STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Michael L. Stefani, P 20938,

Respondent/Appellee.

Case No. 09-47-GA

Decided: May 11, 2011

Appearances:

Robert E. Edick, for the Grievance Administrator, Petitioner/Appellant
Kenneth M. Mogill, for the Respondent/Appellee

BOARD OPINION

This case stems from the whistleblower litigation against the City of Detroit and its then-mayor, Kwame Kilpatrick. Respondent represented the plaintiffs, Detroit police officers Gary A. Brown and Harold C. Nelthrope. The Grievance Administrator filed a formal complaint containing various allegations of misconduct against respondent. The first was summarized by the hearing panel as follows:

> Stefani faxed two subpoenas to [SkyTel Messaging Pager, the MCI company that provided text messaging services to employees of the City of Detroit] in September, 2007, requesting the text messages between Kilpatrick and Christine Beatty ("Beatty") without serving a copy on opposing counsel; and, directed SkyTel to send the text messages directly to Stefani's office as opposed to Judge Michael Callahan as required by a Court Order.

The hearing panel found that respondent violated MRPC 3.4(c) by knowingly issuing subpoenas to SkyTel without notice to opposing counsel and in violation of the court's order that the materials produced in response to a subpoena *duces tecum* to SkyTel be produced to the court for *in camera* inspection. The panel dismissed the other allegations of misconduct (that respondent failed to report Kilpatrick's perjury in accordance with MRPC 8.3, and that respondent's execution

of a confidentiality agreement regarding the text messages constituted the misdemeanor of compounding or concealing a crime in violation of MCL 750.149). The Grievance Administrator has not challenged the dismissal of those charges on review. The panel's report on misconduct is attached as Appendix A. The panel's discipline report, filed June 23, 2010, is attached as Appendix B.

The Administrator argues in his brief that "the aggravating and mitigating factors, properly weighed, do not justify a downward departure from the suspension recommended by the ABA Standards [For Imposing Lawyer Sanctions]," and "requests . . . that the Board enter an order suspending Respondent's license to practice law in Michigan." While we find no error in the panel's well-reasoned decision, we exercise our overview authority to adjust the level of discipline and we increase the discipline imposed from a reprimand to a 30-day suspension.

Panel Proceedings:

As we have noted, respondent represented plaintiffs Brown and Nelthrope in the Whistleblowers' Act litigation against the City of Detroit and Mayor Kilpatrick. The case was tried to verdict and a jury awarded damages against the city. The judgment entered on October 9, 2007, awarded $3,600,000 to Deputy Chief Brown and $2,900,000 to Officer Nelthrope, plus $1,454,897.88 in statutory interest accrued through September 11, 2007, bringing the total owed by the City as of the date of the verdict to $7,954,897.88.[1]

The allegations of misconduct found by the panel involved respondent's *ex parte* subpoenas to SkyTel, the pager company that provided text messaging services to City of Detroit employees. Respondent had subpoenaed records of text messages between Kilpatrick and Christine Beatty prior to trial, but Kilpatrick's counsel moved to quash the subpoena and a hearing was held before Judge Michael J. Callahan which resulted in the issuance of an order requiring that the copies of the text messages should be sent to him for *in camera* inspection to resolve Kilpatrick's claims regarding privilege prior to release to counsel.[2] Two such pre-trial subpoenas were issued by respondent, and two orders requiring production to the judge were entered by the court.[3]

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[1] Petitioner's Exhibit 9.

[2] See Report on Misconduct, p 7. A copy of the court's August 2, 2004 order is Petitioner's Exhibit 2.

[3] The second order was entered September 27, 2004 (Petitioner's Exhibit 5).

