual knowledge is required to satisfy Rule 8.3(a), but actual knowledge can be, and indeed often must be, inferred. If it is possible to infer by circumstances and prove by clear and convincing evidence that Attorney A, as a reasonable attorney, knew that Attorney B had violated the Rules of Professional Conduct, then Attorney A should be held to have sufficient knowledge of Attorney B's wrongdoing to warrant the imposition of sanctions under Rule 8.3(a). Thus, Attorney A must have more than a mere suspicion of Attorney B's unprofessional conduct; he cannot ignore his own common sense and legal training. The majority, however, states:

[The] standard must be an objective one, not tied to the subjective beliefs of the lawyer in question. The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred and that the conduct, if it did occur, raises a substantial question as to the purported offender's honesty, trustworthiness or fitness to practice law in other respects.

This standard replaces the vague term "actual knowledge" with the equally vague term "firm opinion." Thus, the majority provides an attorney with no further insight as to what is required of
him under Rule 8.3(a). Moreover, semantics aside, the record indicates that Attorney U actually knew of Attorney S's misconduct.

II.

At issue is whether Attorney U knew of Attorney S's fee-splitting arrangement with PFL in violation of Rule 5.4(a). An examination of the record shows that he did.

PFL was a laboratory engaged in performing pulmonary function tests upon people who had been exposed to asbestos. William T. McNeese, one of the owners of PFL, and Attorney S entered into an agreement in 1988 whereby Attorney S and PFL would split $175 of the $400 laboratory fee charged to each of Attorney S's clients. There would be a further split in the fee Attorney S received under his contingency contract with the client. As so often happens in such a scheme, McNeese decided in 1989 that he was not getting a big enough piece of the pie, and approached Attorney U.

McNeese first presented Attorney U with a proposed written contract providing for a splitting of legal fees. Attorney U told McNeese that such a contract would be unenforceable because it violated the Rules of Professional Conduct. McNeese then informed Attorney U that PFL and Attorney S had been operating under a verbal fee-splitting agreement for several months, but now Attorney S was denying its existence and disputing the amount owed. McNeese also told Attorney U that Frank Trapp, S's attorney in the dispute, had suggested a flat fee arrangement, but the parties were unable to agree on the amount PFL would be paid.

Attorney U was aware that such a fee-splitting agreement violated Rule 5.4(a) of the Rules of Professional Conduct. Once informed of his conduct, Attorney U acquired actual -- not circumstantial--knowledge of the breach. Attorney U was not informed merely of suspicious circumstances from which he might reasonably conclude that unethical conduct had occurred, but had received clear-cut information from McNeese that Attorney S had entered into a fee-splitting agreement with PFL.

The only question facing Attorney U was the reliability of the knowledge he had gleaned from McNeese. To fulfill his obligation as a responsible attorney, Attorney U had several ethical options: If he considered the information unreliable or unbelievable, he could ignore it. If he considered the information trustworthy, he could prevail upon Attorney S to admit or deny it, provide him with opportunity to respond, and, depending upon the credibility of the response, either drop the matter or inform the appropriate authorities. Finally, if he considered the information related by McNeese trustworthy, Attorney U simply could report the conduct.

Attorney U, however, had a much better idea. Obviously he could not force Attorney S to pay PFL as the two had agreed, because their agreement was illegal and void. Nor did he have any legal basis to require Attorney S to sign any new contract, and certainly not one with such an outrageous lab fee. But, aha! He did have something. He could scare Attorney S into signing a contract by threatening him with suspension or disbarment from practicing law. Blackmail.

According to the majority's logic, however, Attorney U knew enough to attempt baldfaced blackmail, yet somehow had insufficient knowledge to report Attorney S's conduct to the Bar. Consider the evidence in the record now before us.
On October 10, 1989, Attorney U wrote Trapp a letter threatening Attorney S with complaint proceedings before the Bar unless Attorney S met their terms. Having sufficiently relied upon the facts relayed to him by McNeese in his attempt to blackmail Attorney S, Attorney U now is estopped from asserting he had no knowledge of the agreement. The record indicates that McNeese had furnished Attorney U with detailed information: his October 10 letter to Trapp tells him that since February 19, 1988, some 1,061 clients of Attorney S had been given pulmonary tests by PFL; PFL (McNeese) had agreed to finance all medical costs for testing; and upon recovery, PFL would be reimbursed its medical costs and paid one-half of Attorney S’s fees. Attorney U advised Trapp that this violated Rule 5.4(a) of the Rules of Professional Conduct. He then wrote Trapp that his client wanted $4,000 from Attorney S from each client, and that this "compensation will be significantly less than it would have been under the verbal fee sharing arrangement ..." Finally, Attorney U wrote: I have advised Pulmonary Function Laboratory of the availability of the complaint proceedings available through the Mississippi Bar Association. Unless something can be worked out along the lines of this proposal, it is the intention of Pulmonary Laboratory to seek relief through whatever legal avenues are available to it.

Nevertheless, Attorney U had the audacity to claim he had never threatened Attorney S.

On October 27, Attorney U again wrote Trapp regarding the negotiations in progress and what PFL expected from Attorney S. In his response, Trapp advised Attorney U "without admitting or conceding any arrangement ever existed," that his client now "renounces" any such arrangement. On November 17, Attorney U retorted, informing Trapp that he and PFL had no intention of letting Attorney S get by with any kind of prevarication as to a fee-splitting agreement: “PFL has advised me that they have no intention of renouncing the fact that there was a fee-sharing arrangement between them and [Attorney S].” Attorney U’s letter further stated:

As you know, I have advised PFL of its options, including the availability of the complaint proceedings available through the Mississippi State Bar Association. Again, unless something can be worked out along the lines of a negotiated flat fee arrangement, it is the intention of PFL to seek relief through whatever legal avenues are available to it.

Please discuss this with [Attorney S] and inform us of his decision. If we have not received a response from [Attorney S] by November 27, 1989, our clients will perform no further retesting on [Attorney S]’s clients and will pursue whatever legal remedies it considers appropriate.

Of course, if Attorney S had succumbed to the blackmail, neither the Bar nor this Court would have been the wiser. This fee-splitting contract between PFL and Attorney S forever would have been swept under the rug. No one would have known. Attorney S did not cave in, however, and Attorney U made yet another more ominous threat in his December 1st letter to Trapp. In closing, he wrote:

This matter has now drug [sic] on for some time. We have been instructed to obtain the necessary forms from the Mississippi State Bar Association for Pulmonary Function Laboratory to proceed with a bar complaint against [Attorney S].
Trapp's final letter to Attorney U on December 6 told him that Attorney S was unwilling to play along. He advised Attorney U that the proposed charge of $4,000.00 per client for laboratory services was exorbitant, far above the $423.00 charge to clients of other attorneys. Further, letting Attorney U know in no uncertain terms that his actions amounted to outright blackmail, Trapp's letter concludes:

Everyone recognizes the arrangement alleged by Mr. McNeese would be an unenforceable contract. Moreover, that alleged arrangement runs afoul with the spirit of the runner and champerty statutes. Thus it is clear Mr. McNeese's demand for $4,000 per client is either (1) to pay blackmail to keep Mr. McNeese from filing a complaint with the bar association or (2) to pay Mr. McNeese for allegedly referring clients to [Attorney S]. In either case, the payment would be illegal.

Over the past several weeks, I had talked with [the associate] (a member of Attorney U's law firm) about the situation. I reiterated [Attorney S]'s disavowal of the arrangement alleged by Mr. McNeese....

Your letter of December 1, 1989, is a unilateral rejection of our good faith effort to come up with a fair fee schedule. Your letter does not state what figure you are referring to that is "significantly above the [$423 quote]." I only assume it is another effort to extract some excessive fee from [Attorney S]. Any payment on that basis would not be legitimate. I cannot advise my client to agree with any fee schedule which is only a guise for an illegal payment.

Was Trapp's assessment accurate? Yes. First, it is apparent that Attorney U was not attempting to sue for the breach of some enforceable contract, or to make Attorney S pay some sum which he legally owed PFL. No, his sole purpose was to extort from Attorney S an obligation to pay a fee for which he otherwise was not liable in any shape, form or fashion under the law. It was, pure and simple, as Trapp characterized it, blackmail. Trapp did not buy it.

There was no further correspondence. Instead, true to Attorney U's threat, McNeese followed through by filing a Bar complaint against Attorney S in January, 1990.

A year later, Attorney S, in turn, filed a bar complaint against Attorney U. Thereafter, the Bar filed a motion for summary judgment, followed by a cross-motion for summary judgment filed by Attorney U.

Because of the legal shenanigans revealed within, the affidavits of both Attorney U and McNeese should not go unnoted:

Attorney U's affidavit of February 18, 1991, states:

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2. When my firm and I were first engaged by Mr. Bill McNeese of Pulmonary Function Laboratory (PFL) we were asked to review a proposed fee-splitting agreement between PFL and one or more unidentified attorneys. This was in August 1989. I did not learn at that time that PFL was supposedly operating with any attorney under any such agreement.

3. We expressed our professional opinion about the agreement furnished to us by PFL for review. We prepared a substitute agreement for a contingent fee arrangement between PFL and certain individuals for whom PFL proposed to do testing and to render other services.

12. I never threatened or coerced either [Attorney S] or his attorney. I never sought to extort
anything from either of them. I never told Mr. Trapp or [Attorney S] of any intent to file a bar complaint except as stated in my letters which are exhibits to the complaint.

13. I certainly never personally threatened or otherwise said that I would file a bar complaint against [Attorney S] because I have never known to my personal knowledge that he committed any violation of the Rules of Professional Conduct. In any event, PFL, the party claiming such conduct on the part of [Attorney S], filed a complaint against him within ninety (90) days of telling me of its complaint against [Attorney S].

14. I have not sought at any time material hereto to induce anyone to commit any crime or to violate the Rules of Professional Conduct of the Mississippi State Bar and I have not done so myself.

McNeese’s affidavit of February 14, 1991, states:

4. In the course of my discussions with [Attorney U] and [the associate] about the ethical prohibitions of [Attorney S] entering into a fee-splitting arrangement with PFL, as PFL contended he had done, [Attorney U] advised me that if, in fact, such an agreement had existed, it might be the basis for a complaint with the Mississippi State Bar Association against [Attorney S] by PFL.

5. At no time prior to PFL filing a bar complaint against [Attorney S] did [Attorney U] encourage PFL to file such a bar complaint, nor did [Attorney U] advise PFL that it should use the threat of a bar complaint as a means of forcing [Attorney S] to resolve the differences between he and PFL.

6. Once PFL realized that it had the basis for a bar complaint against [Attorney S], it was my intention to file such a bar complaint....

7. The first suggestion to PFL that a flat fee agreement might be entered into between [Attorney S] and PFL, in lieu of the prior contingency fee agreement, was made to me by the attorney for [Attorney S]. The $4,000.00 flat fee proposal made on behalf of PFL to [Attorney S] suggested in [Attorney U's] letter to Mr. Frank Trapp of October 27, 1989, was in lieu of the former agreement and was for services to be provided by PFL over and above the usual pulmonary function testing provided in such cases. (Emphasis in original.)

Neither the majority nor I know for certain, even at this late date, whether such a fee-splitting agreement in fact ever existed, but if there was such an agreement, we acquired actual knowledge of its existence when we examined the record submitted to us on appeal. Likewise, Attorney U acquired actual notice or knowledge of such an agreement when he "learned" of it in September, 1989 from his client, McNeese.

Upon learning such information from one’s client, an ethical attorney has the obligation either to report it or to call upon the other attorney for a denial or explanation, advising him that he has a duty to report the conduct. Attorney U chose neither of these salutary courses. Rather, he chose blackmail to extort an agreement from Attorney S to which the latter could not be legally obligated, and in the absence of such threat, would no doubt have told Attorney U to take a hike.

What were Attorney U's letters to Trapp if not threats? And his claim that he never knew to his "personal knowledge" of any violations? He knew enough to attempt blackmail, which he obviously believed or he would never have risked accusing the attorney
of it. [4] This Court has chosen to ignore the evidence and Attorney U's transgressions. In so doing, it has stripped Rule 8.3(a) of all meaning.

How can the majority assert that a lawyer placed sufficient reliance on information furnished to him by his client to blackmail another attorney, but did not have sufficient knowledge to relay that information to the Bar? Ordinary people are found guilty beyond a reasonable doubt and sentenced to decades in prison on less proof than this. One wonders what it would take to prove to the majority that Attorney U knew of the fee-splitting arrangement.

Take your pick or select them all. Under every authority quoted in the majority opinion, Attorney U hit the bull's eye. There can be no question but that his client, McNeese, told him of the fee-splitting contract between Attorney S and PFL, and that he believed it. How else could he have accused Attorney S and so doggedly threatened him with a lawsuit?

The majority tells us that "the other party to the purported arrangement denies that it existed." To find such a denial in this case, one must go outside the record. Trapp certainly did not deny that such an agreement had ever been made by his client. He was too good a lawyer for that: he pled nolo contendere. Curiously, the majority further instructs:

It is not for the lawyer to believe or disbelieve the client. Ultimately, it is for the fact finder, either judge or jury. A lawyer must be free to assert his client's claims, at least until there is evidence apparent that the client is lying. The state of mind necessary to assert the claim, however falls well short of that required for a "firm opinion" as to whether specific conduct occurred. We must allow lawyers at least this degree of detachment if we are to assure the competent and vigorous representation essential to our adversary system of justice.

The majority also contends that the fact that Attorney U wrote letters to Trapp, accusing Attorney S of conduct which could cost him his license to practice law, does not mean anything. It says, "Lawyers do that all the time." Does the majority really believe this? Has the majority not read Rule 11 of the Mississippi Rules of Civil Procedure? Moreover, practically speaking, I have never met an attorney, and doubt very seriously that I will ever meet one, who makes idle threats based upon information he does not believe. Only a very naive lawyer would write a letter threatening to file suit based on facts he, himself, did not believe. Even more fatuous is the majority's conclusion that Attorney U did not necessarily believe McNeese's detailed description of the fee splitting arrangement with Attorney S. He just "believed" it enough to attempt blackmail. Strange routes are taken by the majority in its apologia for Attorney U's conduct and its protection of old, established Jackson law firms.

III.

Finally, the majority finds that it is required to render the issue of charges that Attorney U also violated Rule 1.16(a) or 1.2(d) on grounds that the issue of using "threats of a bar complaint to exact a settlement" was not properly before us since no formal complaint had been filed with the Clerk of this Court on that charge. I thought that we reviewed attorney discipline cases de novo. Mississippi State Bar v. Young, 509 So.2d 210, 217-218 (Miss.1987). Attorney U was treated with utmost leniency by the Complaint Tribunal, which levied only the sanction of a public reprimand against him. He would not have lost a single day or a single dollar in his law practice. Totally oblivious to any wrongdoing on his part, however, and with not a kernel of contrition for all he did,
Attorney U appeals to this Court, expressing outrage at the injustice done him. And the majority concurs, forbidding even a slap on the wrist.

In recent years we have seen the public's trust in the legal profession erode to almost nothing. With this case, however, we might have been able to show that the legal profession is so committed to policing itself that it will punish those who do not assist in this goal, regardless of the stature or prestige of the offending attorney's practice and reputation. Opportunities to prove oneself worthy of another's trust are extremely rare. The facts in this case are clear--Attorney U did know of the illicit fee-spitting arrangement between an attorney and his client, a non-attorney, and did not report it. The law is clear as well--not only are attorneys required to act in professional manner, they also are required by Rule 8.3(a) to report conduct of other attorneys which they know has violated the rules. Today's result should therefore be no less straightforward--Attorney U should be sanctioned. If attorneys are to be self-regulating and have their own Rules of Professional Conduct, these rules must be enforced, especially those designed to aid in self-regulation. A true profession can do no less.

Obviously, membership has its privileges. I would affirm the sanction, and remand for a hearing on what clearly was blackmail as we originally ordered. Accordingly, I dissent.

Notes:
[1] Several portions of Justice Bank's original majority opinion have been used verbatim, as those portions accurately explain the procedural history and facts involved.
[1] The following is an excerpt from the original majority opinion, most of which remains as today's majority as noted in the majority opinion, ante p. 964 n. 1.
This is conduct not charged here, however. We, therefore, remand this matter to the Complaint Tribunal for further proceedings with regard to this issue. Myers v. Miss. State Bar, 480 So.2d 1080, 1091 (Miss.1985).
[1] We can only speculate as to what sort of fee agreement Attorney U might have had with McNeese. Because the majority has elected to sweep his transgressions under the carpet, we will never know.
[2] McNeese was the former business agent for a large union and part owner of PFL, a laboratory set up for the sole purpose of screening asbestosis claimants seeking to recover against manufacturers doing business in Mississippi.
[3] Rule 5.4(a) of the Mississippi Rules of Professional Conduct provides:
(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's
estate or to one or more specified persons;
(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and whole or in part on a profit-sharing arrangement.

[4] The use of the words "personal knowledge" is an interesting exercise in semantics. If Attorney U meant he did not personally witness the fee splitting arrangement between Attorney S and PFL, he was saying no more than the obvious, something the tribunal already knew. On the other hand, if he meant anything less, in the absence of discarding every dictionary in the English language, clearly he had "personal knowledge." He was specifically informed by his client.

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BACKGROUND

After plaintiffs Kenneth and Julia Skolnick filed a multicount complaint in the circuit court of Cook County against defendants Terry Robin Horwitz Kass and Altheimer & Gray, the trial court entered an agreed protective order that forbade dissemination of designated materials produced during discovery. Subsequently, Kass sought modification of the protective order and leave to file a counterclaim against the plaintiffs. Kass alleged that documents produced as discoverable materials revealed fraudulent conduct by Kenneth Skolnick. Kass argued that the newly revealed information triggered her ethical obligation to report suspected attorney misconduct to the Illinois Attorney and Registration Disciplinary Commission (ARDC), and therefore, that the information should no longer be subject to the restrictions of the protective order. Kass asserted as well that these same documents gave rise to the allegations of her counterclaim.

The trial court granted leave to file the counterclaim, but simultaneously ordered that the counterclaim remain under seal. The court also refused to modify the protective order. The appellate court affirmed the trial court's order placing the counterclaim under seal, and reversed that part of the order refusing to modify the protective order. 303 Ill.App.3d 27. In this consolidated appeal, which is before the court pursuant to Supreme Court Rule 315 (177 Ill.2d R. 315), we affirm in part and reverse in part.

BACKGROUND
In 1993, plaintiff Kenneth Skolnick (Skolnick), a lawyer, was employed by the defendant law firm of Altheimer & Gray (Altheimer) as an equity partner. Defendant Terry Robin Horwitz Kass (Kass), also a lawyer, was employed by Altheimer as an associate. In June 1993, Altheimer and Kass sent separate letters to the ARDC. The ARDC is an agency of this court which, inter alia, receives, investigates and prosecutes allegations of professional misconduct by attorneys licensed to practice in Illinois. 134 Ill.2d R. 751 et seq. In their respective letters, Kass and Altheimer stated that the firm had inadvertently filed a forged document with the circuit court of Cook County and that an unknown person in the firm, possibly a lawyer, had created the bogus document. Neither letter asserted directly that Skolnick was responsible for the purported forgery, but each letter identified Skolnick as an individual who had been questioned concerning the creation of the forged document.

The Administrator of the ARDC filed a complaint against Skolnick, and charged him with several breaches of the Illinois Rules of Professional Conduct (134 Ill.2d R. 1.1 et seq.). The Administrator alleged that Skolnick had, among other things, caused a forged document to be filed with the circuit court and had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; engaged in conduct prejudicial to the administration of justice; and in the course of representing a client, knowingly made a misstatement of material fact to a third party. 134 Ill.2d Rs. 4.1(a), 8.4(a)(4), (a)(5). The ARDC conducted an investigation regarding the allegations contained in the ARDC complaint, but later dismissed the action for lack of evidence.

On May 17, 1995, Skolnick and his wife, Julia Skolnick (collectively, plaintiffs), filed a nine-count complaint against Altheimer and Kass. Plaintiffs alleged that Kass and Altheimer accused Kenneth Skolnick of creating the forged document, and that defendants repeated these accusations to others within the firm, and to clients of the firm, even though Altheimer and Kass knew these accusations to be false. Kenneth Skolnick asserted that he lost present and future business as a result of the accusations, and that he was forced to leave the firm and accept a job paying a reduced salary and benefits. Skolnick pleaded claims for defamation, tortious interference with business relations, breach of fiduciary duty and intentional infliction of emotional distress. Julia Skolnick asserted a separate claim for loss of consortium and joined her husband in seeking damages for intentional infliction of emotional distress.

The circuit court entered an "Agreed Protective Order" on February 1, 1996. The order applied to "all information supplied during discovery [in the lawsuit] that shall be designated by the party or person producing it as 'confidential.' " Access to "confidential" information was restricted to the court, the parties, their attorneys, and [730 N.E.2d 10] experts retained for litigation. The order also allowed any party to "seek relief from the court *** from any of the provisions or restrictions" provided in the order, "upon good cause shown."

On February 19, 1998, Kass moved for modification of the protective order, and for leave to file a counterclaim. Kass maintained that, during the course of discovery, she received records generated by nonparty entities indicating that Kenneth Skolnick had engaged in fraudulent
conduct. According to Kass, the content of the documents triggered her obligation, under the Illinois Code of Professional Conduct, to report Kenneth Skolnick's alleged misconduct to the ARDC. 134 Ill.2d R. 8.3(a). She requested modification of the confidentiality provisions of the protective order so she could disclose the contents of the documents to the ARDC. Additionally, Kass argued that these same documents formed the basis for her counterclaim. After a hearing, the trial court denied Kass' motion to modify the protective order, and granted Kass leave to file the counterclaim, although the court directed Kass to file the pleading under seal.

Kass appealed the circuit court's order to the appellate court pursuant to Illinois Supreme Court Rule 307(a). The appellate court partially reversed and partially affirmed the circuit court order. 303 Ill.App.3d 27. The appellate court held that Kass' obligation to report attorney misconduct to the appropriate authority was "absolute" and that this absolute duty "must be accompanied by the absolute right to report." 303 Ill.App.3d at 30. Thus, the trial court's refusal to modify an agreed order to allow the attorneys to fulfill their ethical obligations constituted error. 303 Ill.App.3d at 30.

The appellate court ruled also that merely reporting Skolnick's suspected attorney misconduct to the trial court did not relieve Kass of her obligation to report to the ARDC. Only the Illinois Supreme Court or its designated agent possesses the authority to punish attorneys for their ethical transgressions. Ipso facto, the supreme court is the only forum that can receive complaints of ethical wrongdoing. 303 Ill.App.3d at 30.

The appellate court affirmed the trial court's order placing Kass' counterclaim under seal. 303 Ill.App.3d at 33. The appellate court held that, by agreeing to the protective order, Kass voluntarily relinquished her right to disseminate "confidential" information gathered in the course of discovery. Further, constitutional rights do not attach to information disclosed solely to try a lawsuit, and, given the breadth of discoverable material under our court rules, a trial court must retain authority to block the dissemination of information, as it deems necessary. The appellate court rejected too the contention that "the public" could claim access to the allegations contained in the counterclaim. The court concluded that Kass lacked standing to assert this argument. 303 Ill.App.3d at 32.

Pursuant to Supreme Court Rule 315 (177 Ill.2d R. 315), this court granted Kass' petition for leave to appeal the appellate judgment affirming the trial court's order to file her counterclaim under seal. The court has consolidated Kass' appeal (Docket No. 87324) with the Skolnicks' separate appeal (Docket No. 87320), also pursuant [730 N.E.2d 11] to Rule 315, from the appellate judgment reversing the trial court's order refusing to modify the protective order.

ANALYSIS

A. Appellate Court Jurisdiction

The Skolnicks contend that the appellate court lacked jurisdiction to entertain Kass' interlocutory appeal. The Skolnicks argue that Supreme Court Rule 307(a)(1), which formed the basis for the appeal below, only permits interlocutory appeals from orders granting or denying injunctive relief. 166 Ill.2d R. 307(a)(1). The trial court's order denying the motion to modify the protective order was not in the nature of injunctive relief, Skolnick maintains, but rather a ministerial act "deriving from inherent authority of the [c]ircuit [c]ourt to control its proceedings."

Rule 307(a)(1) states:
"An appeal may be taken to the Appellate Court from an interlocutory order of court:
(a) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction[.]"
166 Ill.2d R. 307(a)(1).

A court looks to the substance, not the form, of an order to determine if it is injunctive in nature. In re A Minor, 127 Ill.2d 247, 260 (1989). Illinois courts have construed the meaning of "injunction" in Rule 307(a)(1) broadly. In re A Minor, 127 Ill.2d at 262; Doe v. Doe, 282 Ill.App.3d 1078, 1082 (1996). An injunction is "a 'judicial process operating in personam and requiring [a] person to whom it is directed to do or refrain from doing a particular thing.' " In re A Minor, 127 Ill.2d at 261, quoting Black's Law Dictionary 705 (5th ed. 1979). In particular, an interlocutory order circumscribing the publication of information is reviewable as an interlocutory injunctive order, pursuant to Rule 307(a)(1). In re A Minor, 127 Ill.2d at 263; Doe, 282 Ill.App.3d at 1082; Cummings v. Beaton & Associates, Inc., 192 Ill.App.3d 792, 796 (1989).

In this case, the protective order entered by the circuit court allowed the parties to designate information disclosed in discovery as "confidential." Once so designated, the information could be disclosed only to persons expressly identified in the protective order. By its terms, therefore, the order forbade the publication of certain information, or, in other words, circumscribed the parties' opportunity to "do a particular thing."

Nonetheless, the Skolnicks maintain that the protective order was only a ministerial act, resulting from the trial court's inherent authority to control access to court records. Citing to JFS v. ABMJ, 120 Ill.App.3d 261 (1983), the Skolnicks contend that purely ministerial functions of the trial court, such as "impounding records," do not amount to injunctive relief under Rule 307(a)(1).

The Skolnicks' argument lacks merit. This court has explicitly overruled JFS to the extent that JFS suggests that court-ordered restraints upon publication of information are not appealable under Rule 307(a)(1). See In re A Minor, 127 Ill.2d at 263. The order denying Kass' motion to modify the protective order and restricting public access to pleadings was in the nature of injunctive relief. The appellate court possessed the necessary jurisdiction to dispose of the parties' appeal.

Equally meritless is the Skolnicks' insistence that, if injunctive in nature, then the circuit court's order is a permanent injunction and thus is not subject to interlocutory appeal (citing Steel City Bank v. Village of Orland Hills, 224 Ill.App.3d 412, 416-17 (1991)). The Skolnicks are [730 N.E.2d 12] correct that a permanent injunction is a final order, appealable only pursuant to Supreme Court Rules 301 or 304 (155 Ill.2d Rs. 301, 304). Steel City Bank, 224 Ill.App.3d at 417. A permanent injunction is of unlimited duration and "alters the status quo," meaning that it adjudicates rights between the interested parties. Smith v. Goldstick, 110 Ill.App.3d 431, 438 (1982). The Skolnicks attempt to compare the protective order to a permanent injunction by stating that the order established a "status quo" between the parties.

The Skolnick's argument is misplaced. The protective order is not a permanent injunction because it "concludes no rights" between the parties. Smith, 110 Ill.App.3d at 438. It follows,
therefore, that nothing in Kass' appeal sought to alter permanent injunctive relief. The appellate
court appropriately exercised its jurisdiction to entertain Kass' appeal.

