STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant-Cross Appellee,

v

Michael L. Stefani, P 20938,

Respondent/Appellee-Cross Appellant,

Case No. 10-113-GA

Decided: February 21, 2013

Appearances:
Robert E. Edick, for the Grievance Administrator
Kenneth M. Mogill, for the Respondent

BOARD OPINION

This is the second discipline case against respondent, both of which emanate from his conduct as attorney for the plaintiffs in two whistleblower cases against the City of Detroit and former Mayor Kilpatrick (*Brown and Nelthrope v Detroit* and *Harris v Detroit*). The general factual background for this and other discipline cases arising from the settlement of those civil cases is generally well-known. The hearing panel in this case has written comprehensive and thoughtful reports on misconduct and discipline and the factual findings are set forth in those reports, which we append to this opinion. The panel found that respondent's conduct in settling the whistleblower cases violated MRPC 4.1 (prohibiting knowingly false and material statements of fact to a third person in the course of representing a client) by virtue of statements and omissions during his negotiations with attorney Samuel McCargo with respect to efforts of the parties to maintain the confidentiality of text messages between Mayor Kilpatrick and Chief of Staff Christine Beatty. (Three other charges regarding allegedly false statements were dismissed.) By a two-to-one decision, the hearing panel determined that a reprimand was the appropriate sanction. The panel chairperson, dissenting, would have imposed a suspension of 90 days, with credit for the 30-day suspension imposed in respondent's prior matter. We find no error in the majority's report on discipline, but, in the exercise of our independent judgment on review of a sanctions decision, we conclude that a

suspension is warranted and will impose a suspension of 30 days under the circumstances of this case. While the net result will not entail an actual suspension given the petitioner's concession that 30 days should be credited toward any suspension imposed in this case in light of the prior proceedings and sanction, we nonetheless consider it important to discuss and declare the appropriate level of discipline for misconduct of this nature.

I. Did the Hearing Panel Err in Denying Respondent's Motion for Summary Disposition under MCR 2.116(C)(7) Asserting that this Proceeding was Barred by *Stefani I*?

Before addressing the appropriate level of discipline, we must decide a preliminary question. Respondent contends on cross-review that the panel erred in denying his motion for partial summary disposition, pursuant to MCR 2.116(C)(7), arguing that various allegations in the formal complaint here (including those supporting the panel's findings of misconduct) were barred by the decision in *Grievance Administrator v Michael L. Stefani*, 09-47-GA (HP misconduct report dated 3/2/2010; discipline report and order of reprimand dated 6/23/2010), aff'd as modified regarding discipline (ADB 2011), lv den 490 Mich 897 (2011) (*"Stefani I"*). We review the panel's denial of summary disposition on these grounds de novo.[1] For several reasons, we conclude that the panel committed no error in denying the motion.

A. Procedural Background in *Stefani I* – Petitioner's Attempt to Join the Claims Herein with Those Initially Pleaded in *Stefani I* and the *Stefani I* Panel's Denial of Petitioner's Motion to Supplement Without Addressing the Merits of the Claims.

The formal complaint in *Stefani I* was filed on May 19, 2009, and alleged three types of misconduct by the respondent: (1) knowingly violating a court rule by issuing a subpoena *duces tecum* to a telecommunications company for text messages without notifying opposing counsel and violating a court order by not making the documents produced returnable to the court, contrary to MRPC 3.4(c); (2) violating MRPC 8.3 by not reporting the misconduct of the former Mayor (perjury); and (3) violating the criminal law by compounding or concealing a crime through entering into the confidentiality agreement(s) relating to the text messages which were produced to respondent and used in the negotiations to resolve the *Brown and Nelthrope*, and *Harris* cases. Misconduct was ultimately found only as to the first charges.

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[1] *Washington v Sinai Hospital of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *Grievance Administrator v Wilson A. Copeland, II*, 09-48-GA (ADB 2011).

The formal complaint in this case alleges that "on various dates after October 10, 2007, [respondent] made evasive, misleading and false statements in order to conceal his disclosure of the text messages to the Detroit Free Press."[2] Four contexts are identified: (1) during negotiations with Mr. McCargo in *Brown/Nelthrope* and *Harris*; (2) during Freedom of Information Act litigation; (3) during a hearing before City Council; and (4) during respondent's testimony in *Grievance Administrator v Samuel E. McCargo*, ADB Case No. 09-50-GA. The panel found that respondent violated MRPC 4.1 in the first context only. (The panel was unanimous, except as to the testimony during the McCargo hearing. Chairperson McGraw would have found misconduct there too. Also, panel member Dunn would not have found any of the catchall rule violations in the first context.[3])

Petitioner sought to include these essential charges in *Stefani I* after learning that respondent might admit to having provided the *Detroit Free Press* with copies of the text messages. Prior to that, in other forums or settings, respondent had declined to answer questions about how the Free Press obtained the text messages and did not admit that he had provided the newspaper with a copy. The Administrator first learned that respondent might admit he gave the text messages to the *Free Press* in a telephone call from respondent's counsel on September 24, 2009, during which a proposed consent resolution of *Stefani I* was discussed.[4]

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[2] Formal Complaint, p 3, ¶ 15.

[3] The panel majority of Mr. McGraw and Ms. Heard-Longstreet found that respondent's negotiations violated not only MRPC 4.1, but also MRPC 8.4(b) (dishonesty) and (c) (conduct prejudicial to the administration of justice) as well as MCR 9.104(A)(1)-(3).

[4] The Deputy Administrator wrote to respondent's counsel the following day a letter stating in part:

> Yesterday you called me to explore a possible consent resolution. I agreed, at your request, that our discussion was covered by MRE 408, and that your statements would not be admissible against your client in [*Stefani I*] in the event an agreement could not be reached.
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> You then informed me during that discussion that your client was prepared, as part of a consent resolution, to admit that he personally provided the text messages to the *Detroit Free Press* prior to the settlement of the Whistleblower lawsuit on October 17, 2007.
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> If your client testifies during his misconduct hearing that he was the person who leaked the messages, then I will move under MCR 2.118(C) to amend the formal complaint to conform to the evidence by adding charges of misconduct under, for example, MRPC 4.1 and 4.4. I believe this "wait and see" approach satisfies MRE 408 with respect to your client's case.

The hearing commenced on October 8, 2009, two weeks after the settlement discussions between counsel. Respondent was the first witness, and on direct examination he did in fact testify that he gave a copy of the texts to the *Free Press*. In keeping with the intention announced in his letter, the Deputy Administrator immediately requested that the panel recess to allow him to amend the formal complaint. Respondent's counsel objected to the continuance and asked the panel to proceed. Before deciding to adjourn and receive a motion from the Administrator, the panel engaged counsel in a colloquy regarding the degree to which the new claims would be factually related to the existing claims. Petitioner urged the efficiency of trying the claims or charges together and expressed concerns that res judicata arguments would be raised should the motion not be granted.[5]

The hearing on October 8, 2009, was adjourned and the Administrator filed a motion to supplement the formal complaint pursuant to MCR 2.119(E). On October 26, 2009, the panel heard oral argument on the motion, during which the Administrator expressed concern that there was "an effort to have it both ways. Can't do it here, according to respondent, and can't do it there in a new request for investigation and formal complaint."[6] Panel member Baiers stated:

> I certainly don't think the Grievance Administrator in any way sat on its rights in filing these new charges, because really, until October 8th

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[5] In the course of the colloquy a panel member posed a question which elicited the following exchange:

> MR. BAIERS: I still don't see, it's not the same set of facts.
> MR. EDICK: It is.
> MR. MOGILL: Of course it's not the same set of facts.
> MR. BAIERS: I don't see why the Attorney Grievance Commission couldn't then now open a new investigation, file new charges based on perjury in prior statements he's made to the Attorney Grievance Commission or in prior hearings and charge him with discipline under that. That's not the same set of facts. He's being charged now with violating a court order, compounding a felony, and failing to report misconduct of another attorney. The fact that his testimony may later give rise to some sort of perjury, I think that's something that the Commission needs to investigate and decide if they want to charge.
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> MR. EDICK: . . . I think that it would be more appropriate for this panel, rather than taking a chance that a subsequent investigation would be met with objections along the lines of res judicata or collateral estoppel --
> MR. MOGILL: Or splitting the cause of action.
> MR. EDICK: Thank you. So we can take it for granted that there would be those objections raised in light of the very serious change in testimony that was entirely within the control of Mr. Stefani. That judicial efficiency would require that we resolve that issue within these proceedings even if it requires a short continuance. [*Stefani I* Tr 10/8/2009, pp 120-121.]

[6] *Stefani I* Tr 10/26/2009, p 7.

> when Mr. Stefani took the stand under oath, you didn't know for certain what he was going to say. So, I don't see how you can be accused of sitting on your rights. [*Stefani I*, Tr 10/26/2009, p 13.]

At the conclusion of the hearing on the motion, the panel retired to deliberate and, upon returning to the bench, the Chairperson announced the panel's decision to deny leave to file a supplemental formal complaint without addressing the merits of the proposed supplemental claims.[7]

Following oral argument, the panel entered an order denying the motion, and stating, in part:

> Having carefully considered petitioner's motion, we are not persuaded that supplementation of the formal complaint as sought by petitioner in this particular instance would be in the interest of justice, that adjudicative economy or convenience would necessarily be served, or that the addition of these new charges at this point in these proceedings is otherwise appropriate. In addition, we conclude that granting leave to allow the amendment or supplementation of the formal complaint requested by petitioner under the circumstances in this case would be tantamount to abrogating significant portions of MCR 9.112 - 9.114 which deal with the investigation and processing of allegations of misconduct prior to the filing of a formal complaint. Accordingly, we decline to allow the supplementation of the formal complaint. [November 2, 2009 Order Denying Motion to Supplement Formal Complaint in *Stefani I*.]

The hearing resumed on November 18, 2009, and continued on two additional days, and, ultimately, the hearing panel found misconduct as to one of the three charges. As noted above, the panel imposed a reprimand. On review, the Board increased discipline to a suspension of 30 days. *Stefani I*.

The formal complaint in *this* matter was filed on October 7, 2010. Respondent filed a motion for partial summary disposition under MCR 2.116(C)(7) on November 30, 2010. The motion was denied for the following reasons given by the panel in this case:

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[7] [F]or the reasons that we will place in a written order, we are going to deny the motion to – petitioner's motion to supplement the formal complaint.

We'd like to clarify a few things for the record, however. **The panel is not taking a position on the merits of the proposed amended claim or charges,** nor are we directing the parties in any matter about what procedural steps may be available to them at this time in terms of further action by either the administrator or the respondent. The issue then is more of a housekeeping issue, that is, I know that it's in everyone's interest to move this proceeding along . . . . [Tr 10/26/2009, p 36 (emphasis added).]

> The panel is not moved to accept the categorical application or rejection of res judicata principles urged by either party. We are persuaded, however, that the policy underlying the principle is not well applied to this case as it has developed; and that to rule in respondent's favor on that basis alone will not serve the process to which the parties were subjected in a prior proceeding. In other words, the better interest of the disciplinary process in this case is served by having respondent's whole conduct considered on its merits. [February 3, 2011 Order Denying Respondent's Motion for Partial Summary Disposition.]

B. Analysis – This Proceeding is not Barred by *Stefani I*.

Respondent argues that because "the allegations of misconduct at issue arose out of the same transaction for which respondent has already been prosecuted, MCR 2.203(A) and 9.115(A) precluded petitioner from subsequently prosecuting respondent for this alleged misconduct."

As noted above, the Administrator had filed a motion to supplement the formal complaint in *Stefani I*, but respondent opposed the filing of a supplemental complaint on various grounds. Respondent now contends that the attempt to supplement in *Stefani I* came too late. Respondent also contends that because no specific court rule excepts MCR 2.203(A) from applying in discipline proceedings, the panel in this case erred in denying his motion for summary disposition under MCR 2.116(C)(7). We conclude that the panel's denial of summary disposition in this case was correct.

The compulsory joinder rule, MCR 2.203(A), was adopted to facilitate the operation of the common law doctrine of res judicata.[8] Our Supreme Court has said:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). [*Washington v Sinai Hospital*, 478 Mich 412, 418; 733 NW2d 755 (2007).]

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[8] Staff Comment to 1998 Amendment to MCR 2.203(A).

"The goal of res judicata is to promote fairness."[9] It is a "judicially created" doctrine intended to "'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'"[10] And, it must not be applied when to do so would subvert the intent of the legislature, or, in this instance, the Supreme Court.[11]

Assuming the claims here arise out of the same transaction (a point about which the panel in *Stefani I* seemed to have some question), this proceeding is not barred by res judicata for several reasons. First, petitioner could not litigate the claims because the panel exercised its discretion and decided not to hold the hearing on the initial claims in abeyance while the proposed supplemental claims dealing with statements regarding the whereabouts of the text messages and who delivered copies to the *Free Press* were appropriately brought before a panel. Petitioner's attempt to amend and/or supplement the complaint was undertaken promptly. The *Stefani I* panel said as much, and, in denying the motion to supplement the formal complaint, specifically indicated that it was not rendering a decision on the merits of petitioner's proposed supplemental complaint. Accordingly, the claims are not barred. See *Martin v Michigan Consolidated Gas Co*, 114 Mich App 380; 319 NW2d 352 (1982) (denial of a motion to amend is not a decision on the merits precluding the claims from being raised in a subsequent suit unless denial was on the basis of futility). Moreover, other comments by the panel, and the panel's written order, make it clear that the panel did not believe that petitioner would be precluded from initiating an investigation and commencing formal proceedings (such as this one) regarding the charges in the supplemental complaint.

Further, we agree with the Administrator's argument that MCR 9.115(A) does not require the application of res judicata in this case. In addition to the reasons discussed above for concluding that this proceeding is not barred, the procedures for investigating and charging misconduct set forth in subchapter 9.100 and identified by the *Stefani I* panel illustrate some of the differences between ordinary civil proceedings and discipline proceedings. And, although it may have been possible for the panel to have adjourned the hearing to enable the Administrator and Commission to expedite consideration of the new potential allegations of misconduct so that the request for investigation

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[9] *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 383 (1999).

[10] *Pierson Sand & Gravel*, 460 Mich at 380.

[11] *Bennett v Mackinac Bridge Authority*, 289 Mich App 616, 630 (2010), lv den 489 Mich 858 (2011).

could have been processed as quickly as possible in accordance with subchapter 9.100, we do not find that the failure to do this prejudiced the respondent any more than it did the Administrator who urged supplementation and joinder of the new allegations of misconduct over respondent's successful objections.

Finally, these proceedings, though civil in nature, are significantly different than, say, a suit over a promissory note or even a legal malpractice action. The purpose of attorney discipline proceedings is not primarily punishment or compensation for loss by a client, but to protect the public, the courts and the legal profession. MCR 9.105(A). And our Supreme Court has specifically declared that: "Subchapter 9.100 is to be liberally construed for the protection of the public, the courts, and the legal profession." MCR 9.102(A). The Court has further provided that: "An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice." MCR 9.107(A). Therefore, we find the result reached by the panel in this case (denying respondent's motion for summary disposition on res judicata grounds) to be correct and the rationale it employed to be insightful.

For all of the foregoing reasons, we find no error in the panel's decision that the doctrine of res judicata does not bar this discipline prosecution. Nor do we believe that this second proceeding is unfair to respondent under these circumstances.

II. Did the Hearing Panel Err in Applying the American Bar Association Standards for Imposing Lawyer Sanctions and Impose Insufficient Discipline?

The Administrator has petitioned for review, arguing that the hearing panel applied the incorrect ABA Standard and, therefore, imposed inadequate discipline. Neither party challenges the panel's findings and conclusions with respect to misconduct. As we have recently stated:

> The standard of review for the Attorney Discipline Board's review of a hearing panel's decision recognizes that while the Board is to determine whether or not there is evidentiary support for a panel's findings, the Board has greater discretion in its review of the panel's final result, in this case, the appropriate level of discipline. *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). This greater discretion to review and, if necessary, modify a hearing panel's decision as to the level of discipline, is based, in part, upon a recognition of the Board's overview function and its responsibility to ensure a level of uniformity and continuity. *Matter of Daggs*, 411 Mich 304; 307 NW2d 66 (1981). [*Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012), p 7.]

The panel found that respondent violated MRPC 4.1 (Truthfulness in Statements to Others) in the course of negotiating the settlement, including confidentiality provisions, in *Brown/Nelthrope v City of Detroit* and *Harris v City of Detroit* by leading or allowing defense counsel to believe that the confidentiality of the text messages between Kilpatrick and Beatty could be assured when, in fact, respondent had already delivered copies of the texts to a reporter at the *Detroit Free Press* (Jim Schaefer) and he was virtually certain that publication would occur. The hearing panel's report on misconduct notes the divergence in testimony as to whether respondent was asked, essentially, how many copies of the text messages existed and who had them, or whether he was asked "where are they?" The panel's report includes the following findings and conclusions:

> [I]t is not necessary to resolve this factual dispute, and we merely assume that the facts are as recited by Mr. Stefani. Mr. Stefani admits to being asked "we want the text messages, where are they, will you give them to us." [Tr 02/07/11] at 128, 200. Mr. Stefani responded that they could not have the text messages and that they needed an escrow agreement. As to the whereabouts of the text messages, Mr. Stefani told them there was a copy in his office safe, another in a safe at his house, and another copy on his desk. He did not disclose the copy that had been given to Mr. Schaefer.
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> Under these circumstances, Mr. Stefani's silence was equivalent to making a statement. We need not decide any other issue regarding a lawyer's obligation to disclose facts or information in connection with efforts to resolve a civil dispute.
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> Mr. Stefani also made statements to induce Mr. McCargo and others to believe that the confidentiality of the text messages could be maintained. The first question Mr. McCargo asked after seeing the excerpted text messages in the supplemental brief was whether the brief had been filed, *id.* at 120, and then, whether Mr. Stefani would be willing to hold off filing if permission for a global settlement could be obtained. *Id.* at 120-121. Mr. Stefani told him "I will not file it if we can resolve this thing, you know, I'll hold off." *Id.* at 121. Mr. Stefani admitted that he "maneuvered them into settling this case by letting them believe the text messages would be kept confidential" *id.* at 146, and that he knew defendants were bargaining for something they could not obtain. *Id.* at 225-226. He frankly admitted that "[t]here's no question that I let them believe one thing that wasn't accurate." *Id.* at 146.
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> In this Panel's view, the falsity of the statements made by Mr. Stefani is not a close question. We do not accept the fine line Mr.