The trial commenced on August 21, 2007, and ended on September 11, 2007.[4] On September 25, 2007, respondent faxed a third subpoena to SkyTel, and, on September 28, 2007, respondent faxed a fourth subpoena for the text messages to SkyTel.[5] These subpoenas directed SkyTel to produce the records to respondent, not the judge.[6] The records were produced on October 5, 2007.[7] Thereafter, respondent filed his motion for attorney fees pursuant to the Whistleblower Protection Act. The motion was referred to former Genesee Circuit Judge Valdemar Washington for facilitation. The facilitation was held on October 17, 2007, and it was not until then that respondent provided to opposing counsel copies of the third and fourth subpoenas.[8]

The hearing panel's report on misconduct found that the facts were not in dispute:

> Respondent admits both that he sent the September 25, 2007 and September 28, 2007 subpoenas to SkyTel without serving them on the Defendants as required by MCR 2.305(A)(5) and that he had the text messages sent to his law firm and not to Judge Callahan for *in camera* review as required by the October 2004 court order. The question before the panel is only whether these actions constitute misconduct under the Rules of Professional Conduct. [Hearing Panel Report on Misconduct, p 23.]

The hearing panel found that respondent violated MRPC 3.4(c), which provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

In its report on discipline, the panel analyzed the misconduct committed under the ABA Standards for Imposing Lawyer Sanctions and concluded that Standard 6.22 (suspension) provided the presumptive level of discipline for this Rule 3.4(c) violation. In addressing the factor of injury, the panel found that, although respondent's conduct created no actual harm to the legal process, his actions created the potential for harm and this potential was created notwithstanding the testimony

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[4] Formal Complaint ("FC") and Answer, ¶¶ 14, 17.

[5] FC and Answer ¶¶ 18-19.

[6] FC and Answer ¶ 20.

[7] FC and Answer, ¶ 22.

[8] FC and Answer, ¶ 21

of Judge Callahan and Kilpatrick attorney Samuel McCargo that the text messages would have been admitted into evidence even if SkyTel had sent them to the judge first.

The Administrator argued to the panel that the following aggravating factors applied: 9.22(b) (dishonest or selfish motive); 9.22(g) (refusal to acknowledge wrongful nature of conduct); and 9.22(i) (substantial experience in the practice of law). Respondent argued that the following mitigating factors were applicable: 9.32(a) (absence of a prior disciplinary record); 9.32(b) (absence of dishonest or selfish motive); 9.32(e) (full and free disclosure; cooperative attitude toward the proceedings); 9.32(g) (character or reputation); and 9.32(l) (remorse).

In addition to those factors set forth in Standard 9.32's nonexclusive listing, respondent argued that:

> The misconduct was truly aberrational in the course of a long career. It was an isolated event that occurred only after Mr. Stefani had devoted literally thousands of hours to the case, shortly after the conclusion of an emotional draining, intensely fought trial at which Mr. Stefani was called upon to represent his client against multiple adversaries. It was an error that has not been and will not be repeated. [Respondent's Memorandum of Law Regarding Sanction, p 6.]

And respondent further argued that:

> Mr. Stefani's conduct once he obtained the text messages contributed materially to enormous public good, as it was key to bringing an end to a profoundly corrupt, nationally embarrassing mayoral administration that was materially harming not just Detroit but all of southeastern Michigan. [Respondent's Memorandum of Law Regarding Sanction, p 6.]

In its report on discipline, the panel assessed the aggravating factors argued by the Administrator and the mitigating factors argued by respondent, and distinguished cases cited by the Administrator in support of the claim that respondent had a selfish or dishonest motive. The panel disagreed with the argument that respondent failed to acknowledge the wrongful nature of his conduct, and held that respondent's experience in the practice of law and as a hearing panelist was not aggravating, but, rather, was mitigating in light of the fact that his record had been unblemished until the misconduct here. The panel also found other mitigating factors: no dishonest or selfish

motive[9]; a "cooperative attitude throughout these proceedings"; and nine witnesses to "respondent's character and integrity throughout his long career."

The hearing panel imposed a reprimand. The Grievance Administrator has petitioned for review, arguing that a proper weighing of the aggravating and mitigating factors would not justify a "downward departure from the suspension recommended by the ABA Standards."