B. Kass' Duty to Disclose Information Subject to the Protective Order

The Skolnicks assert that the appellate court erred by reversing the trial court's order denying
Kass' motion to modify the protective order. The Skolnicks' attack on the appellate court judgment
is threefold. First, the Skolnicks contend that "[t]he appellate court improperly assumed that the
mere claim of a reporting obligation by a lawyer for an adverse party strips the trial court of any
authority or discretion regarding the protective order." Second, the Skolnicks question whether
Kass bore any obligation under the Rules of Professional Conduct to report the alleged
misconduct. Third, assuming Kass possessed a duty to report the purported misconduct, the duty
was fulfilled by alerting the trial court to Skolnick's alleged wrongdoing. We dispose of each of
these arguments seriatim.

Trial courts are invested with considerable discretion to supervise the course of discovery as
the court deems appropriate. Atwood v. Warner Electric Brake & Clutch Co., 239 Ill.App.3d 81, 88
(1992). The flexibility enjoyed by trial courts in directing discovery extends to the entry of
protective orders. May Centers, Inc. v. S.G. Adams Printing & Stationery Co., 153 Ill.App.3d 1018,
1021 (1987). Supreme Court Rule 201(c)(1) states:

"The court may at any time on its own initiative, or on motion of any party or witness, make a
protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable
annoyance, expense, embarrassment, disadvantage, or oppression." 166 Ill.2d R. 201(c)(1).

The parameters of protective orders are entrusted to the court's discretion. Statland v.
Freeman, 112 Ill.2d 494, 499 (1986). We will alter the terms of a protective order only if no
reasonable person could adopt the view taken by the circuit court. Cleveringa v. J.I. Case Co., 230

At bar, the protective order proposed by the parties and entered by the circuit court precluded
the parties from disclosing information produced by a party during discovery, which the producing
party designated as "confidential." Information originally obtained from nonparties also could not
be disclosed if deemed confidential by a party. The order allowed any party to seek modification of
the protective order for good cause.

Citing In re Himmel, 125 Ill.2d 531 (1988), and Supreme Court Rule 8.3(a) (134 Ill.2d R. 8.3(a)),
Kass argued that the content of certain "confidential" documents obtained during discovery
supposedly revealed misconduct by Kenneth Skolnick. Kass insisted that the knowledge of this
misconduct necessitated modification of the protective order so that Kass could fulfill her ethical
[730 N.E.2d 13] duty to report the purported misconduct to the ARDC.

In Himmel, 125 Ill.2d 531, Tammy Forsberg retained attorney John Casey to represent her in
a personal injury action. Pursuant to a contingency agreement executed between Forsberg and
Casey, Casey was to receive one-third of any settlement or verdict he obtained in Forsberg's
favor. Casey subsequently obtained a $35,000 settlement for Forsberg, but Casey converted the
entire $35,000 for his own use and never forwarded any amount of the settlement to Forsberg.
After unsuccessful attempts to get her money from Casey, Forsberg retained attorney James Himmel to help Forsberg recover her share of the personal injury settlement from Casey.

In the course of representing Forsberg, Himmel learned that Casey had illegally converted Forsberg's settlement funds. Forsberg, represented by Himmel, then entered into a settlement with Casey, whereby Casey promised to pay Forsberg $75,000 in return for Forsberg's pledge not to bring any legal action against Casey arising out of his conversion of Forsberg's money. Additionally, Forsberg instructed Himmel not to report Casey's professional misconduct to the ARDC.

Casey's unethical behavior was eventually revealed, and the ARDC prosecuted Himmel for violation of a prior version of Rule 8.3(a), Illinois Supreme Court Rule 1-103(a) (107 Ill.2d R. 1-103(a)). Like Rule 8.3(a), Rule 1-103(a) imposed on Illinois lawyers an affirmative obligation to report unprivileged knowledge of another lawyer's fraudulent or deceitful conduct to the proper authorities. Himmel, 125 Ill.2d at 539; 107 Ill.2d R. 1-103(a).

This court affirmed the ARDC's determination that Himmel should be publicly disciplined for failing to report Casey's misconduct to the ARDC. Regardless of Forsberg's direction that Himmel should not inform the ARDC of Casey's actions, Himmel was "duty-bound to uphold the rules in the Code [of Professional Responsibility]" (Himmel, 125 Ill.2d at 539), including the rule that mandates reporting acts of fraud, deceit or misrepresentation by other lawyers. Himmel, 125 Ill.2d at 541.

Significantly, the court remarked that failure to report Casey's bad acts necessitated Himmel's suspension, regardless of the absence of a "dishonest motive" by Himmel. Himmel, 125 Ill.2d at 542. Himmel's knowledge of Casey's conduct "involving dishonesty, fraud, deceit, or misrepresentation," where that knowledge is otherwise not subject to the attorney/client privilege, was sufficient to impose on Himmel an obligation to report Casey to the ARDC. Failing in that obligation, Himmel was himself subject to punishment. Himmel, 125 Ill.2d at 543.

As stated in Himmel, the duty to report misconduct is absolute. See also Jacobson v. Knepper & Moga, P.C., 185 Ill.2d 372, 377 (1998). Further, the duty, and the certain discipline that flows from a breach of that duty, is animated by a desire to: maintain the integrity of the legal profession, further the ends of justice, and protect the public from unscrupulous attorneys. Himmel, 125 Ill.2d at 544; In re Demuth, 126 Ill.2d 1,13 (1988); In re Imming, 131 Ill.2d 239, 260 (1989). Although Rule 201(c)(1) permits courts to enter protective orders "as justice requires," the principles underlying a lawyer's Himmel obligation are so important that, in our opinion, only the weightiest considerations of "justice" (166 Ill.2d R. 201(c)(1)) could excuse a trial court's refusal to modify a protective order so that counsel could fulfill its absolute, ethical duties.

In this case, the Skolnicks fail to identify any reason why Kass' ethical obligations should yield to the terms of the protective order. Further, the trial court neglected to explain why it denied Kass' motion to modify the protective order. The transcript of the hearing on
the motion to modify the protective order indicates only that the court entertained argument of
counsel and then ruled in the Skolnicks' favor. In the absence of any stated justification for
refusing to modify the protective order, the interests of justice weigh decidedly in favor of allowing
Kass to fulfill her ethical duty to disclose the alleged attorney misconduct.

The Skolnicks next contend that the circumstances of the present lawsuit do not trigger the
reporting obligations stated in Rule 8.3(a) (134 Ill.2d R. 8.3(a)). An attorney is obliged to report the
misconduct of another attorney only under the following circumstances:

"(a)

A lawyer possessing knowledge not otherwise protected as a confidence by these Rules or by law
that another lawyer has committed a violation of Rule 8.4(a)(3) or (a)(4) shall report such
knowledge to a tribunal or other authority empowered to investigate or act upon such violation."
134 Ill.2d R. 8.3(a).

Rule 8.4(a)(3) forbids lawyers from committing criminal acts that reflect adversely on their
trustworthiness, honesty or fitness as an attorney. 134 Ill.2d R. 8.4(a)(3). Rule 8.4(a)(4) bars
lawyers from engaging in conduct involving fraud, dishonesty, deceit or misrepresentation. 134
Ill.2d R. 8.4(a)(4).

The Skolnicks assert first that the information Kass sought to disclose is "protected as a
confidence" and therefore expressly excepted from the obligation to report stated in Rule 8.3(a).
The Skolnicks derive their interpretation of "confidence" from the documents that the Skolnicks
tagged with the label "confidential" during discovery. Their interpretation of the meaning of
"confidence" as it is used in Rule 8.3 is misguided. The Rules of Professional Conduct contain a
"Terminology" section to define designated words used in the rules. According to the definition
supplied by this court, "[c]onfidence" "denotes information protected by the lawyer-client privilege
under applicable law." 134 Ill.2d 472. The Skolnicks do not claim that the documents in question
are subject to the attorney/client privilege. Accordingly, Kass is in no danger of improperly
revealing a "confidence," as described in Rule 8.3.

The Skolnicks maintain that Kass cannot report any alleged misconduct to the ARDC because
Kass does not possess "knowledge *** that another lawyer has committed a violation of *** Rule
8.4(a)(3) or (a)(4)." Apparently, the Skolnicks believe that "knowledge" means "absolute certainty"
and, further, that Kass failed to demonstrate the alleged wrongdoing with a sufficient degree of
certainty to justify any report to the ARDC.

The Skolnicks offer no authority to support their interpretation. However, we note that the
terminology section of the Code of Professional Conduct defines "[k]nowingly," "known" and
"knows" as "actual knowledge" which "may be inferred from circumstances." 134 Ill.2d 472;
Annotated Model Rules of Professional Conduct 555 (3d ed. 1996). Further, the "knowledge"
requirement of our Rule 8.3 is similar to Model Rule 8.3 propounded by the American Bar
review of ethical opinions from other states, the ABA has concluded that the "knowledge"
requirement of Model Rule 8.3 requires "more than a mere suspicion" but need not amount to
We have examined the documents filed under seal in support of Kass' motion to modify the protective order. We will not divulge the contents of the documents, but we are satisfied that the information contained [730 N.E.2d 15] in the documents raises more than a mere suspicion of misconduct by Kenneth Skolnick. Kass could reasonably infer from the circumstances of the events revealed by the documents that conduct of the sort described in Rules 8.4(a)(3) and 8.4(a)(4) had occurred. Therefore, Kass possessed adequate knowledge to trigger the reporting responsibilities under Rule 8.3. We emphasize, however, that while we conclude that Kass had a duty to report the suspected misconduct to the ARDC, we do not render an opinion as to the merits of any charges that may or may not be filed against Kenneth Skolnick as a result of the information the ARDC receives in relation to this matter.

Lastly, the Skolnicks argue that Kass can discharge her ethical duty to report lawyer misconduct by informing the trial court of the alleged misbehavior, and that Kass need not alert the ARDC to her suspicions of Skolnick's supposed wrongdoing. In support of this argument, the Skolnicks quote Rule 8.3(a), which directs those reporting misconduct to do so "to a tribunal or other authority empowered to investigate or act upon such violation." (Emphasis added.) 134 Ill.2d R. 8.3(a).

The Skolnicks misinterpret Rule 8.3(a). The word "tribunal" must be read in the context of the entire sentence in which it appears. M.I.G. Investments, Inc. v. Environmental Protection Agency, 122 Ill.2d 392, 400 (1988). The proper inquiry is not whether a "tribunal" means a "trial court," as the Skolnicks contend, but rather means what authority or authorities are "empowered" to act upon a charge of attorney misconduct. As stated in Rule 8.3(a), only an authority granted such power may receive reports of misconduct. 134 Ill.2d R. 8.3(a). In Illinois, only this court possesses the "inherent power to discipline attorneys who have been admitted to practice before it." In re Harris, 93 Ill.2d 285, 291 (1982). The court, in turn, has delegated the authority to investigate and prosecute claims of attorney misconduct to the ARDC. In re Mitan, 75 Ill.2d 118, 123-24 (1979). Further, while a trial court bears an independent responsibility to report attorney misconduct to the ARDC (155 Ill.2d R. 63(B)(3)), only this court may discipline an attorney found guilty of ethical misbehavior. In re Himmel, 125 Ill.2d at 544. Thus, Kass is correct in arguing that she was required to report the claimed misconduct to the ARDC. See also People v. Camden, 210 Ill.App.3d 921, 926 (1991). Her duty to report cannot be discharged by reporting the suspected misconduct to the trial court. The trial court's refusal to modify the protective order prevented Kass from fulfilling her obligation to report attorney misconduct to the ARDC. We find that the trial court's refusal to modify the protective order was not a reasonable exercise of the trial court's discretion. We affirm the appellate court judgment to the extent it reversed the trial court's order denying Kass' motion to modify the protective order.

C. Whether the Trial Court Errantly Ordered That Kass' Counterclaim Be Filed Under Seal

In a separate appeal, Kass contends that the circuit court abused its discretion by ordering that Kass' counterclaim remain under seal. Kass asserts that the circuit court order violates the
public's right, grounded in common law and in the United States Constitution, to access court files.
U.S. Const., amend. I.

1. The Common Law Right to Review Court Files

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 55 L.Ed. 2d 570, 579, 98 S.Ct. 1306, 1312 (1978), the United States Supreme Court acknowledged the existence of a common law presumption that allows the public to "inspect and copy public records and documents, including judicial records and documents." Nixon, 435 U.S. at 597, 98 S.Ct. at 1312, 55 [**730 N.E.2d 16**] L. Ed. 2d at 579. The common law right of access to court records is essential to the proper functioning of a democracy (*Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn. 1986)), in that citizens rely on information about our judicial system in order to form an educated and knowledgeable opinion of its functioning (*Minneapolis Star & Tribune Co.*, 392 N.W.2d at 202). Too, the availability of court files for public scrutiny is essential to the public's right to "monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system." *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984); see also *Newell v. Field Enterprises, Inc.*, 91 Ill.App.3d 735, 748 (1980) ("the common law right of access *** symbolizes the legislature's determination that the public interest is best served by increasing the public's knowledge about what is transpiring inside the judicial process").

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In Illinois, the state legislature codified the public's right to review judicial records in section 16(6) of the Clerks of the Courts Act (705 ILCS 105/16(6) (West 1998)):

"All records, dockets and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, docket and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto." 705 ILCS 105/16(6) (West 1998).

In *Marriage of Johnson*, 232 Ill.App.3d 1068, 1072 (1992); see also *Nixon*, 435 U.S. at 597 n.7, 55 L.Ed. 2d at 579 n.7, 98 S.Ct. at 1312 n.7 (citing an earlier version of section 16(6)).

However, the right of access is not absolute. In *Nixon*, the Supreme Court stated that "[e]very court has supervisory power over its own records and files, and access [may be] denied where court files might[ ] become a vehicle for improper purposes." *Nixon*, 435 U.S. at 598, 55 L.Ed. 2d at 580, 98 S.Ct. at 1312. Thus, whether court records in a particular case are opened to public scrutiny rests with the trial court's discretion, which must take into consideration all facts and circumstances unique to that case. *Nixon*, 435 U.S. at 599, 55 L.Ed. 2d at 580, 98 S.Ct. at 1312-13; but see *Johnson*, 232 Ill.App.3d at 1072-73 (to overcome presumption, the party opposing public access bears the burden of establishing: (1) a compelling interest that favors a closed file, and (2) that the protective order is drafted in the least restrictive manner possible); D. Lee, Sealed Documents, Closed Hearings, and the Public's Right to Know, 81 Ill. B.J. 456, 457 (1993).

2. The Constitutional Right to Inspect Court Files

There is a parallel right of access to court records embodied in the first amendment to the United States Constitution (U.S. Const., amend. I). *Grove Fresh Distributors, Inc. v. Everfresh*
Juice Co., 24 F.3d 893, 897 (7th Cir. 1994). The first amendment right presumes a right to inspect court records which have "historically been open to the public" and disclosure of which would further the court proceeding at issue. United States v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989). The presumption can be rebutted by demonstrating that suppression is "essential to preserve higher values and is narrowly tailored to serve that interest." Grove, 24 F.3d at 897. Other courts have interpreted the first amendment right of access as requiring a showing of a "compelling" or similarly stringent interest to overcome the constitutional right to review court records. See Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 203 (Minn. 1986); Johnson, 232 Ill.App.3d at 1075, [730 N.E.2d 17] 174 Ill.Dec. 209, 598 N.E.2d 406; Sealed Documents, 81 Ill. B.J. at 457 nn.13, 14.

Whether we proceed under the common law or constitutional standards, the counterclaim in this case became part of the court file once the trial court granted leave to file the pleading. In re Marriage of Johnson, 232 Ill.App.3d 1068, 1074 (1992); 705 ILCS 105/16(6) (West 1998). At that point, the presumption of a right of public access to the counterclaim attached.

Moreover, under either the common law standard or the first amendment standard, the Skolnicks failed to make the necessary showing to rebut the presumption of a right of access to the court file. None of the reasons the Skolnicks articulated before the trial court in opposition to the motion to file a counterclaim amounted to a "compelling interest" (Minneapolis Star & Tribune Co., 392 N.W.2d at 203) or suggested an "improper purpose[ ]" (Nixon, 435 U.S. at 598, 55 L.Ed. 2d at 580, 98 S.Ct. at 1312) sufficient to justify a sealed court file. Further, the trial court neglected to state why it ordered the counterclaim under seal. Therefore, regardless of whether we proceed under a common law or a first amendment analysis, we reach the same conclusion: the trial court abused its discretion by ordering the counterclaim to be filed under seal.

For example, the Skolnicks' written response to the motion for leave to file a counterclaim attacked the timeliness of the proposed pleading. While pertinent to the threshold determination of whether the counterclaim may be filed (Hutchinson v. Brotman-Sherman Theatres, Inc., 94 Ill.App.3d 1066, 1073 (1981); 735 ILCS 5/2-608 (West 1998)), the timeliness of the pleading is irrelevant to the decision to place a document under seal.

Additionally, the Skolnicks challenged the merits of the counterclaim, including whether the purportedly "bad acts" of Kenneth Skolnick described in the counterclaim were alleged merely to "insulate [Kass] and her counsel in the subsequent publication of those 'bad acts' allegations." The Skolnicks argued that the counterclaim was subject to being stricken "as scandalous and irrelevant," pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1998)).

We are not sure what the Skolnicks intended by their reference to Kass' alleged attempt to "insulate" herself and her attorney. In any event, the Skolnicks' attack on the legal sufficiency of the counterclaim, when Kass was merely seeking leave to file the pleading, was premature.
As the Skolnicks conceded, the proper vehicle to challenge the merits of the counterclaim is a separate section 2-615 motion, properly filed after leave was given to file the counterclaim. 735 ILCS 5/2-615 (West 1998).

Next, the Skolnicks argued that Kass' motion to file a counterclaim was really an indirect threat to expose Kenneth Skolnick's alleged misbehavior and to report that behavior to the ARDC. In the Skolnicks' view, Kass was attempting to use the counterclaim to intimidate the Skolnicks and thereby gain an advantage over the Skolnicks in this lawsuit. The Skolnicks correctly observe that an attempt by a lawyer to blackmail an opponent through the threatened use of ARDC proceedings violates the Rules of Professional Conduct. 134 Ill.2d R. 1.2(e).

Perhaps the circuit court was persuaded that the counterclaim was filed solely to intimidate the Skolnicks. If so, the circuit court's ruling constituted an abuse of its discretion. Upon review of Kass' counterclaim, we find that, facially, the pleading appears to state cognizable causes of action. In any event, we do not find the pleading frivolous, or without any independent merit.

If the circuit court placed the counterclaim under seal in order to save the Skolnicks from embarrassment, then this, too, would constitute an abuse of discretion. The mere fact a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing the court file. In Doe v. Doe, 282 Ill.App.3d 1078 (1996), a minor plaintiff filed an action against her uncle, accusing him of sexually molesting the plaintiff. The defendant requested a court order that the lawsuit proceed with the use of pseudonyms for the parties. Pursuant to section 2-401(e) of the civil procedure code (735 ILCS 5/2-401(e) (West 1998)), defendant argued, fictitious names could be employed upon a showing of "good cause." The defendant further alleged that exposure of his true identity would damage his reputation and his family, and therefore, good cause existed to conceal the parties' names.

The appellate court ruled that the parties would not be allowed to use pseudonyms merely to save the reputation of defendant and his family from potential harm. Doe, 282 Ill.App.3d at 1088. In pertinent part, the court observed that in many lawsuits, plaintiffs place a defendant's reputation at risk merely by alleging that the defendant is guilty of negligence or misconduct. In the broadest sense, any lawsuit could be viewed as "a bad-faith tactic to induce settlement and reap economic gain at the defendant's expense through baseless allegations." Doe, 282 Ill.App.3d at 1088. Therefore, the alleged harm identified by the defendant was too commonplace to amount to a showing of "good cause."

We find the holding of Doe analogous to the instant appeal. Allegations of a complaint are, by their very nature, likely to be critical in some fashion of the defendant named in the pleading. The mere fact that allegations stated in a counterclaim might embarrass the counterdefendant do not, therefore, amount to an "improper purpose" in filing the pleading. See also Coe v. County of Cook, 162 F.3d 491, 498 (7th Cir. 1998).

Lastly, the appellate court held that the counterclaim was properly placed under seal because it references financial records belonging to the Skolnicks. 303 Ill.App.3d at 32. Relying on Statland
In Statland, a party sought leave to disclose confidential financial records released during discovery in one case as discovery in another lawsuit. The circuit court refused. This court affirmed the circuit court's order. The court held that Rule 201 invested the circuit court with discretion to set the parameters of a protective order, and that this court found no basis to conclude the circuit court abused that discretion. Statland, 112 Ill.2d at 499.

In the instant appeal, however, the document at issue is a pleading, not information released during discovery for the sole purpose of discovery. As stated in Johnson, once filed with the court, a [730 N.E.2d 19] pleading becomes part of the public record. Johnson, 232 Ill.App.3d at 1074. Further, discovery is distinct from documents that are filed with the court. By its nature, discovery is intentionally broad in scope: it is intended to reveal not only facts admissible at trial, but also facts that may lead to admissible evidence. Monier v. Chamberlain, 35 Ill.2d 351, 357 (1966); see also Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-33, 81 L.Ed. 2d 17, 26-27, 104 S.Ct. 2199, 2207-08 (1984) ("[Discovery is] not open to the public at common law [citation], and, in general, [it is] conducted in private as a matter of modern practice. [Citation.] Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information"). Thus, it is important that a trial court be permitted to shield sensitive information from public view, so that the parties can marshal evidence in support of their cases, and determine which issues should be pursued, and which should be abandoned.

By contrast, once filed, the pleadings, motions and other papers filed with the court assume the presumption of public access explained above. As the Seventh Circuit Court of Appeals stated recently, "Litigation is a public exercise; it consumes public resources. It follows that in all but the most extraordinary cases-perhaps those involving matters of weighty national security-complaints must be public." Levenstein v. Salafsky, 164 F.3d 345, 348 (7th Cir. 1998).

More importantly, the Skolnicks' response to Kass' motion for leave to file a counterclaim never mentions the fact that the counterclaim relied on financial records as a reason to deny leave to file. While we are willing to speculate as to whether the trial court relied on arguments that the Skolnicks actually raised below, we will not assume that the trial court based its ruling on arguments that the Skolnicks never articulated before the trial court. Therefore, to the extent the Skolnicks now rely on a "financial records" argument to keep the counterclaim under seal, that argument has been waived.

We also conclude that the Skolnicks have waived any challenge to Kass' standing to pursue this appeal. The appellate court questioned Kass' standing to assert the common law right of
access to court records (303 Ill.App.3d at 32), although the appellate court cited no authority to support that conclusion. Regardless, standing is an affirmative defense (Glisson v. City of Marion, 188 Ill.2d 211, 221 (1999)). The Skolnicks have not challenged Kass' alleged lack of standing-on any ground-before the trial court or this court, and we cannot discern whether the Skolnicks initiated the argument before the appellate court. We will not supply contentions not advanced by the parties and, accordingly, deem the argument waived.

In the absence of an "improper purpose" or "compelling interest" identified by the Skolnicks or the trial court, we conclude that the trial court abused its discretion by placing the counterclaim under seal. We vacate the trial court order barring public access to the counterclaim and remand the case for further proceedings.

CONCLUSION

For the reasons stated above, we affirm the judgment of the appellate court reversing the trial court's refusal to modify the protective order. We reverse that part of the appellate court judgment affirming the trial court's order to place the counterclaim under seal. We reverse the judgment of the circuit court and remand this cause for further proceedings consistent with this opinion.


Notes:
[1] Kass' counsel in this lawsuit, Sonnenschein Nath & Rosenthal (Sonnenschein), filed a separate notice of interlocutory appeal to the appellate court. 303 Ill.App.3d 27, 237 Ill.Dec. 137, 708 N.E.2d 1177. Kass and Sonnenschein asserted substantially similar arguments before the appellate court. Sonnenschein is an appellee to one (Docket No. 87320) of the two appeals consolidated before this court. In the interest of brevity, the arguments asserted below by Kass and Sonnenschein will be identified here as arguments by Kass, only.

[2] At least one commentator has remarked on the similarity between the common law and first amendment presumptions favoring public access to court records. Sealed Documents, 81 Ill. B.J. at 457. This writer suggests that the difference between the standards lies in their application: "First, a constitutional right of access, unlike the common law right, cannot be modified by legislation or court rule. Second, an appellate court must review a denial of the [f]irst [a]mendment right more closely than it does a denial of the common law right, which is subject only to the 'abuse of discretion' standard." Sealed Documents, 81 Ill. B.J. at 457-58.
This is a disciplinary proceeding against respondent, James H. Himmel. On January 22, 1986, the Administrator of the Attorney Registration and Disciplinary Commission (the Commission) filed a complaint with the Hearing Board, alleging that respondent violated Rule 1-103(a) of the Code of Professional Responsibility (the Code) (107 Ill.2d R. 1-103(a)) by failing to disclose to the Commission information concerning attorney misconduct. On October 15, 1986, the Hearing Board found that respondent had violated the rule and recommended that respondent be reprimanded. The Administrator filed exceptions with the Review Board. The Review Board issued its report on July 9, 1987, finding that respondent had not violated a disciplinary rule and recommending dismissal of the complaint. We granted the Administrator's petition for leave to file exceptions to the Review Board's report and recommendation. 107 Ill.2d R. 753(e)(6).

We will briefly review the facts, which essentially involve three individuals: respondent, James H. Himmel, licensed to practice law in Illinois on November 6, 1975; his client, Tammy Forsberg, formerly known as Tammy McEathron; and her former attorney, John R. Casey.

The complaint alleges that respondent had knowledge of John Casey's conversion of Forsberg's funds and respondent failed to inform the Commission of this misconduct. The facts are as follows.

In October 1978, Tammy Forsberg was injured in a motorcycle accident. In June 1980, she retained John R. Casey to represent her in any personal injury or property damage claim resulting from the accident. Sometime in 1981, Casey negotiated a settlement of $35,000 on Forsberg's behalf. Pursuant to an agreement between Forsberg and Casey, one-third of any monies received would be paid to Casey as his attorney fee.

In March 1981, Casey received the $35,000 settlement check, endorsed it, and deposited the check into his client trust fund account. Subsequently, Casey converted the funds.
Between 1981 and 1983, Forsberg unsuccessfully attempted to collect her $23,233.34 share of the settlement proceeds. In March 1983, Forsberg retained respondent to collect her money and agreed to pay him one-third of any funds recovered above $23,233.34.

Respondent investigated the matter and discovered that Casey had misappropriated the settlement funds. In April 1983, respondent drafted an agreement in which Casey would pay Forsberg $75,000 in settlement of any claim she might have against him for the misappropriated funds. By the terms of the agreement, Forsberg agreed not to initiate any criminal, civil, or attorney disciplinary action against Casey. This agreement was executed on April 11, 1983. Respondent stood to gain $17,000 or more if Casey honored the agreement. In February 1985, respondent filed suit against Casey for breaching the agreement, and a $100,000 judgment was entered against Casey. If Casey had satisfied the judgment, respondent's share would have been approximately $25,588.

The complaint stated that at no time did respondent inform the Commission of Casey's misconduct. According to the Administrator, respondent's first contact with the Commission was in response to the Commission's inquiry regarding the lawsuit against Casey.

In April 1985, the Administrator filed a petition to have Casey suspended from practicing law because of his conversion of client funds and his conduct involving moral turpitude in matters unrelated to Forsberg's claim. Casey was subsequently disbarred on consent on November 5, 1985.

A hearing on the complaint against the present respondent was held before the Hearing Board of the Commission on June 3, 1986. In its report, the Hearing Board noted that the evidence was not in dispute. The evidence supported the allegations in the complaint and provided additional facts as follows.

Before retaining respondent, Forsberg collected $5,000 from Casey. After being retained, respondent made inquiries regarding Casey's conversion, contacting the insurance company that issued the settlement check, its attorney, Forsberg, her mother, her fiance and Casey. Forsberg told respondent that she simply wanted her money back and specifically instructed respondent to take no other action. Because of respondent's efforts, Forsberg collected another $10,400 from Casey. Respondent received no fee in this case.