> Stefani seeks to draw between a question which asks "we want the text messages, where are they" and questions which ask "where are all of the copies you made" or "how many copies and where are they?" In our considered judgment, each is a reiteration of the same question and each is designed to elicit the same response. It is not reasonable to conclude that the first question ("where are they") did not require Mr. Stefani to disclose the disk in the possession of the *Free Press*, but a question which asks "how many copies and where are they" would have elicited that information (as Mr. Stefani apparently argues). See *e.g., id.* at 225-226 ("None of them ever asked Have you ever given them to somebody else? Or How many copies did you make? Where are all of the copies you made? They never asked that.").
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> [W]e cannot logically conclude that the question "where are they" allowed Mr. Stefani to describe the location of some, but not all, of the text messages (and copies) that came into his possession. The question was not, "where are some of the text messages" or "where are you keeping two or three copies of the text messages." "Where are they" implies no limitation and his response would lead one to reasonably believe that he had accounted for all of the copies (there is a copy in my office safe, another in a safe at my home, and another copy on my desk).
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> The statements Mr. Stefani made with respect to confidentiality were also false. Mr. Stefani knew to nearly a 100% certainty that the *Free Press* would publish the text messages, and that was clearly his intent. *See id.* at 106-107, 141, 197-198, 224. In fact, he believed that it was "not ethical to settle the case" without having the information become public. *Id.* at 89. Negotiating with Mr. McCargo to maintain the confidentiality of the text messages when Mr. Stefani had already committed the text messages to public disclosure is by omission a false statement. [HP Report on Misconduct, pp 6, 12-14.]

The panel sums up the elements of the rule in question: "To trigger a violation of MRPC 4.1, a lawyer's statement must be material, false, knowing, and made in the course of representing a client."[12] And it concludes: "we find that statements Mr. Stefani made to Mr. McCargo regarding the location of the text messages and their confidential status, as well as statements he knowingly omitted, violate the . . . rules."[13]

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[12] Report on Misconduct, p 12.

[13] *Id.* A majority of the panel found that respondent violated not only MRPC 4.1, but also MRPC 8.4(b) (dishonesty) and (c) (conduct prejudicial to the administration of justice) as well as MCR 9.104(A)(1)-(3).

After the panel issued its findings with respect to misconduct, the parties addressed the appropriate level of discipline. Petitioner argued for suspension under ABA Standard 6.12. Respondent argued that a reprimand was appropriate under Standard 6.13.[14]

The hearing panel's report on discipline reached the conclusion, by a 2-to-1 majority, that Standard 5.1 was applicable to the misconduct found in this matter and imposed a reprimand. The dissent would have applied Standard 6.1 and ordered a suspension, or, would have ordered a suspension even if Standard 5.1 was used as the starting point in the analysis.[15]

Dissenting panel member Dunn found only a violation of MRPC 4.1.

[14] Both standards are set forth under the rubric of Standard 6.1, which provides:

6.1 False Statements, Fraud, and Misrepresentation

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

[15] Standard 5.1 provides:

5.1 Failure to Maintain Personal Integrity

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which

Of course, the panel was not bound by the parties' agreement on a point of law, such as the applicability of a particular standard.[16] On review, petitioner argues that the panel majority's conclusion that Standard 5.1 applied to the exclusion of Standard 6.1 led to the selection of the wrong recommended level of discipline (reprimand) that is generally appropriate for the misconduct here. Respondent argues that the panel majority's analysis is not incorrect, but that reprimand is the appropriate sanction under Standard 5.1 or Standard 6.1.

We find the panel majority's decision to apply Standard 5.1 to be well-reasoned and appropriately tailored to the misconduct in this case. To be sure, arguments can be made that Standard 6.1 *could* apply here, but our reading of Standard 6.12, which the petitioner argues governs this case, leads us to the contrary conclusion:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being *submitted to the court or that material information is improperly being withheld*, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. [ABA Standard 6.12. Emphasis added.]

Language throughout the standard demonstrates that it applies to misrepresentations to tribunals and not to third persons, such as opposing counsel. Notwithstanding the generic catchline of Standard 6.1 ("False Statements, Fraud, and Misrepresentation"), the preamble speaks of

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includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

[16] See, e.g., *Kimmelman v Heather Downs Mgmt*, 278 Mich App 569, 576 (2008); *Rice v Ruddiman*, 10 Mich 125, 138 (1862).

"misrepresentation to a court"[17] and all but one of the subsidiary standards mentions deception of "the court." The exception, Standard 6.13, nonetheless uses the language and concepts of MRPC 3.3 on candor to a tribunal, making the panel's observation that this case does not involve that rule most apt.[18]

In light of the foregoing, it is not surprising that we have read Standard 6.1 as involving misrepresentation to a tribunal in our prior opinions. For example, in one case we reasoned:

> Further, Standard 5.11(b) deals with dishonesty, generally. Standard 6.1 is expressly concerned with lawyer dishonesty in dealing with a court, and Standard 6.12 most closely fits the facts of this case. Therefore, we conclude that the panel did not err in applying Standard 6.12 instead of Standard 5.1. [*Grievance Administrator v Keith J. Milan*, 06-74-GA (ADB 2008), p 5.]

Compare *Grievance Administrator v Kenneth P. Williams*, 03-80-GA (ADB 2005) (discussing a panel's application of Standards 5.1 and 6.1 in a case involving a lawyer's signature of opposing counsel on a stipulation and submission to a court without consent but while flagging the absence of consent).

Other jurisdictions also apply Standard 5.1 when assessing discipline for MRPC 4.1 violations. For example, in a Colorado case involving a lawyer who made misrepresentations to opposing counsel during negotiations following the death of his client (which was not disclosed immediately), the Colorado Supreme Court treated the violation of general rules proscribing dishonest conduct as subsumed under the MRPC 4.1 charge for purposes determining discipline, and analyzed the case under ABA Standard 5.1. *In Re Rosen*, 198 P3d 116, 117 (Colo, 2008). The Colorado court articulated its quite logical reading of various Standards' applicability with respect to dishonest conduct as dependent upon the recipient of the deception or misrepresentation:

> Unless deceit or misrepresentation is directed toward a client, see ABA Standard 4.6, a tribunal, see ABA Standard 6.1, or the legal profession itself (as, for example, by making false representations in

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[17] It is true, that the precatory language also mentions conduct prejudicial to the administration of justice, but one must still ascertain the primary character of the case and its violations and align it with the most appropriate standard. There are many types of conduct prejudicial to the administration of justice, and a review of the formal complaints filed with the Board shows that this charge is made in virtually every one.

[18] Compare Standard 5.13's reference to "remedial action" with MRPC 3.3(a)(3)'s reference to "remedial measures."

> applying for admission to the bar), see ABA Standard 7.0, it is considered by the ABA Standards to be the violation of a duty owed to the public, see ABA Standard 5.0. [*Rosen*, 198 P3d at 120.]

We do, however, agree with the Administrator (and so does respondent) that the Standards cannot be mechanically applied. There are several reasons for this, including the generality of the Standards in some respects, the differences between jurisdictions in terms of how certain misconduct may be viewed, and, quite frankly, possible drafting glitches. We reiterate a point made in one of our recent opinions, which incorporates important observations and directions from our Supreme Court:

> Of course, the Standards "do not provide rigid guidelines for a level of discipline to be imposed in every conceivable factual situation." *Grievance Administrator v Harvey J. Zamek*, 98-114-GA; 93-133-FA (ADB 1999). They are "not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct." ABA Standards, p 6. Nonetheless, under *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), they are the starting point for the discharge of "our responsibility on review . . . to examine the factors affecting the assessment of the appropriate level of discipline in light of the ABA Standards and applicable Michigan precedents and attempt to ensure continuity and proportionality in discipline." *Grievance Administrator v Kathy Lynn Henry*, 09-107-JC (ADB 2010).
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> Also,
>
> > [*Lopatin's*] directive to follow the ABA standards is not an instruction to [the ADB or its panels to] abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [*Lopatin*, 462 Mich at 248 n 13.] [*Grievance Administrator v Valerie Colbert-Osemuede*, 09-46-GA (ADB 2012), pp 13-14.]

With the foregoing principles in mind, this Board has opined previously that dishonesty of the type covered, intermittently, in ABA Standard 5.1, should, in many cases, result in suspension

(and not only disbarment or reprimand):

> Standard [5.12] does not expressly reference dishonest acts, but only speaks of certain criminal conduct. We have observed elsewhere that apparent gaps in the intended coverage of Standard 5.1 render it somewhat difficult to apply, and that it is likely that ABA Standard 5.12 was intended to apply to certain dishonest conduct as well as the criminal conduct mentioned therein.[19]

Thus, as is discussed further below, we conclude that the generally appropriate sanction for the misconduct in this matter is not necessarily a reprimand.

The Administrator also argues that the majority opinion on discipline overlooked "five additional findings of misconduct" which "underscore why Standard 6.1 should have been used to assess Mr. Stefani's discipline." We disagree. The members of the panel were all well aware that the panel found respondent to have violated MRPC 8.4(b) and (c), and MCR 9.104(1) - (3). The bulk of these additional findings, which were clearly and logically secondary to the arguments by the parties and findings by the panel as to MRPC 4.1, deal with generalized statements of the duties of honesty and the like, and they do not alter the nature or character of the conduct in this case. The panel properly decided to focus on the primary charge, and the rule violation with the most precise

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[19] *Grievance Administrator v Kenneth P. Williams*, 03-80-GA (ADB 2005), quoting *Grievance Administrator v Arnold M. Fink* (After Remand), 96-181-JC (ADB 2001), in which opinion the Board noted:

> [The] effort to place a particular case in the appropriate spot along the continuum [between Standard 5.11 and 5.12] is somewhat hampered by the fact that the text of the standards do not consistently describe the conduct to which they are applicable. For example, under 5.11(b), disbarment is deemed appropriate for intentional dishonest conduct seriously reflecting adversely on fitness to practice, whether or not the conduct is criminal. However, Standard 5.12 appears on its face to be applicable only to criminal conduct (with additional elements involving fitness), whereas the text of Standard 5.13 (dishonesty and similar conduct that adversely reflects on fitness) does not specifically reference criminal conduct. It is unlikely that the Standards were meant to suggest that criminal conduct not meeting all of the elements of Standards 5.11(a) and 5.12 must always escape discipline altogether or that dishonest non-criminal conduct should only be the subject of a disbarment order or a reprimand, and not a suspension.

Accordingly, we are not convinced that readings of Standard 5.1 to the contrary are accurate or correctly capture the generally appropriate sanctions for the subject conduct. See, e.g., *In Re Rosen*, supra, at 120:

> [C]onduct involving dishonesty, fraud, deceit, or misrepresentation, as long as it falls short of actual criminality or comparable intentional conduct seriously adversely reflecting on one's fitness to practice law, should generally be sanctioned only by reprimand, or censure. See ABA Standard 5.13. Suspension as a sanction for knowingly dishonest conduct directed toward someone other than a client or tribunal is generally reserved for engaging in criminal conduct. See ABA Standard 5.1.

elements, and select the most appropriate sanctions standard based on its primary thrust, i.e., the essential nature of the conduct sought to be covered therein. Here, the panel correctly determined that Standard 6.1 is obviously and in the main (if not entirely) aimed at misrepresentations to a court.[20] We are not persuaded that the panel majority erred in applying Standard 5.1 instead of Standard 6.1 for the MRPC 4.1 violation in this instance. Nor are we of the opinion that application of Standard 6.12 would have changed the ultimate result in this case.

While we find no error in the panel's application of the Standards, we are of the opinion that a suspension should be considered the generally applicable discipline for misconduct of this nature. As we have noted above, this Board has opined that the ABA Standards may not always appropriately reflect the seriousness of knowing misrepresentations (or fraudulent, deceitful or dishonest conduct) that adversely reflect on a lawyer's fitness to practice law. With this fitness element included, we are not speaking of harmless inaccuracies. Setting the bar at reprimand, then, does not seem adequate.

Additionally, as we have recently observed:

> This Board's responsibility to ensure consistency and continuity in discipline imposed under the ABA Standards and caselaw necessarily means that we may not always afford deference to a hearing panel's sanction decision, and that we may be required to independently determine the appropriate weight to be assigned to various aggravating and mitigating factors depending on the nature of the violation and other circumstances considered in similar cases. *Grievance Administrator v Saunders V. Dorsey*, 02-118-AI; 02-121-JC (ADB 2005). [*Grievance Administrator v Karen K. Plants*, 11-27-AI; 11-55-JC (ADB 2012).]

The panel found that respondent pursued a lawyerly approach in researching the law of silent fraud, but that he was mistaken in assuming that tort law exhausted the applicable jurisprudence for determining what is proper as a matter of professional conduct. The panel also concluded that had he recognized the need to review decisions applying MRPC 4.1, less than clear guidance would have been afforded him. These are but two facets of the panel's extraordinarily thorough and cogent examination of every conceivable factor bearing upon the sanctions analysis under the Standards. And, in addition to the factors explored at length by the panel majority, we note the concluding

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[20] MRPC 3.3 was not among the rules alleged in the formal complaint to have been violated, and there is ample evidentiary support for the majority's finding that the record does not establish a misrepresentation to the circuit court regarding the settlement. See Discipline Report, p 7.

remarks, finding "the conduct of respondent to have been, at the least, disappointing," and characterizing it accurately as "artifice" and "not justif[ied]."

Thus, while we afford full deference to the panel's carefully considered examination and findings with respect to these factors, we must diverge from the majority's conclusion as to the appropriate level of discipline. A suspension is appropriate for the conduct here. However, the panel's recitation of the facts and balancing of the relevant factors convinces us that a suspension at the lower end of the allowable spectrum is also appropriate. Accordingly, we shall enter an order imposing a 30-day suspension. Credit shall be given for the respondent's previous 30-day suspension.

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Carl E. Ver Beek, Craig H. Lubben, Sylvia P. Whitmer, Ph.D., Lawrence G. Campbell, Dulce M. Fuller, and Louann Van Der Wiele concur in this decision.

Board Member Rosalind E. Griffin, M.D., was voluntarily recused and did not participate.

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
Attorney Grievance Commission,

Petitioner,

v

Michael L. Stefani, P20938

Respondent

Case No. 10-113-GA

MISCONDUCT REPORT OF TRI-COUNTY HEARING PANEL # 25

PRESENT: Stephen D. McGraw, Chairperson
Kristine Heard Longstreet, Member
William B. Dunn, Member

APPEARANCES: Robert E. Edick, Deputy Administrator,
for the Grievance Administrator

Kenneth M. Mogill
MOGILL, POSNER & COHEN
for Michael L. Stefani, Respondent

AUTHORS: Sections I, II, III, IV, V.A. and V.C. were written by Chairman McGraw

Section V.B. was written by Panel Member Dunn

I. EXHIBITS

Petitioner's Ex. 1 - Judgment
Petitioner's Ex. 2 - Brief
Petitioner's Ex. 3 - Supplemental Brief
Petitioner's Ex. 4 - Stefani's Handwritten Notes
Petitioner's Ex. 5 - Settlement Agreement
Petitioner's Ex. 6 - 10/18/07 email
Petitioner's Ex. 7 - Escrow Agreement
Petitioner's Ex. 8 - Confidentiality Agreement

Respondent's Ex. A - Curriculum Vitae
Respondent's Ex. B - Deposition Excerpt (pages 140-146) FOIA proceeding
Respondent's Ex. C - Excerpt of Testimony (pages 139-141) City Council
Respondent's Ex. D - Excerpt of Testimony (pages 117-119) *McCargo* Hearing

II. WITNESSES

Samuel McCargo
Michael Stefani
James Howlett
Horace Steven Foreman
Gary Brown

III. PANEL PROCEEDINGS

The Formal Complaint against attorney Michael L. Stefani relates to statements he made regarding the location and confidential status of certain text messages exchanged between former Mayor Kwame M. Kilpatrick and his Chief of Staff Christine Beatty. The Grievance Administrator ("GA") filed this proceeding after leave to supplement the charges in an earlier proceeding was denied. See *Grievance Administrator v Michael L. Stefani*, ADB Case No. 09-47-GA (relating to the manner in which Mr. Stefani obtained the text messages and his alleged concealment of another lawyer's (Mr. Kilpatrick's) perjury). The Formal Complaint in the present action charges that Mr. Stefani knowingly made a false statement of material fact after disclosing the text messages to Mr. Kilpatrick's attorney, Samuel McCargo, as an inducement to settle the lawsuit Mr. Stefani's clients commenced against Mr. Kilpatrick and the City of Detroit. When questioned about the whereabouts of the text messages, Mr. Stefani did not disclose that he had given a disk containing the text messages to a reporter for the *Detroit Free Press*, and led Mr. McCargo to believe that the confidentiality of the text messages could be maintained. While Mr. Stefani admits to having been morally conflicted about not disclosing this fact, he insists that in this adversarial context, Mr. McCargo (and four other attorneys representing the City) failed to ask the question that would have required the disclosure.

The Complaint also relies upon statements Mr. Stefani made regarding the *Free Press'* source for the text messages during a January 30, 2008 deposition in *Detroit Free Press v City of Detroit*, Wayne County Circuit Court Case No. 08-100-214-CZ (Complaint, ¶18) and during an April 8, 2008 legislative hearing before the Detroit City Council (Complaint, ¶19). The Complaint further recites that in testimony during a misconduct hearing on July 23, 2009, in *Grievance Administrator v Samuel E. McCargo*, ADB Case No. 09-50-GA, Mr. Stefani responded "I do not, no" to the question "do you know who gave the Skytel records to the *Free Press*?" (Complaint, ¶20). Mr. Stefani's conduct is alleged to be in violation of MRPC 4.1, MRPC 8.4(a)-(c), and MCR 9.104(A)(1)-(4) (Complaint, ¶21).

Earlier in these proceedings, Mr. Stefani sought summary disposition on *res judicata* grounds as to the allegations in paragraphs 16 through 19 of the Complaint, asserting that further litigation of these allegations was barred by the findings of fact and conclusions of law rendered in *Stefani*, *supra*. This Panel denied that motion on February 3, 2011, concluding that "the better interest of the disciplinary process in this case is served by having respondent's whole conduct considered on its merits." An evidentiary hearing was conducted on February 7, 2011. On March 24, 2011, the parties submitted Proposed Findings of Fact and Conclusions of Law. Oral arguments were heard on March 29, 2011, and post-argument briefs were filed on April 8, 2011.

IV. FINDINGS OF FACT

Except with respect to one issue identified below, the essential facts underlying the GA's charges are not in dispute. We find it unnecessary to resolve the disputed issue in order to reach a decision on the questions presented for panel review. We therefore rely upon Mr. Stefani's own testimony in making the following findings of fact.

A. Mr. Stefani's Conduct in Settlement Negotiations

Mr. Stefani represented Gary Brown and Harold Nelthrope in a Wayne County Circuit Court "whistleblower" action filed against the City of Detroit and former Mayor Kilpatrick in 2004. Tr 02/07/11 at 78. A second lawsuit against the same defendants was filed on behalf of Walter Harris. *Id.* at 78-79. On September 11, 2007, the jury in the Brown/Nelthrope action returned a verdict for plaintiffs in the amount of $6.5 million. Interest on the verdict approximated $1.4 million for a total judgment of nearly $8 million. *Id.* at 79. There had been no overtures from the defense relative to settlement since May or June of 2007. *Id.* at 111. Mr. Stefani proposed settlement just before trial but defendants "kind of blew me off." *Id.* at 112. Following the verdict Mr. Kilpatrick acted as though he was going to appeal and would not settle. *Id.* at 112.