Discussion:

Standard 6.2 provides in pertinent part:

> 6.2 Abuse of the Legal Process
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> 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 failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists: . . .
>
> 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
>
> 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

The Administrator does not argue for a suspension of any specific length; the request for relief simply asks that the order of reprimand be vacated and "that the Board enter an order suspending Respondent's license to practice law in Michigan."

Respondent acknowledges that the panel correctly determined that Standard 6.22 was applicable, and that suspension is the presumptively appropriate sanction. However, in addition to

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[9] The panel noted that it was highly likely respondent would have benefitted financially from pursuing the appeal and the motion for attorney's fees. Instead, he settled and dropped the fee request because he was "focused on his clients' best interests and express wishes in pursuing the settlement of their cases." Discipline Report, p 7.

arguing various mitigating factors and some authorities imposing reprimands, respondent cites a portion of the ABA Standards which are attached as an appendix to the ABA/Bureau of National Affairs Manual on Professional Conduct for the proposition that "most courts impose a reprimand" for conduct of this nature. This cite appears to be drawn from the commentary immediately following the text of Standard 6.23 (calling for a reprimand when negligent failure to comply occurs).[10] The case referenced in the commentary that is most closely on point is the *Florida Bar v Rosenberg*, 387 So 2d 935, 936 (Fla 1980). In that case, a reprimand was issued (with one year probation) for various conduct, including what appears to be the knowing failure to serve papers on opposing counsel.[11] To the extent that the commentary to Standard 6.23 suggests that a knowing or intentional violation of a court order or rule warrants, presumptively, a reprimand, it is at odds with the text of Standards 6.22 and 6.23, and we decline to follow it.

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[10] The commentary to Standard 6.23 states:

> Most courts impose a reprimand on lawyers who engage in misconduct at trial or who violate a court order or rule that causes injury or potential injury to a client or other party, or who cause interference or potential interference with a legal proceeding. For example, in *McDaniel v. State of Arkansas*, 640 S.W. 2d 442 (Ark 1982), a lawyer who failed to file briefs in a timely manner after having been given extensions received a reprimand. In *Florida Bar v. Rosenberg*, 387 So. 2d 935 (Fla 1980), the court imposed a reprimand on a lawyer who used harassing delay tactics at trial and who also refused to send copies of documents to opposing counsel. Courts also impose reprimands when lawyers neglect to respond to orders of the disciplinary agency. For example, in *In re Minor*, 658 P.2d 781 (Alaska 1983), the court imposed a public censure [reprimand] on a lawyer who, because of poor office procedures, neglected to respond to a letter from the Alaska Bar Association.

[11] The opinion in *Rosenberg* states, in part:

> [I]t is alleged that the respondent, after having received a Notice of Appearance from opposing counsel in the case, filed various pleadings, including a Motion for Default and two motions for Final Judgment which had either no certificate of service on opposing counsel or contained certificates of service but which were never mailed or otherwise delivered to opposing counsel. By reason of his acts, the respondent is charged with conduct which adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility and of failing to comply with known local customs of courtesy or practice without giving opposing counsel timely notice of his intent not to comply and of intentionally and habitually violating established rule or procedure, all in violation of Disciplinary Rule 7-106(C)(5) and (7) of the Code of Professional Responsibility. [*Florida Bar v Rosenberg*, 387 So 2d 935, 936 (Fla 1980); emphasis added.]

The Administrator, in arguing for a suspension, analogizes this case to another discipline matter arising from the *Brown* and *Nelthrope* litigation against the City of Detroit, *Grievance Administrator v Samuel E. McCargo*, 09-50-GA (HP Report 3/10/10):

> Mr. McCargo and Respondent were both found to have committed misconduct during the Brown/Nelthrope lawsuit which presumptively called for a suspension. Each of them was able to point to a long and distinguished legal career with no history of discipline. Mr. McCargo was suspended. Respondent was reprimanded. The Board is now obliged to square those results. [Petitioner's Reply Brief, p 3.]