The Hearing Board found that respondent received unprivileged information that Casey converted Forsberg's funds, and that respondent failed to relate the information to the Commission in violation of Rule 1-103(a) of the Code. The Hearing Board noted, however, that respondent had been practicing law for 11 years, had no prior record of any complaints, obtained as good a result as could be expected in the case, and requested no fee for recovering the $23,233.34. Accordingly, the Hearing Board recommended a private reprimand.

Upon the Administrator's exceptions to the Hearing Board's recommendation, the Review Board reviewed the matter. The Review Board's report stated that the client had contacted the
Commission prior to retaining respondent and, therefore, the Commission did have knowledge of the alleged misconduct. Further, the Review Board noted that respondent respected the client's wishes regarding not pursuing a claim with the Commission. Accordingly, the Review Board recommended that the complaint be dismissed.

The Administrator now raises three issues for review: (1) whether the Review Board erred in concluding that respondent's client had informed the Commission of misconduct by her former attorney; (2) whether the Review Board erred in concluding that respondent had not violated Rule 1-103(a); and (3) whether the proven misconduct warrants at least a censure.

As to the first issue, the Administrator contends that the Review Board erred in finding that Forsberg informed the Commission of Casey's misconduct prior to retaining respondent. In support of this contention, the Administrator cites to testimony in the record showing that while Forsberg contacted the Commission and received a complaint form, she did not fill out the form, return it, advise the Commission of the facts, or name whom she wished to complain about. The Administrator further contends that even if Forsberg had reported Casey's misconduct to the Commission, such an action would not have relieved respondent of his duty to report under Rule 1-103(a). Additionally, the Administrator argues that no evidence exists to prove that respondent failed to report because he assumed that Forsberg had already reported the matter.

Respondent argues that the record shows that Forsberg did contact the Commission and was forwarded a complaint form, and that the record is not clear that Forsberg failed to disclose Casey's name to the Commission. Respondent also argues that Forsberg directed respondent not to pursue the claim against Casey, a claim she had already begun to pursue.

We begin our analysis by examining whether a client's complaint of attorney misconduct to the Commission can be a defense to an attorney's failure to report the same misconduct. Respondent offers no authority for such a defense and our research has disclosed none. Common sense would dictate that if a lawyer has a duty under the Code, the actions of a client would not relieve the attorney of his own duty. Accordingly, while the parties dispute whether or not respondent's client informed the Commission, that question is irrelevant to our inquiry in this case.

We have held that the canons of ethics in the Code constitute a safe guide for professional conduct, and attorneys may be disciplined for not observing them. (In re Yamaguchi (1987), 118 Ill.2d 417, 427, 113 Ill.Dec. 928, 515 N.E.2d 1235, citing In re Taylor (1977), 66 Ill.2d 567, 6 Ill.Dec. 898, 363 N.E.2d 845.) The question is, then, whether or not respondent violated the Code, not whether Forsberg informed the Commission of Casey's misconduct.

As to respondent's argument that he did not report Casey's misconduct because his client directed him not to do so, we again note respondent's failure to suggest any legal support for such a defense. A lawyer, as an officer of the court, is duty-bound to uphold the rules in the Code.

[533 N.E.2d 793]
[127 Ill.Dec. 711] The title of Canon 1 (107 Ill.2d Canon 1) reflects this obligation: “A lawyer should
assist in maintaining the integrity and competence of the legal profession." A lawyer may not choose to circumvent the rules by simply asserting that his client asked him to do so.

As to the second issue, the Administrator argues that the Review Board erred in concluding that respondent did not violate Rule 1-103(a). The Administrator urges acceptance of the Hearing Board's finding that respondent had unprivileged knowledge of Casey's conversion of client funds, and that respondent failed to disclose that information to the Commission. The Administrator states that respondent's knowledge of Casey's conversion of client funds was knowledge of illegal conduct involving moral turpitude under In re Stillo (1977), 68 Ill.2d 49, 54, 11 Ill.Dec. 289, 368 N.E.2d 897. Further, the Administrator argues that the information respondent received was not privileged under the definition of privileged information articulated by this court in People v. Adam (1972), 51 Ill.2d 46, 48, 280 N.E.2d 205, cert. denied (1972), 409 U.S. 948, 93 S.Ct. 289, 34 L.Ed.2d 218. Therefore, the Administrator concludes, respondent violated his ethical duty to report misconduct under Rule 1-103(a). According to the Administrator, failure to disclose the information deprived the Commission of evidence of serious misconduct, evidence that would have assisted in the Commission's investigation of Casey.

Respondent contends that the information was privileged information received from his client, Forsberg, and therefore he was under no obligation to disclose the matter to the Commission. Respondent argues that his failure to report Casey's misconduct was motivated by his respect for his client's wishes, not by his desire for financial gain. To support this assertion, respondent notes that his fee agreement with Forsberg was contingent upon her first receiving all the money Casey originally owed her. Further, respondent states that he has received no fee for his representation of Forsberg.

Our analysis of this issue begins with a reading of the applicable disciplinary rules. Rule 1-103(a) of the Code states:

"(a) A lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." 107 Ill.2d R. 1-103(a).

Rule 1-102 of the Code states:

"(a) A lawyer shall not
(1) violate a disciplinary rule;
(2) circumvent a disciplinary rule through actions of another;
(3) engage in illegal conduct involving moral turpitude;
(4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or
(5) engage in conduct that is prejudicial to the administration of justice." 107 Ill.2d R. 1-102.

These rules essentially track the language of the American Bar Association Model Code of Professional Responsibility, upon which the Illinois Code was modeled. (See 107 Ill.2d Rules art. VIII, Committee Commentary, at 604.) Therefore, we find instructive the opinion of the American Bar Association's Committee on Ethics and Professional Responsibility that discusses the Model Code's Disciplinary Rule 1-103 (Model Code of Professional Responsibility DR 1-103 (1979) ). Informal Opinion 1210 states that under DR 1-103(a) it is the duty of a lawyer to report to the
proper tribunal or authority any unprivileged knowledge of a lawyer's perpetration of any misconduct listed in Disciplinary Rule 1-102.

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(ABA Committee on Ethics & Professional Responsibility, Informal Op. 1210 (1972) (hereinafter Informal Op. 1210).) The opinion states that "the Code of Professional Responsibility through its Disciplinary Rules necessarily deals directly with reporting of lawyer misconduct or misconduct of others directly observed in the legal practice or the administration of justice." Informal Op. 1210, at 447.

This court has also emphasized the importance of a lawyer's duty to report misconduct. In the case In re Anglin (1988), [533 N.E.2d 794]

[127 Ill. Dec. 712] 122 Ill.2d 531, 120 Ill. Dec. 520, 524 N.E.2d 550, because of the petitioner's refusal to answer questions regarding his knowledge of other persons' misconduct, we denied a petition for reinstatement to the roll of attorneys licensed to practice in Illinois. We stated, "Under Disciplinary Rule 1-103 a lawyer has the duty to report the misconduct of other lawyers. (107 Ill.2d Rules 1-103, 1-102(a)(3), (a)(4).) Petitioner's belief in a code of silence indicates to us that he is not at present fully rehabilitated or fit to practice law." ( Anglin, 122 Ill.2d at 539, 120 Ill. Dec. 520, 524 N.E.2d 550.) Thus, if the present respondent's conduct did violate the rule on reporting misconduct, imposition of discipline for such a breach of duty is mandated.

The question whether the information that respondent possessed was protected by the attorney-client privilege, and thus exempt from the reporting rule, requires application of this court's definition of the privilege. We have stated that " (1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." (People v. Adam (1972), 51 Ill.2d 46, 48, 280 N.E.2d 205 (quoting 8 J. Wigmore, Evidence 2292 (McNaughton rev.ed.1961) ), cert. denied (1972), 409 U.S. 948, 93 S.Ct. 289, 34 L.Ed.2d

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218.) We agree with the Administrator's argument that the communication regarding Casey's conduct does not meet this definition. The record does not suggest that this information was communicated by Forsberg to the respondent in confidence. We have held that information voluntarily disclosed by a client to an attorney, in the presence of third parties who are not agents of the client or attorney, is not privileged information. (People v. Williams (1983), 97 Ill.2d 252, 295, 73 Ill. Dec. 360, 454 N.E.2d 220, cert. denied (1984), 466 U.S. 981, 104 S.Ct. 2364, 80 L.Ed.2d 836.) In this case, Forsberg discussed the matter with respondent at various times while her mother and her fiancé were present. Consequently, unless the mother and fiancé were agents of respondent's client, the information communicated was not privileged. Moreover, we have also stated that matters intended by a client for disclosure by the client's attorney to third parties, who are not agents of either the client or the attorney, are not privileged. (People v. Werhollick (1970), 45 Ill.2d 459, 462, 259 N.E.2d 265.) The record shows that respondent, with Forsberg's consent,
discussed Casey's conversion of her funds with the insurance company involved, the insurance company's lawyer, and with Casey himself. Thus, under Werhollick and probably Williams, the information was not privileged.

Though respondent repeatedly asserts that his failure to report was motivated not by financial gain but by the request of his client, we do not deem such an argument relevant in this case. This court has stated that discipline may be appropriate even if no dishonest motive for the misconduct exists. (In re Weinberg (1988), 119 Ill.2d 309, 315, 116 Ill.Dec. 216, 518 N.E.2d 1037; In re Clayter (1980), 78 Ill.2d 276, 283, 35 Ill.Dec. 790, 399 N.E.2d 1318.) In addition, we have held that client approval of an attorney's action does not immunize an attorney from disciplinary action. (In re Thompson (1963), 30 Ill.2d 560, 569, 198 N.E.2d 337; People ex rel. Scholes v. Keithley (1906), 225 Ill. 30, 41, 80 N.E. 50.) We have already dealt with, and dismissed, respondent's assertion that his conduct is acceptable because he was acting pursuant to his client's directions.

Respondent does not argue that Casey's conversion of Forsberg's funds was not illegal conduct involving moral turpitude under Rule 1-102(a)(3) or conduct involving dishonesty, fraud, deceit, or misrepresentation under Rule 1-102(a)(4). (107 Ill.2d Rules 1-102(a)(3), (a)(4).) It is clear that conversion of client funds is, indeed, conduct involving moral turpitude. (In re Levin (1987), 118 Ill.2d 77, 88, 112 Ill.Dec. 708, 514 N.E.2d 174; In re Stillo (1977), 68 Ill.2d 49, 54, 11 Ill.Dec. 289, 368 N.E.2d 897.) We conclude, then, that respondent possessed unprivileged knowledge of Casey's conversion of client funds, which is illegal conduct involving moral turpitude, and that respondent failed in his duty to report such misconduct to the Commission. Because no defense exists, we agree with the Hearing Board's finding that respondent has violated Rule 1-103(a) and must be disciplined.

The third issue concerns the appropriate quantum of discipline to be imposed in this case. The Administrator contends that respondent's misconduct warrants at least a censure, although the Hearing Board recommended a private reprimand and the Review Board recommended dismissal of the matter entirely. In support of the request for a greater quantum of discipline, the Administrator cites to the purposes of attorney discipline, which include maintaining the integrity of the legal profession and safeguarding the administration of justice. The Administrator argues that these purposes will not be served unless respondent is publicly disciplined so that the profession will be on notice that a violation of Rule 1-103(a) will not be tolerated. The Administrator argues that a more severe sanction is necessary because respondent deprived the Commission of evidence of another attorney's conversion and thereby interfered with the Commission's investigative function under Supreme Court Rule 752 (107 Ill.2d R. 752). Citing to the Rule 774 petition (107 Ill.2d R. 774) filed against Casey, the Administrator notes that Casey converted many clients' funds after respondent's duty to report Casey arose. The Administrator also argues that both respondent and his client behaved in contravention of the Criminal Code's
prohibition against compounding a crime by agreeing with Casey not to report him, in exchange for settlement funds.

In his defense, respondent reiterates his arguments that he was not motivated by desire for financial gain. He also states that Forsberg was pleased with his performance on her behalf. According to respondent, his failure to report was a "judgment call" which resulted positively in Forsberg's regaining some of her funds from Casey.

In evaluating the proper quantum of discipline to impose, we note that it is this court's responsibility to determine appropriate sanctions in attorney disciplinary cases. (In re Levin (1987), 118 Ill.2d 77, 87, 112 Ill.Dec. 708, 514 N.E.2d 174, citing In re Hopper (1981), 85 Ill.2d 318, 323, 53 Ill.Dec. 231, 423 N.E.2d 900.) We have stated that while recommendations of the Boards are to be considered, this court ultimately bears responsibility for deciding an appropriate sanction. (In re Weinberg (1988), 119 Ill.2d 309, 314, 116 Ill.Dec. 216, 518 N.E.2d 1037, citing In re Winn (1984), 103 Ill.2d 334, 337, 82 Ill.Dec. 664, 469 N.E.2d 198.) We reiterate our statement that "[w]hen determining the nature and extent of discipline to be imposed, the respondent's actions must be viewed in relationship "to the underlying purposes of our disciplinary process, which purposes are to maintain the integrity of the legal profession, to protect the administration of justice from reproach, and to safeguard the public." (In re LaPinska (1978), 72 Ill.2d 461, 473 [21 Ill.Dec. 373, 381 N.E.2d 700].)" In re Levin (1987), 118 Ill.2d 77, 87, 112 Ill.Dec. 708, 514 N.E.2d 174, quoting In re Crisel (1984), 101 Ill.2d 332, 343, 78 Ill.Dec. 160, 461 N.E.2d 994.

Bearing these principles in mind, we agree with the Administrator that public discipline is necessary in this case to carry out the purposes of attorney discipline. While we have considered the Boards' recommendations in this matter, we cannot agree with the Review Board that respondent's conduct served to rectify a wrong and did not injure the bar, the public, or the administration of justice. Though we agree with the Hearing Board's assessment that respondent violated Rule 1-103 of the Code, we do not agree that the facts warrant only a private reprimand. As previously stated, the evidence proved that respondent possessed unprivileged knowledge of Casey's conversion of client funds, yet respondent did not report Casey's misconduct.

This failure to report resulted in interference with the Commission's investigation of Casey, and thus with the administration [533 N.E.2d 796] of justice. Perhaps some members of the public would have been spared from Casey's misconduct had respondent reported the information as soon as he knew of Casey's conversions of client funds. We are particularly disturbed by the fact that respondent chose to draft a settlement agreement with Casey rather than report his misconduct. As the Administrator has stated, by this conduct, both respondent and his client ran afoul of the Criminal Code's prohibition against compounding a crime, which states in section 32-1:

"(a) A person compounds a crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of an offender.

(b) Sentence. Compounding a crime is a petty offense." (Ill.Rev.Stat.1987, ch. 38, par. 32-1.)

Both respondent and his client stood to gain financially by agreeing not to prosecute or report
Casey for conversion. According to the settlement agreement, respondent would have received $17,000 or more as his fee. If Casey had satisfied the judgment entered against him for failure to honor the settlement agreement, respondent would have collected approximately $25,588.

We have held that fairness dictates consideration of mitigating factors in disciplinary cases. (In re Yamaguchi (1987), 118 Ill.2d 417, 428, 113 Ill.Dec. 928, 515 N.E.2d 1235, citing In re Neff (1988), 83 Ill.2d 20, 46 Ill.Dec. 169, 413 N.E.2d 1282.) Therefore, we do consider the fact that Forsberg recovered $10,400 through respondent's services, that respondent has practiced law for 11 years with no record of complaints, and that he requested no fee for minimum collection of Forsberg's funds. However, these considerations do not outweigh the serious nature of respondent's failure to report Casey, the resulting interference with the Commission's investigation of Casey, and respondent's ill-advised choice to settle with Casey rather than report his misconduct.

Accordingly, it is ordered that respondent be suspended from the practice of law for one year. Respondent suspended.
In this employment discrimination action arising from the termination of the petitioner attorney by the respondent law firm, we reiterate that a petitioner's disability does not shield him from the consequences of workplace misconduct.

Respondent Hill Betts & Nash (hereinafter referred to as "HBN") terminated the petitioner, James Hazen, on March 15, 2006, upon discovering that the petitioner charged hotel rooms, limousines, alcohol, adult movies and calls to escort services to his corporate American Express card and then attempted to have these charges billed to clients. On August 30, 2006, HBN reported the petitioner's misconduct to the Departmental Disciplinary Committee for the First Judicial Department (hereinafter referred to as the "DDC"). The petitioner filed a verified complaint with the New York State Division of Human Rights (hereinafter referred to as the "DHR") on November 7, 2006 charging HBN with unlawful discrimination and retaliation. The petitioner claims that his misconduct was caused by his bipolar disorder, that HBN failed to accommodate his mental illness, that his termination was discriminatory, and that HBN retaliated against him by reporting him to the DDC.

Evidence and testimony before the Administrative Law Judge (hereinafter referred to as "ALJ") at a public hearing held during four days in December 2007 and January 2008 established the following: The petitioner was one of several partners at HBN who were issued a corporate American Express card for business expenses. HBN permitted Hazen to use the credit card for personal expenses, but required that he identify these charges and reimburse HBN. HBN's policy is to send each cardholder a sub-statement to mark up with notations indicating whether the charges are personal, chargeable to the firm or a client, or related to travel, entertainment or automobile expenses. It was not HBN's practice to return the statement to the cardholder for further review. The petitioner testified that until the period at issue in this case, he had adhered to
this procedure and returned marked-up sub-statements with any receipts and payment for his personal charges.

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However, in December 2005, when the petitioner was provided with a sub-statement for the last quarter of 2005, he ignored requests from HBN's accounting department and did not submit his annotated sub-statement. The petitioner stopped coming to the office in mid-December, and advised HBN that he was told to "decompress." On January 11, 2006, a partner at HBN contacted the petitioner and asked him to submit his credit card sub-statement on the following day so that the accounting department could close out the 2005 books. The petitioner sent a fax in reply stating that he could not "waste two hours coming in [to] do the bills," but that he would mark up the sub-statement and fax it to accounting. When he did not send in the sub-statement on January 12, the accounting department e-mailed the sub-statement to the petitioner again and copied two partners at HBN. That evening, one of the partners reviewed the bills, and, seeing charges for more than 50 hotel stays between September 26 and December 27, 2005, initiated an internal investigation of the petitioner's credit card use.

The day after the petitioner received the e-mail from HBN's accounting department, he asked Phillip Russotti, his friend, also an attorney, to intervene on his behalf. Russotti testified that the petitioner advised him that he was having a problem at work with his credit card reports and that the firm was demanding that he complete them. Later that day, Russotti called a partner at HBN and advised him that he had met with the petitioner and found him in a "terrible state" and that the petitioner planned to begin seeing a psychiatrist. HBN presented evidence that until this point, it was unaware that the petitioner was having any mental health issues. Russotti also requested more time for the petitioner to prepare his expense reports.

The evidence reflects that the petitioner saw a doctor on January 16. On January 17 and 25, Russotti advised HBN that the petitioner was suffering from a mental ailment, but did not specify the ailment. On January 23, the petitioner faxed the accounting department his annotated credit card sub-statement. The same day, HBN requested medical documentation supporting the petitioner's claim of mental illness and inability to return to work. However, on January 26, petitioner refused to discuss his purported illness with HBN citing "privacy" reasons.

On January 27, Russotti mailed a copy of a one-page letter from the petitioner's doctor stating that the petitioner had experienced an unspecified "severe mood disorder." None of the correspondence contained any medical documentation of bipolar disorder or a description of the petitioner's workplace limitations as a result of his "disorder." The letter indicated only that the petitioner was responding well to treatment and was expected to be able to return to work within a few weeks.

On January 31, Russotti sent a letter to HBN on the petitioner's behalf advising HBN that the credit card sub-statement that the petitioner submitted on January 23 falsely listed personal expenses in December 2005 and January 2006 as chargeable to clients. Russotti explained that these false expenses were attributable to "[the petitioner's] emotional illness." On February 3, HBN's counsel informed Russotti that HBN was terminating the petitioner effective March 6, 2006.

During the hearing, the petitioner testified that although he engaged in the conduct for which
he was terminated, it was caused by his bipolar disorder. The petitioner admitted that he repeatedly charged hotel rooms, limousines, and liquor to the HBN corporate card. Furthermore, during his hotel stays, petitioner charged pornographic movies and calls to escort services on the HBN card. Although HBN expected the petitioner to stay a few nights at a hotel in September to work on a case, the petitioner did not tell HBN about any of the other stays. The petitioner blamed his conduct on his bipolar disorder, and testified that he "only engaged in this inappropriate behavior and needed a companion when [he] was either in a manic or depressed state." However, he also admitted that in 2001, he had charged an escort to his corporate credit card and marked it as a client expense that was later discovered and corrected by HBN.

The petitioner testified that he also booked hotel rooms to avoid contact with people in the office on days when he was productive, but not manic. However, the petitioner explained that he booked the hotel rooms in advance on a travel web site. The petitioner conceded that despite using the hotels for inappropriate conduct, he believed that he could list the hotel fees as client expenses because he used the rooms for work.

A partner at HBN testified that the investigation of the petitioner's expenses was concluded in March 2006 and determined that petitioner had charged $21,117.77 in personal expenses to the credit card since October 25, 2005, and attempted to list many of those expenses as billable to clients. HBN sent a letter to the petitioner on March 20 that included the investigation findings and stated the amount that the petitioner owed to the firm. Although the petitioner testified that he could have reimbursed HBN at any time, he did not remit the balance owed. On April 24, the petitioner sent a letter to HBN indicating that he believed he was wrongfully terminated.

HBN submitted evidence that in June 2006, HBN retained a legal ethics expert to seek an opinion as to whether HBN was under a duty to report the petitioner's misconduct to the DDC. HBN's counsel advised HBN that it could not avoid reporting the petitioner's misconduct, and that the obligation to report was not affected by the petitioner's alleged disability. Following a meeting with the petitioner's counsel regarding the allegations of discrimination in July, HBN reported the petitioner's misconduct on August 30, 2006.

Nine months after the hearing concluded, on September 25, 2008, the DHR ALJ issued a Recommended Findings of Fact, Opinion and Decision and Order finding that HBN had discriminated and retaliated against the petitioner. The ALJ awarded the petitioner $50,000 for mental anguish, but declined to award any compensation for lost salary or benefits on the ground that the petitioner failed to show that he made reasonable efforts to mitigate damages. Both parties objected to the ALJ Order and submitted supplemental briefs to the DHR Commissioner. The Commissioner issued a Final Order on October 27, 2010, amending the Recommended Order to award the petitioner compensation for lost wages through December 31, 2009, in the amount of $548,161, plus interest.

In his petition to Supreme Court, the petitioner sought to affirm the Final Order to the extent that it found HBN liable and calculated lost wages through December 31, 2009. However, the petitioner objected to the Final Order to the extent of claiming that he is entitled to additional
compensation. The petitioner asserts that he should have also been awarded lost wages from December 31, 2009 through October 27, 2010, in the amount of $126,840, and an additional $200,000 for mental anguish. The petitioner also claims that he should have been awarded lost wages until his anticipated retirement date in the amount of $973,356.

The Commissioner filed a cross petition to enforce the Final Order as issued, and HBN filed a cross petition to annul, reverse and vacate the Final Order and dismiss the petitioner's complaint. By order entered March 11, 2011, Supreme Court transferred the proceeding pursuant to Executive Law § 298 and 9 NYCRR 202.57 to this Court for review.

For the reasons set forth below, we annul the Commissioner's Final Order, vacate the award, and dismiss the petitioner's complaint. Under the Human Rights Law, the scope of judicial review is "extremely narrow and is confined to the consideration of whether the Division's determination is supported by substantial evidence in the record." City of New York v. State Div. of Human Rights, 70 N.Y.2d 100, 106, 517 N.Y.S.2d 715, 717, 510 N.E.2d 799, 801 (1987); see also 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 179-181, 408 N.Y.S.2d 54, 56-57, 379 N.E.2d 1183, 1185-1186 (1978). "Substantial evidence, which has been characterized as a minimal standard or as comprising a low threshold must consist of such relevant proof, within the whole record, as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Matter of Café La China Corp. v. New York State Liq. Auth., 43 A.D.3d 280, 280, 841 N.Y.S.2d 30, 31 (1st Dept.2007) (internal quotation marks and citations omitted). Although judicial review of an agency determination appears to be limited, the Court of Appeals has made clear that a reviewing court exercises a genuine judicial function and that review is more than a "rubber stamp" of an agency's determination. See Matter of New York City Tr. Auth. v. State Div. of Human Rights, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54, 577 N.E.2d 40, 45 (1991); Matter of Reape v. Adduci, 151 A.D.2d 290, 293, 542 N.Y.S.2d 562, 564 (1st Dept.1989).

In this case, the ALJ found that the respondent's reason for terminating the petitioner was a pretext and that the real reason for terminating him was his disability. We disagree. The record reflects that there is no evidence at all, much less substantial evidence, that HBN knew, before they terminated the petitioner, that the petitioner was disabled by a bipolar disorder or how that disorder limited his performance in the workplace. See e.g. Pimentel v. Citibank, N.A., 29 A.D.3d 141, 811 N.Y.S.2d 381 (1st Dept.2006), lv. denied, 7 N.Y.3d 707, 821 N.Y.S.2d 813, 854 N.E.2d 1277 (2006) (employer was not required to accommodate employee's depression where employee failed to adequately explain extent and limits of her restrictions).

The record reflects that until the petitioner began receiving requests from HBN in December 2005 to account for his credit card expenses, there was no indication that the petitioner was suffering from a mental illness. By his own account, the petitioner was able to produce "quality professional legal work" during the time he was allegedly disabled, and argued his portion of a complex summary judgment motion on December 9, 2005. Russotti testified that when he saw the petitioner in December, shortly before their January meeting, the petitioner's behavior did not
seem unusual. The petitioner's doctor's records also indicate that neither the internist who had been treating him for more than a year for diabetes, nor the therapist who had been treating him for post-9/11 stress, diagnosed the petitioner with bipolar disorder or even mentioned the possibility that he was bipolar.

Furthermore, once the petitioner began alluding to an "emotional illness," HBN specifically requested the details of the petitioner's condition in order to evaluate the medical benefits available to the petitioner, and the petitioner flatly refused to provide any information. The communications from Russotti, the petitioner, and the petitioner's doctor, contained only vague references to emotional illness or "mood disorder," and thus did not fall into the category of an "impairment [...] which [...] is demonstrable by medically accepted clinical [...] techniques." Executive Law § 292(21)(a).

Thus, all that was before HBN when it terminated the petitioner on February 3 was that he had charged more than $21,000 in hotels and other personal expenses to the corporate credit card and tried to bill HBN's clients for personal expenses. Then, when confronted and asked for an explanation, he did not reimburse HBN and instead blamed his conduct on a "mood" illness, which he still did not identify.

Despite this total lack of evidence as to the petitioner's termination due to his bipolar disorder, the ALJ incomprehensibly found that HBN's legitimate reason for terminating the plaintiff was a pretext. The ALJ relied on evidence that another HBN attorney had charged $25,000 to his corporate credit card and was not terminated. However, this demonstrates only that the ALJ misapprehended the nature of the professional misconduct. The other HBN attorney did not attempt to charge clients for his personal expenses and paid the money back over time; therefore, his conduct is clearly distinguishable from the petitioner's, which essentially amounted to attempted theft from HBN and its clients.

The ALJ also noted that e-mails between two HBN partners raised an inference of discrimination. This too is not supported by record evidence. The e-mails have no direct statements of animus based on disability. Rather, they are the rational concerns of a law firm in the midst of litigating what the ALJ called "the largest case [HBN] had ever had in 10 to 15 years, with a potential for realizing damages in the hundreds of millions of dollars."