During pretrial discovery, Mr. Stefani issued subpoenas to SkyTel to obtain text messages from devices used by Mr. Kilpatrick and Ms. Beatty. Those subpoenas resulted in the entry of a protective order requiring that any text messages responsive to the request be first submitted to the court for an *in camera* review. *Id.* at 79-80, 191. SkyTel did not produce records in response to the subpoenas either before or during the trial. *Id.* at 81. Mr. Stefani later found out that the City had told SkyTel not to produce the records pending the filing of a motion to quash. *Id.* at 80, 84, 192.

Following the verdict, and believing the text messages could be relevant to post-trial motions and attorney fees, and thinking that there could be something in the text messages "that we don't know about," Mr. Stefani directed subpoenas to SkyTel on September 25, 2007, and September 28, 2007, seeking text messages from Ms. Beatty's city-issued device. *Id.* at 82, 192-194. This time, instead of seeking text messages from Ms. Beatty's pager, the subpoena requested text messages from the City of Detroit pager leased to Ms. Beatty. Mr. Stefani admitted that this change in the wording of the subpoena was the "key that opened the door" to receipt of the text messages. *Id.* at 221-222. Although Mr. Stefani knew he was violating the court rules, he did not give timely notice of the subpoena to opposing counsel. *Id.* at 82-83, 194-195. He believed that if Mr. Kilpatrick's counsel became aware of the text messages in the conventional manner, he would "rush into court and get the thing suppressed or turned over to the Mayor." *Id.* at 88. As to this point, Mr. Stefani testified that he didn't "feel justified in violating any ... portion of the Canons of Ethics" but he "felt morally justified as to what they had done to me. But it didn't excuse my violation of the Canons of Ethics." *Id.* at 195.

On October 5-6, 2007, SkyTel produced a single disk to Mr. Stefani which contained the text messages. *Id.* at 84-85. Mr. Stefani immediately "saw the obvious evidence of lying and

perjury" and realized that he had "a smoking gun." *Id.* at 95. Mr. Stefani's assistant made two copies of the disk and a hard copy print-out. *Id.* at 85. One copy was given to Jim Schaefer at the *Detroit Free Press* for safe-keeping and because Mr. Stefani believed that the public had the right to know what the text messages contained. *Id.* at 87-89, 94-97. Mr. Stefani wanted to use the text messages to further his clients' interests while at the same time insuring the public's right to know. *Id.* at 87-89. One particular desire was to use the text messages to deflect Mr. Kilpatrick's contention that the jury verdict was racially-motivated and to "show the public that the legal system worked and that despite what the Mayor said, the jury did its job." *Id.* at 87-88. Mr. Stefani also believed that it was "not ethical to settle the case with the whistleblower without having the information come public." *Id.* at 89.

Mr. Stefani and Mr. Schaefer had an oral understanding that the text messages could be used for "lead value" on non-Brown/Nelthrope matters, but Mr. Schaefer could not use the text messages in the story. With regard to the Brown/Nelthrope case, the understanding was that the *Free Press* would not use the text messages unless Mr. Schaefer and the *Free Press* first tried to obtain them independently. *Id.* at 99-101. Mr. Stefani's message to the *Free Press* was "get your own copy, and if you can't ... you can use mine," and this did not require the *Free Press* to explain its efforts to Mr. Stefani or to elicit further permission to publish. *Id.* at 101-102, 224. Mr. Stefani's intent was to have the messages published and he was "99 percent sure" the *Free Press* would run a story about Kilpatrick's perjury. *Id.* at 106-107, 141, 197-198, 224.

Judgment was entered in the Brown/Nelthrope case on October 9, 2007, and Mr. Stefani moved for attorney fees. *Id.* at 91-92. The presiding judge referred the attorney fee issue to facilitation, which occurred on October 17, 2007. *Id.* at 94, 107. Mr. Stefani took with him to the facilitation a supplemental brief in support of the attorney fee request which included references to the text messages, *id.* at 107-108, but he did not show the brief to opposing counsel right away. *Id.* at 112. [A close to final draft of that brief was marked as Exhibit 3.] Offers went back and forth a number of times, and at one point, defendants were at $450,000 while Mr. Stefani's clients were at $825,000. Mr. Stefani then offered to settle the attorney fee issue for $500,000 if the parties could reach a global settlement for Brown, Nelthrope, and two other clients Mr. Stefani represented in claims against the City. Defense counsel took the offer back to their clients but they were unable to secure authority for a global resolution. *Id.* at 113-114.

At this point, the parties had been negotiating for two and a half hours. *Id.* at 115. Mr. Stefani gave the facilitator an envelope that contained a copy of the supplemental brief and asked him to give it to Mr. McCargo only. *Id.* at 114-116. Mr. Stefani had concluded that it was in his clients' best interest to give Mr. McCargo an opportunity to resolve the case without the text messages becoming public. Id at 118. Mr. Stefani knew the text messages "would become public eventually because the *Free Press* had them, but in order to get a settlement of the case," he felt it would be better to let Mr. McCargo decide whether to share them with the City's lawyer. *Id.* at 117-118. He did not want the text messages to become public before he settled the case. *Id.* at 119. On the other hand, Mr. Stefani testified on re-direct that if Mr. McCargo or another of the attorneys asked if he had disclosed anything to other persons, he intended to admit it. *Id.* at 198, 201.

About 45 minutes after the envelope was delivered to Mr. McCargo, Mr. Stefani saw him in the parking lot. Mr. McCargo looked ashen and upset, and asked whether the supplemental brief had been filed. When Mr. Stefani told him it had not, Mr. McCargo asked whether Mr. Stefani would be willing to hold off if he could get authority to negotiate a global negotiation. Mr. Stefani said "I will not file it if we can resolve this thing, you know, I'll hold off." *Id.* at 119-121. Half an hour later, Mr. Stefani was told that Mr. Kilpatrick was willing to negotiate a global solution. *Id.* at 122. Mr. Stefani testified that there was no doubt in his mind that the primary catalyst for the change in position was the supplemental brief references to the text messages, *id.* at 122, and that the desire "to assure that these messages would not go public" prompted a settlement that very same day. *Id.* at 224-225.

Within an hour to an hour and a half, a settlement amount and "[a]lmost the entire agreement" had been reached. *Id.* at 122-123. The lawyers decided to continue preparation of the agreement at Mr. Stefani's office. *Id.* at 123. When they arrived, Mr. Stefani gave them the draft of an agreement he had been working on, which consists of fax numbered pages 5 through 9 of Petitioners' Exhibit 4. *Id.* at 125. Mr. McCargo's handwritten notations appear in the margin of the draft. *Id.* at 126. One note says "Are there any more records SkyTel", with the notation "Agents and investigators" appearing below. *Id.* at 126. Mr. Stefani recognized that confidentiality was the number one concern, *id.* at 123, and "they wanted to keep [the text messages] confidential." *Id.* at 224-225. The settlement agreement was drafted to put "teeth" into this commitment. Mr. Stefani testified:

> [T]heir Number 1 concern is they wanted a penalty if my law firm or anybody in my law firm released the messages. They wanted, as they put it, we've got to have teeth in it. And there were several other - they wanted this - they wanted confidentiality agreements from everyone who worked at Stefani & Stefani. And all that was in that draft that I did.

Id. at 123. But Mr. Stefani admitted to having known at the time that, because of his arrangement with the *Free Press*, the defendants were bargaining for something they could not obtain, which caused him to feel "badly" and "conflicted." *Id.* at 225. He testified:

> CHAIRMAN McGRAW: ... So that with your arrangement with the Free Press, you knew that they were bargaining for something that they couldn't obtain?
>
> THE WITNESS: That is correct, and that's why I testified I was conflicted about that, because, you know, I felt badly that McCargo didn't ask the right - he never asked nor did Mr. Copeland or Miss Osamuede or their two young associates - they had five lawyers. None of them ever asked Have you ever given them to somebody else? Or How many copies did you make? Where are all of the copies you made? They never asked that.
>
> And I felt, you know, badly that I was - I was conflicted between my duties to my client and what I felt was taking advantage of Mr. McCargo not being on his toes.

He was - I think so shocked over this affair language in there, and some of it was awfully specific, I think he just did not have his thinking hat on completely.

Id. at 225-226. See also, *id.* at 227 ("So I was conflicted, and I've testified to that a number of times, I felt uneasy about letting McCargo make a mistake and not correcting it, but I researched it, the silent fraud aspect, and I felt that it was - that it was fair and in my client's best interest to let him make the mistake. It's an adversary system ...")

Mr. Stefani and Mr. McCargo disagree about whether Mr. Stefani was asked "are there any more copies" and have you "given them to anyone else." See *id.* at 199. Mr. McCargo testified that after Mr. Stefani indicated that there was one in his safe in the office and another in a safe at his home, "he was asked, Well are there any more copies" and "if there was anyone else who knew anything about the disk?" *Id.* at 34-35. Mr. Stefani testified that the discussion of the text messages was "the last thing to come up," after the settlement agreement had been negotiated and signed. *Id.* at 128, 200. He denies having been asked whether there were any other copies, and whether he had shared the text messages with others, stating that if those questions had been asked, they would have been included in the terms of the settlement agreement. *Id.* at 126, 199, 201. As it was, there were no representations in the agreement regarding past disclosures; it prohibited only future disclosures. *Id.* at 201-202.

For purposes of the decision we render here today, it is not necessary to resolve this factual dispute, and we merely assume that the facts are as recited by Mr. Stefani. Mr. Stefani admits to being asked "we want the text messages, where are they, will you give them to us." *Id.* at 128, 200. Mr. Stefani responded that they could not have the text messages and that they needed an escrow agreement. As to the whereabouts of the text messages, Mr. Stefani told them there was a copy in his office safe, another in a safe at his house, and another copy on his desk. He did not disclose the copy that had been given to Mr. Schaefer. Mr. Stefani testified as follows:

A. ...So, at the end, he asked, We want the messages.

I said, you can't have the messages. We've got to at least have an escrow agreement.

And he said, Well, where are they? And the safe is right there. I mean, the conference room is much smaller - it's like that water tank over there.

I said, It's in that safe over there. And I did, I did open the safe and take out the envelope and showed them the envelope. I didn't go into the inside of the envelope, but I showed them it was an overnight thing from SkyTel so they would have - they know I wasn't misleading them.

Q. Did you also tell Mr. McCargo that you had another copy at a safe in your house?

A. Yes, I told McCargo that I had another copy at my house, and I had another copy I thought lying on my desk.

Q. But you, of course, did not tell him there was a copy in the possession of Mr. Schaefer?

A. No, I didn't. And I had to be -

Q. Thank you, you answered the question.

Id. at 129-130. See also, *id.* at 200 (repeating this testimony and further stating "But he didn't ask the question - he never asked, you know, how many copies are there, who did you give them to. The question wasn't how many copies and where are they. They were more like prove to us you've got the messages, and that's when I took it out of the safe ...") These responses are challenged as misconduct in the GA's complaint. See Complaint, ¶s 13-17.

Mr. Stefani admits that he "wrestled with the moral question because ... [he] was truly, truly conflicted by knowing that Mr. McCargo didn't think to ask me that question." *Id.* at 204-205. He "analyzed from a moral standpoint whether it was fair" and "do I have to volunteer it" but concluded that if he told him about it "then I'm hurting my clients, because one of them in particular, Nelthrope, really was having some tough times emotionally and he needed to bring closure to this thing." *Id.* at 205. Although he "felt badly about not pointing out McCargo's error to him," he concluded "that my duty was to my client and - my clients and if he didn't think to ask the question, I wasn't going to, you know, hurt my own clients by volunteering that information." *Id.* After agreement was reached, Mr. Stefani called Mr. Schaefer and told him he wanted the disk back. Mr. Schaefer brought it to Mr. Stefani, who asked Mr. Schaefer whether he had taken sufficient notes. Mr. Schaefer responded something to the effect of "we're okay." Mr. Stefani did not ask whether Mr. Schaefer had made a copy. *Id.* at 131-133. Subsequently, the disks, supplemental briefs and a print-out of the text messages were placed in escrow. *Id.* at 137-138.

A couple weeks later, Mr. McCargo told Mr. Stefani it was necessary to redraft the settlement agreement to split the confidentiality agreement into a separate document. The purpose was to avoid disclosing the text messages to the *Free Press* in response to a Freedom of Information Act request. *Id.* at 138-141. Mr. Stefani was concerned that in redrafting, representations would be made regarding retrospective disclosures of the text messages rather than the prospective only language that had appeared in the original document. *Id.* at 142. He was assured the language would be the same. *Id.* Mr. Stefani knew that the *Free Press* already had, or would get, the text messages, *id.* at 141, "and since I already knew that the *Free Press* or felt very strongly the *Free Press* was going to do a story about the Mayor's perjury, I saw no harm in going along with the change and, of course, by doing that it allowed my clients and me to get paid ..." *Id.* at 143. Mr. Stefani acknowledged that Kilpatrick "wanted the information kept secret" and admitted that he "maneuvered them into settling this case by letting them believe the text messages would be kept confidential." *Id.* at 146.

> A. ... There's no question that I let them believe one thing that wasn't accurate. They didn't ask me any questions about is this all you've given. ... [T]here's no question, if they had known I had given the messages, we wouldn't have settled it that day.

Id. at 146-147. The confidentiality agreement contained a fairly substantial liquidated damages clause in the event of breach, but Mr. Stefani had no concern about having his clients sign onto such an agreement because they didn't know he had given the text messages to Mr. Schaefer:

> A. ... [I]f anybody did anything wrong, it was me, and - but I didn't. I followed that agreement to the letter.

Id. at 148.

The documents were signed and the settlement checks received by December 5, 2007. *Id.* at 234. The *Detroit Free Press* ran the story in the first part of 2008. *Id.* at 151. Mr. Stefani did not see anything in the story that could not have come from the text messages. *Id.* at 154.

B. Mr. Stefani's Testimony in *Detroit Free Press v City of Detroit*

After the story was published, Mr. Stefani was subpoenaed to give a deposition in the FOIA action filed by the *Detroit Free Press* in January of 2008. *Id.* at 151, 156. In October or November, or possibly even January, Mr. Schaefer had urged Mr. Stefani to publicly admit that he was the source of the text messages so the *Free Press* could publish its story. Mr. Schaefer also told Mr. Stefani that although he (Schaefer) was not a lawyer, the ethics rules required Mr. Stefani to report Mr. Kilpatrick's perjury to the Attorney Grievance Commission. *Id.* at 158-160.

Mr. Stefani ultimately had a face to face meeting with Mr. Schaefer and the *Free Press*' lawyer, Herschel Fink. *Id.* at 161-162. They discussed the journalist privilege the *Free Press* would assert if Mr. Stefani was deposed on the source issue and added that "whether you answer or not is up to you." *Id.* at 163. Mr. Stefani explained, "I was prepared in my own mind to admit that I had given the text messages, and they were offering me a way to maintain that - maintain that fact as being confidential and I was in favor of that." *Id.* at 163-164.

The deposition occurred on January 30, 2008, *id.* at 156, and answers given at the deposition are the subject of the GA's complaint against Mr. Stefani. See Complaint, ¶18. During the deposition, Mr. Stefani was asked whether he had shared the SkyTel records with the *Detroit Free Press*. He recalls saying, "If I were to say absolutely not I didn't share any records, I would clear myself of suspicion, but I would narrow the field of other possible sources of information that the *Free Press* might have used." *Id.* at 165.

Mr. Stefani was also asked whether he shared the SkyTel records with anyone else, and he responded, "If I were to stay [sic] no to that question it would make it easier for the City to identify the source because there would be one less suspect." *Id.* Mr. Stefani was then asked who he thought had given the SkyTel records to the *Detroit Free Press*, and he recalls saying, "By clearing

myself I could be implicating somebody else, and I - I personally believe whoever did furnish this information to the *Free Press* did the City a service; and so therefore, I think whoever did it should get an attaboy, but I'm not going to tell you who it was." *Id.* at 165-166. Mr. Stefani was also asked why he was asserting a journalist privilege on behalf of the *Free Press*, to which he said "If I were to tell you who I suspected gave those documents, I would narrow the field down and I firmly believe that whoever did this did a service and will want to protect whoever did this because I think they did a service." *Id.* at 166.

Mr. Stefani did not consider his answers to be misleading. During the first week of January 2008, he had been visited in Florida by Mr. Schaefer and a *Free Press* editor who had informed him that Mr. Schaefer was going to Mississippi the following week to get the messages, and he didn't know whether Mr. Schaefer ultimately obtained them. *Id.* at 168-169. Additionally, in giving the text messages to the *Free Press*, Mr. Stefani believed he performed a service for the City and the community:

> A. ... If there was a source down in Mississippi, there was some sort of a lawyer down there, if it was me, I think I did a service, and I think if you were fair, you would acknowledge that whoever did it, whether they breached the Canon, or whether they violated the Rules of Professional Conduct or not did a service to the City of Detroit and this community.

Id. at 169.

C. Mr. Stefani's Testimony Before the Detroit City Council

Mr. Stefani was called to testify at a legislative hearing before the Detroit City Council on April 8, 2008, and was asked whether the text messages were obtained legally. He responded:

> Well I know I obtained them legally. I obtained them through the subpoena process. How the Free Press got them, I'm not in a position to speculate whether it was legal or not, because, you know, I'm just not sure how they got them...if I were to deny to this Council that I had anything to do with it, that would narrow the pool of suspects and make it easier for those who have something to gain by identifying who did facilitate the Free Press, and I'm going to respectfully decline to assist in that.

This testimony is also a subject of the GA's complaint. See Complaint, ¶19. Mr. Stefani explained that he had been visited in Florida the first week of January 2008 by Mr. Schaefer and a *Free Press* editor who informed him that Mr. Schaefer was going to Mississippi the following week to get the messages. *Id.* at 168-169, 171, 231. As he understood it, they were telling him "we're going to try one more time to get the messages", "[w]e're sending Mr. Schaefer down there and if he's unsuccessful, we're going to probably publish based on your ... messages." *Id.* at 171-172. Two weeks later the story came out and Mr. Stefani "did not know whether it was based on messages that he got or messages that I gave him." *Id.* at 172.

