STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Wilson A. Copeland, II, P 23837,

Respondent/Appellee,

Case No. 09-48-GA

Decided: April 29, 2011

Appearances:

Kimberly L. Uhuru, for the Grievance Administrator, Petitioner/Appellant
David W. Christensen, for the Respondent/Appellee

BOARD OPINION

Respondent, Wilson A. Copeland, II, served as special counsel for the City of Detroit in *Brown v Mayor of Detroit*, et al, Wayne County Circuit Court No 03- 3175557-NZ, and was subsequently charged by the Grievance Administrator with engaging in acts of professional misconduct during that representation. The hearing panel found no misconduct and dismissed the formal complaint. The Administrator has petitioned for review, seeking reversal of the hearing panel's dismissal. Having carefully reviewed the record and the arguments of the parties, we affirm.

The panel's report summarizes the allegations in this matter:

> The formal complaint in this matter alleges: that respondent was engaged as an attorney to represent the City of Detroit in the civil suit brought by Gary Brown and Harold Nelthrope against the City of Detroit and Mayor Kwame Kilpatrick, Wayne County Circuit Court Case No. 03-317557-NZ; that respondent performed the engagement through trial and was involved as an attorney for the City in the making of a settlement of the lawsuit; and that respondent knew of the existence of two documents executed on November 1, 2007, that together represented the entirety of the settlement terms reached, being the "Settlement Agreement and General Release" which recited an $8,000,000.00 consideration for the settlement, and the "Confidentiality Agreement," which bound the parties to non-disclosure of text messages among the Mayor and other City officials.

> The Grievance Administrator charges that when the Detroit City Council approved the settlement of the Brown and Nelthrope lawsuit, which approval was necessary to fund payment by the City of the $8,000,000.00 consideration, the City Council was not aware of the existence of the "Confidentiality Agreement" that was part of the settlement. Finally, the Grievance Administrator charges that by not bringing the terms of the "Confidentiality Agreement" to the attention of the Detroit City Council before the City Council agreed to the economic terms set forth in the "Settlement Agreement and General Release," the respondent prejudiced the proper administration of justice [MCR 9.104(A)(1) and MRPC 8.4(c)], exposed the legal profession to obloquy, contempt, censure or reproach [MCR 9.104(A)(2)], engaged in conduct contrary to justice, ethics, honesty or good morals [MCR 9.104(A)(3)], violated standards or rules of professional responsibility by failing to keep his client reasonably informed of the status of his engagement [MRPC 1.4(a)], failed to explain matters to his client to permit the client to make informed decisions [MRPC 1.4(b)], assisted another in unlawfully concealing a document having potential evidentiary value [MRPC 3.4(a)] and attempted to violate these rules, or knowingly assisted another to do so, or did so through the acts of another.

Hearings were held over the course of several days. Respondent was called as a witness in the Grievance Administrator's case in chief, and testified in his own defense. Also testifying were attorney William Mitchell, attorney Ellen Ha, attorney Morley Witus, the Hon. Kwame Kenyatta, a sitting Detroit City Councilman, and attorney Kenneth Lewis, who testified as an expert witness.

I. Factual Background.

The vast majority of the factual allegations in the formal complaint are not in dispute. An overview of the facts established in this matter follows. Additional facts will be set forth in connection with a discussion of the issues.

Respondent was engaged by the City of Detroit to serve as first chair in defending the City in the *Brown/Nelthrope* Whistleblowers' Protection Act litigation. An attorney with the Law Department of the City of Detroit, Chief Assistant Corporation Counsel Valerie Colbert-Osemuede, served as co-counsel with respondent. Plaintiffs alleged that they were discharged or demoted wrongfully for initiating investigations into certain matters. For example, Brown initiated an investigation into an alleged party at the Manoogian Mansion. Nelthrope complained of various alleged improprieties by the Executive Protection Unit. An issue at trial was whether Mayor

Kilpatrick had romantic relationships with his Chief of Staff Christine Beatty and other women.[1]

Plaintiffs Brown and Nelthrope were represented by attorney Michael L. Stefani. Prior to trial, Stefani subpoenaed records of text messages between Kilpatrick and Beatty from SkyTel, the network provider for the pagers leased by the City of Detroit. Defendants objected to the production, and the circuit court ordered that any messages produced in response to the plaintiff's subpoenas be produced to the court so that an *in camera* review could be conducted "pursuant to the governmental deliberative process privilege."[2] Sometime after the jury rendered its verdict for plaintiffs on September 11, 2007, Stefani subpoenaed records of text messages from SkyTel. In accordance with these subpoenas, the records were produced directly to Stefani.

The October 9, 2007 judgment sets forth the damage awards as follows: $3,600,000 for Brown; $2,900,000 for Nelthrope; and, $1,454,897.88 in statutory interest from the date of filing through September 11, 2007. Thus, pursuant to the judgment, the City owed the plaintiffs $7,954,897.88 shortly after the conclusion of the trial, with statutory interest accruing thereafter.[3]

Mr. Stefani filed a motion for attorney fees pursuant to the Whistleblowers' Protection Act on October 9, 2007, and initially demanded $1,000,000 in fees. The motion was referred to a facilitator, retired Genesee County Circuit Judge Valdemar Washington, who met with counsel on October 17, 2007. Among those present were Stefani, respondent, Ms. Colbert-Osemuede, and Samuel E. McCargo, who represented Mayor Kilpatrick. At the facilitator's invitation, Mr. McCargo left the room and was gone for 20-30 minutes. Respondent discovered McCargo in the parking lot reading a document and learned that Mr. Stefani had provided the facilitator with a draft supplemental brief to give to McCargo. See Petitioner's Exhibit 8 (a draft supplemental brief quoting text messages between Kilpatrick and Beatty regarding appointments and transfers in the police department and also evidencing the nature of their relationship). It is not disputed that respondent did not see the draft of the brief, but was told by Mr. McCargo that "Stefani claims to

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[1] Tr 1/6/10 ("Tr I"), p 56. For ease of reference, the transcript generated on the first day of hearing, 1/6/2010, will be referred to as "Tr I." The transcript of the hearing held on 1/7/2010 will be referred to as "Tr II." The third day of hearing was held on 1/11/2010, and the transcript of those proceedings will be cited as "Tr III."