In rejecting HBN's nondiscriminatory reason, the ALJ further credited the petitioner's belated excuse that he behaved improperly because of his disability and accepted the petitioner's argument that HBN was obligated to accommodate him. The ALJ was persuaded by the petitioner's testimony and that of his doctor that the petitioner booked hotel rooms and escorts and falsified his credit card accounting as a result of his bipolar disorder.

We note that the petitioner also testified that he had engaged in the same misconduct in 2001, four years before the onset of his purported bipolar disorder, when he billed an escort to his credit card and was discovered by HBN trying to list it as a client expense. Furthermore, although the petitioner testified that he only used the hotel rooms and escorts when he was either manic or depressed, he also testified that he booked the rooms on-line weeks in advance. Thus, the only way to credit the testimony that his disorder caused him to engage in such behavior, is to accept
the preposterous notion that he was able to predict his mental state weeks in advance and plan accordingly.

The record further refutes the ALJ's findings. Petitioner submitted the sub-statement on January 23. By that time, he had seen his doctor twice. On January 25, the doctor reported that the petitioner had responded promptly to drug treatment on January 16 and continued to have a "brisk, robust response to appropriate treatment." This testimony directly refutes the petitioner's claim that the sub-statement was the "diary of a madman."

Even were we to accept that there was some evidence—sufficient to satisfy the substantial evidence standard—that the petitioner was disabled and that his misconduct was caused by his disability, HBN was not required to excuse that misconduct as an accommodation. Well-established precedent demonstrates that the New York State Human Rights Law "does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace." Valentine v. Standard & Poor's, 50 F.Supp.2d 262, 289 (S.D.N.Y.1999), aff'd, 205 F.3d 1327 (2d Cir.2000); see e.g. McPhatter v. New York City, 378 Fed.Appx. 70, 72, available at 2010 WL 2025758 (2d Cir. May 24, 2010) (even assuming that employee had a history of a disability, the reasons for terminating the employee, including poor attendance, disciplinary record, and other insubordinate behavior, were not pretexts for disability-based discrimination).

There are few reported decisions examining workplace misconduct resulting from a bipolar condition. In each case, the court found that the employer was not required to endure misconduct simply because the employee is disabled. Husowitz v. Runyon, 942 F.Supp. 822 (E.D.N.Y.1996); Davila v. Qwest Corp., 113 Fed.Appx. 849, available at 2004 WL 2005915 (10th Cir.2004). Nor is the employer required to retroactively excuse the misconduct as an accommodation under the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.). Davila, 113 Fed.Appx. at 854, 2004 WL 2005915 at *4. In Davila, the petitioner was terminated for workplace violence and argued that his termination was based on his bipolar disorder, which the employer should have accommodated. In dismissing the petitioner's claim, the court found that "excusing workplace misconduct to provide a fresh start/second chance to an employee whose disability [was] offered as an after-the-fact excuse is not a required accommodation under the ADA." Id.

In this case, the record is clear that it was not until after the petitioner accrued the expenses on his corporate credit card, and was asked to account for them, that he then consulted an attorney and sought a diagnosis from a psychiatrist. Thus, here, as in Davila, the petitioner has offered his disability as an "after-the-fact excuse."

The Equal Employment Opportunity Commission similarly acknowledges that an employee's disability does not relieve him of the consequences of his misconduct. EEOC Guideline No. 30 specifically provides that "an employer [may] discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability," when "the workplace conduct standard is job-related for the position in question and is consistent with business necessity." Here, it is undisputed that charging personal expenses to clients constitutes serious job-related misconduct.

The ALJ's finding of retaliation is also not supported by substantial evidence. We note at the
outset that rule DR 1-103 of the Code of Professional Responsibility, which was in effect in August 2006, requires an attorney to report another attorney's violation of the rules. See 22 NYCRR 1200.0 (now Rules of Professional Conduct rule 8.3). The ALJ concluded that the proximity of notification by the petitioner's attorney of his discrimination claim in July to HBN's report to the DDC in August 2006 raised an inference of retaliation. It is undisputed that in June HBN consulted an attorney specializing in ethics and was advised that it had an obligation to report the petitioner's attempted theft to the DDC if it had a reasonable belief of wrongdoing, regardless of the petitioner's disability. Thus, HBN has provided a legitimate, nondiscriminatory reason demonstrating that the report was not retaliatory.

Accordingly, the determination of respondent State Division of Human Rights, dated October 27, 2010, which, in this employment discrimination proceeding (transferred to this Court, pursuant to Executive Law § 298 and 22 NYCRR 202.57(c)(2), by order of the Supreme Court, New York County [Lucy Billings, J., entered March 11, 2011), after a hearing, found that respondent Hill Betts & Nash, LLP unlawfully discriminated against petitioner James Hazen, and awarded petitioner damages, is annulled, on the law, without costs, the award vacated and the complaint dismissed.

Determination of respondent State Division on Human Rights, dated October 27, 2010 (transferred to this Court, pursuant to Executive Law § 298 and 22 NYCRR 202.57(c)(2), by order of the Supreme Court, New York County [Lucy Billings, J., entered March 11, 2011), annulled, on the law, without costs, the award vacated, and the complaint dismissed.

All concur.
In re ETHICS ADVISORY PANEL OPINION NO. 92-1.

No. 93-41-M.P.

Supreme Court of Rhode Island.


Nina Igliozzi, Ethics Advisory Panel, Mary Lisi, Chief Disciplinary Counsel, David Curtin, Disciplinary Counsel, for plaintiff.

Stephen Rodio, Barbara Margolis, William Gosz, Michael Goldenberg, for defendant.

Lauren Jones, for amicus curiae RI Bar Ass'n. Pamelee M. McFarland, for amicus curiae ACLU.

OPINION

MURRAY, Justice.

This matter came before us pursuant to a petition for review filed by the Rhode Island Chief Disciplinary Counsel (disciplinary counsel), requesting that this court review and rescind the Supreme Court Ethics Advisory Panel Opinion No. 92-1, issued January 14, 1992.

The statement of the facts contained in the petition for review set forth that in 1991 the disciplinary counsel received an inquiry from a member of the Rhode Island Bar regarding the inquiring attorney's ethical obligations. According to the disciplinary counsel, the attorney reported that he was successor counsel on a case. During the course of his representation of his clients, he became aware that former counsel had embezzled a substantial amount of the clients' money. The inquiring attorney reported that he learned of this embezzlement by way of an admission from former counsel, not by way of a disclosure from the clients. The inquiring attorney then reported that former counsel repaid to the clients the embezzled funds and the clients directed the inquiring attorney not to report the embezzlement to the disciplinary authorities because of the clients' "friendly relationship with predecessor counsel."

After hearing these facts, the disciplinary counsel advised the inquiring attorney to seek an opinion from the Supreme Court Ethics Advisory Panel (Ethics Advisory Panel or panel) regarding whether the inquiring attorney may or must report the embezzling attorney to the disciplinary authorities when the client has directed the attorney not to disclose the embezzlement.

The Ethics Advisory Panel provided this court with a more detailed version of these events. According to the panel, it received a letter from an attorney requesting ethical advice. The letter stated that another attorney, "attorney X," had represented a corporation on various legal and business matters since 1987. Attorney X referred a litigation matter to the inquiring attorney regarding a lease agreement that attorney X had negotiated previously on behalf of the client. Pursuant to the lease agreement, attorney X held client funds in an escrow account. After several years of litigation the inquiring attorney negotiated a settlement of the dispute and the client agreed to the settlement. The inquiring attorney then called attorney X to arrange for the release of
the funds from the escrow account. During that conversation, attorney X told the inquiring attorney that the funds were not available because attorney X had used the funds without the client's authorization.

The inquiring attorney then advised the client of the criminal nature of attorney X's conduct and stated that he or she had a duty to report the ethical violation to the disciplinary authorities. According to the brief submitted by the panel, "[t]he client would not authorize a disclosure and expressed a concern to have the client funds replaced. The client believed that to report the misconduct would interfere with the likelihood of the funds being replaced."

Subsequently, attorney X replaced the client's funds. The client was satisfied with the restoration of the funds and refused to authorize disclosure of the misconduct. According to the panel, the client continued to use attorney X's services on other legal matters.

The aforementioned facts implicate two of the most fundamental ethical obligations of attorneys engaged in the practice of law. The first is the lawyer's duty of confidentiality. This duty is set forth in Rule 1.6 of the Rules of Professional Conduct, adopted by this court and set forth under Rule 47 of the Supreme Court Rules, which states:

"Confidentiality of Information.--(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, but is not obligated to, reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to 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."

The second fundamental duty triggered by these facts is an attorney's duty to report to disciplinary authorities the professional misconduct of another attorney. Rule 8.3 of the Rules of Professional Conduct states in pertinent part:

"Reporting Professional Misconduct.--(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6."

The Ethics Advisory Panel reviewed these rules and issued the following opinion:

"An attorney seeks Panel advice as to whether or not an attorney may report another lawyer's professional misconduct without the client's consent when the professional misconduct was discovered during the course of representation of a client."
"The Panel notes that pursuant to Rule 1.6, an attorney is given discretion to reveal information relating to the representation of a client in only two situations. If neither of these situations arise, the attorney is prohibited from making a disclosure. The Panel also notes the comment to Rule 1.6 which states in part, '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.'

"Assuming the information the attorney received is confidential and within the attorney-client privilege, the Panel is of the opinion that absent the consent of the client, the attorney is prohibited by Rule 1.6 of the Rhode Island Rules of Professional Conduct from revealing it, even in the context of reporting another attorney's misconduct. See also Rule 8.3(c) which states that a report regarding another attorney's misconduct is not required where it would involve violating Rule 1.6."

In this petition for review the disciplinary counsel argues that the Rules of Professional Conduct do not prohibit a lawyer from reporting the serious ethical misconduct of another attorney without client consent when the reporting attorney learned of the misconduct by way of an admission by the accused attorney and not by way of disclosure from the client. In the alternative, in the event we find that the panel properly interpreted Rule 1.6 and Rule 8.3, the disciplinary counsel suggests that we amend the Rules of Professional Conduct to clarify an attorney's duty to report the ethical misconduct of another attorney.

Pursuant to an order issued by this court, we invited "all interested members of the Bar" to file briefs as amicus curiae. The Rhode Island Bar Association, as amicus curiae, has argued that the disciplinary counsel lacks standing to seek review of an opinion of the Ethics Advisory Panel. In addition the Rhode Island Bar Association requests that we address the "lack of a real record" in this case. Thus, before considering whether the Ethics Advisory Panel correctly interpreted the Rules of Professional Conduct in this controversy, we address these preliminary matters.

I

STANDING

Article III, Rule 5, of the Rhode Island Supreme Court Rules (formerly Rule 42-5) lists the duties and powers of the disciplinary counsel. Included among these powers and duties is the obligation of the disciplinary counsel "to investigate all matters involving alleged misconduct which come to his/her attention whether by complaint or otherwise." Absent from this list, however, is the enumerated power to seek review by this court of opinions issued by the Ethics Advisory Panel. Similarly, the Rules of the Ethics Advisory Panel do not provide a method for this court's review of opinions the panel issues. The Rhode Island Bar Association argues that absent a rule change granting the disciplinary counsel the authority to seek review of Ethics Advisory Panel opinions, the disciplinary counsel lacks standing.

We believe that the disciplinary counsel does have standing to seek review of this ethics opinion in this case. Certainly parties can satisfy the standing requirement by demonstrating that a court rule or legislative enactment expressly grants them standing to appear before this court. However, the general rule for standing, in the absence of a court rule or statute, requires that a party prove injury in fact. Rhode Island Ophthalmological Society v. Cannon, 113 R.I. 16, 26, 317

In the present case the disciplinary counsel satisfies the injury-in-fact requirement. Two of the functions of the disciplinary counsel are (1) to investigate all matters involving alleged misconduct and (2) to prosecute all disciplinary proceedings before the disciplinary board. See Article III, Rule 5, of the Supreme Court Rules. In this controversy the Ethics Advisory Panel's interpretation of the Rules of Professional Conduct limited the ability of the disciplinary counsel to investigate and prosecute attorney misconduct. In this manner the disciplinary counsel did suffer an injury in fact sufficient to satisfy the standing requirement.

Our conclusion on the standing issue also is consistent with our opinion in In re Ethics Advisory Panel Opinion, 554 A.2d 1033 (R.I.1989). We held in that case that although "it would only be in the rarest of circumstances that this court would respond to a request that we review one of the panel's opinions," we would review panel opinions in cases wherein the issue addressed is of extreme importance to the legal profession. Id. at 1034. This controversy meets this standard because it involves two of the core ethical obligations of attorneys.

Moreover, by considering this question, we fulfill our constitutional obligation to exercise our supervisory power over the legal profession under article X, section 2, of the Rhode Island Constitution and our statutory obligation to "issue * * * all other * * * processes necessary for the furtherance of justice and the due administration of the law." General Laws 1956 (1985 Reenactment) § 8-1-2. We conclude that the disciplinary counsel does have standing and that this matter is properly before us.

II
THE RECORD IN THIS CASE

The Rhode Island Bar Association raises an important argument regarding the factual record on petitions to review opinions of the Ethics Advisory Panel. These petitions do not come before us following an adversary proceeding in which adjudicative facts are established. The disciplinary counsel in this matter provided this court with her statement of the facts, supported by an affidavit. Similarly, the Ethics Advisory Panel provided its statement of the facts. The panel, however, did not provide us with a copy of the letter it received from the inquiring attorney. The Rhode Island Bar Association maintains that there is an inherent bias in a party's rendition of the facts as provided in a party's brief, which ultimately may be significant to our resolution of these matters.

The Rhode Island Bar Association suggests two possible resolutions to this problem: (1) that we rely solely upon the facts set forth in the panel's opinion or (2) that we require the panel to provide a version of the inquiring attorney's letter, sanitized of identifying characteristics. This version would have to be sanitized in order to keep confidential the "name and letter of an inquiring attorney" in accordance with Rule 6 of the Rules of the Ethics Advisory Panel.

We decline to rely solely on the facts set forth in the advisory panel opinions. Often, as in this case, the opinions provide little factual basis underlying their rulings, and an opinion may make a number of legal assumptions based on factual predicates. In order to make our review effective, we require a more detailed statement of the facts. We agree, however, that in the future the Ethics Advisory Panel should provide this
court with a version of the inquiring attorney's letter, sanitized of all identifying information.

Regarding this controversy, we rely on the undisputed facts set forth in the parties' briefs. Our review of the factual assertions of the parties reveals only two inconsistencies between the version of events as set forth by the disciplinary counsel and the version of events as set forth by the Ethics Advisory Panel. First, the disciplinary counsel uses the plural "clients," indicating that there may have been more than one client in this case. The Ethics Advisory Panel uses the singular "client," thereby indicating that there was only one client. This difference has no bearing on our review and we adopt the panel's version that there was one client.

The second factual difference between the disciplinary counsel's version of the facts and the Ethics Advisory Panel's version concerns the reason the client refused to authorize disclosure of the misconduct to the proper authorities. The disciplinary counsel, relying upon her initial conversation with the inquiring attorney, stated that the client's refusal to authorize disclosure was based upon the friendly relationship between the client and attorney X. In contrast, the Ethics Advisory Panel stated that the client withheld consent because the client was concerned that reporting attorney X would interfere with the client's efforts to convince attorney X to restore the embezzled funds. Rhode Island's version of Rule 1.6 does not authorize an attorney to second guess a client's decision to refuse disclosure of otherwise confidential information. This factual discrepancy also has no bearing on our decision.

Thus, relying on the undisputed facts, we address the content of Ethics Advisory Panel Opinion 92-1.

III

ETHICS ADVISORY PANEL OPINION 92-1

Our analysis of the Rules of Professional Conduct begins with Rule 8.3(a), which requires "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" to inform the proper authorities.

In this case none of the parties disputes the suggestion that attorney X's embezzlement of client funds is a violation of the Rules of Professional Conduct that raises a substantial question regarding attorney X's fitness to practice law. In addition, it is clear that on the basis of the admission by attorney X, the inquiring attorney had "knowledge" of the violation as required by Rule 8.3. Thus, absent a confidentiality issue, it is clear that the inquiring attorney would be under an ethical obligation to report the embezzlement and indeed would be subject to discipline if the inquiring attorney failed to report the embezzlement.

Rule 8.3(c), however, expressly exempts Rule 1.6 confidences from disclosure. Pursuant to Rule 1.6, an attorney "shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized." The official comment to Rule 1.6 helps define the phrase "shall not reveal information relating to the representation of a client." The comment 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 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 representation, whatever its source.” (Emphasis added.)

Rule 1.6 permits but does not require disclosure of otherwise confidential information in two limited circumstances: (1) "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm" or (2) in controversies between the lawyer and the client or when the lawyer needs the information to establish a defense to a criminal or a civil charge involving the lawyer's representation of the client.

Applying these rules, the Ethics Advisory Panel concluded that the inquiring attorney's knowledge of attorney X's embezzlement was confidential information because the inquiring attorney learned of the embezzlement during the course of his representation of a client. Moreover, the panel noted that neither of the two exceptions to Rule 1.6 applied, and accordingly Rule 1.6 required the inquiring attorney to keep his or her knowledge of the embezzlement confidential.

The disciplinary counsel maintains that the Ethics Advisory Panel interpreted Rule 1.6 too broadly. The disciplinary counsel asserts that we are not bound by the comment to Rule 1.6 and that in order to give strength to the reporting requirement under Rule 8.3, we should find that the inquiring attorney's knowledge of the embezzlement falls outside the scope of Rule 1.6.

The disciplinary counsel also suggests that because the admission by attorney X was not a "privileged" communication pursuant to the rules regarding the attorney-client evidentiary privilege, the admission was not a protected communication pursuant to Rule 1.6. In support of this argument, the disciplinary counsel cites In re Himmel, 125 Ill.2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790 (1988). In Himmel the Illinois Supreme Court interpreted Rule 1-103(a) of the Illinois Code of Professional Responsibility, which states:

" 'A lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation'." Himmel, 125 Ill. 2d at 540, 127 Ill.Dec. 708, 533 N.E.2d at 793.

The Himmel court concluded that attorney Himmel did have knowledge of a communication that fell outside the attorney-client privilege. The fact that the communication was not "privileged," combined with the court's finding that Himmel stood to gain financially from the nondisclosure of the violation led the Illinois Supreme Court to discipline Himmel for failing to comply with the reporting requirements. Himmel, 125 Ill.2d at 542, 545, 127 Ill.Dec. 708, 533 N.E.2d at 794-96.

The disciplinary counsel's reliance on Himmel in this case is misplaced. Unlike Illinois’ rule, Rule 1.6 of the Rhode Island Rules of Professional Conduct protects from disclosure a broader range of information than would be protected under the attorney-client privilege. Even though the attorney-client evidentiary privilege may not protect this information, Rule 1.6 prevents the inquiring attorney from disclosing it because it relates to the representation of a client.
Turning to the disciplinary counsel's suggestion that in order to strengthen Rule 8.3, we should limit the scope of Rule 1.6, we note that this is not a situation in which the intent of the drafters of the Rules of Professional Conduct is unclear or ambiguous. Attorney X's admission falls within the scope of the broad definition of confidential communication under Rule 1.6 because the admission was related to his or her representation of his or her client. This broad confidentiality rule reflects the drafter's belief that confidentiality is central to the attorney-client relationship because it encourages clients to seek early legal assistance and "facilitates the full development of facts essential to proper representation of the client." Comment to Rule 1.6; see also 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, § 1.6 at 127-33 (2d ed. 1992 Supp.) (discussing the drafting of Rule 1.6 by the American Bar Association).

In addition Rule 8.3 expressly exempts from the reporting requirement confidential information under Rule 1.6. The drafters of the rules anticipated this conflict between Rule 1.6 and Rule 8.3 and concluded that a lawyer's duty of confidentiality owed his or her client supersedes a lawyer's obligation to report attorney misconduct. The text of the Rules of Professional Conduct clearly supports the opinion of the Ethics Advisory Panel.

This is not to say that we are not concerned with the ramifications of this decision. In this case a lawyer has engaged in criminal conduct as well as violated the Rules of Professional Conduct. The failure of the Rules of Professional Conduct to facilitate the investigation and prosecution of attorney X is correspondingly a failure of the legal profession to regulate itself effectively. This failure fuels the perception that under a cloak of confidentiality, the legal profession is engaged in a coverup of attorney misconduct. See David C. Olsson, Reporting Peer Misconduct: Lip Service To Ethical Standards Is Not Enough, 31 Ariz. L.Rev. 657, 658, 675 (1989).

Our research in this area, as guided by the briefs of the parties and the briefs filed by amicus curiae, reveals that some states have promulgated a confidentiality rule that allows disclosure of information in a broader set of circumstances than would be allowed under Rule 1.6 of Rhode Island's Rules of Professional Conduct. See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, §§ AP4:103-AP4:105 at 1259-1266 (outlining the manner in which states have adopted variations of Rule 1.6). The Minnesota rules, for example, would allow an attorney to report to disciplinary authorities the misconduct of another attorney even without client consent, in a limited set of circumstances. See Rule 1.6(b)(6) of the Minnesota Rules of Professional Conduct. In addition some states have expanded the future crimes exception to Rule 1.6 in order to permit an attorney to disclose a client's intention to commit "any crime." 2 Geoffrey C. Hazard, Jr. & W. William Hodes, § AP4:103 at 1261.

We believe these amendments to Rule 1.6 of the Rules of Professional Conduct are worth considering. We therefore request the Supreme Court Committee to Study the Rules of Professional Conduct to canvass other jurisdictions' versions of the confidentiality principle, consider amending Rhode Island's version of Rule 1.6, and report the committee's findings to this court. However, as the rules currently exist, we conclude that Ethics Advisory Panel Opinion
We wish to thank Pamelee M. McFarland on behalf of the American Civil Liberties Union, Rhode Island Affiliate; Lauren E. Jones on behalf of the Rhode Island Bar Association; and Stephen A. Rodio on behalf of the Committee to Study the Rules of Professional Conduct for their excellent amicus briefs. Their work contributed greatly to a meaningful discussion of these ethical issues and assisted this court in fulfilling its obligation to supervise the legal profession in Rhode Island and to foster public trust in its operation.

For the reasons set forth in this opinion, we deny the petition for review and affirm the opinion of the Ethics Advisory Panel.

LEDERBERG, J., did not participate.

Notes:
[2] This court established the Committee to Study the Rules of Professional Conduct in January 1984. Its mandate was to study the American Bar Association Model Rules of Professional Conduct and to make recommendations to this court regarding their adoption. In 1987 the committee completed a final report to this court and we adopted the proposed rules, effective November 15, 1988. Since that time the committee has had an ongoing role regarding suggested changes and amendments to the rules. We are apprised of the fact that the committee already has considered amendments to Rule 1.6 and Rule 8.3. We request, however, further study and a report on the suggested amendments.

**Client/Matter:** -None-


**Search Type:** Natural Language - Expanded Results

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Procedural Posture
After a hearing, the Professional Responsibility Tribunal recommended that respondent attorney, who had a six-count formal complaint filed against him by complainant Oklahoma Bar Association (bar), be disciplined in the form of an 18-month suspension. Both parties sought review and filed briefs, the bar seeking a two year suspension, and the attorney urging he be allowed to continue his practice.

Overview
The bar filed a six-count formal complaint against an attorney alleging neglect of client matters, failure to adequately keep a client informed, failure to appeal twice, and intentional misrepresentation as to the status of a case, both to the court and the client. After a hearing, the professional responsibility tribunal recommended discipline in the form of an 18-month suspension, and that after the period of suspension the attorney be subject to monitoring for his mental condition, attention deficit disorder. Both parties filed briefs, the bar seeking a two year suspension, and the attorney urging he be allowed to continue his practice subject to medication and supervision. The court took the attorney’s neurological deficit into account as mitigation and suspended him from the practice of law for two years and one day. The court held that it had a constitutional duty in overseeing the bar to insure that its members were fit to practice and that the Americans With Disabilities Act did not prevent the discipline of attorneys with disabilities. The court found no excuse for the attorney’s deceitful behavior.

Outcome
The court suspended the attorney from the practice of law for two years and one day and the attorney was assessed costs.
Civil Procedure > Jurisdiction > General Overview

Jurisdiction > Jurisdiction Over Actions, Exclusive Jurisdiction

The Supreme Court of Oklahoma's review of a disciplinary proceeding is de novo. As the licensing court exercising exclusive jurisdiction, it is the duty of the court to review the evidence presented, along with the trial panel report, to determine whether the allegations have been proven by clear and convincing evidence. The nondelegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of the practitioners of the law is solely vested in the Supreme Court of Oklahoma.

Protection of Disabled Persons, Americans With Disabilities Act

A "public entity" is defined to include any state or local government and any department, agency, special purpose district or other instrumentality of a state or states or local government. This definition has been interpreted to include many instrumentalities of the courts, such as boards of bar examiners, judicial nominating commissions, and disciplinary committees. In 42 U.S.C.S. § 12132, public entities are prohibited from discrimination on the basis of a disability.

Civil Rights Law > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Labor & Employment Law > Disability Discrimination > Employment Practices > Demotions & Promotions

Legal Ethics > Sanctions > General Overview

Labor & Employment Law > Disability Discrimination > Employment Practices > General Overview

The Americans With Disabilities Act clearly applies to the Oklahoma Bar Association (bar), as an arm of the Supreme Court of Oklahoma. No "reasonable accommodation" can be made with regard to an attorney's neglect of client matters and deceit in court which would accomplish the purpose of maintaining the integrity of the bar and promoting the public's confidence in the state's many attorneys. The Supreme Court of Oklahoma has a constitutional duty in overseeing the bar to insure that its members are fit to practice.

Civil Rights Law > Protection of Disabled Persons > Americans With Disabilities Act > Scope

Legal Ethics > Sanctions > General Overview

The Americans With Disabilities Act does not prevent...
the discipline of attorneys with disabilities.

**Syllabus**

Complaint filed against respondent alleging neglect of client matters, failure to adequately inform clients, and intentional misrepresentation of the status of a case to a court and client. Respondent asserts that he is disabled under the ADA, and entitled to reasonable accommodation.

**Counsel:** ALLEN J. WELCH, ASSISTANT GENERAL COUNSEL, OKLAHOMA BAR ASSOCIATION, Oklahoma City, Oklahoma, Attorney for Complainant.

TOM C. LANE, SR., Sapulpa, Oklahoma, JOHN D. "ROCKY" BOYDSTON, BOYDSTON & REHEARD, Eufaula, Oklahoma, Attorney for Respondent.

**Judges:** KAUGER, V.C.J., HODGES, LAVENDER, HARGRAVE, SUMMERS, JJ. -Concur. OPALA, J., with whom SIMMS and WATT, JJ., join, concurring in part and dissenting in part. WILSON, C.J. - Not Participating

**Opinion by:** Summers

**Opinion**

[**1114**] BAR DISCIPLINARY PROCEEDING

Summers, J.:

[*P1] The Oklahoma Bar Association filed a six-count formal complaint against Respondent Michael Busch alleging neglect of client matters, failure to adequately keep the client informed, failure to appeal [***2] twice, and intentional misrepresentation as to the status of a case, both to the court and the client. After a hearing the Professional Responsibility Tribunal recommended discipline in the form of an eighteen-month suspension, and that after the period of suspension Respondent be subject [**1115**] to monitoring for his mental condition, Attention Deficit Disorder. Both parties have filed briefs, the Bar seeking a two year suspension, and the Respondent urging he be allowed to continue his practice subject to medication and supervision.