D. Mr. Stefani's Testimony at the *McCargo* Disciplinary Hearing

Another aspect of the GA's complaint charges that Mr. Stefani testified falsely during a July 23, 2009 misconduct hearing in *Grievance Administrator v Samuel E. McCargo, supra.* See Complaint, ¶20. At that hearing, Mr. Stefani was asked if he shared the SkyTel records with the *Free Press*, and whether, prior to October 17, 2007, he gave or shared the SkyTel records with anyone. Out of respect for the journalist/source privilege, Mr. Stefani declined to answer these questions. Mr. Stefani was then asked, "Do you know who gave the SkyTel records to the Free Press?" to which he replied "I do not know." *Id.* at 172-175.[1]

At the hearing before this Panel, Mr. Stefani testified that he misunderstood that last question. *Id.* at 175. He thought the question meant "do I know whose messages the Free Press published; in other words, he said do you know who gave the messages to the Free Press. I thought he was talking about the ones that they published. And I didn't know that." *Id. See also, id.* at 228-229. Mr. Stefani knew the *Free Press* was making efforts to obtain the text messages, and admits that he had no reason to believe that they had been successful. *Id.* at 229-230. Mr. Stefani testified that if he had "thought for a minute he was asking if I had given those messages ... I would have said I respectfully decline to answer on the grounds of the newspaper source privilege...I was doing what I thought I was entitled to do and I certainly wasn't lying." *Id.* at 176, 211-212. Mr. Stefani testified that he was not afforded an opportunity to explain the misunderstanding that led to this "very terse answer" because an objection on relevancy grounds was sustained and the subject was dropped. *Id.* at 213-214.

E. Other Matters Affecting Credibility

Finally, Mr. Stefani admitted that during a group discussion involving Mr. Stefani, Charlie LeDuff, Sharon McPhail and Adolf Mongo that may have occurred on September 18, 2008, Mr. Stefani answered "absolutely not" to the question "did you give text messages to the media?" *Id.* at 179. Mr. Stefani said he was not under oath and had been accused of all kinds of things "and I did say, no, I didn't give them because I didn't think I was obligated to tell them the facts." He acknowledged, "I made a mistake and I lied to them." *Id.* at 179-180. This false statement was not alleged as a basis for a finding of misconduct in the formal complaint. Rather, testimony as to this statement was elicited at the hearing as relevant to respondent's credibility.

V. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

We unanimously conclude, for the reasons set forth below, that:

- respondent's statements in connection with the settlement negotiations commencing October 17, 2007, were in violation of various Rules of Professional Conduct (see Section A below and the separate concurring statement of Panel Member Dunn);

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[1] The July 23, 2009 hearing transcript in *Grievance Administrator v Samuel E. McCargo*, ADB Case No. 09-50-GA, describes this testimony as "I do not, no", which is consistent with the Complaint allegations.

- respondent's statements during his deposition testimony in the FOIA action, *Detroit Free Press v City of Detroit* (see paragraph 18 of the formal complaint), did not violate the Rules of Professional Conduct as alleged (see Section C below); and,

- respondent's statements before the Detroit City Council (see paragraph 19 of the formal complaint), did not violate the Rules of Professional Conduct as alleged (see Section C below);

By a majority, this hearing panel finds and concludes that respondent's testimony during the McCargo disciplinary hearing, as alleged in paragraph 20 of the formal complaint, did not violate the Rules of Professional Conduct (see decision of Panel Members Longstreet and Dunn in Section B below). Panel Chairperson McGraw dissents from the findings and conclusions in Section B for the reasons set forth in his separate statement.

A. Statements Made or Omitted By Mr. Stefani in the Course of Settlement Negotiations Violate MRPC 4.1, MRPC 8.4(a)-(c), and MCR 9.104(A)(1)-(4).

The first issue we must address is whether the GA has established by a preponderance of the evidence that statements made or omitted by Mr. Stefani in the course of settlement negotiations violate MRPC 4.1 and MRPC 8.4(a)-(c) of the Michigan Rules of Professional Conduct, and/or MCR 9.104(A)(1)-(4) of the Michigan Court Rules. We answer affirmatively.

MRPC 4.1 requires a lawyer to be truthful in his statements to others. It provides that, "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person." MRPC 4.1. While the Rule's Comments emphasize that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," it follows the law in explaining that "a false statement may include the failure to make a statement in circumstances in which silence is equivalent to making such a statement."

MRPC 8.4 defines professional misconduct. Pursuant to subsection (a), misconduct occurs when a lawyer violates or attempts to violate the MRPC or knowingly assists or induces another to do so, or does so through the acts of another. Subsection (b) defines misconduct as engaging "in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Misconduct will be found under subsection (c) when a lawyer engages in conduct that is prejudicial to the administration of justice.

MCR 9.104(A) describes acts or omissions that constitute misconduct, whether or not occurring in the course of an attorney-client relationship. They include: "(1) conduct prejudicial to the proper administration of justice; (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach; (3) conduct that is contrary to justice, ethics, honesty, or good morals; [and] (4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court."

On the basis of Mr. Stefani's testimony, we find that statements Mr. Stefani made to Mr. McCargo regarding the location of the text messages and their confidential status, as well as statements he knowingly omitted, violate the above rules.

1. The "Statements" to Mr. McCargo Violate MRPC 4.1.

To trigger a violation of MRPC 4.1, a lawyer's statement must be material, false, knowing, and made in the course of representing a client. The statements upon which we rely in reaching our decision fall into two categories. The first category pertains to statements regarding the location of the text messages. The second related category involves the ability to keep them secret. We intend the term "statements" throughout this opinion to include omissions as well as affirmative representations.

In defining statements in this manner, we rely upon the Comments to MRPC 4.1, which explain that "a *false statement may include the failure to make a statement in circumstances in which silence is equivalent* to making such a statement" (emphasis added). This Panel's view of the law and a lawyer's obligation to disclose information to opposing counsel as set forth here arises from the very unique set of facts this case presents. Defendants could not have known or discovered that Mr. Stefani's actions had thwarted their goal of preventing public disclosure of the text messages absent disclosure by Mr. Stefani. Under these circumstances, Mr. Stefani's silence was equivalent to making a statement. We need not decide any other issue regarding a lawyer's obligation to disclose facts or information in connection with efforts to resolve a civil dispute.

a. The "Statements."

Mr. Stefani admits making statements regarding the location of the text messages. He admits being asked "we want the text messages, where are they, will you give them to us." Tr 02/07/11 at 128, 200. In response to "where are they," Mr. Stefani admits stating that there was a copy in his office safe, another in a safe at his home, and another copy on his desk, but he did not disclose the location of the copy he had given to Mr. Schaefer. *Id.* at 128-130.

Mr. Stefani also made statements to induce Mr. McCargo and others to believe that the confidentiality of the text messages could be maintained. The first question Mr. McCargo asked after seeing the excerpted text messages in the supplemental brief was whether the brief had been filed, *id.* at 120, and then, whether Mr. Stefani would be willing to hold off filing if permission for a global settlement could be obtained. *Id.* at 120-121. Mr. Stefani told him "I will not file it if we can resolve this thing, you know, I'll hold off." *Id.* at 121. Mr. Stefani admitted that he "maneuvered them into settling this case by letting them believe the text messages would be kept confidential" *id.* at 146, and that he knew defendants were bargaining for something they could not obtain. *Id.* at 225-226. He frankly admitted that "[t]here's no question that I let them believe one thing that wasn't accurate." *Id.* at 146.

b. In the Course of Representation and Materiality.

All of the statements were indisputably made in the course of negotiations undertaken by Mr. Stefani to globally resolve litigation on behalf of his clients. It is also beyond question that the statements were material to the negotiated resolution of the litigation. To be material, the representation need not relate to the sole or primary reason for the transaction, but must relate to an important fact. *Papin v Demski*, 17 Mich App 151, 156; 169 NW2d 351 (1969). See also, *Zine v Chrysler Corp*, 236 Mich App 261, 283; 600 NW2d 384 (1999) ("a material fact for purposes of the MCPA would likewise be one that is important to the transaction or affects the consumer's decision to enter into the transaction.").

Although there is abundant evidence from which materiality can be inferred, Mr. Stefani essentially admits it. He testified that there was no doubt in his mind that the primary catalyst for the defendants' change in position on the global settlement issue was the supplemental brief references to the text messages, *id.* at 122; the desire "to assure that these messages would not go public" prompted a settlement that very same day. *Id.* at 224-225. Confidentiality was the number one concern, *id.* at 123; "they wanted to keep [the text messages] confidential" *id.* at 123, 224-225, and put "teeth" into the commitment. *Id.* at 123. In Mr. Stefani's own words, "there's no question, if they had known I had given the messages, we wouldn't have settled it that day." *Id.* at 146-147.

c. Falsity.

In this Panel's view, the falsity of the statements made by Mr. Stefani is not a close question. We do not accept the fine line Mr. Stefani seeks to draw between a question which asks "we want the text messages, where are they" and questions which ask "where are all of the copies you made" or "how many copies and where are they?" In our considered judgment, each is a reiteration of the same question and each is designed to elicit the same response. It is not reasonable to conclude that the first question ("where are they") did not require Mr. Stefani to disclose the disk in the possession of the *Free Press*, but a question which asks "how many copies and where are they" would have elicited that information (as Mr. Stefani apparently argues). See *e.g., id.* at 225-226 ("None of them ever asked Have you ever given them to somebody else? Or How many copies did you make? Where are all of the copies you made? They never asked that.").

In another context Mr. Stefani acknowledged that if a judge asked him "Mr. Stefani, do you have any copy other than this copy, do you have any other ones or ***do you know where any other ones are***, I would, of course, have to be truthful and I would tell them, yes, I gave one to my buddy Ed or I gave one to my cousin Lucy ..." *Id.* at 104 (emphasis added). We fail to see how "do you know where any other ones are" and "where are they" substantively require different responses. Mr. Stefani's concealment is not excused by a purported failure to ask the right question.

Further, irrespective of the response required by other comparable iterations of the inquiry, we cannot logically conclude that the question "where are they" allowed Mr. Stefani to describe the location of some, but not all, of the text messages (and copies) that came into his possession. The question was not, "where are some of the text messages" or "where are you keeping two or three copies of the text messages." "Where are they" implies no limitation and his response would

lead one to reasonably believe that he had accounted for all of the copies (there is a copy in my office safe, another in a safe at my home, and another copy on my desk).

The statements Mr. Stefani made with respect to confidentiality were also false. Mr. Stefani knew to nearly a 100% certainty that the *Free Press* would publish the text messages, and that was clearly his intent. *See id.* at 106-107, 141, 197-198, 224. In fact, he believed that it was "not ethical to settle the case" without having the information become public. *Id.* at 89. Negotiating with Mr. McCargo to maintain the confidentiality of the text messages when Mr. Stefani had already committed the text messages to public disclosure is by omission a false statement.

d. Knowingly Made.

The final MRPC 4.1 issue is whether Mr. Stefani's false statements were knowingly made. The comments to MRPC 1.0 (governing the scope and applicability of the rules and commentary) provide that knowingly "denotes actual knowledge of the fact in question" and that "[a] person's knowledge may be inferred from circumstances."

Mr. Stefani's testimonial admissions do not leave room for equivocation on this issue. He admits to having known that, because of his arrangement with the *Free Press*, the defendants were bargaining for something they could not obtain. *Id.* at 225. This caused him to feel "badly" and conflicted," like he was "taking advantage of Mr. McCargo not being on his toes." *Id.* He was "uneasy about letting McCargo make a mistake and not correcting it," *id.* at 227, and "wrestled with the moral question." *Id.* at 204-205. He analyzed "whether it was fair" from a moral standpoint, and whether he had an obligation to "volunteer it," ultimately concluding that he was not going to "hurt my own clients by volunteering that information." *Id.* at 205. These admissions alone establish that Mr. Stefani was not ignorant of the truth. The falsity of his statements was not inadvertent but knowing.

Even aside from Mr. Stefani's admissions, an objective view of the record demonstrates that Mr. Stefani was not jesting when he claimed to have "maneuvered" the defendants into settling the case "by letting them believe the text messages would be kept confidential." *Id.* at 146. A calculated scheme to create this false impression is apparent.

The first step was to subpoena the text messages without giving timely notice to defendants or the Court, an admitted violation of the court rules. Then, Mr. Stefani specified delivery of the text messages directly to his office, despite a court order requiring that they be produced to the Court. Upon receipt of the text messages, Mr. Stefani gave a copy to the *Free Press* and excerpted references in a supplemental brief on attorney fees. Mr. Stefani then provided the supplemental brief to Mr. McCargo alone, creating the impression that Mr. McCargo could decide whether and with whom the text messages would be shared. Then there was the promise to hold off filing - and to not file at all - if a global resolution could be reached. In drafting the settlement agreement, Mr. Stefani agreed to put "teeth" into the promise of prospective confidentiality, an empty gesture given the retrospective disclosure that had already been made. Mr. Stefani's partial answer to "where are they" furthered the illusion by falsely assuring defendants that the text messages had

been secured. This was followed by Mr. Stefani's retrieval of the *Free Press*' disk (an utterly futile act given Mr. Stefani's failure to determine whether a copy had been made), the illusory escrow arrangement, and the truly ironic redrafting of the settlement agreement to insulate the text messages from a possible *Free Press* FOIA request. As to the latter point, Mr. Stefani testified:

> [S]ince I already knew that the Free Press or felt very strongly the Free Press was going to do a story about the Mayor's perjury, I saw no harm in going along with the change and, of course, by doing that it allowed my clients and me to get paid..."

Id. at 143.

In summary, while it certainly may have been a laudable goal to provide the public with information regarding the serious misdeeds of Mr. Kilpatrick, nevertheless and importantly, a lawyer must adhere to the obligations imposed by the Rules of Professional Conduct, which are not situational, and require ethical behavior at all times. We therefore find that Mr. Stefani's statements during negotiations with Mr. McCargo violate MRPC 4.1.

2. The "Statements" to Mr. McCargo Violate MRPC 8.4 and MCR 9.104(A)(1)-(4).

For the reasons expressed above, we also find that Mr. Stefani has engaged in misconduct as defined by MRPC 8.4(a)-(c) and MCR 9.104(A)(1)-(4). More specifically, our finding that Mr. Stefani violated MRPC 4.1 triggers a finding of misconduct under MRPC 8.4(a) ("misconduct occurs when a lawyer violates or attempts to violate the MRPC") and MCR 9.104(A)(4) (defining misconduct as conduct which violates the rules of professional responsibility adopted by the Supreme Court).

Further, our finding that Mr. Stefani knowingly made a false statement of material fact to a third party in the course of representing a client triggers a violation of MRPC 8.4(b) (which encompasses within the definition of misconduct, conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) and MCR 9.104(A)(3) (which prohibits conduct that is contrary to justice, honesty, or good morals). Such conduct is also prejudicial to the administration (and proper administration) of justice, and therefore proscribed by MRPC 8.4(c) and 9.104(A)(1). Finally, it takes no great leap of faith to conclude that such conduct exposes the legal profession to contempt and reproach, thereby constituting misconduct within the meaning of MCR 9.104(A)(2). For these reasons, misconduct proscribed by MRPC 8.4(a)-(c) and MCR 9.104(A)(1)-(4) has been established.

B. Mr. Stefani's Testimony During the *McCargo* Hearing Did Not Violate MRPC 4.1, MRPC 8.4 or MCR 9.104(A).

Respondent's Exhibit D [*McCargo* 07/23/09 hearing transcript, at 119] shows that the statement alleged by Petitioner in paragraph 20 of the formal complaint was made. Respondent contends that the answer as reported in the transcript was completely truthful as responding to what he considered the question to mean: do you know who gave the SkyTel records to the Free

Press that it published? Tr 02/07/11 at 211. Respondent claims he does not know whether he was the source of the text messages published by the *Free Press*, or whether the *Free Press* was able to obtain those messages directly by pursuing contacts with SkyTel provided by Respondent. Thus, the answer in the transcript, "I do not, no," in response to the question Respondent says he thought he was being asked would not be untruthful.

We are persuaded that Respondent understood the question in the manner he testified to. This is a more plausible understanding of the evidence than a reading which would have Respondent uttering an obviously untrue response. We agree with Respondent that, after having so carefully answered previous questions to the same effect, such a flat denial "doesn't make sense." *Id.* at 212. Thus, we do not find that the conduct alleged in paragraph 20 of the formal complaint violates any applicable rule.

C. Mr. Stefani's Deposition Testimony in *Detroit Free Press v City of Detroit* and His Testimony Before the Detroit City Council Did Not Violate MRPC 4.1, MRPC 8.4 or MCR 9.104(A).

As described above, during a deposition in *Detroit Free Press v City of Detroit*, Mr. Stefani was asked a series of questions regarding the SkyTel text messages. During a hearing of the Detroit City Council, he was asked whether the text messages were obtained legally. The GA challenges Mr. Stefani's responses to these questions as further evidence of misconduct.

While Mr. Stefani's testimony on these occasions was less than forthright, we do not find that it constitutes professional misconduct or a violation of the rules as we understand them.

Misconduct having been established, the Attorney Discipline Board shall schedule a separate disciplinary hearing to address aggravating and mitigating factors.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #25

Dated: November 16, 2011 **By:** Stephen D. McGraw

Stephen D. McGraw, Chairperson

Statement of Panel Member Dunn Concurring in Part, Dissenting in Part:

I. Concurring statement:

A. I believe additional discussion and legal analysis of MRPC Rule 4.1 and its comment is needed. I would not want our opinion to be viewed as precedent that could expose any lawyer who decides not to disclose a piece of useful information in a matter to grievance prosecution. The law on the subject is ample and, I believe, worth wending our way through in the interest of clarity. In the balance here is an overall duty of loyalty to a client, which requires competent and diligent representation and confidentiality, against a specific duty not to make knowingly a false statement of material fact. Accordingly, the result must be justifiable under extensive interpretive resources applicable. This matter is not as simple as it has been made to seem.

There can be no serious dispute about most elements of this violation: the questions whether the statements were material and were made knowingly and in the course of representation, and whether Mr. McCargo is a third party within the meaning of the rule, must clearly all be answered in the affirmative. Violation of MRPC Rule 4.1 does not require adverse effect, only the act itself.[1] The question then comes down to: *was a false statement made*? As discussed below, answering this question requires sustained analysis.

Was an express statement that was false actually made? Petitioner has alleged in paragraph 16 of the formal complaint that Stefani "told Samuel E. McCargo" certain specific untrue statements - there are *no other copies* than in Respondent's safe, at his home or on his desk; and *no one else* had been given access to them other than specifically named persons. Stefani has denied these allegations, and disputes (Tr. 200, 2/7/2011) that the questions that allegedly gave rise these answers were in fact asked. Mr. McCargo testified that they were asked (Tr. 34-5, 2/7/2011). Stefani has testified that he maneuvered the settlement by letting the Mayor believe something that was not possible (Tr. 146, 2/7/2011), and that he researched the law of silent fraud (Tr. 227, 2/7/2011). That being so, it would seem unlikely that Stefani would make affirmatively untrue statements as alleged. In addition, if the questions as McCargo claims were asked and assurances had been given as alleged, it stretches credulity to believe that the answers, particularly to questions that were the subject of "pressing inquiry" as McCargo has claimed (Tr. 35, 38, 2/7/2011), would not have been incorporated in a comprehensive agreement of settlement that provided severe economic penalties for violation - as noted by Stefani (Tr. 210, 2/7/2011).