[2] Petitioner's Ex 4.

[3] Petitioner's Exhibit 6. See http://courts.michigan.gov/scao/resources/other/interest.pdf for Michigan's statutory interest rates.

have the text messages and now he wants to put *Harris* [another whistleblower case against the City] on the table."[4] A few moments after respondent discovered McCargo, Valerie Colbert-Osemuede joined them and decided to call Corporation Counsel John Johnson. After the arrival of Mr. Johnson, the parties negotiated a settlement and went to Stefani's office that evening to reduce it to writing.

The October 17, 2007 settlement agreement provided that: Stefani & Stefani would "transfer ownership of and surrender to an attorney designated by the Mayor and the City all records, originals and copies, of text messages from SkyTel Messaging for the text pager leased by the City of Detroit and issued to Christine Beatty for the periods of September through October 2002 and April through May 2003"; that Stefani would not file his supplemental brief and would destroy all copies and drafts of the supplemental brief; that Stefani, his employees, and his clients would "refrain from disclosing to any person or entity the existence or content" of the text messages on pain of paying liquidated damages amounting to $2,666,666.00 for Stefani, $3 Million for *Brown*, $2 Million for *Nelthrope*, and $400,000 for *Harris*; and that defendants would pay $8 Million to settle *Brown* and *Nelthrope*, and $400,000 to settle *Harris*.[5]

A separate escrow agreement requiring deposit of the records in a bank safe deposit box was also executed on October 17, 2007, and signed by McCargo and Stefani.[6] Pursuant to this agreement, respondent contacted the bank to secure the safe deposit box and followed up with Stefani's office.

An October 18, 2007 memo from Ms. Colbert-Osamuede to City Council sought approval of the settlement. It did not reference the texts or the confidentiality and escrow provisions. Respondent did not participate in the drafting of the memorandum to Council, attend a session of the Council, or otherwise communicate directly with Council regarding the settlement.

On or about October 19, 2007, the Detroit Free Press submitted to the City's Law Department a letter pursuant to the Michigan Freedom of Information Act ("FOIA"), MCL 15.231, et. seq., requesting settlement agreements and any related documents in the two whistleblower cases

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[4] Formal Complaint & Answer, ¶ 43. See also, Tr I, p 75.

[5] Petitioner's Exhibit 9.

[6] Petitioner's Exhibit 10.

(*Brown/Nelthrope* and *Harris*).[7] Ellen Ha, Supervising Assistant Corporation Counsel at the City of Detroit, and the lawyer who handled FOIA requests for the City, testified that she believes she received the request on October 22, 2007.[8]

The Detroit City Council approved settlement on or about October 23, 2007.

The City responded to the Free Press's FOIA request on October 29, 2007 as follows: "Your request is denied, at this time, pursuant to MCL 15.235(4)(b). It is our understanding that, currently, there is no settlement agreement, as parties are working on the details of the agreement. Therefore, if you re-submit your request at a later time, we will re-process your request."[9]

After the parties to the *Brown/Nelthrope* litigation entered into the settlement agreement on the evening of the October 17th facilitation at the insistence of the facilitator, the agreement was bifurcated into (1) a settlement agreement and general release, and (2) a confidentiality agreement, both of which are dated 11/1/2007.[10] The confidentiality agreement provided for the "exchange and return of . . . private and confidential records that were not used [at trial]" pertaining to the principal parties (Brown, Nelthrope, and Kilpatrick) and one non-party witness, Christine Beatty, and that the signatories to that agreement, their agents and others would maintain confidentiality with respect to those documents.[11]

A second FOIA request for settlement documents was submitted by the Free Press on or about November 13, 2007. Ha followed up with Colbert-Osemuede and was given the settlement agreements in *Brown/Nelthrope* and *Harris*.[12] In response to this second FOIA request, the City, through Ms. Ha, sent a letter dated December 7, 2007, enclosing the two settlement agreements and identifying and withholding as privileged the memoranda submitted to City Council pertaining to

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[7] The Formal Complaint alleges that the request was submitted on or about October 23, 2007, and the Answer admits this allegation. Formal Complaint & Answer, ¶ 61. The request, Petitioner's Exhibit 16, is dated October 19, 2007.

[8] Tr I, p 152.

[9] Petitioner's Exhibit 19.

[10] Petitioner's Exhibit 20 and 21.

[11] Petitioner's Exhibit 20.

[12] Tr I, p 157.

the settlements.[13] The Free Press filed suit against the City on January 3, 2008, claiming a violation of FOIA and alleging that there were additional documents which were not produced.

Respondent did not participate in responding to the FOIA requests. In January 2008, respondent learned of the FOIA action, and, at the request of the City, attended three meetings with Colbert-Osamuede, McCargo, Ha, and others.

On or about January 23 - 25, 2008, the contents of the text messages between Kilpatrick and Beatty were published in the Detroit Free Press.