[*P2] All incidents giving rise to this complaint involved Respondent's handling of Connie Bateman's medical malpractice claim. 1 Respondent filed on behalf of Bateman and her daughter a lawsuit against the doctor who delivered Bateman's daughter. The daughter, now an adult, suffers permanent physical and mental handicaps, allegedly caused by the doctor's negligence. On November 9, 1989, Bateman's motion for default judgment was granted, giving her a judgment against the doctor for ten million dollars. The doctor made no attempt to set aside the judgment.

[*P3] [***3] A few months later Respondent sent the doctor a letter, stating that Respondent would not execute on any personal assets, but would instead collect from any insurance proceeds available. Respondent testified that a brief investigation led him to believe that the doctor had insurance and did not have substantial personal assets. Bateman testified that she did not agree to having such a letter sent. In response to this letter the doctor wrote to his insurance carrier, admitting negligence and making demand that it pay the policy limits. The carrier refused to pay. After further contact the insurer stated that no coverage was in effect at the time of the incident.

[*P4] When it was later discovered by Respondent that the doctor had substantial amounts of money in several different bank accounts, as well as a ranch which was not his homestead and a collection of valuable antique cars, Respondent attempted to execute against his personal assets. But the letter from Respondent was upheld in a state court as being a valid covenant not to execute. Bateman was thus barred from executing against the personal assets of the doctor and has, to this date, received nothing on her ten million dollar [***4] judgment.

[*P5] Bateman told Respondent to appeal the state court ruling and he agreed. He filed a Notice of Intent to Appeal. However, he failed to file a Petition in Error. He did not notify Bateman of this, and later testified that he decided not to file the appeal because he felt the chances of winning were slim.

1 Count I of the complaint alleges violation of Rule 1.1 and 1.3 by signing a letter agreeing not to pursue the personal assets of the doctor. Count II alleges that he failed to appeal the district court's ruling. Count III alleges violations of Rules 1.4(a) and (b) in failing to inform Bateman of his decision not to appeal. Count IV alleges violations of Rule 1.1 and 1.3 in failing to timely appeal from the ruling in favor of the hospital. Count V alleges that he failed to inform his client that the appeal had been dismissed. Count VI alleged intentional misrepresentation to a court regarding the status of the case.
[*P6] In 1990 Respondent filed a second lawsuit for Bateman against Drumright Memorial Hospital, alleging negligence on the part of the hospital for permitting the doctor to have hospital privileges. The hospital filed a motion for summary judgment, which was sustained. Bateman asked Respondent to appeal. He agreed and filed a Petition in Error. However, due to his preoccupation with another case he filed the Petition in Error a day late. In 1991 this Court dismissed the appeal as being out of time. He did not notify Bateman of these events.

[*P7] In February, 1993, Respondent appeared in front of District Judge Woodson, in a hearing to determine the enforceability of the covenant not to execute. Judge Woodson specifically questioned Respondent as to the status of the lawsuit against the hospital, and Respondent stated that the appeal was pending and he "expected a decision shortly."

[*P8] During this ongoing attorney-client relationship with Bateman, she testified that he repeatedly refused to return her calls as to the status of her case. Respondent's secretary confirmed this, and stated that she repeatedly urged Respondent to tell Bateman of its status. Bateman was in the courtroom when he told Judge Woodson that the appeal was pending. She did not know it had been dismissed until she inquired with the Supreme Court Clerk's office.

[*P9] Respondent testified that in June and July 1993 he was diagnosed as having Attention Deficit Disorder. Since that time he has been on medication, and the problem has, for the most part, resolved itself. He continues to seek counseling for other problems in his personal life which have resulted from his disorder. He believes that his handling of the Bateman case was a direct result of Attention Deficit Disorder.

[*P10] His psychiatrist testified on his behalf, stating that Respondent has done well since the implementation of a regime of medication. The second step includes surveillance and monitoring of the professional practice of Respondent. The doctor suggests that someone who does not have ADD must oversee his workload. The third step includes monitoring for periods of "flooding." During these periods, Respondent would need another attorney to take over his case load. This last step requires that Respondent continue his involvement with Lawyers Helping Lawyers. The doctor did not believe it necessary to inform Respondent's clients of his problem.


[*P13] The trial panel determined that Respondent's conduct violated the Rules of Professional Conduct. Specifically, the panel found: As to Counts I, II and IV Respondent violated Rules 1.1 and 1.3 with regard to his actions (sending the letter agreeing not to execute on personal assets from the judgment in the first case, and failing to appeal the district court's rulings as to both cases) which bar Bateman from executing on the doctor's personal assets. As to Count III Respondent violated Rule 1.4(a) and (b) by failing to keep Bateman informed about her case and in failing to explain the legalities. As to Count V Respondent violated Rule 1.4 and 8.4(c) by failing to inform Bateman that the appeal against the hospital had been dismissed and misleading her to believe it was still pending. As to Count VI, Respondent violated Rules 3.3(a)(1) and 8.4(c) by making a false statement to Judge Woodson. The trial panel continued by finding that Respondent's conduct in Counts I, III, V and VI were not a result of his disorder, and "do not relate to his diagnosis of attention deficit disorder."

[*P14] This Court's review of a disciplinary proceeding is de novo. State ex rel. Okla. Bar Ass'n v.
Kessler, 818 P.2d 463, 466 (Okla. 1991); State ex rel. Okla. Bar Ass'n v. Perkins, 757 P.2d 825, 828 (Okla. 1988). As the licensing court exercising exclusive jurisdiction, it is the duty of this Court to review the evidence presented, along with the trial panel report, to determine whether the allegations have been proven by clear and convincing evidence. Kessler, at 466. "The nondelegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of the practitioners of the law is solely [[**9]] vested in this Court." State ex rel. Okla. Bar Ass'n v. Downing, 804 P.2d 1120, 1122-3 (Okla. 1990).

**[P15]** Respondent asserts that the trial panel erred in its imposition of discipline by [[**1117]] failing to follow the mandates of the American with Disabilities Act (ADA). See 42 U.S.C. 12101 et seq. He asserts that as an individual with a disability recognized under the ADA, he is entitled to a "reasonable accommodation" for his disability, and that the trial panel's imposition of punishment is not a "reasonable accommodation."

**[P16] [[**10]] The Bar Association rebuts Respondent's claim with several assertions. First, the Bar urges that impairment is not an excuse or defense to a charge of attorney misconduct. Citing cases from other jurisdictions, the Bar asserts that discipline is not foreclosed because the misconduct was a product of mental illness. Second, the Bar claims that the ADA does not apply to Bar disciplinary proceedings. Finally, the Bar asserts that even if the ADA does apply it does not preclude discipline, because the trial panel specifically found that four of the six counts in the complaint were not attributable to Respondent's disorder.

**[P17]** This is an issue of first impression, and one of great concern to the Oklahoma Bar Association and this Court. Historically, state courts have been vested with the power to determine the standards and qualification required for those seeking to practice law. Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957). To protect the public, states "have broad power to establish standards for licensing practitioners and regulating the practice of professions." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 44 L. Ed. 2d 572, 95 [[***11]] S. Ct. 2004 (1975). Furthermore, the state has a constitutional and substantial interest in determining whether an individual is fit to practice law. Application of Griffiths, 413 U.S. 717, 722-23, 37 L. Ed. 2d 910, 93 S. Ct. 2851 (1973). This interest includes the freedom to gage on a case-by-case basis the fitness of individuals seeking to practice law. Griffiths, at 725. Federal courts are "particularly chary of intrusion into the relationship between the state and those who seek license to practice in its courts." Tang v. Appellate Division of the New York Supreme Court, 487 F.2d 138, 143 (2nd Cir. 1973), cert. denied, 416 U.S. 906, 40 L. Ed. 2d 111, 94 S. Ct. 1611 (1974).

**[P18]** Prior to the enactment of the Americans with Disabilities Act, courts traditionally held that mental illness did not prevent attorney discipline. Because of the importance of maintaining the integrity of the bar, courts held that discipline was necessary regardless of the reason for unfitness. However, mental infirmity might be a basis for mitigation. See Matter of Hoover, 155 Ariz. 192, 745 P.2d 939 (Ariz. 1987)(manic depression was not a complete bar to discipline but was a factor to consider [[**12]] when deciding the punishment); Carter v. Gonnella, 526 A.2d 1279 (R.I. 1987)(bipolar disorder did not prevent bar discipline); Matter of Hein, 104 N.J. 297, 516 A.2d 1105 (N.J. 1986)(alcoholism was not a defense to bar discipline). To hold otherwise would erode the public's confidence in the bar. Hein, at 1108. The sympathy felt for those with mental illnesses does not extend "to the point of lowering the barriers to the protection we have attempted to give to that portion of the public who are clients, especially clients who entrust their money to lawyers." Id.

**[P19]** The Americans with Disabilities Act, enacted 1990, states as its goal "equality of opportunity, full participation, independent living and economic self-sufficiency" for disabled individuals. 42 U.S.C. § 12101(8). It has been described as a "nationwide mandate to provide reasonable accommodations for disabled persons." Petition of Rubenstein, 637 A.2d 1131, 1136 (Del. 1994) quoting Morrissey, The Americans With Disabilities Act: [[**1118]] The Disabling of the Bar Examination Process, The Bar Examiner, 3 We note that the Bar Association does not dispute that Respondent's disorder is recognized under the ADA. After conducting our independent research, the ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual..." 28 C.F.R. § 35.104 interprets this definition to include "any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Respondent's psychiatrist testified that ADD is a neurological disorder, and is recognized in the Diagnostic and Statistical Manual. He also stated that it does fall within the Americans with Disabilities Act and is mentioned in the Individuals with Disabilities Education Act of 1979.

Jason Jackson
Relevant to this case is Subchapter II of the ADA which deals with "public entities." § 12131. "Public entity" is defined to include "any State or local government" and "any department, agency, special purpose district or other instrumentality of a State or States or local government." Id. This definition has been interpreted to include many instrumentalities of the courts, such as Boards of Bar Examiners, judicial nominating commissions, and disciplinary committees. Rubenstein, at 1136; Doe v. Judicial Nominating Commission for the Fifteenth Judicial Circuit of Florida, 1995 W.L. 679983 (Fla. 1995); In the Matter of Wolfgram, 1995 W.L. 506002 (Cal.Bar.Ct. 1995). In Section 12132, public entities are prohibited from discrimination on the basis of a disability.

The Bar Association urges that the ADA is inapplicable to the association in general and more specifically, the Professional Responsibility Tribunal. The basis for this argument is that the Bar Association is not an "employer" of attorneys. However, the ADA has three subchapters. The first deals with employers, the second with public entities and the third with public accommodation. It is the second subchapter - public entities - which is involved here. Matter of Wolfgram, 1995 W.L. 506002 (Cal. Bar Ct. 1995)(the State Bar is subject to subchapter II, the "public entities" section, of the ADA). Clearly, the ADA applies to the Oklahoma Bar Association, an arm of this Court. Tweedy v. Oklahoma Bar Ass'n, 624 P.2d 1049 (Okla. 1981).

Because the parties do not dispute that the Respondent's disability falls within the purview of the ADA, and because the Oklahoma Bar Association is subject to the ADA, we next must decide what impact this Act has on Respondent's disciplinary proceeding. Thus far, the issues raised by the ADA have primarily centered in two areas: bar admissions and disciplinary proceedings. While we are obviously concerned with its effect in disciplinary proceedings, we should not disregard the reasoning used in the bar application cases.

Two states have been called upon to reconcile the duty of the bar association in monitoring and disciplining its members with the mandate of the ADA. The Florida Supreme Court, in Florida Bar v. Clement, 662 So. 2d 690 ( Fla. 1995), addressed the issue when an attorney who was suffering from bipolar disorder (manic depression) was accused of ethical violations. The disciplinary referee recommended disbarment, but the attorney disputed the recommendation, urging that it violated the ADA. The Florida Supreme Court disbarred the attorney although his sickness was one recognized by the ADA.

The Court held that "the ADA does not prevent this Court from sanctioning [an attorney]." Id. at 700. This holding was based on two grounds. First, the conduct complained of (misuse and misappropriation of client funds) was not causally connected to his mental illness. Second, even if the conduct has been causally related:

The ADA would not necessarily bar this Court from imposing sanctions..." A person is a 'qualified' individual with a disability with respect to licensing if he or she, with or without reasonable modifications, 'meets the essential requirements.' This requires a case-by-case analysis of the disabled person and the jobs or benefits he or she seeks. Id. at 687. Clement is not "qualified" to be a member of the Bar because he committed serious misconduct, and no "reasonable modifications" are possible... Thus, while the ADA applies to the Bar, it does not prevent this Court from taking disciplinary action against Clement. (citations omitted)

Id. at 700.

Likewise, in Matter of Wolfgram, 1995 W.L. 506002 (Cal. Bar Ct. 1995), a hearing judge forced an attorney into inactive status because he was unable to practice law without substantial harm or threat to his clients. The attorney suffered from severe depression. The attorney asserted that the ADA prohibited his involuntary inactive status. The California Bar Court relied on federal court decisions which have held that "disabilities which prevented an otherwise qualified employee from meeting the essential requirements [**1119] of the job were not entitled to protections under the ADA." Id. at 7. citing Tyndall v. National Educ. Centers, Inc., 31 F.3d 209, 212-14 (4th Cir. 1994)(teacher's disability prevented her from carrying out her job functions even with extensive accommodations); Reigel v. Kaiser Foundations Health Plan, 859 F. Supp. 963 (ED.N.C. 1994)(physician's shoulder injury rendered her unable to perform essential patient diagnosis) and Larkins v. CIBA Vision Corp., 858 F. Supp. 1572 (N.D.Ga. 1994)(panic attacks prevented a customer representative from performing essential job functions). The Bar Court agreed that the attorney...
should be placed on inactive status regardless [***17] of his disability. 4

[**P26**] A slightly different result has occurred when the issue is bar admission rather than attorney discipline. These attacks have focused on either the questions asked on the bar application or on the examination process itself. In Petition of Rubenstein, 637 A.2d 1131 (Del., 1994), the applicant suffered from a learning disability which kept her from passing the bar. She filed a petition requesting extra time to take both portions of the exam. The Board of Bar Examiners granted her request as to one portion but denied it as to the other. She sought relief from the Delaware Supreme Court. The Court held that once a disability is established which meets the criteria of the ADA, the public entity must make reasonable accommodations to facilitate the disabled person. As an instrumentality of the court, the Board of Bar Examiners was subject to the "reasonable accommodation" standard of the ADA. Extra time for the taking of the examination was considered a reasonable accommodation.

[**P27**] In McCready v. Illinois Board of Admissions to the Bar, 1995 W.L. 29609 (N.D.Ill. 1995), an applicant alleged violations of the ADA when he was denied admission to the bar after passing the examination. The denial was based on his mental health history which included prolonged problems with drug addiction and other mental disorders. The court held that the denial of admission was proper and did not violate the ADA.

Under Title II, the protected class is limited to 'qualified individuals with a disability.' BY protecting 'qualified individuals with a disability' (and not all individuals with disabilities), the ADA expressly recognizes that, in some cases, an individual may be unqualified by reason of the disability...It is [***19] not enough to qualified 'but for' a disability; 'the right inquiry is whether the person can satisfy the program's requirements despite his handicap.'

Id. at 5 (citations omitted). 5

[**P28**] From the cases dealing with attorney discipline as well as those dealing with admission, we see that it is still the ultimate responsibility of the Oklahoma Bar Association to protect the integrity of the Bar, and to insure the continued confidence in the Bar by the public. Concededly, this responsibility also includes the duty to follow federal laws as they become applicable to the state.

[**P29**] The ADA clearly applies to the Oklahoma Bar Association, as an arm of this Court. However, unlike Rubenstein, we see no "reasonable accommodation" which [***20] can be made with regard to Respondent's neglect of client matters and deceit in court which would accomplish the purpose of maintaining the integrity of the Bar and promoting the public's confidence in the state's many attorneys. This Court has a constitutional duty in overseeing the Bar to insure that its members are fit to practice. Application of Griffiths, 413 U.S. at 722-24.

[**P30**] Our case is closer to Clement. As the Florida Supreme Court stated, HN5 the ADA does [*1120] not prevent the discipline of attorneys with disabilities. This holding is consistent with prior Supreme Court law. See Griffiths, 413 U.S. at 725; Goldfarb, 421 U.S. at 792. It is undisputed that Respondent failed to pursue an appeal in the first case and failed to timely file the petition in error in the second. We find the evidence to be clear and convincing that Respondent agreed - without his client's knowledge or permission - to pursue the ten million dollar judgment only against the doctor's insurance rather than against the doctor's personal assets. We similarly find that he told Judge Woodson that an opinion in the appeal was expected soon, when, in fact, Respondent knew that the appeal had been dismissed [***21] as untimely.

[**P31**] As mitigation we find that Respondent was suffering from Attention Deficit Disorder, that he is now being treated for this illness, and take that into account in the imposition of our discipline. We also note that Respondent has worked with Lawyers Helping Lawyers because of his illness.

[**P32**] We would be shirking our duty as the guardians of the state's bar were we to permit Respondent to avoid

4 The Colorado Supreme Court has been called upon to decide whether the fact that an attorney had a mental illness, termed success neurosis, could be considered as a mitigating circumstance. The attorney did not raise the Americans With Disabilities Act. The Court held that the hearing board's finding that it was not established could be upheld and that the neurosis need not be considered as mitigation. People v. Goldstein, 887 P.2d 634, 641 Colo. 1994.

discipline. Such would surely erode public confidence in the bar. Respondent's client testified that due to Respondent's gratuitous letter she has received no compensation for her daughter's injuries in spite of the fact that she obtained a ten million dollar judgment. We find no excuse for Respondent's deceitful behavior in a court of this state. While his neglectful behavior may have been influenced by his ADD, his physician testified that lying is not a direct result of the illness. Because we find that the Bar Association has proven by clear and convincing evidence all counts as alleged in the complaint, we agree that discipline is necessary.

[*P33] Taking his neurological deficit, now under control, into account as mitigation, [***22] Respondent is hereby suspended from the practice of law for two years and one day. After completion of the suspension, if Respondent resumes his practice, he shall be subject to the guidelines set forth by Dr. Dodson in his letter of August 1, 1995. This plan shall include Respondent's involvement with Lawyers Helping Lawyers. If disagreement as to the plan arises, Lawyers Helping Lawyers shall immediately contact the office of the General Counsel for the Oklahoma Bar Association. We also find that Respondent should be, and is hereby, assessed costs in this matter totalling $2,272.54 to be paid within thirty days of the date this opinion becomes final.

[*P34] KAUGER, V.C.J., HODGES, LAVENDER, HARGRAVE, SUMMERS, JJ. - Concur

OPALA, J., with whom SIMMS and WATT, JJ., join, concurring in part and dissenting in part.

Dissent by: OPALA

Dissent

I concur in the court's view that respondent breached professional discipline and that the A.D.A. does not pose a legal impediment to imposition of sanctions; I dissent from today's suspension. I would order respondent's disbarment.

[*P35] WILSON, C.J. - Not Participating

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Document (1)

1. *Fritsch v. City of Chula Vista, 2000 U.S. Dist. LEXIS 14820*

   **Client/Matter:** -None-

   **Search Terms:** Fritsch v. City of Chula Vista, 2000 U.S. Dist. LEXIS 14820, 11 Am. Disabilities Cas. (BNA) 273

   **Search Type:** Natural Language - Expanded Results

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**Fritsch v. City of Chula Vista**

United States District Court for the Southern District of California

February 17, 2000, Decided; February 22, 2000, Filed; February 23, 2000, Entered

Civil No. 98-0972-E(CGA)

**Reporter**

2000 U.S. Dist. LEXIS 14820 *; 11 Am. Disabilities Cas. (BNA) 273

RUTH M. FRITSCH, Plaintiff, v. CITY OF CHULA VISTA, et al., Defendant.

**Disposition:** [*1] Defendants' motion for summary judgment on all counts [# 89-1, 89-2, 96-1, 96-2] granted. Action dismissed in its entirety.

**Core Terms**

confidential, attorneys, medical examination, confrontation, disability, alleges, business necessity, privacy, agrees, upset, summary judgment, psychological, disseminated, job-related, retaliation, harassment, sexual, medical information, defendants', termination, responded, agitated, invasion, visibly

**Case Summary**

**Procedural Posture**

Defendant former employer filed a motion for summary judgment in plaintiff former employee's action alleging employment discrimination in violation of the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., and state law invasion of privacy, wrongful termination, and retaliation.

**Overview**

Plaintiff former employee brought an action against defendant former employer alleging employment discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq., and state law invasion of privacy, wrongful termination, and retaliation for defendant's termination of plaintiff following plaintiff's refusal to submit to a psychological evaluation to determine her fitness to perform her job. Defendant moved for summary judgment, claiming that the psychological evaluation was job related and not actionable under the ADA, and that plaintiff failed to present evidence of any employment discrimination by defendant. The court granted summary judgment for defendant, holding that the psychological evaluation was job related and necessary to determine whether plaintiff could perform the essential functions of her job, and that plaintiff failed to present evidence of any employment discrimination by defendant.

**Outcome**

Summary judgment granted for defendant former employer because plaintiff former employee's psychological evaluation was job related and necessary to determine whether she could perform the essential functions of her job, and plaintiff failed to present evidence of any employment discrimination by defendant.

**LexisNexis® Headnotes**

Civil Procedure > ... > Summary
Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > Materiality of Facts

**HN1** Summary Judgment, Opposing Materials

A party is entitled to summary judgment if the pleadings
and other documents show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). The opposing party must set forth specific facts showing there is a genuine issue for trial.

Labor & Employment
Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

Public Health & Welfare
Law > Healthcare > General Overview

Labor & Employment
Law > Discrimination > Disability Discrimination > General Overview

HN2 Burdens of Proof, Employee Burdens of Proof

To establish a prima facie case of disability discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq., a plaintiff must first establish that she suffers from a disability as defined by the ADA.

Labor & Employment Law > ... > Disability Discrimination > Defenses > Business Necessity

Labor & Employment
Law > Discrimination > Disability Discrimination > General Overview

HN3 Defenses, Business Necessity

When a plaintiff claiming disability discrimination under the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., denies that she has an actual disability, she must demonstrate that her employer regarded her as being disabled. 29 C.F.R. § 1630.2(g)(3), (l)(3). Second, she must establish that she was able to perform the essential functions of the job, either with or without reasonable accommodations. The third element of the prima facie case demands that the plaintiff show that her employer fired her in whole or part because of her protected disability.

Business & Corporate
Compliance > ... > Discrimination > Disability Discrimination > Federal & State Interrelationships

HN4 Disability Discrimination, Federal & State Interrelationships

The Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., permits an employer to require a current employee to submit to a medical examination only if the employer can prove that it is inquiring into the employee's ability to perform job-related functions. 42 U.S.C.S. § 12112(d)(4)(A), (B); 29 C.F.R. § 1630.14(c). Specifically, the employer must demonstrate that the request for a medical examination is job-related and consistent with business necessity. 42 U.S.C.S. § 12112(d)(4)(A). This protection is available to every employee, regardless of whether she is a qualified individual with a disability. The need for the examination may be triggered by some evidence of problems related to job performance or safety.

Business & Corporate
Compliance > ... > Discrimination > Disability Discrimination > Federal & State Interrelationships

HN5 Disability Discrimination, Federal & State Interrelationships


Labor & Employment Law > Employee Privacy > Constitutional Protections

Torts > Intentional Torts > Invasion of Privacy > Defenses

Constitutional Law > Substantive Due Process > Privacy > General Overview

Labor & Employment Law > Employee Privacy > Medical & Psychological Examinations

Jason Jackson
MEMORANDUM DECISION AND ORDER

This case involves an experienced attorney who had an emotional outburst in court and who challenges the employer's request that she submit to a psychological evaluation to determine her fitness to perform her job. The attorney contends that the employer's decision violated various employment discrimination laws, primarily the Americans with Disabilities Act (ADA). Based on the information available to the employer about the severity of the outburst and his personal observations of the attorney's demeanor when she reported the incident; the staff psychiatrist's recommendation that the employee immediately take a fitness-for-duty evaluation; and the high level of fortitude and professionalism required of litigation attorneys, the court concludes that the employer properly requested the attorney to submit to a psychological evaluation.

BACKGROUND

Plaintiff Ruth Fritsch began her legal career in 1979 at the City Attorney's Office in Los Angeles. Fritsch then worked for five years at the San Diego District Attorney's Office. In June 1988, her present employer, the City of Chula Vista, hired her. For a brief time, she was appointed the Acting City Attorney, but primarily held the position of Chief Litigator.

In 1994, Fritsch filed a suit against Bruce Boogard, who was then the City Attorney, for sexual harassment. That claim settled in August 1996. The terms of that settlement agreement require Fritsch to maintain the confidentiality of those events. As a term of the settlement, the City transferred Fritsch to the City Manager's office and fired Boogard.

In 1994, Fritsch filed a suit against Bruce Boogard, who was then the City Attorney, for sexual harassment. That claim settled in August 1996. The terms of that settlement agreement require Fritsch to maintain the confidentiality of those events. As a term of the settlement, the City transferred Fritsch to the City Manager's office and fired Boogard.

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For RUTH M FRITSCH, plaintiff: Suzy Moore, Law Offices of Suzy Moore, San Diego, CA.

For CHULA VISTA CITY OF, JOHN KAHENY, defendants: Phillip L Kossy, Littler Mendelson, San Diego, CA.

Judges: WILLIAM B. ENRIGHT, Judge, United States District Court.
represented the City in a police misconduct suit. Plaintiff's counsel, Charles Viviano, had been fired from the City Attorney's office for incompetence. Viviano had noticed the deposition of Fritsch in the lawsuit, and Fritsch had filed a motion to quash that subpoena. While the two attorneys were waiting in the courtroom to appear on that motion, Viviano leaned close to Fritsch and called her "a terrible lawyer" and stated that he "couldn't wait to get into her personnel file." Fritsch responded by calling Viviano a "pig that had a problem with women." Viviano said that Fritsch's problem was "she had a female chip on her shoulder." Fritsch responded that Viviano "wasn't working for the City anymore because he was incompetent." Viviano said "bullshit." Fritsch then apologized to Viviano. Viviano informed her that Kaheny was going to hear about it and that she was "losing it."

The two attorneys then proceeded into Superior Court Judge Peter Riddle's chambers for the motion hearing. Judge Riddle had not witnessed the verbal altercation, but admonished both attorneys to act professionally and move on. Judge Riddle noticed that Fritsch was crying or sobbing; "very, very distressed"; and "upset and agitated," so he offered her the privacy of his library to collect herself. During his deposition, Judge Riddle was then asked, "but she wasn't sobbing uncontrollably or anything of that nature," and he responded, "I'm not prepared to say that." Judge Riddle recalls that Fritsch was alone in the library for fifteen minutes. Fritsch denies that she "broke down and sobbed" in chambers. Fritsch apologized to the court and stated that the emotions were running high because Viviano was trying to depose her.

After the conference, Fritsch talked to her husband about the incident. In the meantime, a witness to the altercation left a voice message for Kaheny and stated that Viviano had been a "jerk" in court.

Fritsch returned to the office and told Kaheny about the confrontation. She informed Kaheny that Viviano had made a sexist remark, that she had responded that he was incompetent, and that the judge had admonished them both. Fritsch told Kaheny that his dealings with Viviano (Fritsch contends that Viviano routinely discussed the police misconduct suit with Kaheny, instead of Fritsch) had encouraged Viviano's behavior and that she was being "old boyed." Fritsch testified that she was "calm" during that conversation. Fritsch's secretary reported that Fritsch was not acting unusual, yelling, screaming, or crying during the conversation. Kaheny, however, perceived Fritsch as in "a state of frenzy," "visibly upset, visibly shaken, hyperventilating."

Judge Riddle was concerned about Fritsch "as a human being, perhaps less than a judge," and called Kaheny to advise him that a confrontation had occurred between Fritsch and Viviano. He expressed his concern that Fritsch had been "very upset." Judge Riddle was concerned with Fritsch's condition because she "appeared to be in considerable distress."