I would find that the allegations of Petitioner in paragraph 16 of the formal complaint, to the extent they require us to find that Stefani "told" McCargo certain false facts, have not been proven. If the conclusions of my colleagues are based, as they say, on Mr. Stefani's testimony, then they must credit his version of why the questions were asked, not infer that they meant what they

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[1] *Restatement of the Law Third, The Law Governing Lawyers*, §98, cmt. C notes: "For professional discipline purposes, the lawyer codes generally incorporate the definition of misrepresentation employed in the civil law of tort damage liability for knowing misrepresentation, including the elements of falsity, scienter, and materiality. However, for disciplinary purposes, reliance by and injury to another person are not required."

think the questions must have meant. Stefani testified that he understood that McCargo and the City lawyers were concerned about whether the disks they were negotiating to recover actually existed (Tr.200,2/7/2011), whether the "records" identified in the proposed Settlement Agreement were the entirety of the text messages provided by SkyTel to Stefani (Tr.202,53-4,2/7/2011), and whether they would be able to recover all the records/disks that Stefani had; and that the questions of "where are they" are in that context. Moreover, McCargo's testimony confirms this (Tr. 33, 54, 2/7/2011).

Was a statement that was false made by silence? It is undisputed that conversations during the facilitation negotiations did include statements concerning the whereabouts of the SkyTel records and those who knew of them. Although Stefani denies that specific questions were asked to which the answers as alleged in paragraph 16 were given, he admits that answers to inquiries about the existence and availability of the records and the identity of persons who knew of the text messages were given in some context. (Tr. 127, 2/7/2011). In addition, Stefani admits not disclosing the sharing of text messages with the *Free Press* prior to the facilitation negotiations (Tr. 129-130, 2/7/2011) when he believed that doing so would have some effect on the settlement process (Tr. 147, 2/7/2011).

Petitioner has argued that in the context of the discussions in the facilitation and negotiation, Respondent's *not* disclosing the sharing of text messages with the *Free Press* violates the rule against making a false statement. Petitioner relies on Comment to MRPC 4.1 that states:

> Making a false statement may include the failure to make a statement in circumstances in which silence is the equivalent to making such a statement.

In support of his argument, Petitioner cites *Virzi v Grand Trunk Warehouse and Cold Storage Co*, 571 F Supp 507 (ED Mich, 1983), in which Judge Gilmore interpreted Model Rule[2] 4.1 - adopted by the ABA less than two months before the issue date of the court's opinion, and five (5) years before adoption of a similar rule in Michigan[3] - to mean that failure of counsel to disclose death of a client to opposing counsel during the course of negotiation of an insurance settlement, allowing the insurance company's lawyers to fear the testimony of the client as a witness should the case go to trial, was basis to set aside a settlement. Petitioner contends that the failure of Stefani to disclose the prior release of text messages to the *Free Press* during the facilitation settlement negotiations is highly analogous to the failure of counsel to reveal death of a client. (Petitioner's Proposed Findings of Fact and Conclusions of Law, at 9.) The court in *Virzi* cited State Bar of Michigan Formal Ethics Opinion 142 as addressing what it deemed a comparable problem. That opinion dealt with the misrepresentation by a lawyer not revealing the fact that the client was a minor, thereby giving the lawyer basis to attempt to set aside any adverse ruling because the client

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[2] American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules"), first adopted by the ABA in 1983.

[3] Model Rule 4.1 is derived from Canon 7 of the Code of Professional Responsibility. DR 7-102 provided that in representing a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal (A)(3), or knowingly make a false statement of law or fact (A)(5). Michigan adopted its version of the Model Rules in 1988.

was a minor and the adjudication would thus be invalid. This conduct violated a duty of candor to a court. The duty of candor to a court is covered by MPRC 3.3, not 4.1. The *Virzi* court concluded that the obligation of candor to a court under MRPC 3.3 extended to counsel for the other party; and said that it felt that candor and honesty necessarily require disclosure [to opposing counsel] of such a significant fact as the death of one's client, applying Model Rule 4.1 at 512. The court drew special attention to the Comment to Model Rule 4.1: "Misrepresentations can also occur by failure to act."[4]

ABA Formal Opinion 95-397, in construing the duty to reveal under Model Rule 4.1, expressly circumscribed the *Virzi* interpretation of the Rule: "The death of a client means that the lawyer no longer has a client, and if she does thereafter continue in the matter, it will be on behalf of a different client." At 365. Failure to disclose death misrepresents the correctness of a fact previously stated. The ABA Opinion adds in note 7: "... absent a prior representation that has become false or other circumstances creating a duty to speak, a lawyer has no general duty to advise his adversary of useful facts or promising legal theories." At 365, citing ABA Formal Opinion 94-387.

The ABA interpretation of Rule 4.1 - that it applies when there is misrepresentation by silence of a previously stated fact, and does not create of a duty of candor to opposing parties -- has been followed in other death-of-client cases. See, *Kentucky Bar Assn v Geisler*, 983 SW2d 578 (Ky 1997), interpreted in *Harris v Jackson*, 192 SW3d 297 (Ky. 2006). Also, see Illinois State Bar Opinion 96-3 stating that an action for personal injuries can be continued only by a representative of the estate under Illinois law, and proceeding without informing third persons of the death is a false statement of a prior represented fact.

Therefore, I reject the argument of Petitioner that *Virzi* establishes a rule of candor beyond previously represented facts to be applied to MRPC Rule 4.1. That does not end the inquiry, however.

The law on the subject of misrepresentation by silence or omission is plentiful, and, in applying the interpretative guidance provided by the Comment[5], presents challenges. To what

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[4] This language in Comment [1] to Model Rule 4.1 was replaced in the 2002 amendments to the Model Rules because the original language was deemed too vague. See Annotated Model Rules of Professional Conduct, Sixth Edition (American Bar Association, 2007, at 385). Model Rule 4.1 Comment now provides: "A misrepresentation can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." The Model Rule Comment does not contain a statement that silence can be a misrepresentation, as does the Michigan Comment. Although MPRC Rule 4.1 is identical to Model Rule 4.1(a), the more recent Comment to the Model Rule has not been adopted in Michigan, and a proposal to do so was rejected by the Michigan Supreme Court in ADM 2009-06. When the Michigan version of the Model Rules was adopted five years after *Virzi*, the Comment language that was significant to the court was not incorporated, and the language describing silence as misrepresentation, inset in text above, was adopted. The Michigan modification of the Model Rule Comment was intentional (see MRPC 1.0 Comment). Whether Michigan's Comment to Rule 4.1 is intended to have the equivalent function of the original Comment to Model Rule 4.1 is unknown, but arguable at best.

[5] As noted in MRPC Rule 1.0: "The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. . . . The comments are intended as guides to interpretation, but the text of each rule is authoritative."

extent does the Comment to Rule 4.1 seek to remind the lawyer of duties imposed by other law in relations with third persons (constraining bounds of advocacy), and to what extent does the Comment instruct that regardless of the common law of fraud and other core values of the legal profession (confidentiality, loyalty to client), there is a transcendent duty not to do anything to mislead a third person in the course of representing a client, embodied in Rule 4.1? Or, to frame these questions alternatively: where does one draw the line between silence that helps your client (thus serving the duties of confidentiality and loyalty) and full disclosure when opposing counsel or parties may misapprehend a fact that is important to them in resolving a matter? The comment to Rule 4.1 identifies the issue even if it does not clearly mark the boundary: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."

The law regarding silent fraud -- also known as fraud by nondisclosure or fraudulent concealment -- is quite clear in Michigan. While most frauds are based upon affirmative false representations of material fact, "[a] fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." *Williams v Benson*, 3 Mich App 9, 18-19; 141 NW2d 650 (1966), quoting *Tompkins v Hollister*, 60 Mich 470, 483; 27 NW 651 (1886). As a result, "the suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud." *Id.* at 19. In short, a party's "silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud as an actual affirmative false representation." *Trakul v Paul A. Trakul Trust & Sandra Woodruff*, 2008 Mich App LEXIS 1935 (Sept. 18, 2008); See, e.g., *Barrett v Breault*, 275 Mich 482; 267 NW 544 (1936); *Allen v Conklin*, 112 Mich 74; 70 NW 339 (1897); *Tompkins v Hollister*, 60 Mich 470; 27 NW 651 (1886).

The foregoing maxims raise the question: *When is it that one ought to speak?*

The leading contemporary case on silent fraud in Michigan is *M&D, Inc. v McConkey*, 231 Mich App 22; 585 NW2d 33 (1998). *M&D, Inc.* is somewhat unique in that it was decided by a special panel of seven judges of the Michigan Court of Appeals, convened for the purpose of resolving a conflict between a prior opinion in *M&D, Inc.* and *Shimmons v Mortgage Corp. of America*, 206 Mich App 27; 520 NW2d 670 (1994). In essence, the conflict panel was asked to consider the question of whether or not nondisclosure alone was sufficient to constitute silent fraud in Michigan. In *Shimmons*, the court held that a plaintiff may allege fraudulent concealment when a seller has knowledge of a defect and fails to disclose it to the buyer (even when the purchase agreement contains an "as is" clause). *Id.* at 29. The special conflict panel rejected the *Shimmons* holding and instead adopted the rule stated in *M&D, Inc.* that "in order to establish a claim of silent fraud, there must be evidence that the seller made some sort of representation that was false." *M&D, Inc.*, 231 Mich App at 25. It was not enough, as in *Shimmons*, that the seller had knowledge of a defect and failed to disclose it to the buyer. The panel further held that "[a] misrepresentation need not necessarily be words alone, but can be shown where the party, if duty-bound to disclose, intentionally suppresses material facts to create a false impression to the other party." *Id.* In short, *M&D, Inc.* stands for the proposition that, in Michigan, "silence cannot constitute actionable fraud unless it occurred under circumstances where there was a duty to disclose." *Id.* at 29.

Central to the court's holding in *M&D, Inc.* is the fact that the plaintiffs failed to ask the right questions. Plaintiff purchased a commercial property on an "as is" basis. 231 Mich App at 25. The property was subsequently leased to the operator of a pet supplies store and flooded after a heavy rainfall. *Id.* Evidence adduced at trial showed that the property had a long history of such flooding; however, "there was no evidence that plaintiffs asked whether the property had experienced any flooding, and defendants never made any representation concerning flooding to plaintiffs." *Id.* at 26. The court distinguished these facts from those found in *Groening v Opsata*, 323 Mich 73; 34 NW2d 560 (1948).

In *Groening*, the plaintiffs wished to purchase a home built on a bluff overlooking Lake Michigan. *Id.* at 77. Prior to purchase, plaintiffs asked defendants whether the home's proximity to the bluff was dangerous and defendants responded that the bluff was perfectly safe. *Id.* at 78. One year after plaintiffs had purchased the home, the bluff eroded and the home was destroyed. *Id.* at 79. Evidence offered at trial indicated that the defendants had known about the erosion risk for at least two years. *Id.* The court held that "concealment of material facts that one under the circumstances is bound to disclose may constitute actionable fraud" and that the defendant's answers to plaintiff's questions were tantamount to misrepresentation. *Id.* at 83. The court explained that "[the defendants] made replies to plaintiff's specific inquires, which replies did not bring forth the facts that plaintiffs were seeking to learn, but were in such form as naturally tended to reassure plaintiffs and to cause them to proceed on the assumption that the property was not in any danger from erosion." *Id.* at 82. After reviewing the facts of *Groening*, the *M&D, Inc.* court noted that in every case decided by the Michigan Supreme Court, "fraud by nondisclosure was based upon statements by the vendor that were made in response to a specific inquiry by the purchaser, which statements were in some way incomplete or misleading." *M&D, Inc.*, 231 Mich App at 30; See, e.g., *Nowicki v Podgorski*, 359 Mich 18; 101 NW2d 371 (1960); *Sullivan v Ulrich*, 326 Mich 218; 40 NW2d 126 (1949); *Wolfe v A E Kusterer & Co.*, 269 Mich 424; 257 NW 729 (1934).

More recent cases have not diverged from the silent fraud doctrine outlined in *M&D, Inc.* In *Hord v Environmental Research Institute of Michigan*, 463 Mich 399, 400; 617 NW2d 543 (2000), the plaintiff relocated to Michigan to take a job and was laid off about a year later. Plaintiff alleged that he would not have accepted the job had he not been presented with a misleading "operating summary" for the company. *Id.* at 402. Plaintiff argued that the "operating summary" presenting financial data from 1991 was used to mislead him about the financial condition of the company in 1992. *Id.* While a divided Court of Appeals accepted plaintiff's argument, the Michigan Supreme Court reversed and noted that "[p]laintiff had a simple, straightforward avenue to discover defendant's current financial condition. He simply had to ask." *Id.* at 407, quoting *Hord v Environmental Research Inst.*, 237 Mich App 95, 100; 601 NW2d 892 (1999) (Hoekstra, J., dissenting). The Court reaffirmed the *M&D, Inc.* holding that mere nondisclosure is insufficient to constitute silent fraud and noted that "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Id.* at 412; See *Buntea v State Farm Mutual Auto Insurance Co.*, 467 F Supp 2d 740,

745 (2006) ("The misrepresentation occurs when a party suppresses part of the truth when asked, not by mere nondisclosure.").

Thus, with few exceptions and none that govern, the abundant Michigan law on this point returns us to the place where the interpretations of MRPC 4.1 left us: a Michigan lawyer has a duty to correct a misapprehension of fact at least when that misapprehension arises from an express or tacit representation by the attorney.

Was the premise underlying respondent's negotiation of and entry into the settlement false? What distinguishes this case from those discussed above is that Respondent by his own actions created the falsity of the premise that was material: *that the text messages were not yet disclosed beyond the control of the parties to the settlement.*

Knowing of the uncertainty of how the trial judge would handle the text messages Respondent had surreptitiously obtained, having reason to believe that his obtaining the text message under a subpoena without informing other counsel was improper, having reason to believe that he was required to turn over the text messages to the trial judge but choosing not to do so, and believing that his delivery of text messages to the press would provide a defense to any further effort to suppress or recover the text messages by the third persons with whom he was negotiating, respondent alone advanced the premise that further disclosure of the text messages could be controlled through settlement and respondent alone had already created the falsity of the premise. These unique facts distinguish the conduct of respondent from that which has been found acceptable in the cases discussed above. The falsity of the premise could not have been known to or discovered by the third person independently. The premise must be regarded as a represented fact that was false. The premise could only be exposed as false by asking questions that the third person had no reason to ask if the premise of respondent's proposal was true.[6] We do not understand any of the cases dealing with misrepresentation by unstated fact to require the third person to pursue inquiry "are you lying to me?" when that is the only course of action that could elicit the truth.

Therefore, it is my opinion that respondent's conduct violates MRPC 4.1 because the premise of the negotiations and settlement, in turns advanced and affirmed by Respondent, constituted either a false statement when made or a prior representation that became false and was silently allowed to be relied on.

B. Limited by the following, I concur that Respondent's violation of MRPC Rule 4.1 is "professional misconduct" under MRPC Rule 8.4(a) and is "grounds for discipline" under MCR 9.104(A)(4). These rules are definitional, at best, and do not constitute additional offenses. Accordingly I find no independent meaning in them.

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[6] McCargo's testimony is that he asked the questions that were answered with additional misleading and untrue statements, but I have not considered that testimony credible in view of conflicting testimony and plausible alternatives to what the questions might actually have been. If McCargo had testified that he had no reason to ask such questions, his testimony might have been more persuasive.

II. Dissenting statement

I do not agree that finding a violation of Rule 4.1 opens the flood gates of Rule 8.4(b) and (c) and MRPC 9.104(A)(1), (2), and (3).

First, as noted in *The Restatement of the Law Third, The Law Governing Lawyers*, §5, comment C:

> ...[A] specific lawyer-code provision that states the elements of an offense should not, in effect, be extended beyond its stated terms through supplemental application of a general provision to conduct that is similar but falls outside of the explicitly stated ground for a violation.

This deference to the more specific rule when it is supposed to apply is supported in Comment [1] to Model Rule 4.1, which states:

> ...[F]or misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4. (emphasis added)

This matter involves representation of a client, and a specific Rule has been found applicable. There is no need to reach for more vague and arguably inapplicable statements of professional indignation.

The majority's approach is that violation of all these generality rules follows violation of any other rule as night follows day. Hence, they cannot both be meaningful. If the dishonesty prohibition of Rule 8.4(b) is to be read as another Rule 4.1, or simply as an effect of the cause, then one of them is superfluous or both are inadequately written. The automatic application of a more general rule under the night-follows-day approach has been rejected in *In re Haley*, 476 Mich. 180 (2006), applying the Canons of Judicial Ethics. It is similarly analyzed and rejected in *In re PRB Docket No. 2007-046* and *In re PRB Docket No. 2007-047*, 2009 Vt. 115, 2009 Vt. LEXIS 138 (2009) in the context of this case - a Rule 4.1 violation but refusal to apply what is Michigan's Rule 8.4(b) in the absence of conduct that indicates a lawyer lacks character required for bar membership, citing *D.C. Bar Legal Ethics Comm. Op 323* (2004). Mr. Stefani may have been wrong in his conclusions about his legal or ethical duty, but he did not ignore them. I do not find that Respondent's violation of MRPC Rule 4.1 reflects adversely on his fitness as a lawyer. To read MRPC 8.4(b) as applying to any dishonesty would result in overwhelming the disciplinary process with complaints against most members of the bar - it would be an absurd application of the Rule. There must be more than that. There is not more here.

I would expressly find that Respondent's conduct in violating MRPC Rule 4.1 was not prejudicial to the administration of justice, in violation of Rule 8.4(c) and MCR 9-104(A)(1) or (3).

I may hold a minority view - certainly a narrow one -- that the 8.4 subsections must have some independent meaning beyond other rules. If every violation of a rule invokes 8.4(c), then that should be so stated in the rules. Unfortunately, a study of cases shows that it is commonly

found merely as a result of a violation of another rule, and I think that is reflected in the majority opinion in this case, which offers no analysis or rationale for its finding. I could comfortably find that a violation of the 3 series of rules, ones that actually relate to the administration of justice, can be prejudicial. But would a misrepresentation under Rule 4.1 in a business transaction inherently be prejudicial to the administration of justice? Does abetting a result that seems "unjust" constitute prejudicing the administration of justice? Whose administration? Or is violation of Rule 4.1 prejudicial to the administration of justice simply because it is related to an ongoing proceeding?[7] It behooves us not to throw high sounding phrases around like lightning bolts in a high sense of indignation in the adjudication of discipline. We should be more discerning. Here, I do not see that an unjust or even unfair result occurred by Respondent's conduct, though others may differ. Nevertheless, violation of Rule 4.1 is clear. It is sufficient unto the day.

The formal complaint alleges that Respondent's conduct violates MCR 9.104(A)(2) (exposes the legal profession to obloquy, contempt, censure or reproach), and MCR 9.104(A)(3) (conduct contrary to justice). Mr. Stefani's conduct in misleading Mr. McCargo has reflected on himself as an individual, and in my view his conduct did nothing to bring shame to the profession. Further, as another panel has recently observed in an unrelated case, " these vague and ill-defined catchall rules add nothing to the important function of protecting the public, the profession, and the courts in this case . . . [R]espondent's conduct, and the conduct of all other members of the bar, is better measured and elucidated by the more precise rules. . . analyzed above." *Grievance Administrator v David T. Hill*, 10-128-GA, HP Report 09/20/2011, pp 4-5.