II. The Panel's Report.

The panel found: that respondent was added to the City's defense team because of his "first chair" trial experience before juries; that his co-counsel (Colbert-Osamuede, who remained involved in the case) and her superior (Johnson) were "as involved if not more involved than respondent in negotiating the terms of the settlement"; that the Detroit City Charter required Council approval of the settlement; and that, when Council approved the $8,000,000 settlement for the *Brown* and *Nelthrope* cases, it was not informed of "the existence or terms of the Confidentiality Agreement."

The panel also found that "it was routine for City Council approval of settlements to be handled exclusively by Corporation Counsel or deputies in the City Law Department, such as Ms. Colbert-Osamuede, and rare for engaged outside counsel, such as respondent, to be involved in the process."[14] The panel found that, consistent with his previous experience, respondent "played no role in seeking City Council approval of the settlement made in the Brown and Nelthrope lawsuit."[15]

The panel also found that the scope of the representation entered into by respondent did not extend to obtaining settlement approval from Council:

> [P]ast practice and routine indicate that the duty to disclose [terms of the confidentiality agreement] rested not with special trial counsel but with those routinely tasked with going to Council to secure the approval of settlement, Ms. Colbert-Osemuede and Mr. John Johnson. The record does not support a finding that respondent's engagement extended to securing City Council approval for a settlement of the lawsuit he'd be special counsel in.[16]

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[13] Tr I, p 159; Petitioner's Exhibit 25.

[14] HP Report, p 3.

[15] *Id.*

[16] *Id.*

Additionally, the panel concluded Council was entitled to know of the existence and terms of the confidentiality agreement before approving the settlement, but found that:

> It was not established that respondent ever agreed to, or even knew of, any plans to withhold from the Detroit City Council the existence of, or the terms of, the Confidentiality Agreement that was part of the settlement. . . . While it seems clear to us that Ms. Colbert-Osamuede and Mr. John Johnson breached their duties of disclosure toward the City of Detroit when approval for the settlement was sought from City Council, we can not say that respondent did so or attempted to do so, or knowingly assisted Ms. Colbert-Osamuede or Mr. Johnson in doing so, or did so through their acts or the acts of anyone else, as charged in the formal complaint. Nor was testimony presented by the Grievance Administrator about the interval between Council approval and Council's discovery of the Confidentiality Agreement terms, and what respondent's knowledge was before or during that interval about what was planned to be told to City Council to secure its approval, or what it was told.[17]

In conclusion, the panel found that "the Grievance Administrator has failed to prove, by a preponderance of the evidence, that respondent is guilty of any of the misconduct charged in the formal complaint."

III. Arguments on Review.

The Administrator argues on review: "The hearing panel's conclusions of law are erroneous and not supported by the record. The charged misconduct is supported by the evidentiary record." In particular, the Administrator argues that the panel erred in dismissing the charges under MRPC 1.4 and 3.4(c).

A. Standards of Review.

The standard for this Board's review of a hearing panel's findings of fact is described in *Grievance Administrator v Edgar J. Dietrich*, 99-145-GA (ADB 2001), p 2:

> In reviewing a hearing panel decision, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). See also, *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n12 (2000) (citing MCR 2.613(C)).

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[17] HP Report, pp 3-4.

Under the clearly erroneous standard, a reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Thames v Thames*, 191 Mich App 299, 301-302 (1991), lv den 439 Mich 897 (1991). "Deference is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C)." *Id.* Similarly, in discipline proceedings:

> Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board defers to the panel's assessment of their demeanor and credibility. *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, 96-96-GA (ADB 1997). See also *In re McWhorter*, 449 Mich 130, 136 n 7 (1995).
>
> In short, "it is not the Board's function to substitute its own judgment for that of the panels' or to offer a *de novo* analysis of the evidence." *Grievance Administrator v Carrie L. P. Gray*, 93-250-GA (ADB 1996), lv den 453 Mich 1216 (1996). [*Dietrich, supra.*]

Hearing panel decisions on the law are reviewed by the Board *de novo*. *Grievance Administrator v Jay A. Bielfield*, 87-88-GA (ADB 1996); *Grievance Administrator v Geoffrey N. Fieger*, 94-186-GA (ADB 2002).

B. MRPC 1.4.

The petitioner argues that respondent violated MRPC 1.4(a) and (b),[18] as follows: "Respondent was bound by his contract with the city and by his ethical duties to fully advise City Council of all the material terms of the settlement. Because he failed to do so, Respondent's conduct violated MRPC 1.4(a) and (b)."[19] More specifically, the Administrator contends that respondent had a duty to apprise City Council of the non-monetary terms of the settlement (the confidentiality provisions), and that he breached this duty.

No specific panel findings are challenged in this review as lacking proper evidentiary support. Indeed, the petitioner's statement of the issue shifts the nature of the review inquiry from

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[18] Michigan Rule of Professional Conduct 1.4 states, in its entirety:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[19] Petitioner's Brief in Support of Petition for Review ("Petitioner's Brief"), p 18.

whether there is support for the panel's findings to whether there is support for the petitioner's allegations. This is, of course, not the standard. This Board affirms factfinding when there is proper evidentiary support in the record. Although we may review the record very closely and carefully, as we have done in this case, we do not re-sift the evidence and weigh it anew.

The Administrator also argues that the panel erred as a matter of law in not concluding that respondent had a duty to independently inform City Council of all of the particulars and elements of the settlement in *Brown/Nelthrope,* which would include confidentiality provisions pertaining to various materials such as the text messages.