Viviano also called Kaheny to say that something had to be done about Fritsch's comment, and he would not let it drop. Viviano told Kaheny that Fritsch had "lost it" and was "just out of control." Viviano described her as "agitated, upset, loud, emotional."

Later that day, Fritsch's husband, on his own initiative, called Viviano and said, "I am the husband of the women you insulted this morning in South Bay Court. Anybody can talk and anybody can say nasty things to a woman as long as they are sure that they won't be accountable for what they say. Don't be too sure of this in this case." Fritsch's husband is an agent for the Drug Enforcement Agency (DEA). Viviano then called Kaheny to report the "threat" and expressed his intent to seek a temporary restraining order and to contact the supervisor at the DEA. Later, her husband told Fritsch not to worry because nothing could happen to his job.

The next day, Kaheny confronted Fritsch with Viviano's report of the threat. Fritsch responded that "it's not a big thing. There's nothing to worry about." Kaheny felt that Fritsch was "overly calm" and appeared "dissociated." Kaheny believed a normal attorney would be concerned with the potential lawsuit for a threat, but that "I wasn't getting the response that I would have assumed from someone who could have understood the seriousness of what had occurred."

Kaheny felt "there's a problem here," and called the City's consulting psychiatrist. Kaheny relayed the events as he knew them to Dr. Ettari. Dr. Ettari said that they could "set her up for a fitness for duty evaluation" and to "get her in here right away." Kaheny believed Dr. Ettari conveyed a "sense of urgency." Kaheny testified that "after my conversation with Dr. Ettari, I was convinced that for own benefit and the protection of the office in which I hold, that she needed to be seen by a professional so I could get a proper evaluation of exactly what kind of duties she could perform."

Kaheny requested Fritsch submit to a psychiatric evaluation. Senior Assistant City Attorney Moore, and
the Director of Human Resources (Candy Emerson) were present. Fritsch refused. Kaheny fired her for insubordination.

Fritsch filed this lawsuit, containing ADA and related employment discrimination claims, against the City of Chula Vista and Kaheny. Defendants move for summary judgment on all counts.

DISCUSSION

A party is entitled to summary judgment if the pleadings and other documents show that there is no genuine issue as to any material fact. *Fed. R. Civ. P. 56(c)*. The opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

I. ADA Claims

In her Second Amended Complaint (SAC), Fritsch alleges that defendants engaged [*8] in a variety of discriminatory practices that are illegal under the ADA. Specifically, she alleges that defendants made unlawful medical inquiries; unlawfully required employees to submit to psychiatric evaluations; terminated her for refusing to submit to the unlawful examination; and unlawfully disseminated confidential medical information to persons with no legitimate reason for having access to that information. SAC P 16. Fritsch's central complaint is that defendants illegally ordered her to submit to a psychiatric evaluation. *HN4*

The ADA permits an employer to require a current employee to submit to a medical examination *only if* the employer can prove that it is inquiring into the employee's ability to perform job-related functions. *42 U.S.C. § 12112(d)(4)(A), (B); 29 C.F.R. § 1630.14(c)*. Specifically, the employer must demonstrate that the request for a medical examination is "job-related and consistent with business necessity." § 12112(d)(4)(A). This protection is available to every "employee," regardless of whether she is a "qualified individual with a disability." *Fredenburg, 172 F.3d at 1181*. The EEOC manual provides that "the need for the examination may be triggered by some evidence of problems related to job performance or safety." EEOC Technical Assistance Manual § 6.6.

Defendants argue that the request meets this standard because [*10] Kaheny had good cause to require Fritsch to submit to a fitness-for-duty examination. *Sullivan v. River Valley School Dist.*, 20 F. Supp. 2d 1120, 1126 (W.D. Mich. 1998) (prior to requesting the teacher take a psychological examination, the school board sought outside input from a psychologist). Those facts include: (1) Kaheny's observations of Fritsch when she described the confrontation in that she was visibly upset, visibly shaken, hyperventilating, and in a state of Frenzy; as well as the content of the confrontation in that Fritsch had publicly maligned the competence of an opposing attorney; (2) Viviano's report that Fritsch had lost it, was out of control, agitated, and unsettled; (3) Judge Riddle's unprecedented phone call expressing concern for Fritsch's distressed condition because "he'd never seen anything like that happen before"; (4) Kaheny's observations of Fritsch's blase attitude and disassociated state when he informed her that Viviano was going to pursue legal action against her husband; and (5) Dr. Etter's opinion that the case was appropriate for an immediate fitness-for-duty evaluation, which Kaheny interpreted as conveying a sense of urgency.

To establish a prima facie case of disability discrimination under the ADA, Fritsch must first establish that she suffers from a disability as defined by the ADA. *Bradley v. Harcourt Brace and Co.*, 104 F.3d 267, 271 (9th Cir. 1996); *Fredenburg v. Contra Costa County Dept. of Health Services*, 172 F.3d 1176, 1178 (9th Cir. 1999) (plaintiff must first show that she is a "qualified individual with a disability"). Here, *HN3* because Fritsch denies that she has an actual disability, she must demonstrate that the City regarded her as being disabled. *29 C.F.R. § 1630.2(g)(3), (I)(3)*. Second, she must establish that she was able to perform the essential functions of the job, either with or without reasonable accommodations. *Bradley, 104 F.3d at 271*. [*9*] The third element of the prima facie case demands that Fritsch show that the City fired her in whole or part because of her protected disability. *Id.*

A. Business Necessity to Request a Medical Examination

The court agrees with defendants' position. The medical examination was job related because Kaheny needed to determine whether Fritsch could perform the essential functions of her job. See *Yin v. California*, 95 F.3d 864, 868 (9th Cir. 1996), cert. denied, 519 U.S. 1114, 117 S. Ct. 955, 136 L. Ed. 2d 842 (1997). Her job as a senior litigator required her to meet with opposing counsel and appear in court. An attorney should be able to perform those functions in a professional and calm manner, so that she can focus on the best interests of the client's needs instead of her own personal feelings.
or sensitivities. Fritsch's behavior at the court proceeding was severe enough to prompt the judge presiding over the litigation to contact her supervisor. This is a most unusual circumstance, and it carries great weight in the court's assessment of the nature of Fritsch's behavior after the verbal altercation. Importantly, Fritsch's emotional outburst prevented the judge from holding the motion hearing that had been scheduled. Her conduct therefore directly affected her ability to perform the immediate task of arguing the motion to quash the subpoena. Moreover, [*12] the comments made by Viviano were rude, but they did not rise to such a level that one would expect an experienced attorney to become visibly upset and unable to proceed with an in-chambers conference. Because the medical examination was job-related and consistent with business necessity, the court agrees with defendants that the demand for the examination was not motivated by illegal discrimination or simple curiosity into whether Fritsch suffered from a mental impairment. Miller v. Champaign Comm. Unit, School Dist., 983 F. Supp. 1201, 1206(C.D. Ill. 1997) (the job-related or business necessity language of the ADA exonerates the employer for liability).

Fritsch argues that factual issues remain as to whether the request was job-related and a business necessity. She emphasizes that defendants based the decision on the single incident, yet Fritsch had been a model employee for nine years. Defendants believed the incident "came out of the blue." Fritsch notes that by contrast, the Sullivan case involved a teacher who had engaged in disruptive, abusive behavior for three years and the Yin case involved an employee with a five-year history of absences, fainting [*13] spells, and low productivity.

The court is not persuaded by these arguments. In rejecting the plaintiff's view, the court assesses the totality of the circumstances and the context in which Fritsch degenerated. An individual employed as a litigation attorney is expected to be able to handle conflict. The very essence of the litigator's business is confrontation and dispute, including the use of strategies to shake the confidence of the opponent and the use of techniques to challenge and undermine the credibility of those who oppose your client's interests. This was not an incident involving a novice teacher who is publicly berated and humiliated by an angry parent. It is reasonable for an employer to expect a litigation attorney to withstand the pressures inherent in a legal dispute, including an opponent's occasional boorish behavior. Moreover, the City had a legitimate business necessity for inquiring into Fritsch's stability as she was representing the public entity. It is reasonable for the City to expect the individuals who represent it to conduct themselves in a calm, professional demeanor. The attorney, as champion of the City's position, is expected to proceed with confidence [*14] and strength. The City entrusts the litigator with important matters -- matters than can affect the financial health of the City. The City reasonably expects its attorneys to have a clear vision of its goal in the litigation and to form rational, coherent, and logical strategies in defending the emotionally-charged claims of police misconduct.

Fritsch further argues that factual questions remain because the defense witnesses use strong language to describe Fritsch's demeanor after the confrontation with Viviano, but her secretary reported that Fritsch was not acting unusual and was not crying. Moreover, Fritsch contends that Kaheny based his assessment of Fritsch's behavior at court on Viviano's biased and incorrect account. Kaheny testified in deposition that he learned later that Viviano had misstated the facts to him. He also testified that he knew Viviano was an aggressive litigator with a reputation for exaggeration and as a "professional agitator." And, while an independent witness had left a message on Kaheny's phone that Viviano was the one who initiated the confrontation and had behaved like a jerk, Kaheny did not investigate. Instead, Kaheny accepted Viviano's [*15] description of Fritsch as "out of control" at face value. Also, Judge Riddle had informed Kaheny that both lawyers were upset and agitated. Fritsch further argues that the fact that Kaheny consulted with a doctor is entitled to little weight because Kaheny based his description of Fritsch's conduct on Viviano's exaggerated report. For example, Kaheny did not tell the doctor that Viviano had instigated the verbal altercation; and he relayed Viviano's incorrect report that Fritsch had yelled in court and had instructed her husband to threaten him. Finally, from Fritsch's perspective, her blase response to the news that Viviano would seek a TRO was appropriate because her husband had assured her that his job was not in jeopardy. Fritsch did not encourage or participate in her husband's decision to call Viviano.

The court concludes that Fritsch's arguments do not defeat the defendants' summary judgment motion. Here, the supervisor who was entrusted with the management of the City's legal team made a decision based on information from a variety of sources. That facts were later clarified and adjusted does not alter the solid foundation of evidence in Kaheny's possession at the
time he [*16] telephoned the doctor. Importantly, as defendants note, Kaheny used the information available to him to consult with a medical professional. Kaheny did not attempt to apply his lay perspective to the determination of whether Fritsch was suffering from a mental disorder. Instead, he relayed the available information underlying his concerns of whether Fritsch could perform her job to a medical professional. He then relied on the doctor's advice to refer the employee for further evaluation. Importantly, it was the doctor, not the supervisor, who suggested that Fritsch submit to a psychological examination. It was reasonable and appropriate for the employer to seek the guidance of a mental health worker, and to follow that advice. This procedure allowed the employer to gather the necessary information to allay its reasonable fears that an employee was unfit to perform her job responsibilities. In today's climate of workplace violence, an employer need not wait for the sound of gunfire to institute a preliminary investigation into the mental stability of an employee. Given the totality of the circumstances, the court concludes as a matter of law, that the City acted within the confines [*17] of the law in asking Fritsch to undergo a psychological examination.

B. Pattern and Practice

In her ADA claim, Fritsch alleges that the City has engaged in an unlawful pattern and practice of discrimination. SAC P 16, 17. Fritsch is not permitted to pursue this theory as a matter of law because the ADA authorizes the Attorney General, not private citizens, to bring such claims. 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-6); e.g., United States v. E. Tel. Co., 976 F. Supp. 1262 (D. Minn. 1997).

Even if Fritsch had a private right of action, she has not presented evidence of class-wide discrimination. Babrocky v. Jewel Food Co. & Retail Mfg., 773 F.2d 857, 866-67 & n.6 (7th Cir. 1985). Her case involves an isolated incident rather than repeated conduct necessary to establish a pattern claim. Teamsters v. United States, 431 U.S. 324, 336 n.16, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). She has not presented facts that show "systemic disparate treatment."

C. Confidential Medical Information

Fritsch alleges that defendants violated the ADA by [*18] disseminating her confidential medical information to persons who had no legitimate need for the information. SAC P 16(f). Defendants argue that the statutory provisions do not apply to Fritsch because they refer to the dissemination of medical information obtained through the process of the medical examination. 42 U.S.C. § 12111(3)(B)(i); 29 C.F.R. § 1630(c)(1) (referring to information "obtained under" a medical examination of a current employee that meets the job-related and consistent with business necessity standard). The court agrees with this reading of the statute because the ADA dictates that medical information obtained in the course of a permitted medical examination must be treated as confidential. Because Fritsch was never examined by Dr. Ettari, the defendants did not disseminate confidential material within the meaning of the ADA.

II. California Claims

A. Invasion of Privacy

Fritsch included a two-part invasion of privacy claim in her complaint. SAC P 28-31. First, she alleges a violation when defendants demanded that she take the psychological evaluation. Second, she alleges defendants disseminated the confidential information [*19] to other City employees. HN5 To establish a state constitutional violation, plaintiff must show (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) a serious invasion of that interest. Hill v. NCAA, 7 Cal. 4th 1, 39-40, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994).

Relying on their ADA arguments as to business necessity, defendants argue that the first part of the claim fails because the request for the mental examination was authorized by law. The court agrees with this analysis.

As to the second aspect, defendants argue that Kaheny properly involved other City employees in his decision making process. Emerson and Moore were present at the time Kaheny requested Fritsch to take the examination, but their mere presence does not constitute a serious invasion of Fritsch's privacy interests. Kaheny properly consulted with Emerson, in her capacity as the Director of Human Resources, about the incident. Moore was Kaheny's second-in-command. Kaheny told both of them to keep the matter confidential and "in house." Kaheny also had to tell his secretary because she typed the letter terminating Fritsch. Kaheny's disclosure to the attorney who was taking over Fritsch's caseload [*20] does not amount to a serious violation.

B. FEHA and Wrongful Termination Claims
Fritsch has also pleaded state law claims for violations of the Fair Employment and Housing Act and the common law tort of wrongful termination in violation of public policy. SAC P 19-20, 32-36.

California’s FEHA parallels the ADA. Bradley, 104 F.3d at 271. The court has held that defendants acted properly when requesting the medical examination; consequently, her FEHA claim fails. Sullivan, 20 F. Supp. 2d at 1126 (because request for a mental examination furthered the school's legitimate business purpose, the employee's refusal constituted insubordination).

Similarly, Fritsch cannot establish that the employer's decision to request the examination and to then fire her for refusing that request violated public policy. Because the court has also rejected her claims concerning the invasion of privacy and dissemination of confidential medical records under the ADA, these allegations do not support the tort claim. Accordingly, her state common law wrongful termination claim fails.

C. Retaliation

Fritsch alleges a FEHA claim based on her allegation [*21] that the defendants' conduct was motivated by a desire to punish her for having brought the sexual harassment claims against the former City Attorney Boogard. HN7 To establish a case of retaliation, plaintiff must show that she engaged in protected activity, that she was subjected to adverse employment action, and a causal link between the two. Soldinger v. NW Airlines, 51 Cal. App. 4th 345 (1996). The burden shifts to the employer to come forward with a non retaliatory explanation. The burden then shifts back to the plaintiff to establish that the employer's reason was pretextual.

Defendants seek summary judgment on this claim on that ground that Fritsch cannot demonstrate a casual connection between the Boogard sexual harassment claim and the request for the mental examination. Importantly, Kaheny was not employed at the City during the unlawful sexual harassment activity nor during the litigation of Fritsch's claim against Boogard. Kaheny was not involved in the prior misconduct, and thus, the assumption that he had a motive to retaliate is unsupported.

The court also agrees that the temporal proximity is strained. Fritsch filed the claim against Boogard in 1994, [*22] though Kaheny learned of it when he took office in November 1996. The alleged retaliation took place eight months later in June 1997. E.g., Harrison v. Metro Gov't of Nashville, 80 F.3d 1107 (6th Cir. 1995) (time span of 14 to 15 months to satisfy the temporal proximity element), cert. denied, 519 U.S. 863, 136 L. Ed. 2d 111, 117 S. Ct. 169 (1996); cf. Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9th Cir.) (four month gap satisfied temporal proximity of events), cert. denied, 522 U.S. 950, 139 L. Ed. 2d 287, 118 S. Ct. 369 (1997).

In addition, as discussed in connection with the ADA claims, the court agrees with defendants that Fritsch's retaliation claims fail because the City had a legitimate, non-discriminatory reason for its actions. For these reasons, the court grants summary judgment on the retaliation claim.

III. Declaratory Relief

Fritsch included a Declaratory Relief claim in the complaint. She asks the court to declare that it is her right to present evidence of the City's practice and pattern of discrimination by presenting similar claims by other City employees. To do so, Fritsch must [*23] be relieved from the confidentiality clause in the settlement agreement of the sexual harassment lawsuit. That agreement also contained an arbitration clause.

The court agrees with defendants that the claim is moot because the entry of summary judgment eliminates the need for Fritsch to assert the prior claims of discrimination. Consequently, she has no need to breach or challenge the prior confidentiality agreement. Nor does the City need to enforce its right to send such claims to arbitration.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth above, the court hereby grants defendants' motion for summary judgment on all counts [# 89-1, 89-2, 96-1, 96-2]. This action is dismissed in its entirety.


WILLIAM B. ENRIGHT, Judge

United States District Court
Document (1)

1. *Fla. Bar v. Clement, 662 So. 2d 690*
   - Client/Matter: -None-
   - Search Type: Natural Language - Expanded Results
   - Narrowed by:
     | Content Type | Narrowed by |
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     | Cases        | -None-      |
**Fla. Bar v. Clement**

Supreme Court of Florida  
November 2, 1995, Decided  
No. 82,097

**Reporter**  
662 So. 2d 690 *; 1995 Fla. LEXIS 1749 **; 20 Fla. L. Weekly S 553

THE FLORIDA BAR, Complainant, v. PETER CHARLES CLEMENT, Respondent.

**Prior History:** [**1**] Original Proceeding - The Florida Bar.

**Core Terms**

mortgage, disbarment, trust account, funds, concert, disability, deposit, argues, bipolar disorder, recommended, misconduct, auditor, disciplinary, psychiatrist, suspension, recorded, shopping center, Regulating, shortage, practice of law, earnest money, rehabilitation, mitigation, referee's findings, proceedings

**Case Summary**

**Procedural Posture**  
Respondent attorney sought review of a referee recommendation for respondent's suspension from the practice of law. Respondent claimed he suffered from a bipolar disorder at the time of the misconduct and was unable to distinguish right from wrong. Complainant bar association sought disbarment where respondent knowingly and intentionally violated bar rules, misappropriated client funds, and misrepresented information to a client.

**Overview**  
Respondent attorney was disbarred from the practice of law because respondent violated bar rules and failed to prove that his bipolar disorder was the cause of his misconduct. Complainant bar association sought respondent's disbarment for knowingly and intentionally violating bar rules, misappropriating client funds, and misrepresenting information to a client. A referee recommended that respondent be suspended from the practice of law for 36 months. Respondent claimed that he should not be sanctioned because he was suffering from a bipolar disorder when the misconduct occurred and was not able to distinguish right from wrong and because the disorder was a disability under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.S. § 12101, et seq. The state supreme court disbarred respondent and held that respondent failed to prove that his misconduct occurred while he labored under a mental disorder and could not distinguish right from wrong, thus, disbarment was proper. Although respondent's disorder was an ADA disability, sanctions did not violate the ADA because respondent's misconduct was not a direct result of his disorder.

**Outcome**  
The state supreme court granted complainant bar association's request for respondent attorney's disbarment. Where respondent knowingly and intentionally violated bar rules, misappropriated client funds, and misrepresented information to a client, disbarment was proper. Sanctions did not violate the Americans with Disabilities Act of 1990 and were not precluded where respondent's misconduct was not a direct result of his bipolar disorder.

**LexisNexis® Headnotes**

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

Legal Ethics > Sanctions > General Overview

**HN1** Reviewability, Factual Determinations
A bar organization referee's findings of fact should be upheld when supported by competent, substantial evidence.

Although bar disciplinary proceedings are not governed by technical rules of evidence, it is a better practice to comply with Fla. Stat. ch. 92.50(3), which requires oaths to be administered to foreign witnesses.

A fact-finder should not arbitrarily reject unrebutted testimony.

A nonexpert witness may testify to an opinion about mental condition if the witness had an adequate opportunity to observe the matter or conduct about which the witness is testifying. Fla. Stat. ch. 90.701 (1993).

A sanction must serve three purposes: the judgment must be fair to society, be fair to the attorney, and sufficiently deter others from similar misconduct.

Disbarment is the most severe sanction because it terminates a lawyer's ability to practice law. Fla. Bar Rule 3-5.1(f). Disbarment enforces the purpose of sanctions by protecting the public from further practice by the lawyer and by protecting the reputation of the legal profession. Disbarred lawyers may be allowed to apply for readmission, but not until at least five years after the effective date of the disbarment. Fla. Bar Rule 3-5.1(f). The presumption is against readmission, and a lawyer seeking readmission must show by clear and
convincing evidence successful completion of the bar exam and rehabilitation and fitness to practice law.

Legal Ethics > Sanctions > Disbarments

Legal Ethics > Sanctions > Suspensions

Sanctions, Disbarments

Suspension is a less severe sanction than disbarment in that the suspended lawyer is removed from the practice of law for a specified period of time not to exceed three years. Fla. Bar Rule 3-5.1(e). Suspensions of 90 days or less do not require proof of rehabilitation, while suspensions of more than 90 days require proof of rehabilitation and may require passage of all or part of the bar exam.

Legal Ethics, Client Funds

The misuse of client funds is one of the most serious offenses a lawyer can commit, and disbarment is presumed to be the appropriate punishment.

Disability Discrimination, Federal & State Interrelationships

Under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.S. § 12101, et seq., the term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices or the provision of auxiliary aids and services, meets the essential eligibility requirements for the participation in programs or activities provided by a public entity. 42 U.S.C.S. § 12131(2). Manic-depression or bipolar disorder is recognized as a disability under the Rehabilitation Act of 1973, which was a precursor to the ADA. Courts consider cases decided under the Rehabilitation Act to be persuasive authority for interpreting the ADA.
PER CURIAM.

Attorney Peter Charles Clement has petitioned this Court to review a referee's recommendation that he receive a thirty-six-month suspension. We have jurisdiction pursuant to article V, section 15 of the Florida Constitution.

The referee found Clement guilty of violating numerous Rules Regulating the Florida Bar. Clement says he should not be sanctioned because he was suffering from manic-depression (or bipolar disorder) when the misconduct occurred and could not distinguish right from wrong. The Bar maintains that Clement knowingly and intentionally violated the rules, misappropriated client funds, and misrepresented information to a client. The Bar urges us to disbar Clement.

We approve the referee's findings of fact. We disapprove the referee's recommended suspension and disbar Clement because this sanction serves the purposes of attorney discipline.

I. FACTS

A. Count 1

Clement and Murray Koren met in 1980, and the two developed an attorney-client and a personal relationship which the referee described as a "father/son type relationship." Clement worked as Koren's attorney until 1991, placing mortgages and preparing real estate contracts, closing documents, trust agreements, and wills. Clement did not charge Koren for his legal representation. Instead, his fees were usually paid by people who sought a loan or mortgage from Koren. Koren also loaned money to Clement and his father.

Clement filed for personal bankruptcy in November 1990. He sought to discharge all outstanding loans from Koren for which he was personally responsible or had guaranteed for his father. Despite the bankruptcy filing, Koren continued to be Clement's friend and to use Clement as his attorney. Before filing for bankruptcy, Clement told Koren that he felt a moral obligation to satisfy the debts.

In December 1990 Clement met Edward Morelli, who was promoting Julio Iglesias and Willie Nelson concerts at Dunedin Stadium. Clement decided to invest in the venture and borrowed $20,000 to finance his interest.

At the same time, Clement was representing the owner of a shopping center in a foreclosure action. Clement asked Koren if he wanted to buy the shopping center. Koren sent Clement a $5,000 check, made out to Clement's trust account, as an earnest money deposit if the owner accepted a contract to buy the shopping center.

Clement deposited the check into his trust account on January 7, 1991, then issued a trust account check to himself for $5,000. Clement indicated in his trust account records that the funds were disbursed on behalf of Koren. Clement later admitted using Koren's funds for his own use, but said Koren authorized him to do so. He claimed that the offer to buy the shopping center had been rejected and that he wanted to use the $5,000 as a loan to finance the promotion of the Dunedin concerts.

Koren, on the other hand, testified that he did not agree to loan Clement the $5,000 on or before January 7, 1991. He also testified that Clement did not tell him before January 7 that the owner rejected a contract to buy the shopping center. Koren's testimony was corroborated by a letter from Koren to Clement dated January 28, 1991, which said in relevant part, "notify status of shopping center purchase. If not being sold to us, return the $5,000 escrow deposit immediately." Clement admitted receiving the letter.

The referee found no corroborating evidence to support Clement's claim that he presented the owner with an offer to buy the shopping center on January 7, 1991, or that Koren agreed to loan Clement the earnest money deposit on or before that date. The referee found that Clement knowingly used Koren's $5,000 with the intent to appropriate the money to his own use.

Sometime between January 28 and February 5, 1991, Koren demanded the return of his $5,000. Clement asked Koren to let him use the money to finance the concerts. Koren initially refused, but agreed after Clement promised to repay the money with proceeds from ticket sales. Clement later told Koren that Morelli had stolen about $10,000 in cash from ticket sales.

1 The referee found that Clement violated the following Rules Regulating the Florida Bar: as to Count 1, rule 4-1.1; rule 4-1.3; rule 4-1.4(a); rule 4-1.4(b); rule 4-1.8(a); rule 4-1.15(a); rule 4-8.4(a); rule 4-8.4(b); rule 4-8.4(d); and rule 4-8.4(d); and as to Count 2, rule 4-1.15(a); rule 5-1.1(a); rule 5-1.1(c); rule 5-1.2(b)(5); rule 5-1.2(b)(6); rule 5-1.2(b)(1)(B); rule 5-1.2(c)(2); rule 5-1.2(c)(3); and rule 5-1.2(c)(4).

2 These facts are drawn from the referee's findings of fact.

Jason Jackson
proceeds, so he could not repay the money.

On February 6, 1991, Clement asked Koren for a $25,000 loan to keep the concerts from going under. Koren refused. Clement called later that day and told Koren that Anthony Montello would assume responsibility for one concert and would give Koren a promissory note secured by a mortgage on three pieces of property in return for a $25,000 loan. Clement also said Montello would make the promissory note for $30,000 so Koren would have security for the $5000 loan to Clement. Koren initially refused, but later agreed to meet with Montello. Koren instructed Clement, as his attorney, to investigate the three Montello properties to determine their equity, tax status, and mortgage status.

When Koren met with Montello in Clement's office on February 7, 1991, Clement presented Koren with a $30,000 note and mortgage on the three pieces of property. The note and mortgage bore the signatures of Anthony and Loretta Montello, but the signatures were not witnessed or notarized.

The next day Koren gave Montello a $25,000 cashier's check--but only after Clement assured Koren that he knew of no reason Koren should not make the loan. Clement did not put Koren's $25,000 into his trust account because he needed to wire $25,000 to an entertainment agency to avoid cancellation of the concert. Koren instructed Clement to have the note and mortgage recorded, and Clement agreed to do so.

Clement said he was not acting as Koren's attorney for this loan, but Koren testified otherwise. The referee found clear and convincing evidence that Clement was acting as Koren's attorney, including a February 9, 1991, letter from Koren with specific instructions on legal matters regarding the Montello transaction.