Dissenting Statement of Chairperson McGraw:

This matter, the allegations of misconduct, testimony, exhibits and applicable law hardly can be fairly characterized as simple although an experienced trial lawyer may not find it difficult to understand most of what occurred here. Indeed nothing about this panel's efforts to weigh the evidence, understand the applicable law and carefully apply it to the true facts, as is manifest in the painstaking hard work apparent in the Misconduct Report, should be viewed as simple or for that matter, a process that is an excuse for an academic exercise. Plainly any such conclusions are not right.

Obviously, and this is indeed obvious, reasonable minds may disagree regarding the law and facts of a disputed matter and in that spirit I respectfully dissent from Section V, B of the foregoing report on misconduct. I would find and conclude that Mr. Stefani's testimony during the *McCargo* hearing was dishonest and prejudicial to the administration of justice.

A witness testifying under oath has an obligation to tell the truth, the whole truth, and nothing but the truth. A lawyer as a witness has this same obligation. In testimony before the disciplinary panel in *Grievance Administrator v Samuel E. McCargo*, Mr. Stefani declined to answer whether he shared the SkyTel records with the *Free Press* or whether, before October 17, 2007, he gave them to anyone. He was then asked "Do you know who gave the SkyTel records to

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[7] And I note that the misconduct of this Respondent, in connection with that proceeding, has already been adjudicated. *Grievance Administrator v Michael L. Stefani*, Case No. 09-47-GA.

the Free Press?" to which he replied "I do not, no." Respondent's Exhibit D at 119. Mr. Stefani later testified that he answered in that manner because he did not know whether the *Free Press* had independently obtained the text messages, and whether those text messages were used in the story. Mr. Stefani claims he had no opportunity to explain his answer because an objection on relevancy grounds was sustained. Tr 02/7/11 at 172-175.

I do not accept Mr. Stefani's explanation of this response. The question was straightforward. It was not tied to any particular story or publish date. It merely inquired whether Mr. Stefani knew who gave the SkyTel records to the *Free Press*. Mr. Stefani's answer was unequivocal. It was not interrupted. He completed the answer before the objection was posed. Nonetheless, if he needed to supplement his answer to make it truthful, he knew, as a lawyer, how to do so. Mr. Stefani never expressed such a need, allowing an untruthful answer to stand. I therefore conclude that Mr. Stefani's untruthful testimony at the *McCargo* hearing constitutes misconduct within the meaning of MRPC 8.4(b) and MCR 9.104(A)(2), and is prejudicial to the administration of justice, contrary to MRPC 8.4(c) and MCR 9.104(A)(1).

I also note that the majority concludes Respondent must have misunderstood the question "Do you know who gave the SkyTel records to the Free Press" since his flat denial at the McCargo hearing doesn't make sense on account of his careful answers to previous questions to the same effect. Such a conclusion surpasses understanding in view of Respondent's admission on cross examination by counsel for the Petitioner that he lied to Charlie Le Duff of *The Detroit News* on September 18, 2008, when asked directly whether he had given the text messages to the media. Furthermore, although asked about it on more than one other occasion, Respondent didn't disclose that he had given the text messages to the *Free Press* and only made that disclosure weeks before another disciplinary proceeding initiated against him (referring to ADB Case No. 09-47-GA) for reasons that might advantage him there.

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission

Petitioner,

Case No. 10-113 GA

V.

MICHAEL L. STEFANI, P 20938

Respondent.
_____/

DISCIPLINE REPORT OF TRI-COUNTY HEARING PANEL NO. 25.

PANEL MEMBERS:

STEPHEN D. McGRAW, Chairperson
KRISTINE HEARD LONGSTREET, Member
WILLIAM B. DUNN, Member

APPEARANCES:

ATTORNEY GRIEVANCE COMMISSION
BY: Robert E. Edick, Deputy Administrator

Appearing on behalf of Petitioner

MOGILL, POSNER & COHEN
BY: Kenneth M. Mogill

Appearing on behalf of Respondent

AUTHORS: The Majority Report was written by Panel Member Dunn

The Dissent was written by Chairperson McGraw

I. EXHIBITS

None offered.

II. WITNESSES

Thomas J. Guyer
Angelo Iafrate
Luther A. Bradley
John M. Peters
Michael L. Stefani

III. FINDINGS AND CONCLUSIONS REGARDING DISCIPLINE

A. INTRODUCTION.

As stated in the Misconduct Report in this matter, filed November 16, 2011, (the "Report"), this panel found that Michael L. Stefani committed professional misconduct by knowingly making a false statement of material fact to a third person in the course of representing a client, in violation of Michigan Rule of Professional Conduct ("MRPC") 4.1, which declares in its entirety that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person." The panel did not find that a false statement was affirmatively made, but that a false impression was created and reinforced by respondent *despite respondent's knowledge* that the false impression was being relied on by defendant's counsel. (Tr. 2/7/2011, at 146.) In reaching its conclusion, the panel relied on Comment to MRPC 4.1, which states: "Making a false statement may include the failure to make a statement in circumstances in which silence is equivalent to making such a statement." In the unique circumstances of this case, the panel concluded that defendant's counsel, the "third person" with whom Mr. Stefani was engaged in negotiations, could not have known or discovered that Mr. Stefani's prior actions had already thwarted counsel's goal of preventing public disclosure of Skytel text messages, absent disclosure of that fact by Mr. Stefani (Report at 12); and the apparent premise of surrendering control over the text messages to

defendants was created, and supported at least by innuendo, by Mr. Stefani. Mr. Stefani testified that he researched the law of silent fraud, which he considered applicable, and had concluded that his conduct was not tortious under prevailing Michigan law. [1] (Tr. 2/7/2011 at 226, 227.) What Mr. Stefani failed to ascertain was that tort principles underlying the case law pertaining to silent fraud are not relevant in determining a violation of MRPC 4.1. (Report, concurring opinion, at 19.) We note that application of MRPC 4.1 to misleading silence or innuendo appears to be without precedent in the proceedings of the Attorney Discipline Board of Michigan.

As a consequence of this finding, the panel also found that Mr. Stefani had engaged in misconduct as defined in MRPC 8.4(a) and MCR 9.104(4). The majority opinion then stated:

> "Further, our finding that Mr. Stefani knowingly made a false statement of material fact to a third party in the course of representing a client triggers a violation of MRPC 8.4(b) (which encompasses within the definition of misconduct, conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) and MCR 9.104(A)(3) (which prohibits conduct that is contrary to justice, honesty, or good morals). Such conduct is also prejudicial to the administration (and proper administration) of justice, and therefore proscribed by MRPC 8.4(c) and 9.104(A)(1). Finally, it takes no great leap of faith to conclude that such conduct exposes the legal profession to contempt and reproach, thereby constituting misconduct within the meaning of MCR 9.104(A)(2). For these reasons, misconduct proscribed by MRPC 8.4(a)-(c) and MCR 9.104(A)(1)-(4) has been established." (Report, at 15.)

On February 8, 2012, this panel heard evidence in oral argument regarding appropriate sanction for the misconduct. The panel's analysis and findings follow.

B. GOVERNING LEGAL STANDARDS.

Panels of the Michigan Attorney Discipline Board ("ADB") have been directed by the Michigan Supreme Court to determine an appropriate sanction for professional misconduct by

[1] A brief review of Michigan law on the principles of silent fraud involving attorneys is contained in the Report at pp 20-22 It indicates that Mr Stefani's conclusion as a matter of tort law was not incorrect.

following the analytical framework set forth in the American Bar Association Standards For Imposing Lawyer Sanctions (referred to herein as the "Standards" and each a "Standard"). In *Grievance Administrator v Lopatin,* 462 Mich 235, 244 (2000, "*Lopatin*"), the Supreme Court explained that the basic goal of the attorney disciplinary system, as stated in MCR 9.105 is to protect the public, the courts, and the legal profession. To that end, the Court directed ADB panels to conduct a three step analysis in determining an appropriate sanction for attorney misconduct.

The panel is to make initial inquiry by answering three questions: 1) what ethical duty did the attorney violate – was it a duty to a client, the public, the legal system, or the profession?; 2) what was the lawyer's mental state – did the lawyer act intentionally, knowingly, or negligently?; and 3) what was the extent of the actual or potential injury caused by the lawyer's misconduct – was there a serious or potentially serious injury? *Lopatin,* at 239.

Second, the panel must select a sanction that corresponds to the type of misconduct committed by the attorney from the Standards for a variety of types of misconduct.

Finally, after identifying the Standards sanction for the particular misconduct, the panel may consider evidence of relevant aggravating and mitigating factors that may influence the appropriateness of a sanction under all the circumstances. After reviewing these factors, the panel decides whether to increase or decrease the recommended sanction. *Lopatin,* at 240, citing Standard 9.1.

C. LEGAL ANALYSIS

1. Duty Violated, Mental State and Actual or Potential Injury.

This panel has determined that Mr. Stefani violated MRPC 4.1. Inherent in the charge of misconduct under this rule is that the misconduct involves a third person, in this case, an opposing lawyer; and that the charged lawyer acted knowingly. (Report, at 12.)

The Report made no findings of any injury caused by Mr. Stefani's conduct. We note that a finding of misconduct in violating MRPC 4.1 does not require either reliance by or injury to the third person. See, Restatement of the Law, Third, The Law Governing Lawyers, Section 98, cmt. C.

In oral argument in the discipline phase of this case, petitioner has propounded the existence of three injuries: (1) had the defendants known that the text messages had already been disclosed and that confidentiality of them was no longer possible, they would not have settled the case, "*at least not then...*" (Tr. 2/8/2012, at 30, emph. added); (2) defendants were "deprived of the opportunity to seek judicial relief" [the prompt settlement thus foreclosed judicial appeal of other issues] "*however unlikely that might have been.*" (*Id.*, emph. added); and (3) defendants were deprived of the opportunity to have an in-camera review of the text messages. (*Id.*)[2]

The record in the misconduct phase of this matter shows that the acceleration of timing of settlement, although affecting a change in conduct at the moment, provided for payment of a judgment that had already been entered, and certain attorney fees that were less than those statutorily permitted and which, based upon testimony of Judge Callahan in *Grievance*

[2] Based on the testimony of Mr. McCargo, after the Skytel text messages had been delivered into and taken out of escrow by a representative of defendant Kilpatrick in fulfilling the Settlement Agreement the parties had entered into, the text messages were never presented to the court for in-camera review, even though the defendants remained unaware that a copy of the text messages had been given to The Detroit Free Press (Tr. 2/7/2011, at 41)

Administrator v. Michael L. Stefani, ADB Case No. 09-47-GA ("Stefani I")[3] would have been awarded in the absence of settlement. (Stefani I Misconduct Report, 3/2/2010, at 22.) The text messages relating to the perjury of Mr. Kilpatrick and Ms. Beatty concerning the firing of Mr. Stefani's clients and concerning their own relationship would have been admitted into evidence, thus disclosing the content that defendant's counsel wished to conceal. *Id.* The settlement ended the continued accrual of judgment interest, approximately $1,000 per day. (Tr. 2/7/2011, at 47.) Defendant's counsel believed there were no viable avenues of legal appeal evident in the underlying case. *Id.* Whatever injury resulted from the deprivation of further appeals was at best tactical, in delaying what the affected counsel believed to be an inevitable conclusion and in possibly leveraging a decreased settlement by forcing the victorious plaintiffs to wait longer and longer for satisfaction of their claim. Only on the basis that injury results from a change of position for a tactical advantage of delay in paying a judgment can acceleration of settlement be considered injurious.

The Standards define "injury" as harm that results from the lawyer's conduct; and the harm must be caused to a client, the public, the legal system or to the profession. The panel recognizes that Mr. Stefani's misconduct resulted in a Settlement Agreement, which, although omitting representations concerning the whereabouts or past disclosure of text messages while providing extensively for penalties for future disclosure, would not have been entered into at that time had the Mr. Stefani disclosed that he had previously delivered a copy of the text messages to the press. Despite the absence of tangible injury, this panel believes that Mr. Stefani's

[3] *Stefani I* arose out of the same underlying facts as this case, but in which Mr Stefani was charged with misconduct for causing the text messages obtained from Skytel to be delivered to Mr Stefani and not to the Court as required by Court Order; for failing to report another lawyer for violating Rules of Professional Conduct in committing perjury in deposition and trial testimony; and, by executing a confidentiality agreement about disclosure of text messages in connection with the settlement of the *Brown/Nelthrope* and *Harris* cases, for committing a criminal act of compounding or concealing a crime. All issues pertaining to such alleged misconduct have been adjudicated in *Stefani I.*

misconduct in advancing settlement based upon a false, unspoken premise was injurious to the legal process. We do not conclude, however, that such injury was serious or potentially serious under the circumstances; and in the definitional categories of the Standards, we conclude that there was "little or no" injury. As we discuss in the following section, however, imposition of discipline under the appropriate Standard does not consider injury as a factor.

2. **Determination of the ABA Recommended Sanction.**

In oral argument, both petitioner and respondent addressed application of Standard 6.1 as the source of the recommended sanction. Both acknowledged that Standard 6.1 applies to false statements, fraud, and misrepresentation to a court. Petitioner has urged that because the text messages were still under an order of a court for delivery to the court, whatever misconduct occurred became a false statement to the court when the settlement was achieved. (Tr. 2/8/2012, at 53.)[4] We reject this tenuous connection as rationalizing application of Standard 6.1. In this case, Mr. Stefani was charged with violating MRPC 4.1, false statements to a third person, not MRPC 3.3, candor to a tribunal, and a finding of misconduct is based on MRPC 4.1.

Both petitioner and respondent appear to have relied on an appendix to the Standards that links Standard 6.1 to misconduct resulting from a violation of MRPC 4.1. Prior Attorney Discipline Board cases have stated that Standard 6.1 does not apply in the case of misconduct to a client, the public, or other lawyers, but applies in the case of misrepresentation to a tribunal.[5] *Grievance Administrator v Keith J. Mitan,* ADB Case No. 06-74-GA; *Grievance Administrator v Alexander Benson,* ADB Case No. 08-52-GA; *Grievance Administrator v Kenneth P. Williams,*

[4] The terms of the Settlement Agreement were not approved by the Court, which simply issued an order of dismissal of the *Brown/Nelthrope* case on the parties' representation that the case had been settled. Although accelerated in time as a product of the misconduct, the Settlement Agreement itself contained no misrepresentations The fact that the text messages had been obtained and not delivered to the Court and were then the subject of a separate confidentiality agreement was not disclosed to the Court, but that has already been the subject of the *Stefani I* disciplinary proceeding.

[5] The Appendix properly notes that Standard 6.1 applies in the case of misconduct for violation of MRPC 3.3, Candor to a Tribunal.

ADB Case No. 03-80-GA. See also, *Disciplinary Matter involving West*, 805 P.2d 351 (AK 1991).[6]

It is the duty of a hearing panel to discern the correct discipline, regardless of the parties' suggestions. *Lopatin*, 462 Mich. at 248, n.13; *Grievance Administrator v James R. Phillips*, ADB Case No. 11-62-JC. Our review of other standards and case law[7] directs us to apply Standard 5.1, captioned Failure to Maintain Personal Integrity, in the case of misconduct for violation of MRPC 4.1 and under MRPC 8.4(b). This Standard applies when a lawyer engages in criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation.[8]

Standard 5.1 provides a four part strata of disciplinary consequence – disbarment, suspension, reprimand, and admonition – depending on the severity of the misconduct. In each stratum it is necessary to find that the lawyer's conduct in some degree reflects adversely on the lawyer's "fitness to practice."[9] Disbarment (Standard 5.11) is an appropriate sanction when the

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[6] The one exception appears to be *Grievance Administrator v. Mark T. Light*, ADB Case No. 98-198-GA, in which Standard 6.1 was applied in the case of a misrepresentation to the Attorney Grievance Commission, which is not a tribunal Sanctions under Standard 6.1 were imposed in *Grievance Administrator v. George T Krupp*, ADB Case No. 96-287-GA in a conflation of misconduct under MRPC 3.3 and MRPC 4 1 (more appropriately a MRPC 3.4 than a 4.1 violation) arising out of the same conduct, which occurred in a court room. Although it appears to be a case in which 6.1 was used when a MRPC 4.1 violation occurred, it can be explained that the greater applicable penalty, or more onerous discipline, was be imposed when two choices are available.

[7] See, *In re Rosen*, 198 P 3d 116, 2008 Colo Lexis 1735(CO. 2008)

[8] In the Michigan Rules of Professional Conduct, Rule 8 4(b) combines the dishonesty, etc. and criminal conduct offenses, whereas in the Model Rules of Professional Conduct, misconduct involving criminal conduct adversely reflecting on the lawyers fitness is the subject of Rule 8 4(b), and dishonesty, etc., without consideration of reflection on lawyer fitness, is the subject of Rule 8.4(c). Standard 5.1 applies to both Model Rules and to Michigan Rule 8.4(b).

[9] We observe that "fitness to practice" is expressed in three ways in Standard 5.1 The preamble in Standard 5.1 qualifies criminal conduct as that which reflects adversely on a lawyer's "fitness as a lawyer in other respects" (other than honesty or trustworthiness) but omits any reference to any such reflection as to dishonesty, etc. – effectively replicating the pattern of Model Rules 8 4(b) and 8 4(c) However, Standard 5.11 (Disbarment) pertains to dishonesty, etc. that reflects on the lawyer's "fitness to practice," while Standard 5.13 (Reprimand) and Standard 5 14 (Admonition) refer to a lawyer's "fitness to practice law." Because there is no criminal conduct implicated in this case, we disregard the phrase "fitness as a lawyer in other respects" and are guided by the specific reference to

conduct is "intentional" and the dishonesty, etc. "seriously" adversely reflects on the lawyer's fitness to practice. Suspension (Standard 5.12) is appropriate when the conduct is "knowing" and reflects "seriously" on fitness.[10] Reprimand (Standard 5.13) is appropriate when the conduct is "knowing" but the reflection on fitness is less than "seriously" adverse.

Fitness to practice. Other than the conclusion of the majority of this panel that violation of MRPC 4.1 triggers a result that the respondent's fitness "as a lawyer" has been adversely reflected upon (Report, at 15), the panel has made no findings or previously drawn any conclusion on this subject. No evidence or argument was presented at either the misconduct hearing or the discipline hearing addressing the subject of fitness to practice law.

We believe it is not unreasonable to conclude in this case that the dishonesty found in the violation of MRPC 4.1 reflects adversely on the respondent's fitness to practice law, however temporally; and the threshold for considering a sanction under Standard 5.1 is thus met. We have no basis, however, to conclude that the conduct reflects "seriously" on respondent's fitness, and do not. Accordingly, neither Standard 5.11 nor Standard 5.12 can be considered as expressing presumptively appropriate sanctions.