Respondent has argued throughout these proceedings that his understanding of his role led him to focus on the trial and, after the shock of a substantial verdict against his client, minimizing the payout. It did not occur to him to question the settled arrangements that attended his previous work for the City. Never had he questioned that the Law Department attorneys were the ones to seek approval, in whatever form they or the City required, from Council. Such action on his part would have been even less likely to occur when a Law Department attorney remained as co-counsel for the trial and was fully informed as to the status of the matter. He asked the panel to avoid using 20/20 hindsight in assessing the significance of the text messages, which, having led to the ouster and imprisonment of a mayor, are seen as obviously momentous today.

1. Contractual Obligation to Communicate with the City

Petitioner argues that respondent "was bound by his contract with the city . . . to fully advise City Council of all the material terms of the settlement"[20] and that:

> The scope of respondent's service to the City was specifically set forth in his contract for professional legal services, which respondent signed. . . . [T]he contract does not limit his duties of communication in any way. In fact, the contract specifically sets forth respondent's duty to communicate with the client. Section 404(a)(b) of the contract requires that "[R]espondent shall inform the City of all material and significant developments in the subject matter of the contract."[21]

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[20] Petitioner's Brief, p 18.

[21] Petitioner's Brief, p 15. Petitioner's Exhibit 1 is the Contract for Professional Legal Services Between City of Detroit, Michigan and Grier & Copeland, P. C., Contract No. 2649826, providing that performance of the contract shall commence on May 15, 2004.

The agreement provides that special counsel shall provide certain information on request and shall otherwise "inform the City of all material and significant developments in the subject matter of this contract as soon as practicable under all relevant circumstances."[22] This contractual obligation is not argued to be meaningfully different from MRPC 1.4's requirements that a lawyer "keep a client reasonably informed about the status of a matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Additionally, the contract essentially codifies the lines of communication and reporting found to exist by the panel based on the uncontroverted record. See, for example, the following provisions:

1. The preamble's definition of the "City" as the municipal corporation "acting by and through its Law Department represented by its Corporation Counsel ('City')."

2. Section 6.03 which assigns to Corporation Counsel the duty of accepting performance under the contract.

3. Section 15.01 which provides that: "All notices and communications [to the City] under this *Contract* shall be given in writing . . . to [Corporation Counsel,] City of Detroit Law Department."

4. Exhibit A to the contract which defines the scope of services thus: "The *Attorney* shall act for and assist the City of Detroit Law Department by providing legal representation to the City of Detroit in the matter of . . . [case caption]."

2. Application of MRPC 1.4

The petitioner's brief on review also asserts:

> There is no caselaw or authority that holds that by virtue of the fact that the City had in-house co-counsel on the case, respondent was somehow absolved of his duty to communicate. The duties created by the MRPC, including the

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[22] See Section 404, which provides, in pertinent part:

> 4.04 (a) Upon request of the *City*, separate and apart from monthly statements of *Services*, the *Attorney* shall submit monthly or other regular written progress reports delineating work performed and significant events achieved. Such reports shall be signed by an authorized representative of the *Attorney*.
>
> (b) Notwithstanding the provisions of Subsection 4.04(a), supra, the *Attorney* shall inform the *City* of the status of the *Services* on a regular basis, and shall inform the *City* of all material and significant developments in the subject matter of this contract as soon as practicable under all relevant circumstances, . . .

> duty to communicate [in accordance with MRPC 1.4(a) and (b)], apply to all lawyers, regardless of whether they are in-house or outside counsel.[23]

Additionally, it is argued by petitioner that:

> It is irrelevant that City Council did not specifically ask to be made aware of non-monetary terms of the settlement, or that corporation counsel has not traditionally provided that type of information in its settlement recommendations."[24]

We readily agree that the duty to keep a client reasonably informed under MRPC 1.4 is independent of the duty to comply promptly with reasonable requests for information. See *Grievance Administrator v Hayim Gross,* 97-138-GA (ADB 1999), which was cited by the Administrator for this proposition. However, we have been presented with no authority for the proposition that the type of information traditionally presented to Council, the decisions about what should be presented, the methods by which it is presented, the persons who present it, etc., are not relevant when considering whether a lawyer failed in his duties of communication under MRPC 1.4.

As we have noted, the Administrator does not quarrel with the panel's findings regarding the established and customary practices regarding dealings between respondent or other special counsel and the City. Witnesses for both parties established that a special counsel is not ordinarily involved in seeking Council approval unless invited into this process, and that occurs rarely. Councilman Kenyatta testified that respondent could have inserted himself into the process by requesting to attend a meeting, or by just showing up. But, logic dictates that there must be something to trigger a duty on the part of special counsel to disregard the established practice. The panel quite reasonably concluded that one would only do this if one knew that the Law Department attorneys traditionally tasked with communicating certain things would refuse or fail to communicate that essential information.

Moreover, the panel did not conclude, as the Administrator contends, that the existence of co-counsel, in-house or not, absolves an attorney from communication with the client. This vastly overstates the panel's holding. In fact, the panel seems clearly to have concluded that notwithstanding the persuasive evidence of the custom, routine and terms of his engagement in

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[23] Petitioner's brief, p 15.

[24] Petitioner's brief, p 18.

Brown/Nelthrope and other matters, a duty *could* have arisen which would have required respondent to inform the Council of all of the terms of the settlement, but that the necessary preconditions for such a duty to arise did not take place.