The referee also found that Clement had a conflict of interest in representing Koren in the transaction because Clement's own financial interest limited his professional judgment. Clement needed Koren to loan $25,000 to Montello so the concert would not be canceled and he could recoup from concert profits the $20,000 he borrowed to finance his investment in the concert. Clement did not tell Koren about his financial interest and did not tell him of suspicions that people involved in the concert venture had connections with organized crime. Thus, Koren could not make an informed decision about the loan.

Further, Clement never had the note and mortgage witnessed or notarized and never recorded these documents. Clement gave two different accounts of why this happened. In a deposition given in the lawsuit that Koren filed to recover on the note, Clement stated that Montello asked for the note and mortgage back when Montello realized he would be personally guaranteeing it. Clement testified that he complied with the request. In the Bar proceedings, Clement testified during a grievance committee hearing that someone removed the mortgage and note from his office without his consent.

The referee found that Clement lied under oath either during his deposition or at the grievance committee hearing. In addition, the note and mortgage were never fully executed and recorded to protect Koren's interest. Thus, the referee found, Clement failed to represent Koren competently.

Clement did not respond to Koren's phone calls and letters between February and April 1991 about the status of the Montello note and mortgage. Sometime before April 25, 1991, however, he told Koren that he had recorded the note and mortgage. The referee found that Clement made a knowing and intentional misrepresentation. The referee based this finding on Clement's testimony that he lied to Koren, that he led Koren to believe everything was fine because the $25,000 payment had been made, and that Koren would be paid.

Koren learned in late April 1991 that certain documents were lost or missing. When Koren pressed Clement, Clement said the note and mortgage had not been recorded and they had been lost or stolen.

The concert was canceled because of the Gulf War. Koren lost his lawsuit against Montello because he could not prove that Montello had executed a note and mortgage for $30,000.

The referee rejected testimony from Clement's psychiatrist, Kevin Butler, about Clement's ability to distinguish right from wrong because Butler changed his testimony on four occasions.

B. Count 2

Clement represented Phillippe Tisseaux in the sale of Tisseaux's house. The contract purchase price of $105,000 included a $5000 earnest money deposit that the buyer paid to Tisseaux in Clement's presence. At the closing on September 27, 1991, the buyer gave Clement $100,000, which included a foreign check for $
Clement was supposed to use $72,248.45 to pay off the mortgage. Instead, Clement issued eight checks totaling $10,000 in October and November 1991. He did not pay off the mortgage. Only one check—$600—was for fees to which Clement was entitled.

Tisseaux learned that Clement had not paid off the mortgage when the mortgage company notified him in late November or early December 1991 that his mortgage payment was two months past due. Clement told Tisseaux he would make the mortgage payments when the $7000 foreign check cleared. He did not tell Tisseaux he had used $10,000 of the funds for his own purposes.

Clement sent a trust account check to the mortgage company for the two past-due payments, but did not pay off the mortgage when the foreign check cleared on December 13, 1991.

On December 15, 1991, Tisseaux demanded that Clement pay off the mortgage before he left for France for the Christmas holidays. On December 16, Clement faxed Tisseaux a copy of a trust account check for $71,964.67 dated that day and made out to Household Mortgage. Clement had only $51,000 in the trust account at the time and he did not actually mail a payoff check to the mortgage company.

When Tisseaux returned from France in January 1992, he discovered that Clement had not paid off the mortgage. Tisseaux paid another attorney between $1000 and $2000 to pursue the mortgage payoff. Clement paid off the mortgage on February 7, 1992. He borrowed $20,000 from his mother on February 7 and deposited that money into his trust account to cover the check to Household Mortgage.

Ten months later, a Florida Bar auditor obtained Clement's trust account records and found large shortages, as well as numerous negative balances and unallocated items. Clement did not tell the auditor he had used Tisseaux's funds without authorization in October and November 1991.

At a later visit, the auditor asked Clement about $20,000 deposited in the trust account on February 7, 1992. Clement explained that he had borrowed $20,000 from his mother to cover a shortage in the account. The auditor discovered a negative balance in the Tisseaux account, which resulted from checks made out to Clement. Clement falsely told the auditor that the negative balance was due in part to the buyer's failure to remit a $5000 earnest money deposit on the Tisseaux transaction. Both Clement and Tisseaux testified, however, that the buyer paid the $5000 earnest money deposit on or before closing. Clement still did not tell the auditor that the checks issued to him were actually personal disbursements unrelated to Tisseaux.

Clement also told the auditor that no clients were hurt by the shortages and that none had ever complained. He told the auditor—falsely—that he told Tisseaux about the shortage and that the shortage did not delay the Tisseaux case. In fact, however, Tisseaux was injured by Clement's unauthorized use of his funds because he had to pay another attorney to obtain the funds from Clement. The payoff of the mortgage also was delayed by about two months. Clement told the auditor this was because he was awaiting payoff of the foreign check, which had cleared in December 1991. Clement's statement was false because the delay in paying off the mortgage stemmed from Clement's theft of funds.

Clement did not tell the auditor until April 1993 that the checks issued to him in October and November 1991 and pertaining to Tisseaux were personal disbursements.

Clement admitted that he had shortages in his trust account and stipulated that he used $10,000 of Tisseaux's funds without authorization for his own purposes. He said the shortage was the result of poor record-keeping and his bipolar disorder.

The referee found that Clement knowingly appropriated Tisseaux's funds. He found clear and convincing evidence that Clement was not emotionally impaired when he used Tisseaux's funds without authorization in October and November 1991. Clement also misrepresented and deceived Tisseaux on December 16, 1991, when he told Tisseaux that he paid off the mortgage.

In recommending a thirty-six-month suspension, the referee noted that Clement was admitted to the Bar in 1978 and has no prior disciplinary record.

The referee found these aggravating factors: dishonest or selfish motive; pattern of misconduct; multiple offenses; bad-faith obstruction of disciplinary proceedings by making false statements or not being candid, especially about his trust accounts, or by engaging in other deceptive practices; and substantial

662 So. 2d 690, *694; 1995 Fla. LEXIS 1749, **8
experience in the practice of law.

The referee found these mitigating factors: no prior disciplinary record; personal or emotional problems; diagnosis of bipolar disorder for which he has been undergoing treatment since the summer of 1990; Clement tried to rectify the consequences of his misconduct, but not until after the disciplinary process commenced;[*13] good character and reputation; and interim rehabilitation in the form of forty or more visits to a psychiatrist or psychologist since the summer of 1990.

[*696] The referee also recommended that Clement pay the Bar's costs of $17,549.33; make restitution to Tisseaux and Koren (excluding any debts that Clement discharged in bankruptcy); take two three-hour ethics seminars per year during his suspension and file reports on the courses; make five speeches a year to any bar association on the topic "I'm Proud To Be a Member of The Florida Bar and There Is a Higher Social Calling for Attorneys Than Making Money as Fast as Possible"; on reinstatement, remain on probation as long as he actively practices law and, as a condition of probation, continue to see a Board-certified psychiatrist (other than Butler or an affiliate); take all recommended or prescribed medications; and require the psychiatrist to report to the Bar every four months on Clement's condition.

II. ANALYSIS

Clement presents six issues for our review.

He first argues that the referee erred in rejecting the unrebutted expert testimony of his treating psychiatrist when the referee later relied on the psychiatrist's diagnosis that [*14] Clement suffered from a mental disorder in his mitigation and recommended sanction.

The referee says in his report:

From August 30, 1993, through December 20, 1993, Dr. Butler's expressed opinion regarding [Clement's] mental state for the time period involved in this case changed four (4) times. The evidence is clear and convincing that Dr. Butler was willing to testify to that which would assist his patient in the Bar proceeding. . . . I find Dr. Butler's opinion regarding [Clement's] ability to distinguish right from wrong to be unworthy of belief and reject the same in its totality.

[HN1] First, a referee's findings of fact should be upheld when supported by competent, substantial evidence. Florida Bar v. Weed, 559 So. 2d 1094, 1096 (Fla., 1990). We find that the record supports the referee's findings on Butler's testimony regarding Clement's ability to distinguish right from wrong. At various times, Butler stated that: Clement's mood did not stabilize until early summer 1991 and that his judgment may have been affected from early fall 1990 through spring 1991; Clement's mood did not stabilize until December 1991 and that Clement's judgment was impaired from December [*15] 1990 through 1991; he could not be sure whether Clement knew right from wrong; and Clement did not know right from wrong from late 1990 through all of 1991. The referee was in the best position to assess Butler's demeanor and credibility and found that he was unworthy of belief. Although Butler gave reasons for his changing testimony, the record supports the referee's rejection of this testimony.

Second, the Bar stipulated that Clement was suffering from manic-depression, so it was not necessary for the referee to rely solely on Butler to use that diagnosis in mitigation and in his recommendations.

Although Clement argues that it was error for the referee to reject Butler's unrebutted testimony, caselaw indicates that [HN2] a fact-finder should not arbitrarily reject unrebutted testimony. Roach v. CSX Transp. Inc., 598 So. 2d 246, 249 (Fla., 1st DCA 1992) (unrebutted testimony should not be arbitrarily ignored or wholly disregarded); In re Estate of Hannon, 447 So. 2d 1027, 1028-29 (Fla., 4th DCA 1984) (court cannot arbitrarily ignore unrebutted testimony). The record reflects that the referee did not arbitrarily reject Butler's testimony. We find no merit to Issue 1.

[**16] As his second issue, Clement argues that the referee should not have excluded testimony from Clement's wife about her opinion of Clement's sanity at the time of the alleged offenses. Janet Clement testified extensively about her husband's behavior from 1990 through 1992. The Clements had been married almost twenty years at the time. Among the events she described as unusual behavior for Clement were: moving out of the couple's home without explanation; giving Janet Clement power of attorney, then revoking it and refusing to speak to her except through an attorney; working around the clock, but not appearing to make any more money; looking at houses he could not afford while his bankruptcy was pending; deciding to become a concert promoter; developing a plan to solve problems in the [*697] Middle East; wanting to go to Hong Kong for the weekend to buy shirts on sale; taking the family to Disney World, but deciding after about a half-hour that he wanted his money back; directing traffic during a
Disney parade; exhibiting bizarre behavior that came in peaks and valleys; falling asleep while cooking and causing a fire; and backing his car into the closed garage door.

After this testimony, Clement's lawyer said he wanted to ask Janet Clement whether she had an opinion about Clement's competence. The Bar objected. The referee sustained the objection and suggested a proffer. The lawyer said Janet Clement thought her husband was not competent from late 1990 through 1992, but she was not allowed to testify to that opinion. Clement argues that the referee's refusal to allow Janet Clement to give her opinion was particularly troublesome because the referee said in his final report that "Respondent also presented testimony from his wife to support his position that he was incompetent from December, 1990 to December, 1991. Respondent's wife's testimony did not indicate that from December, 1990 to December, 1991 Respondent did not know right from wrong." Clement argues that Janet Clement could not indicate whether he knew right from wrong because she was not allowed to express her opinion.

**HN3** A nonexpert witness may testify to an opinion about mental condition if the witness had an adequate opportunity to observe the matter or conduct about which the witness is testifying. § 90.701, Fla. Stat. (1993); see also Cruise v. State, 588 So. 2d 983, 990 (Fla. 1991) (lay opinion about a person's sanity permissible if witness testifies based on personal knowledge or observations and such knowledge or observations gained in a time reasonably proximate to the events giving rise to prosecution), cert. denied, 504 U.S. 976, 112 S. Ct. 2949, 119 L. Ed. 2d 572 (1992); Hansen v. State, 585 So. 2d 1056, 1058-59 (Fla. 1st DCA) (lay witness may give opinion on sanity based on impressions of defendant's behavior, but cannot testify to purely legal conclusions such as whether defendant could distinguish right from wrong), review denied, 593 So. 2d 1052 (Fla. 1991). The referee should have allowed Janet Clement to give her opinion about her husband's sanity. 3

Although this lay testimony would have been relevant to the issue of Clement's competency, the referee heard testimony that Clement's emotional state was not severe enough to warrant involuntary hospitalization and that Clement practiced law from December 1990 through December 1991. He admitted Butler's notes and records and heard Janet Clement's extensive testimony about her husband's behavior. The referee thus had adequate evidence before him to determine Clement's competency. Any error in refusing to let Janet Clement state her opinion was harmless.

Clement argues in his third issue that the doctrine of collateral estoppel prevents the Bar from raising the issue of whether Clement used Koren's funds for his personal use. This issue relates to the unsuccessful civil suit that Koren filed to try to establish that Montello owed him a debt. Clement argues that the Bar cannot litigate points and questions that were common to both the civil suit and the Bar proceedings and that were adjudicated in prior litigation, notwithstanding lack of mutuality. Thus, Clement argues, Koren's testimony should have been excluded.

Collateral estoppel is a judicial doctrine that prevents identical parties from relitigating issues that have previously been decided between them. [*20] Monyek v. Klein, 329 So. 2d 25, 26 (Fla. 3d DCA 1976); Golden View Condominium, Inc. v. City of Hallandale, 279 So. 2d 323, 324 (Fla. 4th DCA, cert. denied, 288 So. 2d 258 (Fla. 1973). Although federal courts and some other jurisdictions no longer require mutuality of parties as a prerequisite to asserting the doctrine of collateral estoppel, Florida courts have held that collateral estoppel can be asserted only when the identical issue has been litigated between the same parties. Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano 450 So. 2d 843, 845 (Fla. 1984), modified[*698] on other grounds by Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989).

Neither the parties nor the issues are the same in the civil suit and the instant case. In the civil suit against Montello, Koren unsuccessfully tried to establish that Montello owed him a debt. The parties in the instant case are the Bar and Clement. The issue in the Bar case is whether Clement misappropriated Koren's $5000 earnest money or whether Koren agreed to loan Clement that money on or before January 7, 1991. Because both the parties and issues are different, the doctrine of collateral estoppel does not prevent [*21] the Bar from litigating this issue.

As his fourth issue, Clement argues that the telephonic testimony of Tisseaux, a foreign witness who testified from Costa Rica, should have been excluded because

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3 In addition to the authority to hear this evidence provided by the Florida Evidence Code, a referee in a bar-discipline case can consider any evidence he or she deems relevant to resolving a factual question. See Florida Bar v. Rood, 620 So. 2d 1252, 1255 (Fla. 1993).
the oath was not administered in accordance with section 92.50(3), Florida Statutes (1993).

**["22]** Before Tisseaux testified by telephone, the record reflects discussion about whether anyone could authenticate that Tisseaux was the person on the line. Clement’s attorney argued, “I have no idea who this is, what number we are calling, and that in my experience when we have had a witness such as this there is someone at the other end of the line to verify who they are and to impose an oath that is acceptable to this Court.” The Bar’s counsel said she had previously spoken to Tisseaux at the same telephone number.

The referee swore in Tisseaux, who testified that Clement did not pay off the mortgage until several months after closing. Tisseaux said he hired another lawyer to pursue the payoff.

Florida courts have held in criminal cases that an unworn witness is not competent to testify. See, e.g., Houck v. State, 421 So. 2d 1113, 1115 (Fla. 1st DCA 1982). An affidavit that is not executed in accordance with the requirements of section 92.50(3) is not competent evidence in a civil case. Hamilton v. Alexander Proudfoot Co. World Headquarters, 576 So. 2d 1339, 1341 (Fla. 4th DCA 1991).

**HN5** Bar disciplinary hearings, however, are neither civil nor criminal, but are quasi-judicial. **["23]** R. Regulating Fla. Bar 3-7.6(e)(1). While Clement’s attorney objected to the procedure by which Tisseaux was sworn, he did not contest whether Tisseaux actually testified. Although bar disciplinary proceedings are not governed by technical rules of evidence, see Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986), it would be a better practice to comply with section 92.50(3). But, under the circumstances of this case, we find no error in the referee’s failure to comply with that provision.

Even if we were to find error in allowing Tisseaux to testify, we note that Clement himself testified that he did not pay off the mortgage until several months after the sale of the house and that ledgers from Clement’s trust account support this testimony. Any error, therefore, is harmless.

Clement argues in Issue 5 that the recommended thirty-six-month suspension is unduly harsh because it fails to consider mitigation, including the absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, and physical or mental disability or impairment. In response, the Bar urges Clement’s disbarment in light of the aggravating factors and notwithstanding **["24]** any mitigation.

**HN6** This Court’s scope of review when reviewing a referee’s recommended sanction is somewhat broader than when reviewing the referee’s findings of fact because the Court ultimately has the responsibility to order an appropriate sanction. Florida Bar v.Pearce, 631 So. 2d 1092, 1093 (Fla. 1994). A [*699*] sanction must serve three purposes: the judgment must be fair to society, be fair to the attorney, and sufficiently deter others from similar misconduct. See, e.g., Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992); Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

**HN7** Disbarment is the most severe sanction because it terminates a lawyer’s ability to practice law. R. Regulating Fla. Bar 3-5.1(f); Fla. Stds. Imposing Law. Sancs. 2.2. The commentary to standard 2.2 indicates that disbarment enforces the purpose of sanctions by protecting the public from further practice by the lawyer and by protecting the reputation of the legal profession. Disbarred lawyers may be allowed to apply for readmission, but not until at least five years after the effective date of the disbarment. R. Regulating Fla. Bar 3-5.1(f). The presumption is against readmission, and a **["25]** lawyer seeking readmission must show by clear and convincing evidence successful completion of the bar exam and rehabilitation and fitness to practice law. Id. (“A former member who has been disbarred may only be admitted again upon full compliance with the rules and regulations governing admission to the bar.”); Fla. Stds. Imposing Law. Sancs. 2.2 (commentary).

**HN8** Suspension is a less severe sanction than disbarment in that the suspended lawyer is removed from the practice of law for a specified period of time not to exceed three years. R. Regulating Fla. Bar 3-5.1(e);
This Court has repeatedly asserted that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment." Florida Bar v. Shanzer, 572 So. 2d 1382, 1383 (Fla. 1991) (disbarment warranted for attorney who argued that his depression over personal problems led him to use funds in his trust account for personal purposes). While the referee in the instant case correctly considered Clement's mental condition in mitigation, see, e.g., Florida Bar v. Perri, 435 So. 2d 827, 829 (Fla. 1983); Florida Bar v. Parsons, 238 So. 2d 644, 645 (Fla. 1970), Clement's bipolar disorder continued while he was under the care of a psychiatrist. The referee rejected Butler's testimony in Count 1 regarding Clement's ability to distinguish right from wrong. The referee found clear and convincing evidence that the conduct in Count 2 occurred when Clement was not suffering from the effects of his bipolar disorder. In light of the facts of this case, we find that disbarment is the appropriate sanction.

As his sixth issue, Clement argues that the recommended discipline violates the Americans With Disabilities Act (ADA), which prohibits discrimination against people with disabilities. Under the ADA,

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for . . . the participation in programs or activities provided by a public entity.

Manic-depression or bipolar disorder was recognized as a disability under the Rehabilitation Act of 1973, which was a precursor to the ADA. See Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); Hogarth v. Thornburgh, 833 F. Supp. 1077, 1084 (S.D.N.Y. 1993). Courts have considered cases decided under the Rehabilitation Act to be persuasive authority for interpreting the ADA. See Stillwell v. Kansas City Bd. of Police Comm'rs, 872 F. Supp. 682, 686 (W.D. Mo. 1995). One federal circuit has affirmed a holding that a bipolar disorder is a disability under the ADA. Carrozza v. Howard County, Maryland, 45 F.3d 425 (4th Cir. 1995), aff'g 847 F. Supp. 365 (D. Md. 1994). Thus, Clement's bipolar disorder is a disability under the ADA.

Although Clement suffers from a disability as defined by the ADA, the ADA does not prevent this Court from sanctioning Clement. The referee rejected the testimony of Clement's psychiatrist that Clement lacked the ability to distinguish right from wrong when these incidents occurred. The referee also found "clear and convincing evidence that [Clement] was not emotionally impaired at the time he used Mr. Tisseaux's funds without authorization in October and November, 1991." Because Clement's misconduct was not a direct result of his bipolar disorder, sanctions do not violate the ADA. See People v. Goldstein, 887 P.2d 634, 638 n.2 (Colo. 1994) (attorney's "success neurosis" was not direct cause of misconduct; thus court rejected attorney's claim that his disbarment violated ADA because there was no causal connection between his mental illness and the misconduct).

However, even if any of Clement's actions occurred when he could not distinguish right from wrong, the ADA would not necessarily bar this Court from imposing sanctions. A person is a 'qualified' individual with a disability with respect to licensing if he or she, with or without reasonable modifications, 'meets the essential requirements' for receiving the license. Stillwell, 872 F. Supp. at 685 (citing 28 C.F.R. § 35.104). This requires a case-by-case analysis of the disabled person and the jobs or benefits he or she seeks. 872 F. Supp. 682 at 687. Clement is not "qualified" to be a member of the Bar because he committed serious misconduct, and no "reasonable modifications" are possible. Although Clement was under psychiatric care for his bipolar disorder when the incidents in this case occurred, Clement also said he could fool his doctor into believing that he was in control during some of the period in question. This suggests that nothing could prevent repetition of the egregious misconduct that occurred in this case.

Thus, while the ADA applies to the Bar, it does not prevent this Court from taking disciplinary action against Clement.

III. CONCLUSION

Clement is hereby disbarred. The disbarment will be effective thirty days from the filing of this opinion so that Clement can close out his practice and protect the interests of existing clients. If Clement 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 disbarment effective immediately. Clement shall accept no new business from the date this opinion is published. The costs of these proceedings are taxed against Clement and judgment is entered in the amount of $17,549.33, for which sum let execution issue.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS [**30] and ANSTEAD, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARMENT.
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**Doe v. Judicial Nominating Comm'n**

United States District Court for the Southern District of Florida

November 13, 1995, Decided, nunc pro tunc to the November 9, 1995; November 13, 1995, OPINION FILED, nunc pro tunc to November 9, 1995

CASE NO. 95-8625-CIV-HURLEY

**Reporter**


PAT DOE, Plaintiff, vs. THE JUDICIAL NOMINATING COMMISSION FOR THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, Defendant.

**Subsequent History:** [**1**] As Corrected November 22, 1995.

**Core Terms**

disability, applicants, questions, individuals, screen, regulations, Nominating, disclosure, mental illness, mental health, overinclusive, Examiners, disorders, emotional, contends, public entity, public safety, requirements, counseling, licensing, disputed, illness, individuals with disabilities, bar examiners, asserts, preliminary injunction, eligibility criteria, selection process, state judge, appointment

**Case Summary**

**Procedural Posture**

Plaintiff applicant filed suit against defendant judicial nominating committee seeking injunctive and declaratory relief alleging that certain questions contained on the committee's application to fill a judicial vacancy violated the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq. The applicant sought a preliminary injunction to prohibit the committee from inquiring about the applicants' mental and physical fitness.

**Overview**

The applicant responded to a public solicitation for applications to fill a judicial vacancy. The applicant argued that the ADA prohibited the committee from asking questions about an applicant's mental or physical fitness prior to a conditional offer of employment and that the questions contained on the application were overinclusive. The court rejected the committee's assertion that the Tenth Amendment precluded the application of the ADA to the process for selecting state judges, but concluded that under the necessity exception the committee was justified in utilizing reasonable, narrowly-drawn eligibility criteria which screen out, or tended to screen out, persons with a disability. After reviewing the application, the court held that the questions regarding mental and physical health were overinclusive because they required disclosure of information about past treatment or counseling that had no bearing on the applicant's present ability to perform the job. The court also determined that the applicant satisfied the requirements for the issuance of preliminary injunction, including a substantial likelihood of success on the merits and a strong showing of irreparable injury.

**Outcome**

The court granted the applicant's motion and enjoined the committee from requiring applicants for judicial vacancies to respond to certain questions on the application regarding mental and physical health. The court also concluded that the committee could ask narrowly tailored questions regarding mental and physical conditions that were likely to affect the applicant's ability to perform the job.

**LexisNexis® Headnotes**

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > General Overview

Labor & Employment Law > ... > Disability Discrimination > Scope & Definitions > General

Jason Jackson
Title II of the Americans with Disabilities Act, 42 U.S.C.S. § 12101et seq., prohibits discrimination against disabled persons by public entities. 42 U.S.C.S. §§ 12131-50. It provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by any such entity. 42 U.S.C.S. § 12132. A "public entity" is defined as any department, agency or other instrumentality of a state. 42 U.S.C.S. § 12131(1)(B).

To have standing under the Americans with Disabilities Act, 42 U.S.C.S. § 12101et seq., a plaintiff must be a qualified individual with a disability. 42 U.S.C.S. § 12131(2); 28 C.F.R. § 35.130(a).

If Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute.
State & Territorial Governments, Relations With Governments

The principles of federalism that constrain Congress’ exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments. This is so because those amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.

Americans With Disabilities Act, Legislative Intent

The Americans with Disabilities Act, 42 U.S.C.S. § 12101et seq., was promulgated expressly under Congress’ Fourteenth Amendment powers. 42 U.S.C.S. § 12101(b)(4); U.S. Const. amend. XIV, § 5. Yet the United States Supreme Court has never held that the Fourteenth Amendment may be applied in complete disregard for a state’s constitutional powers. Rather, the Court has recognized that the states’ power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment.

Disability Discrimination, Defenses

Public entities cannot use eligibility criteria that screen out, or tend to screen out, individuals with disabilities unless the criteria are necessary. Under this "necessity exception," public entities may utilize eligibility criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary to insure the safe operation of the program or if the individual poses a direct threat to the health or safety of others. 28 C.F.R. pt. 35, app. A, at 455 (1995).
Capricious Standard of Review

Regulations promulgated under Title II of the Americans with Disabilities Act, 42 U.S.C.S. § 12101et seq., are entitled to substantial deference. Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. Unless the regulations are arbitrary, capricious or manifestly contrary to the statute, the agency's regulations are given controlling weight.

HN13 Protection of Disabled Persons, Americans With Disabilities Act

The Americans with Disabilities Act, 42 U.S.C.S. § 12101et seq., does not preclude a licensing body from any inquiry and investigation related to mental illness, instead allowing for such inquiry and investigation when they are necessary to protect the integrity of the service provided and the public.

HN14 Disability Discrimination, Scope & Definitions

The Americans with Disabilities Act, 42 U.S.C.S. § 12101et seq., prohibits discrimination against individuals on the basis of a mental or physical disability, a history of such a disability, or being regarded as having such a disability. 42 U.S.C.S. § 12102(2).

HN15 Disability Discrimination, Scope & Definitions

Under the Americans with Disabilities Act, 42 U.S.C.S. § 12101et seq., the forced disclosure of information relating to disabilities without a necessary basis for the information is a form of discrimination because it screens out, or tends to screen out, the disabled by imposing disproportionate burdens on them.

HN16 Injunctions, Preliminary & Temporary Injunctions

To satisfy the requirements for a preliminary injunction, the movant must establish: (1) a substantial likelihood of succeeding on the merits; (2) a substantial threat of irreparable injury if relief is denied; (3) an injury that outweighs the opponent's potential injury if relief is granted; and (4) an injunction would not harm the public interest. Where mandatory relief is sought, as distinguished from maintenance of the status quo, a strong showing of irreparable injury must be made, since relief changing the status quo is not favored unless the facts and law clearly support the moving party.
Civil Procedure > Remedies > Injunctions > General Overview

**HN17** Injunctions, Preliminary & Temporary Injunctions

Discrimination on the basis of disability is the type of harm that warrants injunctive relief.

**Counsel:** For Plaintiff: James K. Green, Esq., West Palm Beach, Florida. Susan Stefan, Esq., University of Miami Law School, Coral Gables, Florida.

For Defendant: Elaine Thompson, Esq., Assistant Attorney General, West Palm Beach, Florida.