Knowing or Intentional Misconduct. A factor in ascertaining the presumptively appropriate sanction under Standard 5.1 is the state of mind of the lawyer. Standard 5.11 links "intentional" misconduct with disbarment, and Standard 5.13 links "knowing" misconduct with

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"fitness to practice (law)" in the strata of disciplinary consequences pertaining to dishonesty, etc. notwithstanding the omission of that qualifier in the preamble

[10] It has been noted in prior ADB cases that Standard 5.12 omits mention of dishonesty, etc. misconduct, and refers only to certain criminal conduct, thus on its face precluding presumptive application of suspension for conduct not specified. See, e.g., *Grievance Administrator v Arnold M Fink*, ADB No. 96-181-JC, at 8, *Grievance Administrator v. Kenneth P Williams*, ADB No. 03-08-GA, at 6. By its Order closing ADM File No 2002-29, the Michigan Supreme Court left in place the Standard in the form promulgated by the American Bar Association, although a change to harmonize it with its fellow Standards was recommended by the *Report of the ADB to the Michigan Supreme Court Regarding Proposed Michigan Standards for Imposing Lawyer Sanctions* (June 2002). Thus the Court appears to have sanctioned the limitation of Standard 5.12 to certain criminal matters only, as it reads. How this should affect application of *Lopatin* n.13 is unclear. We do not apply it for other reasons, however.

reprimand. In the Report, the panel found that the misconduct was "knowing," as that is an element of finding a violation of MRPC 4.1. In addressing the application of Standard 6.1 at the discipline hearing, petitioner argued that Standard 6.12 would be a better fit in this case than Standard 6.11 because Standard 6.12 does not require that conduct involve intent to deceive, whereas Standard 6.11 does. (Tr. 2/8/2012, at 52.) Respondent has testified that he researched the law of silent fraud, that he never made any affirmatively untrue statements (the panel found none), that he knew defendant's counsel was missing the key fact about which he believed he had no duty to enlighten him, but would have told the truth if asked. (Tr. 2/7/2012, at 201.) He did not intend to lie. All this indicates a clear plan to not reveal a key fact unless asked. In lay terms, it appears "intentional," although neither petitioner nor respondent has so characterized it.

The Standards provide definitions of intent and of knowing conduct that are not particularly helpful. "Intent" is defined as the conscience objective or purpose to accomplish a particular result. "Knowledge" is defined as conscious awareness of the nature or attendant circumstances of conduct, but without the conscience objective or purpose to accomplish a particular result.

We are without factual or legal basis to reach a conclusion that the respondent's "knowing" conduct was "intentional" conduct as that has been applied in other ADB cases to meet the level of behavior required by Standard 5.11, such that it would provide the presumptively appropriate sanction. We also take into account the argument of petitioner in urging a sanction based on knowing, not intentional, behavior.

For the foregoing reasons, specifically, the lack of "intentional" as opposed to "knowing" conduct, and the absence of "serious" reflection on the respondent's fitness to practice law, we conclude that sanction under Standard 5.11 or Standard 5.12 (were it drafted to apply to the

misconduct) is not presumptively appropriate. We conclude that reprimand is the presumptively appropriate sanction under Standard 5.13.

3. **Relevant Aggravating and Mitigating Factors.**

Once a presumptively appropriate Standard has been identified, the panel may consider aggravating and mitigating circumstances to consider whether the Standard provides a correct sanction. Standard 9.1. The Standards provide no guidance about the weight any of the factors is to be given, or what it takes to be aggravated or mitigated from a presumptively appropriate Standard sanction to another sanction.[11]

Petitioner has posited the following factors as aggravating circumstances to be considered in imposing discipline (Tr. 2/8/2012, at 31-34):

- Respondent's substantial experience in the practice of law--Standard 9.22(i). The record shows that Mr. Stefani has practiced law for more than 40 years (Tr. 2/8/2012 at 23).
- Dishonest or selfish motive—Standard. 9.22(b), by achieving an accelerated settlement, while ensuring that the text messages were made public.[12]
- Refusal to acknowledge wrongful nature of conduct—Standard 9.22(g), by continuing to insist he did not lie to Mr. McCargo, by blaming others for blocking delivery of text messages, and by misleading the public that the court would suppress the messages during the course of the case.

[11] As summarized in *Grievance Administrator v Ralph E Musilli,* ADB Case No. 98-216-GA, citing *Lopatin* n.13: "In the final step of the process of determining the appropriate discipline, panels and the Board must consider whether the ABA Standards have, in their judgment, led to an appropriate recommended level of discipline in light of factors such as Michigan precedent, and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances."

[12] Petitioner has asserted that this was a matter of Mr Stefani eating his cake and having it, too. (Tr 2/8/2012, at 31.) There has been no allegation of misconduct for making the text messages public.

Respondent's counsel argued that the clean record of Mr. Stefani over his lengthy career demonstrates that the misconduct was aberrational. Respondent offered as mitigating factors (Tr. 2/8/2012 at 41-43):

- Absence of a prior disciplinary record—Standard 9.32(a), other than the related matter of *Stefani I.*
- Absence of a dishonest or selfish motive—Standard 9.32(b).
- Cooperative attitude toward the proceedings—Standard. 9.32(e).
- Character and reputation—Standard 9.32(g).
- Imposition of other penalties or sanctions—Standard 9.32(k).
- Remorse—Standard 9.32(l).

This case is intertwined with *Stefani I*, which arose out of the same underlying facts as this case, but in which Mr. Stefani was charged with misconduct for other matters.[13] In the course of the misconduct hearing in *Stefani I*, Mr. Stefani admitted that he had given the text messages to a reporter at the Detroit Free Press. The Grievance Administrator then sought to amend or supplement its Complaint to add charges of misconduct relating to Mr. Stefani's prior testimony to the contrary, but the request was opposed by Mr. Stefani and was denied by the hearing panel in that case on constitutional grounds of due process. As that case then proceeded, misconduct was found only as to the charge based on failure to turn the text messages over to the Court, a violation of MRPC 3.4(c). In its discipline report issued June 23, 2010, that hearing panel determined that the presumptively appropriate sanction for respondent's conduct was under Standard 6.22, calling for suspension, but found sufficient mitigating factors to impose a reprimand. The Board, in an opinion dated May 11, 2011, modified the hearing panel's order of

[13] See note 3.

discipline of reprimand to suspension of respondent's license for 30 days, agreeing with the hearing panel's determination that suspension was the presumptively appropriate sanction, but finding that there was insufficient mitigation to justify the lesser imposition of reprimand.[14]

The present case relates to the conduct that was not subjected to disposition in *Stefani I*, but its relationship to it is undeniable—such that petitioner has conceded that the discipline imposed on Mr. Stefani in that case should be credited or offset against discipline in this case. (Tr. 2/8/2012 at 28-29.) We note also that petitioner did not posit as aggravating factors in this case either the prior disciplinary offense in *Stefani I* (Standard 9.22(a)), or that the finding of misconduct in *Stefani I* and in this case manifested multiple offenses (Standard 9.22(d)).

There seem to be several courses for us to follow in reaching our determination of disciplinary sanction. One is to consider this and the prior case as effectively singular, as the Grievance Administrator sought originally, and determine the appropriate discipline with findings of two acts of misconduct, considering the presumptively appropriate sanction of suspension for the misconduct found in *Stefani I*, and actually applied, and the misconduct in this case as an aggravating factor, multiple offenses (Standard 9.22(d)). Another is to disregard all linkage between the two cases and findings of fact in *Stefani I*, except for its existence as a prior disciplinary offense to be considered as an aggravating factor in this case. A third is to reach a conclusion in this case and then reflect on how it fits with the results in *Stefani I* Clearly, it seems fundamentally fair to consider that neither the Administrator nor respondent should be either worse or better off as a matter of disciplinary consequence as a result of bifurcation of the charges.

[14] The statements in this paragraph are based on the Hearing Panel's Misconduct Report in ADB Case No. 09-47-GA, March 2, 1010, at 2-4, that panel's Order Denying Motion to Supplement the Formal Complaint, dated November 2, 2009; and the Board Opinion dated May 11, 2011.

If we follow the first course noted above, we observe the prior hearing panel's views of the same aggravating and mitigating circumstances presented in this case:

> [W]e disagree with the Petitioner's assertion that Mr. Stefani refused to acknowledge the wrongful nature of his conduct. Mr. Stefani admitted that he did not use good judgment. (Tr at 79, 10/8/09). Finally, the panel declines to adopt Petitioner's position that Mr. Stefani's long career and his service as a volunteer panelist for the Attorney Discipline Board constitute aggravating factors. As discussed below, we consider the fact that Mr. Stefani has practiced law for over 40 years without any disciplinary record to be a mitigating, not aggravating, factor in this analysis.
>
> Several mitigating factors are relevant to our continued analysis. Mr. Stefani has had no record of professional misconduct or discipline during the 41 years he has been licensed to practice law in this State, and the misconduct under review by this panel appears to have been an aberration unlikely to be repeated. There also was no evidence that Mr. Stefani was motivated by a dishonest pecuniary motive in settling the Brown/Nelthrope and Harris cases. In fact, the evidence showed that he accepted a reduced attorney fee as part of the settlement of the Brown/Nelthrope and Harris cases. Mr. Stefani testified that although it was highly likely that his clients would prevail on appeal and ultimately receive some $10 to 12 million (with a potential for attorney fees on appeal for Mr. Stefani), his clients were strongly in favor of receiving less if it meant that the litigation would end then. (Tr. 83-84, 11/12/09.) The evidence established that the parties agreed to settle both the Brown/Nelthrope case, as well as a case between Walter Harris and the City of Detroit, for a total of $8 million. As part of the settlement, Mr. Stefani withdrew his request for statutory attorney fees under the Whistleblower's Protection Act, which he had calculated as being some $ 958,000. (*Petitioner's Exhibits 8, 12, 15.*) Rather than revealing a dishonest financial motive, we believe Mr. Stefani's conduct in this regard indicated instead that he was focused on his clients' best interests and express wishes in pursuing a settlement of their cases.
>
> Furthermore, Mr. Stefani demonstrated a cooperative attitude throughout these proceedings. In addition, the panel heard

testimony from nine witnesses who spoke of his character and integrity throughout his long career. (Tr. 61-85, 11/18/2009.)[15]

Our conclusions regarding aggravating and mitigating factors do not differ substantively from those of the hearing panel in that case, and we specifically note the following:

- Respondent's conduct post-judgment in the *Brown/Nelthrope* case, actions that resulted in *Stefani I* and this case, appears to be unique in a long and respected career; and we believe is unlikely to occur again.
- Respondent's long career, though in theory justifying an expectation that experience should have informed him, has otherwise demonstrated that he is a lawyer of good character. The panel notes that respondent called a total of nine character witnesses in the misconduct and discipline hearings, all of whom testified to Mr. Stefani's effective counsel and integrity in all aspects of his career, without challenge. (Tr. 2/7/2011, at 236-252; Tr. 2/8/2012, at 6-19.)
- Respondent was not careless in forming his course of conduct. He believed that he was within legal bounds, based on research. Although the result of the research was not adequate under the circumstances, he pursued a lawyerly course of action in forming his conduct.
- Respondent's defense of his conduct through the misconduct phase of this case cannot be construed as a refusal to acknowledge the wrongful nature of his conduct. At the misconduct hearing, he testified to remorse about letting Mr. McCargo believe something that wasn't so, and struggled with his conscience about that while continuing to believe he was doing the right thing on behalf of his clients. (Tr. 2/7/2011, at 204-205.) Respondent testified that it was not until

[15] Discipline Report of Tri-County Hearing Panel No 26, in *Grievance Administrator v. Michael L Stefani,* ADB Case No 09-47-GA, at 6-8.

he read the Report did he comprehend that he had been wrong, and so acknowledged it, expressing remorse. (Tr. 2/8/2012, at 22-24.)

- Ethics case law and commentary on the subject of false statements by omission, which differs from tort law, is by no means clear or uniform; and even when reasonably researched does not readily provide absolute answers. Indeed, the right to maintain silence about facts is also recognized in Comment to MRPC 4.1, stating that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." The duty is to not misinform, but the territory between the right, even the duty, not to inform, on one hand, and when silence is the equivalent to making a false statement, on the other, may be referred to as "an ethical no-man's land" in which the lawyer may find less guidance than sought.[16]
- There was not a selfish or dishonest motive. The effort to bring the litigation to an end—post-judgment—was in the interest of respondent's clients, and actually resulted in fees to respondent less than may have been awarded; and actually benefitted defendants in several respects—controlled the fee award and ended accruing interest on judgment. The motive to settle was client directed and serving. Disclosing the text messages to the Free Press was not evidence of a selfish motive in making a false statement to Mr. McCargo.
- It appears that respondent has cooperated fully with the proceedings in this case.

[16] See, Michael H. Rubin, *The Ethics of Negotiations Are There Any?*, 56 La. L. Rev 447 (1995); Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations. Should There Be A Safe Harbor?*, 18 Geo. J. Legal Ethics 179 (2004); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical* Conduct, 34 Hofstra L. Rev. 771 (2006) Although the majority opinion would characterize the behavior as an obvious violation of MRPC 4.1, the opinion is based on its regard of the conduct and abhorrence of Mr Stefani's tactics. The concurring opinion found the legal conclusion of misconduct much more difficult to reach, and the violation less than obvious. If the majority opinion were to be read as instruction to the profession that silence about a known fact in negotiations is unacceptable, it would be a serious misinterpretation of the opinion and of the law. The key fact in this case is that Mr. Stefani created the information central to the negotiation that was withheld, and then made statements that implicitly represented the contrary.

- There is little or no injury as a result of the misconduct.
- Although the panel found violations of three additional Rules of Professional Conduct and several Court Rules as a result of the violation of MRPC 4.1 (Report, at 15), all were the result of a single offense, and do not themselves constitute multiple offenses.

There are two presumptively appropriate sanctions for the misconduct found, suspension for the *Stefani I* misconduct and reprimand for the misconduct in this case. If the two cases were combined, would a sanction greater than that imposed in *Stefani I* - suspension for 30 days - be justified? Certainly the existence of multiple offenses would be an aggravating factor, but it appears to be the only such factor, in the presence of acceptable mitigating factors. If the hearing panel in *Stefani I* had ordered suspension for 30 days, initially, would the hearing panel have considered it necessary to increase the length of that suspension with a single aggravating factor of a second offense, or just been satisfied that there was clearly no basis for the mitigation it found? And would the Board have then found it necessary to increase the length of suspension beyond the 30 days it then imposed? There is no objective basis for us to answer these questions. If this panel assumed the role of disciplinarian for the two cases as combined, should it substitute its judgment over another panel's and of the Board itself in determining what should have been done if all matters had been before a single panel?

In seeking guidance on such queries, we have considered ADB cases in which offenses involving a court and a third party were found. In *Grievance Administrator v. George T. Krupp*, ADB Case No. 96-287-GA, the respondent had been found to have violated MRPC 3.3(a)(1), MRPC 3.3(a)(4), and MRPC 3.4(b) in making a misrepresentation to a court; and MRPC 4.1, in making the same misrepresentation to opposing counsel; with resulting misconduct under MRPC

8.4(a)-(c) and MCR 9.104(1)-(4). The misconduct involved presentation of a false report on the mental condition of a party. A review of the Board's opinion dated April 4, 2002 reveals that the hearing panel considered Standards 6.11, 6.12 and 9.0; and, as a result of mitigating factors, imposed sanction under Standard 6.12, only, instead of disbarment under Standard 6.11, which the panel found was the presumptively appropriate sanction. Respondent appealed the hearing panel's order, seeking to decrease the length of suspension from 90 days. Neither respondent nor petitioner challenged the imposition of suspension. The Board noted that the hearing panel had found as aggravating factors selfish motive of respondent and vulnerability of the victim of misconduct; and that the panel had "afforded some weight" to a finding that respondent committed multiple offenses and engaged in a pattern of misconduct.[17] Here the Board stated:

> There is no evidence to establish that the respondent made misrepresentations in a series of cases or to more than one court. Instead, the panel found Mr. Krupp's ongoing behavior in refusing to turn over the letter to [opposing counsel] constituted repeated attempts to camouflage his dishonesty. This, the panel concluded, amounted to multiple offenses of wrongdoing and a pattern of misconduct. *Krupp,* at 13.

In mitigation, the panel gave some weight to respondent's cooperative attitude in the proceedings and "substantial weight" to respondent's character and reputation in the legal community, as well as to delay in adjudicating the matter. *Id.*

Of significance in *Krupp* is that the panel mitigated the sanction from disbarment, that which was presumptively appropriate, to a moderate-length suspension. The aggravating factors were not sufficient even to justify staying with the presumed sanction, or to merit a suspension of more than 179 days. The Board observed that the parties had cited discipline cases involving misrepresentation ranging from reprimand to revocation, and that the differences in result were

[17] The Board vacated the panel's finding of a violation of MRPC 3.4(a). In imposing the sanction under review, this additional "offense" was considered by the panel

related to the nature of the misrepresentation. *Krupp*, at 15. The Board affirmed the panel's order.

What we may draw from *Krupp* is that the aggravating factor of multiple offenses in a case in which misrepresentation is one offense does not dictate departure from presumptively appropriate discipline for one act of misconduct, and may even be mitigated to lesser discipline. If we consider the two Stefani cases as singular, there is no requirement that the two offenses direct us to impose a more restrictive sanction than has been already imposed.

Considering the second course of action available, in the misconduct phase of this case the panel purposefully disregarded the relationship of *Stefani I* to this case, and heard this case independently. Pursuing that approach, the sanction imposed should be considered independently, with the prior disciplinary offense considered as an aggravating factor. If an aggravating factor, it too appears to be the only such factor, in the presence of acceptable mitigating factors.

If we were to consider that the prior offense is a sufficiently significant aggravating factor to increase the discipline from that presumptively appropriate, reprimand, to imposition of suspension, the length of that suspension would have to be considered in light of the petitioner's concession that we consider the 30-day suspension as a credit toward the ultimate sanction in this case. If credit for prior discipline is applied, then suspension in this case would need to be ordered for a period longer than 30 days to have any further disciplinary effect on respondent. In other words, a suspension for 30 days in this case would record a second disciplinary action but have no other effect on respondent. Thus, not only would we need to impose a sanction appropriate in the case of conduct that "seriously adversely reflects" on respondent's fitness to practice law when we have not found that to be true, we would need to go beyond the minimum

discipline for that sanction, and impose a longer than minimum suspension.[18] That determination seems beyond reason for the offense found here, given the presumptively appropriate sanction for it alone.

Between the two choices, we conclude that this case should be treated on its own, and not as a theoretical combination with it predecessor. That leaves us free to consider the sanction without relationship to credit for prior discipline. Having carefully considered the record in *Stefani I*, and in light of all the aggravating and mitigating factors, discussed above, we do not find the prior disciplinary offense sufficiently aggravating to depart from the sanction considered initially appropriate for the misconduct in this case under Standard 5.13, and to justify imposing a sanction greater than the minimum for the increased category. For that reason, we will impose sanction of reprimand.