Put yet another way, if the client's practice is to require that in-house counsel communicate the terms of settlement to the approving authority, then counsel should abide by that procedure unless counsel has reason to know it would violate a rule of professional conduct. However, if a client has established by instruction and custom a particular channel of communication (including communication required by MRPC 1.4), it is ordinarily reasonable for a lawyer to follow such procedures. Indeed, one might even go so far as to say that, ordinarily, a lawyer's refusal to abide by an organizational client's instructions as to how to communicate with the client is itself *un*reasonable. For example, if a CEO or Board of Directors instructed outside counsel on a case to communicate through the General Counsel – or if the General Counsel established this protocol with the apparent ratification of the CEO and Board – then it would be nonsensical, and probably annoying, if outside counsel disregarded these directions and continued to write and telephone the CEO and Board with details about the case. But, if the outside counsel has reason to believe that important information is not reaching key constituents of his organizational client, then he or she may indeed have a duty under MRPC 1.4 (or even MRPC 1.13) to communicate outside of established and otherwise acceptable channels.

MRPC 1.4 sets forth a rule of reason regarding communication. A treatise on professional responsibility explains some of the dimensions of this duty:

> Both the duty to volunteer information and the duty to provide information upon request are qualified by a requirement of reasonableness under the circumstances. First, as the Comment to Model Rule 1.4 notes at several points, a reasonable level of communication in one context may be wholly inappropriate or even impossible in another. . . . Second, the detail and frequency of communication required to keep a client "reasonably informed" will differ from client to client. Entity clients such as corporations or units of government cannot literally be informed of anything—a lawyer representing such an entity must determine which individuals within the entity should receive the information. See Rule 1.13. . . . Third, also as noted in the Comment to Rule 1.4, reasonableness may depend upon the legal sophistication of the client coupled with the history of dealings between the lawyer and the particular client. [1 Hazard, Hodes & Jarvis, *The Law of Lawyering* (3rd ed 2011), § 7.3, p 7-6.]

The panel astutely questioned the parties. Among the questions asked was whether the Administrator had authority for the proposition "that there's an absolute duty to report out of reporting lines to the ultimate decider" even though there is no showing that the "reporting lines" will break down.[25] No authority has been presented to support the position that the duty to communicate all essential terms of a settlement to every decision-making constituent of an organizational client is absolute no matter what the client may say or no matter what practice with that client may suggest. And, as we discussed above, this view goes too far to satisfy the realities of business, governmental and other organizational affairs. Clients would not want such a rule, as is seen from the fact that communication is often channeled through in-house counsel at the insistence of the organizational client. The contract for services with the City provided that respondent should communicate with the City through the Law Department. The practice was that special counsel deferred entirely to the Law Department (even in cases in which a Law Department attorney was not co-counsel) to communicate the essentials of the settlement terms to the Council and obtain approval. The panel, quite sensibly, left room in its report for an exception into this arrangement, one requiring departure from reporting channels when outside counsel knows in-house counsel will not report significant information, but found that this exception did not apply here because no showing of such knowledge had been made.

Accordingly, we find no error in the hearing panel's implied holding that protocols and practices for a lawyer's communication with an organizational client are relevant to determining whether the lawyer has failed to "keep a client reasonably informed about the status of a matter" or has failed to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" within the meaning of MRPC 1.4.

The Administrator has also argued, essentially in the alternative, that "respondent had enough knowledge about what the text messages contained to trigger a duty to communicate the terms [of the settlement directly to City Council]."[26] This has been a significant point of contention between the parties throughout these proceedings. Although the panel's report did not expressly address the question of what respondent knew about the contents of the texts, the issue was squarely presented to the panel in testimony, during closing arguments, and by the panel's own questions. On review,

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[25] See Tr III, p 122.

[26] Tr, Review Hearing, pp 31-32.

the parties continued to advance competing views of the record below on this point. Neither party has requested remand for additional findings of fact, and we have concluded that it would not aid the appellate process because the panel was clearly aware of the issue and there is proper evidentiary support in the record for its decision.

This branch of the Administrator's argument raises a host of questions. When may outside counsel rely on in-house counsel to communicate that which must be communicated to their common client? What makes this reliance reasonable or unreasonable? Again, it seems *un*reasonable to require redundant communication in all instances. So, when is outside counsel required to skeptically examine the actions of in-house counsel, question the latter's understanding of organizational practices and desires with respect to communication, and, generally, toss out established protocols and communicate directly with certain constituents of the organization about particular matters? And, how does outside counsel go about determining which matters are likely to be of such significance to the organization that those ultimately responsible would want their express or ratified directions as to communication disregarded in a particular instance?

It is beyond the scope of this opinion to comprehensively answer all of these questions. However, from the Administrator's argument we discern the view that knowledge that a designated liaison will cover up a crime or fail to report to the appropriate constituent within the organization information required to be communicated under MRPC 1.4, would clearly seem to trigger a duty to go over or around the liaison. Thus, the reasonableness of respondent's actions, such as not questioning settled practices, depends, in part, upon what he knew about the contents of the texts.

If respondent thought, as he testified, that the texts were subject to a confidentiality agreement because they contained the Mayor's insults and comments about other political figures with which his client, the City, would have to work in the future, then protecting against their release to a wider audience may have been prudent and in the client's best interest. And knowledge of a substantial liquidated damages clause for violation of the confidentiality provision,[27] while it certainly may tend to increase the significance of the provision, does not, by itself, prevent a special counsel from reasonably assuming that the client's in-house counsel will inform the appropriate constituents so that compliance with the agreement may be monitored.

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[27] This factor was raised by the Panel Chairman in questioning respondent. Tr II, p 107.

But here, the Administrator argues, respondent knew enough about the contents of the text messages to trigger the duty to report directly to City Council that there was a confidentiality agreement concerning the text messages. We read the panel's dismissal of the MRPC 1.4 and 3.4(a) charges as a rejection of this position, and review the record for evidentiary support for a finding that respondent believed only that the text messages contained embarrassing remarks by the Mayor about other officials, or, in any event, that he did not know they contained evidence of perjury.