**Judges:** Daniel T. K. Hurley, United States District Judge

**Opinion by:** Daniel T. K. Hurley

**Opinion**

[*1536] ORDER GRANTING PRELIMINARY INJUNCTION

Florida state trial judges are either elected or appointed. When a judicial vacancy occurs between elections, the governor, pursuant to state constitutional mandate, initiates a selection process in which a judicial nominating commission ("JNC") solicits and reviews applicants, and then submits at least three nominees to the governor. Plaintiff is an attorney who responded to a public solicitation from the JNC for the Fifteenth Judicial Circuit. After reviewing the JNC's application form, plaintiff filed this action for injunctive and declaratory relief, asserting that a series of questions concerning physical and mental health violate the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. For the reasons described below, the [*1537] court concludes that the disputed questions are overinclusive and, therefore, violate [*2] the ADA. Consequently, the JNC is enjoined from utilizing the disputed questions or the answers given in response thereto.

**I. FACTS**

When a vacancy occurred on the Circuit Court for the Fifteenth Judicial Circuit (Palm Beach County), the Governor of Florida directed the JNC for this circuit to initiate an advertising and screening process as required by the Uniform Rules of Procedure for Circuit Judicial Nominating Commissions ("Uniform Rules"). Section 1 of these rules provides that the JNC "shall actively seek, receive and review the approved background statements submitted by those who voluntarily request consideration...." Uniform Rules, § I. It further provides that the JNC "shall require completion of the application form attached hereto . . . which shall include a waiver of confidentiality of all material necessary to adequately investigate each applicant." *ibid.*

The goal of the JNC is to ensure that each nominee recommended to the Governor "meets all constitutional and statutory requirements and is fit for appointment...." Uniform Rules, § IV. The constitutional and statutory standards for nomination to the office of circuit judge are that the nominee be a member [*3] of the bar for at least five years, an elector (registered voter) of the State of Florida, and a resident of the territorial jurisdiction of the court. *Fla. Const. art. V, § 8*; see Instructions for Application for Nomination for Judgeship. Fitness is defined as, but not limited to, personal attributes such as integrity, sobriety, moral conduct, competency, and expertise; and judicial attributes such as patience, decisiveness, industry, and ability to handle judicial power. Uniform Rules, § IV.

The JNC application form was formulated to gather relevant information to facilitate the screening process. Plaintiff, however, contends that questions 10 - 13, which concern an applicant's physical and mental health, violate the ADA. The questions are as follows.

10. What is the present state of your health?
11. Do you have any impairment of eyesight, hearing, or other debilitating handicap or disease? If so, please describe.
12. Have you had any hospital confinement, or serious physical illness during the past five years? If yes, give details and identify your attending physician(s), the name(s) of any hospital(s) or other institution(s) to which you were admitted if any and the date(s) of hospitalization(s).
13(a). Have you ever been treated for or suffered from any form of mental illness? If so, give details including names and addresses of treating physicians, psychologists, and/or hospitals, or other facilities involved including dates of treatment or confinement.
13(b). Have you been treated for or suffered from any form of emotional disorder or disturbance or otherwise been treated by psychologists,
as defined by the ADA, "discrimination" is the sunshine. See Fla. Const. art. V, § 11(d); Uniform Rules, § III.

II. Analysis

Experts in the field have suggested that "disability is not really the cause of an undignified, harsh life. The real cause is lack of access to buildings, jobs, transportation; segregation and denial of services." Mary Johnson, Jerry's Kids, THE NATION, Sept. 14, 1992, at 232. Congress, recognizing the truth of this assertion, took a monumental step toward ending such discrimination by enacting the Americans with Disabilities Act, ("ADA"), 42 U.S.C. § 12101, et seq. The underlying premise to this legislation is that it is preferable to provide access to opportunities rather than to "take care of" people with disabilities. See generally Robert L. Mullen, The Americans With Disabilities Act: An Introduction for Lawyers and Judges, 29 Land & Water L. Rev. 175 (1994). The Act's goal is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). So strong was Congress's commitment to achieving this goal, that in addition to relying on its Commerce Clause power, it expressly invoked its authority to enforce the Fourteenth Amendment. 42 U.S.C. § 12101(b)(4). As will be seen hereafter, this power has special significance to the case at bar.

HN1 Title II of the Americans with Disabilities Act prohibits discrimination against disabled persons by public entities. 42 U.S.C. §§ 12131-50. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by any such entity." 42 U.S.C. § 12132. A "public entity" is defined as "any department, agency … or other instrumentality of a State …." 42 U.S.C. § 12131(1)(B).

HN2 As defined by the ADA, "discrimination" includes, inter alia, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, … [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the … [employer's] business. 42 U.S.C. § 12112(b)(5)(A).

HN3 "Otherwise qualified" means that the individual, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id. § 12111(8).

A. Standing

As an initial consideration, the JNC questions plaintiff's standing. HN4 To have standing under the ADA, a plaintiff must be a "qualified individual with a disability." 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(a). The complaint establishes that plaintiff satisfies the constitutional requirements for appointment to the circuit court. In addition, the affidavit, filed under seal, establishes that plaintiff has, or will be perceived as having had, a disability. **8 Furthermore, case law establishes that a plaintiff need not be rejected by a governmental screening authority to have standing to contest potentially overinclusive questions. See Clark v. Virginia Board of Bar Examiners, 880 F. Supp. 430, 442 (E.D. Va. 1995); Ellen S. v. Florida Board of Bar Examiners, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994). Thus the court finds that plaintiff Doe has standing to bring this action.

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B. Tenth Amendment

The JNC, represented by the Florida Attorney General, contends that the Tenth Amendment to the U.S. Constitution precludes application of the ADA to any part of the process for selecting state judges. In making this argument, the JNC does not suggest that it is free to discriminate. To the contrary, Governor Chiles, both in person and through his counsel, has repeatedly affirmed Florida's commitment to eradicating all forms of discrimination in the judicial selection process. The JNC simply contends that the selection of state judges is a traditional sovereign function upon which Congress cannot intrude and upon which, in fact, Congress did not intend to intrude.

The JNC predicates its argument on two cases: Gregory v. Ashcroft, [**9] 501 U.S. 452, 111 S. Ct. 2385, 115 L. Ed. 2d 410 (1991); and Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 494 (1981). Both cases address the difficult issue of the proper balance between federal/state power. The question in Gregory was whether a state law requiring judges to retire at age 70 violated the Age Discrimination in Employment Act, (“ADEA”), 29 U.S.C. §§ 621-634. Acknowledging that the state had a paramount interest in establishing the qualifications for its judges, the Court ruled that [**10] "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute." [11] Gregory, 111 S. Ct. at 2401 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985)). Because Congress failed to make its intention clear, the Court held that the Act did not apply to state judges. "We will not read the ADEA to cover state judges unless Congress had made it clear that judges are included." Id. at 2404. At the same time, the Court noted [**11] "that the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments. . . . This is so because those 'Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.'" Id. at 2405 (quoting City of Rome v. United States, 446 U.S. 156, 179, 100 S. Ct. 1548, 1563, 64 L. Ed. 2d 119 (1980)).

The question in Pennhurst was whether the Congress, by enacting the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 et seq., intended to create substantive rights that were binding on the states. The Court ruled in the negative, finding that the Act was "a mere federal-state funding statute." Pennhurst, 101 S. Ct. at 1540. This decision was aided by the fact that Congress had not expressly invoked its Fourteenth Amendment power. The court stated, "We have had little occasion to consider the appropriate test for determining when Congress intends to enforce those guarantees [under the Fourteenth Amendment.] Because such legislation imposes congressional policy on a State involuntarily, and because it [**12] often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Id. at 1539.

Unlike the statutes involved in Gregory and Pennhurst, the ADA was promulgated expressly under Congress' Fourteenth Amendment powers. See 42 U.S.C. § 12101(b)(4); U.S. Const. amend XIV, § 5. Yet, as noted in Gregory, "this Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment." Gregory, 111 S. Ct. at 2405. Thus the precise question posed by this case is whether a screening process, initiated by a state judicial nominating commission, to review and recommend nominees for appointment to the bench is so closely related to the state's sovereignty that it should be immune from federal antidiscrimination legislation.

Case law analyzing Congress' commerce clause power reveals the difficulty of pinpointing "integral" or "traditional" state governmental [**12] functions. Compare National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), with Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). [**13] "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity [**14] from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Garcia, 469 U.S. at 546. In the final analysis, the decision in the case at bar must turn on Congress’ expressed intent and an evaluation of the impact of the federal legislation upon the state. Eliminating discrimination in the selection of state judges is inclusive and beneficial. It broadens the selection of applicants from which the Governor will ultimately choose, and it enhances public confidence in
the integrity of the selection process. Thus, the court concludes that the **Tenth Amendment** is not a barrier to applying the ADA to this phase of the state's judicial selection process. In short, the JNC is a "public entity" within the meaning of the ADA and is subject to its provisions. See 42 U.S.C. § 12131(1)(B).

**[**13\] C. Regulations**

**HN9** Title 42 U.S.C. § 12134(a) authorizes the Attorney General to issue regulations to implement Title II of the ADA. Title 28 C.F.R. § 35.130 was promulgated pursuant to this authority. It states:

> "A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of that service, program, or activity being offered."

28 C.F.R. § 35.130(b)(8). **HN11** Thus, public entities cannot use eligibility criteria that screen out or tend to screen out, individuals with disabilities unless the criteria are necessary. Under this "necessity exception," public entities may utilize eligibility criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary to insure the safe operation of the program or if the individual "poses a direct threat to the health or safety of others." 28 C.F.R. pt. 35, app. A, at 455 (1995).


**D. Necessity Exception**

Neither party to this suit contends the regulations are arbitrary or capricious. Nor does the JNC deny that the disputed questions inquire about an applicant's disabilities. The JNC, however, asserts that the questions are justified by the "necessity exception" to the Department of Justice's regulations. The JNC argues that judges are vested with tremendous power, **[**15\]** the exercise of which requires a wide range of cognitive skills and physical endurance. Consequently, the JNC asserts that considerations of public safety demand that judicial applicants be subjected to the most thorough scrutiny to insure that they possess the requisite mental and physical ability. Plaintiff, on the other hand, contends that no questions may be asked about physical or mental status before a conditional offer of employment is extended. As a backup position, plaintiff asserts that only questions asking about behavior (e.g., "Have you ever been absent from work for 30 days or longer?"), as opposed to status (e.g., "Have you ever been diagnosed as having a psychosis?"), are permissible. Next, plaintiff contends that if questions about status are permissible, they must be framed in terms of whether the applicant believes he or she is suffering from any physical or mental disability which would impact on his or her ability to perform the job. Finally, plaintiff asserts that the status questions on the JNC application are overinclusive.

Judges in our society are vested with extraordinary power. Decisions of life and death, liberty or imprisonment, custody of children, **[**16\]** and a host of other weighty issues constitute the daily diet of those who serve on the bench. It is absolutely imperative that applicants for these positions be thoroughly vetted to assure their physical and mental fitness. The Florida Constitution places a large part of this responsibility in the hands of the JNC. As the gate keepers of the appointive route to the bench, the commission's task is to invite the best to apply, to scrutinize the applicants, and then to nominate only the most qualified for the governor's consideration. Protecting the public is a paramount goal and, therefore, the court agrees with the JNC's contention that the necessity exception" is applicable to the judicial selection process.

The decision in Applicants v. Texas State Board of Law Examiners, 1994 WL 776692 (W.D. Tex. Oct. 11, 1994), provides useful guidance. Citing the ADA, applicants for admission to the Texas bar challenged a question on the state bar application about their mental health. The

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disputed question asked about diagnosis of certain specified mental illnesses such as bipolar disorder or paranoia that might bear on an applicant's present fitness to practice law. The court found that the bar examiners were entitled to ask narrowly focused status questions under the regulations' necessity exception. The court reasoned, "when, as in this case, questions of public safety are involved, the determination of whether an applicant meets 'essential eligibility requirements' involves consideration whether the individual with a disability poses a direct threat to the health and safety of other."  *Id. at *5.* Commenting further on the public safety aspects of the Board of Examiners inquiry, the court observed:

The Board has a duty not to just the applicants, but also to the Bar and the citizens of Texas to make every effort to ensure that those individuals licensed to practice in Texas have the good moral character and present fitness to practice law and will not present a potential danger to the individuals they will represent. The Board has a limited opportunity to accomplish this task -- the time of the filing of the declaration and application. The Board, therefore, must make every effort to investigate each applicant as thoroughly as possible and as efficiently as possible during this limited time. . . . The rigorous application procedure, including investigating whether an applicant has been diagnosed or treated for certain serious mental illnesses, is indeed necessary to ensure that Texas' lawyers are capable, morally and mentally, to provide these important services.

*Id. at *8.* These considerations are all the more important when it comes to evaluating applicants for judicial office. Accordingly, the court concludes that the JNC is justified by the regulation's necessity exception in utilizing reasonable, narrowly-drawn eligibility criteria which screen out, or tend to screen out, individuals with a disability.

E. Other Contentions

In reaching this conclusion, the court has rejected plaintiff's primary contention that the JNC is prohibited by the ADA from asking any questions about mental and physical fitness before a conditional offer of employment is tendered. Similarly, the court rejects plaintiff's contention that questions must be limited to behavior rather than status. Plaintiff's argument on this last point has been restated in a recent law review note as follows.

The essential problem with [psychological background] questions is that they substitute an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants' behavior. In the context of other antidiscrimination statutes, it has been held to be fundamental that an individual's status cannot be used to make generalizations about that individual's behavior.

Carol J. Banta, Note, The Impact of the Americans With Disabilities Act on State Bar Examiners Inquiries into the Psychological History of Bar Applicants, 94 Mich. L. Rev. 167, 186 (1995) (quoting Medical Society v. Jacobs, 1993 U.S. Dist. LEXIS 14294, [*1542] 1993 WL 413016, at *7 (D.N.J. Oct. 5, 1993). Again, the decision in *Texas Applicants* is instructive. The court relied upon expert testimony which indicated that "a direct mental health inquiry . . . is necessary in the licensing process to get a full understanding of the functional capacity of the applicant's mental fitness."  *Texas Applicants, 1994 WL 776693,* at *7. Thus, the court concluded that "the ADA does not preclude a licensing body from any inquiry and investigation related to mental illness, instead allowing for such inquiry and investigation when they are necessary to protect the integrity of the service provided and the public."  *Id. at *8.* The same conclusion was drawn by the court in *Clark v. Virginia Board of Bar Examiners, 880 F. Supp. 430 (E.D. Va. 1995).* Characterizing the mental health question as overinclusive, the court left the door open for a more narrowly-drawn question about status. "While certain severe mental or emotional disorders may pose a direct threat to public safety, the Board has made no individualized finding that obtaining evidence of mental health counseling or treatment is effective in guarding against this threat."  *Id. at 446.* Like its sister courts in *Clark* and *Texas Applicants*, this court holds that the ADA does not prevent inquiry into an applicant's status, i.e., diagnosis or treatment for severe mental illness.

Plaintiff's contention that questions must be phrased in terms of whether the applicant believes he or she has a mental or physical disability which would prevent the applicant from discharging the responsibilities of the position is rejected also. This court concurs with the reasoning in the *Texas Applicants* case where the court stated, "Self-disclosure-type questions suffer, possibly to a greater degree, from some of the same defects the plaintiffs criticize in the current question - those
who answer untruthfully or who do not recognize or understand the nature and extent of their illness will not be identified."  *Id.* at *7.

**F. Overinclusiveness**

Plaintiff's final contention is that the JNC's questions are overinclusive, i.e., they require disclosure of information about past treatment or counseling that has no bearing on the applicant's present ability to perform the job. Plaintiff contends that the disclosure of this information will stigmatize and subject plaintiff to additional impermissible burdens. To evaluate this claim, one must bear in mind "the overarching purpose of the ADA: to eliminate the stigma and stereotypes associated with disability and to eradicate discrimination on the basis of such stereotypes."  *Banta, supra*, at 177. "The point of the bill is to start breaking down those barriers of fear and prejudice and unfounded fears, to get past that point so that people begin to look at people based on their abilities, not first looking at their disability."  Id. at 178 (quoting Senator Tom Harkin, ADA sponsor). Congress spoke to this point when it found that

Individuals with disabilities are a discrete and insular minority who [*22*] have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .

*42 U.S.C. § 12101(a)(7).* That such feelings persist in society is attested to by the comments of Michael B. Laudor, an attorney with schizophrenia, a major disabling mental illness. With the aid of medication, he gained sufficient control over his illness to attend, graduate and then do post-doctoral work at law school. Recently, Laudor commented, "Some people at Yale Law School told me not to tell anyone because mental illness is a career killer . . . . They won't let you work in law firms, they won't let you work as a professor."  Lisa W. Foderaro, *A Voyage Into Bedlam and Part Way Back*, N.Y. Times, November 9, 1995, at A16.

To achieve its goal of eliminating discrimination against individuals with disabilities, Congress fashioned a broadly inclusive category [*23*] of individuals who are entitled to protection under the ADA.  *HN14* The Act prohibits discrimination against individuals on the basis [*1543*] of a mental or physical disability, a history of such a disability, or being regarded as having such a disability.  *42 U.S.C. § 12102(2).* The last category was drawn from the Rehabilitation Act of 1972, *29 U.S.C. § 701 et seq.*, which Congress amended to provide protection to individuals who are simply "regarded as having" a physical or mental impairment. See *29 U.S.C. § 794.* In so doing, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."  *School Board v. Arline, 480 U.S. 273, 284, 107 S. Ct. 1123 1129, 94 L. Ed. 2d 307 (1987)* (citations omitted).

With this background in mind, we turn again to plaintiff's contention that the JNC's questions violate the ADA because they are overinclusive. Plaintiff argues that he or she will be stigmatized and unduly burdened if forced to disclose counseling or treatment for matters which have nothing to do with job performance but which might cause plaintiff to be regarded by others [*24*] as having suffered from a disability. A hypothetical example illustrates the point. If plaintiff, as a child, had been psychologically abused by an alcoholic parent and thereafter, as an adult, sought counseling or therapy to resolve lingering vestiges from this problem, that treatment would have to be disclosed in response to question 13(b). Plaintiff asserts that disclosure of this type of information is neither justified nor required by the necessity exception. Further, plaintiff contends that such disclosure will demean plaintiff in the eyes of the JNC, plaintiff's clients, and the public. Plaintiff underscores the argument by noting that the JNC application warns applicants that all information provided will be treated as public record. Indeed, the Florida Constitution states, "Except for deliberations of the judicial nominating commissions, the proceedings of the commissions and their records shall be open to the Public."  *Fla. Const. art. V, § 11(d).*

An emerging body of case law has dealt with similar challenges, albeit in the context of applications for membership in state medical and bar associations. In *Medical Society of New Jersey v. Jacobs, 1993 U.S. Dist. LEXIS 14294, 1993 WL 413016* (D.N.J. [*25*] Oct. 5, 1993), the court ruled that the ADA prohibited a state board of medical examiners from asking whether an applicant had "ever suffered or been treated for any mental illness or psychiatric problems."  *1993 U.S. Dist. LEXIS 14294, *3, *Id.* at *1.* The court concluded that the questions were overinclusive because "many, if not the vast majority, of the applicants who answer "yes" to one

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of the challenged questions are nevertheless qualified to hold a medical license by reason of the applicant's character, training, and experience." 1993 U.S. Dist. LEXIS 14294, *17, Id. at *8. Ultimately, the court opted for a behavior-based test. It concluded that "the essential problem with the present questions is that they substitute an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants' behavior." 1993 U.S. Dist. LEXIS 14294, *20, Id. at *7.

In Ellen S. v. Florida Board of Bar Examiners, 859 F. Supp. 1489 (S.D. Fla. 1994), former Chief Judge King denied the board's motion to dismiss, holding that the Tenth Amendment was not a bar to applying the ADA to the licensing or certification of attorneys. The Florida Bar thereafter entered into a consent decree and voluntarily changed the disputed questions. The Supreme Judicial [*26] Court of Maine followed the reasoning of Jacobs and disallowed the bar examiners' questions about diagnoses and treatment of amnesia, emotional disturbances, and nervous or mental disorders. See In re Application of Underwood, 1993 Me. LEXIS 267, 1993 WL 649283 (Me. Dec. 7, 1993).

The two most recent cases to address this issue on the merits are Clark v. Virginia Board of Bar Examiners, 880 F. Supp. 430 (E.D. Va. 1995) and Applicants v. Texas State Board of Law Examiners, 1994 WL 776693 (W.D. Tex. Oct. 5, 1994). Clark dealt with the following question posed to bar applicants: "Have you within the past five (5) years been treated or counseled for any mental, emotional or nervous disorders?" Id. at 431. The court began by finding that the state's licensing process for lawyers is subject to the ADA. Accepting the proposition that "an attorney's uncontrolled and untreated mental or emotional illness may result in injury to clients and the public," the court agreed that "at some stage in the application proceeding, [*1544] some form of mental health inquiry is appropriate." Id. at 436. The critical question was what form of inquiry was permissible? The court declined to provide a specific example, but [*27] offered the following guidance.

[The question] is too broad and should be rewritten to achieve the Board's objection of protecting the public. [The] broadly worded mental health question discriminates against disabled applicants by imposing additional eligibility criteria. While certain severe mental or emotional disorders may pose a direct threat to public safety, the Board has made no individualized finding that obtaining evidence of mental health counseling or treatment is effective in guarding against this threat. Id. at 446. Despite being unwilling to redraft the question, the Clark court expressed its preference for questions more directly related to specific behavioral disorders. Id. at 444 (citing cases).

In Applicants v. Texas State Board of Law Examiners, 1994 WL 776693 (W.D. Tex. Oct. 11, 1994), as discussed above, the court concluded that an applicant's treatment records furnished important information on "the applicant's insight into his or her illness and degree of cooperation in controlling it." Id. at *3. Merely looking to past behaviors, the court said, was not a sufficiently exact and reliable method for ascertaining mental fitness. [*28] Thus the court concluded that some inquiry into past diagnosis and treatment of specified mental illnesses was necessary to provide "the best information available with which to assess the functional capacity of the individual." Id.

In reaching this conclusion, the court in Texas Applicants paid particular attention to balancing the congressional goals of preventing discrimination against the disabled and integrating the disabled into society with the countervailing goal of protecting the public from harm at the hands of persons holding a public trust. The court noted that the Board of Law Examiners had an "awesome responsibility" because of the duty not just to applicants but to the citizens of Texas. Id. at *8. This public duty arises because "lawyers serve the important role in our society of assisting people in the management of the most important of their affairs." Id. at *8. Accordingly, the court concluded that:

The Board would be derelict in its duty if it did not investigate the mental health or prospective lawyers. It has made every effort to do so in the least intrusive, least discriminatory manner possible, focusing on only those serious mental illnesses that experts [*29] have indicated are likely to affect present fitness to practice law. It has limited the inquiry to a specified time frame, primarily spanning late adolescence and adult life. Although affirmative answers do trigger investigation that applicants answering negatively do not have to undergo, the affirmative answer does not result in an immediate denial of a license to practice law. The ensuing investigation serves two purposes: protection of the Bar and the public as well as an opportunity for the applicant to indicate present fitness.

Id. at *9. These guidelines should assist the JNC as well.

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All of these cases reinforce the principle that, [HN15] under the ADA, the forced disclosure of information relating to disabilities without a necessary basis for the information is a form of discrimination because it screens out, or tends to screen out, the disabled by imposing disproportionate burdens on them. With this in mind, let us turn again to the disputed questions in this case. Questions 10 and 11 probe physical health without being clearly related to job performance. For example, as now framed they would elicit intimate and non-essential details on reproductive disabilities which [**30] are certainly not job-related and which, because of the process, would become public record.

The inquiry into "any hospital confinement" [question #12], "any form of mental illness [question #13(a)], "any form of emotional disorder or disturbance" [question 13(b)], vividly demonstrates the overinclusiveness of the mental health questions. As presently framed, these questions will force the disclosure of intimate, personal matters that have nothing to do with job performance. For example, questions 12 and 13 lack limitations that would exclude hospitalization [**1545] or treatment resulting from personal traumas such as childhood sexual abuse or loss of a loved one. Question 13 may also require disclosure of family counseling. How such events and conditions could possibly be considered reasonably related to an individual's capacity to perform as a judge eludes this court. Question 13(c), which deals with treatment for drug and alcohol addiction, has a similar problem and requires special treatment in light of 42 U.S.C. § 12210. Recent history in South Florida teaches the tragic lesson that drug addiction can render a judicial officer vulnerable to corruption and breach of the public [**31] trust. Consequently, concerns for public safety, embodied in the necessity exception, justify inquiry into this area. But at minimum, the inquiry must be subject to reasonable time limitations which are absent here. All of the disputed questions, as presently framed, force the disclosure of information which is not necessary to protect the public safety and, therefore, go beyond that justified by the necessity exception. The exception must be read narrowly to further the remedial purpose of the statute. Therefore, where the inquiry has no reasonable relationship to job performance, but imposes a burden on individuals with disabilities by requiring them to make public disclosure of irrelevant present, past or perceived disabilities, the inquiry violates the ADA.

Plaintiff seeks a preliminary injunction which is an extraordinary remedy. Compact Van Equip. Co., Inc. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978). Indeed, it has been described as a "drastic remedy." Crochet v. Housing Authority of City of Tampa, 37 F.3d 607, 610 (11th Cir. 1994). HN16 To satisfy the requirements for a preliminary injunction, the movant must establish: (1) [**32] a substantial likelihood of succeeding on the merits; (2) a substantial threat of irreparable injury if relief is denied; (3) an injury that outweighs the opponent's potential injury if relief is granted; and (4) an injunction would not harm the public interest.” Gold Coast Publications, Inc. v. Corrigan, 42 F.3d 1336, 1343 (11th Cir. 1994), cert. denied, 64 U.S.L.W. 3282 (U.S. Oct. 16, 1995). Moreover, "where, as here, mandatory relief is sought, as distinguished from maintenance of the status quo, a strong showing of irreparable injury must be made, since relief changing the status quo is not favored unless the facts and law clearly support the moving party.” Doe v. New York University, 666 F.2d 761, 773 (2d Cir. 1981).

As discussed above, the court has concluded that the plaintiff has established a substantial likelihood of ultimately prevailing on the merits. The remaining criteria for issuance of a preliminary injunction have been satisfied also. HN17 Discrimination on the basis of disability is the type of harm that warrants injunctive relief. See D'Amico v. New York State Board of Law Examiners, 813 F. Supp. 217, 220 (W.D. N.Y. 1993); see also Spiegel v. City of [**33] Houston, 636 F.2d 997 (5th Cir. 1981)(defining irreparable injury as one that cannot be undone through monetary damages). The third prong of the test for a preliminary injunction is also met because no damage ensues to the JNC in abiding by the ADA. Finally, the fourth prong is met because the public interest requires that discrimination against the disabled not be tolerated.

III. DECRETAL PROVISIONS

Accordingly, it is ORDERED and ADJUDGED as follows:

1. The Judicial Nominating Commission for the Fifteenth Judicial Circuit of Florida is herewith enjoined, now and in the future, from requiring applicants for judicial vacancies to respond to questions 10 through 13(c), as set forth in this opinion.

2. The Judicial Nominating Commission for the Fifteenth Judicial Circuit of Florida is enjoined from exercising the
current medical records release obtained from all applicants as part of the certificate.

3. The Judicial Nominating Commission for the Fifteenth Judicial Circuit of Florida is enjoined from utilizing or releasing to the public the answers obtained from any present or future applicant in response to questions 10 through 13(c).

[*1546] 4. This court shall [**34] retain jurisdiction over the parties to provide expedited review should there be a challenge to any redrafted question.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 13th day of November, 1995, nunc pro tunc to the 9th of November, 1995.

Daniel T. K. Hurley

United States District Judge

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Ethical Considerations for Government and Administrative Practice Attorneys

Kent Frobish
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June 1, 2018
University of Nebraska College of Law, Lincoln, NE