We find the conduct of respondent to have been, at the least, disappointing, given the established character and reputation of respondent, even under the trying circumstances of the litigation in which events occurred giving rise to the two incidents of misconduct. This case demonstrates that any of us in the profession can undo themselves by rationalizing conduct under tort principles rather than ethics in pursuit of otherwise legitimate goals. Further, a lawyer should not be encouraged to engage in misleading behavior by a less than diligent opponent. Mr. Stefani's artifice would have been exposed had Mr. McCargo provided for a representation as to prior disclosure in the Settlement Agreement or later Confidentiality Agreement. The fact that he did not does not justify Mr. Stefani's conduct in any respect.

[18] If the initial minimum suspension is credited on a sanction here, there is some question as to whether the minimum suspension that could be imposed here is 30 days, or at a minimum 30 days more. MCR 9.106(2).

D. DISCIPLINE.

Accordingly, we impose the sanction of reprimand, without conditions. MCR 9.106(3). This public record of discipline serves the basic goal of the disciplinary system announced by the Michigan Supreme Court: to protect "the public, the courts, and the legal profession"[19] because it openly and permanently memorializes Mr. Stefani's wrongdoing, but without further affecting his right to practice, which we find unnecessary. This stands as another permanent record of respondent's misconduct. This is the majority opinion of the panel. Chairperson McGraw dissents from this opinion as stated below.

IV. PRIOR DISCIPLINE

ADB Case No.	Discipline	Effective Date
09-47-GA	30 day suspension	01/01/12

V. ITEMIZATION OF COST

Attorney Grievance Commission:	
(See Itemized Statement filed 2/27/12)	$6.05
Attorney Discipline Board:	
Conference Call Held 11/3/10	$3.53
Pretrial Hearing Held 1/14/11	$235.00
Conference Call Held 2/2/11	$4.64
Hearing Held 2/7/11	$1,004.00
Conference Call Held 3/15/11	$2.78
Hearing Held 3/29/11	$467.00
Hearing Held 2/08/12	$254.00
Administrative Fee [MCR 9.128(B)(1)]	$1,500.00
TOTAL:	**$3,477.00**

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #25

Dated: August 31, 2012

Stephen D. McGraw, Chairperson
(w/permission 8/31/12)

[19] *Grievance Administrator v Lopatin*, 462 Mich 235, 244 (2000), MCR 9 105.

DISSENTING OPINION OF CHAIRPERSON STEPHEN D. McGRAW:

I respectfully dissent from the majority's conclusion as to the appropriate discipline to be imposed upon Mr. Stefani. I also disagree with the findings and legal analysis which form the premise for the majority's conclusion. In my view, a higher level of discipline commensurate with the seriousness of the misconduct is required. I would suspend Mr. Stefani from the practice of law for a period of 90 days, with credit for the 30 days already served in *Stefani I.*

To begin, the majority recites that "The panel did not find that a false statement was affirmatively made, but that a false impression was created and reinforced by respondent despite respondent's knowledge that the false impression was being relied on by defendant's counsel." Discipline Report at 2. See also Discipline Report at 10 (stating that respondent testified that he never made any affirmatively untrue statements and "the panel found none"). I disagree with this characterization of the Panel's findings. In its Misconduct Report, this Panel clearly found that Mr. Stefani made a "false statement." The Misconduct Report states at pages 11-12:

> The first issue we must address is whether the AGC has established by a preponderance of the evidence that statements made or omitted by Mr. Stefani in the course of settlement negotiations violate MRPC 4.1 and MRPC 8.4(a)-(c) of the Michigan Rules of Professional Conduct, and/or MCR 9.104(A)(1)-(4) of the Michigan Court Rules. We answer affirmatively.
>
> MRPC 4.1 requires a lawyer to be truthful in his statements to others. It provides that, "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person." MRPC 4.1. While the Rule's Comments emphasize that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," it follows the law in explaining that "a false statement may include the failure to make a statement in circumstances in which silence is equivalent to making such a statement."
>
> . . .
>
> On the basis of Mr. Stefani's testimony, ***we find that statements Mr. Stefani made to Mr. McCargo regarding the location of the text messages and their confidential status, as well as statements he knowingly omitted, violate the above rules.***

(emphasis added).

Because the Panel plainly concluded that a false statement was in fact made, it is inaccurate and indeed confounding that the majority states "application of MRPC 4.1 to misleading silence or innuendo appears to be without precedent in the proceedings of the Attorney Discipline Board of Michigan." Discipline Report at 3. This gratuitous statement implies that Mr. Stefani's conduct was borderline and less deserving of disciplinary consequences. That clearly is not so. The misconduct here is well within the prohibition of the cited rules.

It is worthwhile to mention the Panel's findings entirely relied upon Mr. Stefani's testimony and admitted false statements. See Misconduct Report at 3. ("We therefore rely upon Mr. Stefani's own testimony in making the following findings of fact.") This includes Mr. Stefani's false statements regarding the whereabouts of the text messages. As we explained in the Misconduct Report:

> For purposes of the decision we render here today, it is not necessary to resolve this factual dispute, and we merely assume that the facts are as recited by Mr. Stefani. Mr. Stefani admits to being asked "we want the text messages, where are they, will you give them to us." [Tr. 2/7/11] at 128, 200. Mr. Stefani responded that they could not have the text messages and that they needed an escrow agreement. As to the whereabouts of the text messages, Mr. Stefani told them there was a copy in his office safe, another in a safe at his house, and another copy on his desk. He did not disclose the copy that had been given to Mr. Schaefer. Mr. Stefani testified as follows:
>
> A. ...So, at the end, he asked, We want the messages.
>
> I said, you can't have the messages. We've got to at least have an escrow agreement.
>
> And he said, Well, where are they? And the safe is right there. I mean, the conference room is much smaller – it's like that water tank over there.
>
> I said, It's in that safe over there. And I did, I did open the safe and take out the envelope and showed them the envelope. I didn't go inside of the envelope, but I showed them it was an overnight thing from SkyTel so they would have – they know I wasn't misleading them.
>
> Q. Did you also tell Mr. McCargo that you had another copy at a safe in your house?
>
> A. Yes, I told McCargo that I had another copy at my house, and I had another copy I thought lying on my desk.
>
> Q. But you, of course, did not tell him there was a copy in the possession of Mr. Schaefer?
>
> A. No, I didn't. And I had to be –
>
> Q. Thank you, you answered the question.
>
> *Id.* at 129-130.

Misconduct Report at 6-7. Further, as the Misconduct Report states, Mr. Stefani acknowledged that he "maneuvered" opposing counsel into settling the case "by letting them believe the text

messages would be kept confidential," something he knew was untrue. Misconduct Report at 7, citing Tr. 2/7/11 at 146. As Mr. Stefani further testified:

> A. ... There's no question that I let them believe one thing that wasn't accurate. They didn't ask me any questions about is this all you've given. ... [T]here's no question, if they had known I had given the messages, we wouldn't have settled it that day.

Misconduct Report at 8, citing 2/7/11 Tr. at 146-147.

In *Grievance Administrator v Lopatin*, 462 Mich 235, 238; 612 NW2d 120 (2000), the Michigan Supreme Court directed hearing panels to be guided by the ABA Standards for Imposing Lawyer Sanctions when determining the appropriate misconduct sanction. Under the *Lopatin* framework, the first step requires the disciplinary panel to answer three questions:

> (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
>
> (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently)?
>
> (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?)

Id. at 239. After making these initial determinations, the Panel must consult the relevant ABA Standards to determine the recommended discipline for the misconduct at issue. Then the Panel must consider whether relevant aggravating or mitigating factors warrant an increase or decrease of the otherwise applicable sanction. *Id* at 240 This process is not inflexible, however. *Lopatin* preserves and emphasizes the Panel's responsibility to exercise independent judgment when appropriate, explaining:

> We caution the ADB and hearing panels that our directive to follow the ABA standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion.

Id. at 247, n13.

Considering the first *Lopatin* factor, in my view Mr. Stefani's misconduct violated his duty to the profession and to the Court. As to the second and third factors, for the reasons discussed below, I do not agree with the majority's conclusion that the misconduct was not intentional, that it was neither "serious or potentially serious under the circumstances" or that "there was 'little or no' injury." Discipline Report at 6, 10. I further disagree with the majority's

determination that the governing guideline is Standard 5.1, which neither of the parties argued at the discipline hearing was applicable. I believe, as do the parties, that Standard 6.1 governs. Standard 6.1 states:

> 6.1 False Statements, Fraud, and Misrepresentation
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:
>
> 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
>
> 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the Court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
>
> 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The majority rejects Standard 6.1 as the governing guideline on the ostensible basis that Mr. Stefani's violation of MRPC 4.1 involves false statements to a third person other than the Court. Mr. Stefani's conduct did indeed violate MRPC 4.1, but the Panel also held that his conduct violated MRPC 8.4(a)-(c) and MCR 9.104(A)(1)-(4), which encompass conduct directed to a tribunal. *See e.g.*, MRPC 8.4 ("conduct that is prejudicial to the administration of justice"); MCR 9.104(1) ("conduct prejudicial to the proper administration of justice"). In this regard, I note that the majority does not cite to the record for its conclusory assertion that "[t]he terms of the Settlement Agreement were not approved by the Court, which simply issued an order of dismissal of the *Brown/Nelthrope* case on the parties' representation that the case had been settled." Discipline Report at 7, fn 4. In fact, at the misconduct hearing, ***Mr. Stefani affirmatively testified that the parties appeared before Judge Callahan to place the settlement on the record because that's what the Judge wanted the parties to do***:

> Q. And then as I think we already said, on December 15th, the underlying cases were officially concluded when the parties all appeared before Judge Callahan to place a settlement on the record and advise him that the agreements had all been concluded; is that correct?

A. We went on December 15th to place the settlement on the record because the judge called us and wanted us to do that.

Q. This was Judge Callahan, the original trial judge; correct?

A. Yes. And this was after the case was settled and, in fact, we were all surprised, we never expected to hear from him again. And I remember those guys calling me and saying, Hey, what's this about? Do you know why he's calling us?

Tr. 2/7/11 at 149-150.

It is apparent that the Judge was "calling" the parties into Court because he wanted to make a public record of how this very contentious and highly publicized case was resolved. In my view, entering into a settlement agreement on the premise that the text messages will be kept confidential, misrepresenting the terms of the settlement to the Court by failing to disclose the agreement to conceal the text messages, while knowing the text messages had been handed over to the Detroit Free Press for publication, constitutes misconduct that is both serious in nature and highly injurious to the parties, the Court, and to the administration of justice. By omitting any mention of the text messages, Mr. Stefani intentionally hid the text messages from the very Judge who ordered that any text messages produced in response to the SkyTel subpoena be delivered directly to him for in camera review. Mr. Stefani deceived the Court and deliberately misstated the terms of the settlement.

Mr. Stefani, in my view, by his conduct, has dishonored the legal profession and undermined public confidence in the integrity and honesty of lawyers. If we overlook, minimize or excuse Mr. Stefani's conduct, the public should be rightfully skeptical of our profession's ability to police itself. Under no circumstance should the sanction we impose countenance such conduct.

Further, it must be remembered that Mr. Stefani's conduct occurred within the context of a facilitation that had been ordered by the Court to resolve the attorney fee issue. Tr. 2/7/11 at 94, 107. Both the counsel for the Grievance Administrator and Mr. Stefani acknowledged Standard 6.1 as the applicable ABA Standard. And, as the majority admits, Appendix 1 to the ABA Standards links Standard 6.1 to conduct that violates Rule 4.1 of the ABA Model Rules of Professional Conduct, upon which MRPC 4.1 is based. In my view, Standard 6.1 is the guideline we should look to in determining the appropriate discipline to be applied in this case. [20]

[20] Standard 6.1 is broader in scope then the majority assumes. It is not limited to circumstances involving misconduct directed toward a Court. It is triggered by two alternative circumstances: conduct "that is prejudicial to the administration of justice" or "that involves dishonesty, fraud, deceit, or misrepresentation to a court." The first prong – "conduct that is prejudicial to the administration of justice" – need not be directed "to a court." *See e.g., In the Disciplinary Matter Involving James J. Hanlon*, 110 P3d 937, 942 (2005) (applying Standard 6.1 to findings that respondent made false statements and submitted false documents with an intent to deceive a client and the Bar); *In the Matter of David G Davies*, 2001 Ariz. LEXIS 211 at *9 (Dec. 12, 2001) (applying Standard 6.1 to an attorney who wrote himself into the will of a client who also

The sanctions prescribed by ABA Standard 6.1 consider whether the misconduct was intentional (6.11), knowing (6.12) or negligent (6.13). For the purpose of applying ABA Standard 5.1, the majority concludes that Mr. Stefani's conduct was knowing and not intentional. The majority finds that the ABA definitions of intent and knowledge are not particularly helpful. I disagree. The ABA standards define "intent" as "the conscious objective or purpose to accomplish a particular result." "Knowledge" is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Although we concluded in the Misconduct Report that, for purposes of the violations there asserted, Mr. Stefani's conduct was knowing, we also pointed out that he had engaged in a purposeful course of conduct designed to "maneuver" the other parties toward this result. In our Misconduct Report, we explained:

> Even aside from Mr. Stefani's admissions, an objective view of the record demonstrates that Mr. Stefani was not jesting when he claimed to have "maneuvered" the defendants into settling the case "by letting them believe the text messages would be kept confidential." *Id.* at 146. A calculated scheme to create this false impression is apparent.
>
> The first step was to subpoena the text messages without giving timely notice to defendants or the Court, an admitted violation of the Court rules. Then Mr. Stefani specified delivery of the text messages directly to his office, despite a Court order requiring that they be produced to the Court. Upon receipt of the text messages, Mr. Stefani gave a copy to the Free Press and excerpted references in a supplemental brief on attorney fees. Mr. Stefani then provided the supplemental brief to Mr. McCargo alone, creating the impression that Mr. McCargo could decide whether and with whom the text messages would be shared. Then there was the promise to hold off filing - and to not file at all - if a global resolution could be reached. In drafting the settlement agreement, Mr. Stefani agreed to put "teeth" into the promise of prospective confidentiality, an empty gesture given the retrospective disclosure that had already been made. Mr. Stefani's partial answer to "where are they" furthered the illusion by falsely assuring defendants that the text messages had been secured. This was followed by Mr. Stefani's retrieval of the Free Press' disk (an utterly futile act given Mr. Stefani's failure to determine whether a copy had been made), the illusory escrow arrangement, and the truly

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happened to be a close personal friend); *Statewide Grievance Committee v Fountain*, 743 A2d 647, 652 (Conn. 2000) (citing Standard 6.1 with respect to a respondent who forged the signature of an affiant, notarized the affidavit, and forwarded it to opposing counsel in an arbitration proceeding); *Florida Bar v Machin*, 635 So2d 938, 939-940 (Fla 1994) (finding that an attempt to buy a victim's silence at a sentencing hearing by offering a trust to the victim's child is prejudicial to the administration of justice and also referring to Standard 6.1). Standard 6.1 is within the category of standards entitled "*6.0 Violations of Duties Owed to the Legal System.*" I therefore disagree with the majority regarding the extent to which Standard 6.1 can be applied to conduct other than misrepresentation to a tribunal.

ironic redrafting of the settlement agreement to insulate the text messages from a possible Free Press FOIA request. As to the latter point, Mr. Stefani testified:

> [S]ince I already knew that the Free Press or felt very strongly the Free Press was going to do a story about the Mayor's perjury, I saw no harm in going along with the change and, of course, by doing that it allowed my clients and me to get paid..." *Id* at 143.

Misconduct Report at 14-15. In my view, Mr. Stefani's conduct clearly demonstrates "a conscious objective or purpose to accomplish a particular result," potentially invoking the disciplinary recommendation of Standard 6.11. However, I am satisfied that the mental state and criteria of Standard 6.12 more closely address the misconduct at issue here. In fact, the *commentary* to Standard 6.12 cites as an example within its scope a case involving a lawyer who "failed to disclose to the Court or to opposing counsel the fact that he had previously conveyed property that was the subject of a settlement to someone else," referencing *In re Nigohosian*, 442 A2d 1007 (1982).

Suspension is the presumptive sanction for misconduct addressed by Standard 6.12 and is the appropriate sanction here. As we expressed in the Misconduct Report, while providing the public with access to information regarding Mr. Kilpatrick's misdeeds was a laudable goal, Mr. Stefani was not empowered to disregard his professional ethical obligations in the process. We cannot countenance the steps Mr. Stefani took to misrepresent the confidential status of the text messages so a settlement could be reached and to then mislead the Court as to the settlement terms. At this disciplinary stage of the proceeding, we cannot overlook, excuse, or minimize Mr. Stefani's conduct. The sanction we prescribe must be commensurate with the seriousness of his misconduct. We must remain cognizant of our purpose to discipline misconduct "for the protection of the public, the courts, and the legal profession." MCR 9.105(A).

I would therefore impose a 90-day suspension for the misconduct found in this case. See e.g., *Grievance Administrator v George T. Krupp*, Case No. 96-287-GA (April 4, 2002) (imposing a 90-day suspension where respondent, in representing that a letter presented to the Court and to opposing counsel was written by his client's psychiatrist, violated respondent's obligation to be truthful to the tribunal and to opposing counsel). Against the 90-day suspension, I would credit 30 days for the time of suspension already served in *Stefani I*. I do not find this result changed by the proffered aggravating and mitigating factors. On the one hand, one would expect that Mr. Stefani's many years in the practice of law, particularly as a litigator, would have taught him how greatly the judicial system depends upon the honesty and integrity of lawyers to reach a fair and just result, and why ethical behavior must be unwavering. If Mr. Stefani had in fact learned this over the years, he intentionally disregarded it when he pushed aside the second thoughts he admitted having. There is, however, no evidence of a pattern of misconduct or of multiple offenses arising out of different matters. Remorse, by contrast, only came later after reading the finding of misconduct. Tr. 2/8/12 at 20-24. Throughout the misconduct proceedings, Mr. Stefani was staunchly un-repenting and was disrespectful to the lawyer for the Attorney Grievance Administrator. On the other hand, Mr. Stefani is generally considered to be a very capable lawyer and is well thought of, and I accept the fact that his motivation here was, at least in part, to inform the public of the Mayor's criminal behavior. Again, a goal which is laudable. None of these factors, however, alter the propriety of a 90-day suspension.

I do not find that reprimand is an appropriate sanction. If Standard 5.1, rather than Standard 6.1, were held to apply, I would find in the exercise of my independent judgment under *Lopatin* that the selected ABA standard does not (for the reasons expressed above) adequately consider the nature and effect of the misconduct.[21]

[21] I will forgo discussion of other points in the majority opinion that could be addressed because it does not seem fruitful to do so at this time.