The Administrator has conceded that respondent had not read the brief or the text messages themselves, and did not possess either, as the events at issue here were unfolding. The Administrator's argument to the panel, and to this Board, about respondent's state of knowledge is based, in large part, on two elements: (1) statements allegedly made by Mr. McCargo as he was reading Mr. Stefani's supplemental brief at the facilitation; and (2) statements allegedly made at a meeting between Mr. McCargo, Mr. Mitchell, and respondent.

Respondent testified that, at the facilitation, while Mr. McCargo was reviewing Mr. Stefani's brief in the parking lot, respondent heard from McCargo that Stefani supported his argument for fees under the Whistleblowers' Act by claiming that "the mayor wasn't forthcoming."[28] The Administrator argued below that respondent knew this meant Kilpatrick's honesty was implicated. Similarly, on review the Administrator argues, "Respondent assumed that to mean that the mayor had not been truthful in his prior testimony."[29] This assertion by the Administrator is not supported by the record. In fact, to support this assertion, the Administrator's brief cites a portion of the transcript that contradicts this interpretation:

> Q. [AGC Counsel] When he would have said that -- when Mr. McCargo would have said that, you know, Stefani's got this motion to increase his attorney fees, did you ask him, well, why, why is he asking for an increase?
>
> A. [Respondent] Oh, okay. He said because -- something to the effect of, well, the mayor wasn't forthcoming or the mayor did some things that made me work harder. If the mayor hadn't have done this or hadn't have done that, I would not have had to work as hard. And that was the justification for -- it was all about his attorney fee. And so...[30]

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[28] Tr I, p 79.

[29] See Petitioner's Brief, p 6.

[30] Tr I, pp 79-80.

Shortly after this exchange, counsel for the AGC returns to the topic, and respondent makes his meaning even clearer:

> Q. Were you concerned at all at the time regarding Mr. Stefani's allegation that the mayor had not been forthcoming in his -- either his trial or deposition testimony?
>
> A. Not terribly, no. I didn't understand exactly what he was alluding to. But that was not my focus as we stood out there in the parking lot, you know, discussing what was at hand.
>
> Q. So the allegation, just the bare allegation that perhaps the mayor had been untruthful in his testimony, that wasn't something that concerned you as defense counsel in the case?
>
> A. I don't know that I want to take it to the level of the mayor being untruthful. I will take it to the level that the mayor had done some things that interfered with his ability to -- not to defend, to put on his case. But the question of untruthfulness, I don't remember that necessarily being an issue. And it certainly was not what caught my attention as we stood in the parking lot discussing this case.[31]

Additional evidence relied upon to support the claim that respondent knew enough about the contents of the texts to trigger the duty asserted by the Administrator under MRPC 1.4 is set forth by counsel for the AGC at the hearing on review. In response to a question from the Board about evidence that respondent knew perjury had been committed, counsel refers to meetings held between Mr. McCargo, Mr. Mitchell and respondent:

> [AGC Counsel] And I think there was some testimony about the content of it being teenagery, lovey-dovey or some words to that effect.
>
> So it wasn't as if they were just talking about this brief in abstract. There was some conversation about the content. And acknowledging that, he's testified that he never read it. And there's no evidence that he ever read it. I'm not even putting that out there. But there was definitely meetings around the content of this brief.
>
> So to the extent of his knowledge, I think there's more knowledge here than what's been acknowledged, than what's being claimed by my opponent as to what this brief meant for his client. And frankly, I think the concern was more what the brief meant for the mayor in terms of his political future, in terms of making his personal future or whatever.

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[31] Tr I, pp 81-82.

> But the interest really seemed to revolve around protecting him from any further dissemination of these records. And Attorney Mitchell specifically stated that when he came in, his purpose was to try to go to SkyTel, get the records, and block any further dissemination of those records. He wanted to make sure, one, that they really had them, and if they did have them, to make sure they were not disseminated any further.
>
> So all of the interest around that at that point was around protecting these records from being further disseminated. I don't think the city council was necessarily the point of concern there. The interest was in the mayor's privacy.[32]

Two witnesses testified before the panel regarding the meeting with William Mitchell, III, Mr. McCargo and respondent at Mr. McCargo's office – respondent and Mr. Mitchell. Respondent had no recollection of hearing the texts characterized as "teenagery" or the like. Mr. Mitchell testified that in the latter half of October 2007, he met with respondent and McCargo, and that Mayor Kilpatrick arrived later, at which point Mitchell met privately with Kilpatrick. Among the matters discussed before the Mayor arrived were the text messages allegedly in the possession of Stefani. According to Mr. Mitchell, he heard the texts described in the meeting as "teenager-ish" – "things like, I miss you, I love you, I want to be with you, or something to that effect."[33] He believed the texts were also characterized as "teenagery" because they involved name-calling and profanities with respect to other public officials.[34] He testified that "Mr. Copeland wasn't informed kind of by Mr. McCargo about what was going on,"[35] and that he doesn't recall respondent saying much about the texts, and can't say that he was the source of his impression that they contained "teenagery" or embarrassing comments.[36] In terms of whether respondent was present when the texts were described in generalized terms, Mitchell testified, "I believe so. I don't really know."[37] Mr. Mitchell affirmed testimony he gave in another matter: "I can't separate what Mr. McCargo said from what Mr. Copeland said. We had kind of a joint conversation." However, "the conversation spanned

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[32] Review Hearing Tr, pp 10, 28-31.

[33] Tr II, p 12.

[34] Tr II, p 30.

[35] Tr II, p 11.

[36] See Tr II, pp 29-30.

[37] Tr II, p 35.

more than the text messages," and included trial, verdict, facilitation and what happened afterwards and why Mr. McCargo, primarily, felt Mitchell needed to be involved. "[T]here was a lead-in to the conversation about the text messages. Mr. Copeland was there. He participated in some of the conversations. But my recollection really is that when we started talking more specifically about what Mr. Stefani had in that envelope, it was really more Mr. McCargo." See Tr II, pp 35-40.

At one point, Mr. Mitchell testified:

> Q. And you recall testifying that there was a joint conversation between you and Mr. Copeland and Mr. McCargo?
> A. We were -- it was a meeting between us, okay? If you asked me to swear today who said what and if Mr. McCargo said anything -- Mr. Copeland said anything about this in particular, I couldn't. My recollection really is that Mr. McCargo was trying to explain to me why he felt the mayor needed separate counsel. Mr. Copeland had -- was there primarily because he was recommending that I be the one to represent the mayor.
>
> I don't re -- I couldn't assign any particular statement to him. I assume that he might have been present and hearing some of what was said, but I couldn't swear to it. I mean, we had a meeting. We sat down to talk. There was coffee. There was stuff. People were moving around. And primarily Sam and I were talking at that point. Mr. Copeland was in the conference room and he sat down in the initial conversation.[38]

There is ample evidence in support of the view that respondent did not have the knowledge of the contents of the texts claimed by the Administrator. Among other things, the record contains the following:

(1) Respondent's unrebutted testimony that he was not made privy to contents by McCargo in the parking lot;

(2) Respondent's testimony that he did not hear characterizations of the texts as "teenagery" or as being of a romantic nature during the meeting with McCargo and Mitchell in McCargo's office;

(3) Respondent's testimony that he thought the texts contained embarrassingly crude language and references to other politicians;

(4) Respondent's exhibit 7, a party admission (the Administrator's brief in the McCargo discipline case), wherein the Administrator takes the position that McCargo kept the contents of the texts from everybody (including respondent) and let them believe that they needed to be kept under wraps because of the Mayor's language in characterizing

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[38] Tr II, pp 36-37.

various persons, not his philandering or possible perjury; and,

(5) Respondent's testimony that he first learned of the actual contents of the texts, reflecting the nature of relationship between Kilpatrick and Beatty and their discussions about Officer Brown's status at the police department, when they were published in the Detroit Free Press on or about January 25, 2008.[39]

We have carefully reviewed the record to determine whether there is adequate evidentiary support for a finding that respondent did not know the texts arguably evidenced perjury and we conclude that there is ample support for such a finding.

The Administrator has emphasized that the case settled almost immediately once the texts surfaced as an attachment to Stefani's brief at the facilitation for Whistleblowers' Act fees. But, even if it is true that the text messages quoted in Stefani's brief did influence Mayor Kilpatrick to accede to settlement, this does not in any way establish that respondent knew what the texts said. Though the Mayor may have been holding out until the texts surfaced, respondent marshaled persuasive evidence that after the shock of the verdict, he became convinced of the merits of an $8 million settlement without reference to the text messages. He testified that various factors contributed to this assessment, including the pessimism of the City's appellate lawyer in this case, Morley Witus, comments in the press by Council Members to the effect that they would not fund an appeal, and Mr. McCargo's statement that he could only "shake" about $50-100,000 from the $1 Million fee request by Stefani. Also, Stefani had demanded $1.7 Million to settle *Harris*, and respondent believed that case had the potential to result in a greater verdict than either *Brown* or *Nelthrope*. When Stefani agreed to take $400,000 for *Harris*, respondent concluded that *Brown/Nelthrope* "was going to have to settle."[40]

There is proper evidentiary support for the panel's dismissal of allegations that respondent participated in a scheme to withhold significant information from Council or that he otherwise violated MRPC 1.4.

C. MRPC 3.4(c).

The Administrator also argues that the panel "erred in finding that respondent's conduct did not violate MRPC 3.4(a)." That rule provides that a lawyer shall not "unlawfully obstruct another

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[39] Tr II, pp 109-111.

[40] Tr I, pp 140 - 145.

party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act." The comment explains: "Other law makes it an offense to destroy material for purpose of [sic] impairing its availability in a pending proceeding or one whose commencement can be foreseen." The Administrator argues that respondent's conduct violated MCL 750.483a, which makes it a felony for a person to "Knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding."

The Administrator argues that by signing off on the confidentiality provisions, by agreeing to help obtain a safe deposit box, and by contacting attorney Mitchell to introduce him to McCargo and the Mayor, respondent violated the criminal statute, thereby violating MRPC 3.4(a).[41] Again, the argument turns on respondent's knowledge. The petitioner's brief states:

> Respondent knew or should have known that the messages, as they contained evidence of perjury, could potentially be marshaled as evidence in a future proceeding against the mayor. As such, Respondent had a duty not to conceal the messages, or to assist in their concealment. Petitioner established by a preponderance of the evidence that Respondent did assist in such concealment, in violation of MRPC 3.4(a).[42]

As we have concluded above, the panel did not err in declining to find that respondent knew the texts contained evidence of perjury.

Additionally, the statute applies when a person "knowingly and intentionally" conceals evidence. The Administrator argues that respondent "knew or should have known" the texts contained evidence of perjury.

The petitioner's brief on review also argues:

> Respondent also assisted in concealing the October 17, 2007 Settlement Agreement and the November 1, 2007 Confidentiality Agreement from the Free Press. By early January 2008, Respondent knew that the Free Press was seeking these documents through FOIA. Respondent continued to assist in a defense strategy that involved concealing the documents not only from the Free Press, but also from Attorney Ha. It was not until Attorney Stefani alluded to the documents in open court and Attorney Ha specifically asked if a confidentiality agreement existed that Respondent suggested release of the document. However, Respondent and other defense counsel still did not

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[41] Petitioner's Brief, p 19.

[42] Petitioner's Brief, pp 19-20.

> release the document to Attorney Ha. Attorney Ha testified that the October 17, 2007 Settlement Agreement and the November 1 2007 Confidentiality Agreement should have been produced pursuant to the Free Press FOIA requests (1/11/10 Tr. pp. 175-176).
>
> Respondent knew or should have known that the settlement documents had potential evidentiary value in the Free Press proceeding. As such, Respondent had a duty not to conceal the settlement documents, or to assist in their concealment, Petitioner established by a preponderance of the evidence that Respondent did assist in such concealment, in violation of MRPC 3.4(a).[43]

According to the testimony of Ms. Ha and respondent, which agree on all essential points, the first meeting attended by respondent after the Free Press filed its FOIA action dealt with quashing a Free Press subpoena to SkyTel. At the hearing, Ms. Ha was asked these questions and gave the following answers:

> Q. Do you recall if Mr. Copeland spoke at the meeting?
> A. I'm sure he did, but I don't remember what he said.
> Q. And was there any discussion at the meeting of settlement documents or settlement agreements?
> A. No. It was just to talk about the motion to quash, at least that I can recall.[44]

The second meeting took place around January 24, 2008, after the Free Press published the texts, which Ms. Ha recalled as being on or about January 23, 2008. The meeting dealt with strategy around whether the case was moot now that the Free Press had these documents. Ha testified that she didn't recall the October 17th agreement or the November 1st confidentiality agreement coming up. Beyond that, there was very little testimony about what was said at the first two meetings.

Ms. Ha also testified that Stefani was quoted in the January 25, 2008 edition of the Free Press as saying that he would love to talk, but that there was a confidentiality agreement.[45] At a hearing that day, Judge Colombo ordered that Mr. Stefani's deposition be taken. Thus, by the third meeting respondent attended on FOIA matters, which was held on January 29th, Ms. Ha knew that

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[43] Petitioner's Brief, p 20.

[44] Tr I, p 163.

[45] Tr I, p 169.

a confidentiality agreement existed.[46] Ms. Ha's testimony confirms this, and further confirms that, at the January 29th meeting, respondent urged Mr. Mitchell to persuade his client (Kilpatrick) to turn over the confidentiality agreement(s) for *in camera* review by the court.[47]

Ms. Ha testified:

> Q. After you made your statement to the lawyers regarding the confidentiality agreement, let's just produce it, what was the result? Did you get it?
> A. I believe Mr. Copeland understood and he went and called someone. And I believe that person was Mr. Mitchell. And Mr. Mitchell had come into the room.

Eventually, when it became clear that Mr. Mitchell "was not going to do what we all had recommended," Ms. Ha testified, she left the meeting because "[she] wasn't going to get anything and neither was Judge Columbo."[48] At the deposition the next day, Ms. Ha learned that there "were a whole lot of other documents that Mr. Stefani had that I didn't have."

The hearing panel did not find that respondent knowingly and intentionally concealed material with potential evidentiary value. It is easy to see how the panel could reach such a conclusion. In addition to the issue regarding respondent's lack of knowledge of what the texts said (which has been discussed at length above), there are also gaps in the proofs regarding other issues. Although respondent attended meetings after the FOIA litigation was commenced, the record is extremely sparse with regard to any evidence that could be said to support the claim that he concealed information from anyone in connection with that litigation. For example, with respect to Ms. Ha, there is no evidence as to what he knew about *Ms. Ha's* knowledge of the documents in the City's possession. In other words, the fact that she was surprised to learn at Stefani's deposition that a confidentiality agreement and an October 17, 2007 settlement agreement existed does not establish that respondent concealed them from her. Given the evidence regarding the discussion at the three meetings in which he participated, there would be an insufficient basis for the panel to conclude that respondent hid anything or even that he knew Ms. Ha was in the dark.

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[46] Tr I, p 171.

[47] Tr I, pp 171, 184.

[48] Tr I, p 172.

We have carefully reviewed the record, as well as the arguments below and on review, and can ascertain no error in the hearing panel's finding that a violation of MRPC 3.4(a) was not proven by a preponderance of the evidence.

IV. Conclusion.

Given the notoriety surrounding the *Brown/Nelthrope* litigation and related discipline cases against other attorneys involved, some might suspect or presume that respondent, by virtue of sheer proximity to other alleged or proven misconduct, *must* have violated a rule of professional conduct or have known all that has been revealed after detailed investigation. In fact, such notoriety, speculation, and tendency toward hindsight counsels strongly in favor of strict adherence to our limited responsibilities on review.

Having carefully examined the record in this matter to determine whether the panel's findings have "proper evidentiary support in the whole record," *August, supra,* and having considered the Administrator's arguments, we are not persuaded that error below has been established. For all of the foregoing reasons, we affirm the order of the hearing panel dismissing this matter.

Board Members William J. Danhof, Thomas G. Kienbaum, Andrea L. Solak, Carl E. Ver Beek, William L. Matthews, Craig H. Lubben, James M. Cameron, Jr., and Sylvia P. Whitmer, Ph.D., concur in this decision.

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