Respondent argues there is no need to try to "square" a case involving multiple instances of misconduct which include failing to disclose false testimony and not responding truthfully to a request for investigation (*McCargo*) with another case (this one) involving knowing disobedience of an obligation under the rules of a tribunal. Although the two attorneys represented parties in the same litigation, the misconduct charges and findings in their respective discipline matters are far from identical.[12] The fact that the two discipline cases arise from a common factual setting does not mean that different sanctions for vastly different misconduct can or should be reconciled. We can only read the Administrator's argument above in the context of the overarching argument that the mitigating factors here were not sufficient to reduce the presumptive level of discipline from suspension to reprimand, not as requiring similar discipline in two dissimilar cases.

We have examined various cases not cited by the parties in order to ascertain the level of discipline traditionally imposed for this type of violation. General guidance is provided by one

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[12] The hearing panel in the McCargo matter summarized its findings of misconduct as follows:

> [T]he panel unanimously concludes that (1) McCargo violated MRPC 3.4(a) by participating in an attempted coverup of the settlement agreement and other documents in the *Brown/Nelthrope* case and by his participation in the efforts to keep various aspects of the agreement secret; (2) McCargo violated MRPC 3.3 by failing to disclose to Judge Callahan the false testimony concerning the reasons why Brown and Nelthrope were removed from their positions; (3) McCargo violated MRPC 1.2(c) by assisting to cover up false testimony given by Kilpatrick and Beatty; and (4) McCargo violated MRPC 8.1(a) by not responding truthfully to the Request for Investigation as it related to McCargo's knowledge of the Free Press' Freedom of Information Act requests (FOIA). By majority vote (Urso and Gruskin), we conclude that McCargo violated MRPC 3.3(a)(4) by failing to disclose to Judge Callahan the false testimony by Kilpatrick and Beatty concerning their relationship. [*Grievance Administrator v Samuel E. McCargo*, 09-50-GA (HP Report 3/10/10), p 3.]

Michigan Board opinion dealing with the knowing violation of a court order. See *Grievance Administrator v Eleanor C. Smith*, 92-71-GA (ADB 1994) (panel reprimand increased to suspension of 30 days for respondent's willful failure to comply with court order requiring her to repay fees to estate). In that case, some aggravating factors not present here contributed to the decision to suspend. Discipline in *Smith* was increased from reprimand to 30 days for the following reasons:

> There are several aggravating factors present in this case. Respondent was the subject of prior discipline, a 1989 reprimand for neglect and misrepresentation in connection with a divorce matter. Respondent failed to acknowledge the wrongful nature of her conduct and exhibited indifference to her duty to repay the money to the estate.
>
> Respondent's conduct was willful. Her disregard for the orders of the court, failure to acknowledge the wrongful nature of her conduct, and failure to return the funds for four years warrant a suspension. The Board concludes that a thirty-day suspension is appropriate. [*Grievance Administrator v Eleanor C. Smith*, 92-71-GA (ADB 1994).]

In light of the lack of directly applicable Michigan disciplinary cases, and to inform our judgment, we have examined cases from other jurisdictions that have disciplined lawyers for using subpoenas *duces tecum* without notice to opposing parties in various circumstances. For example, in *In re Freeman*, Arizona Supreme Court No. SB-09-003-D (2/24/2009), the equivalent of a reprimand with conditions was imposed under the following circumstances:

> [Respondent Michael L. Freeman] was censured and placed on probation for two years. Participation in the State Bar's Law Office Management Assistance Program and attending a CLE program relating to the Arizona Constitution's Victims' Bill of Rights is required. He also was assessed the costs and expenses of the disciplinary proceedings.
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> Mr. Freeman was hired to represent a client regarding the sexual molestation of a minor. Mr. Freeman petitioned the court for an order to compel the production of the minor's counseling records. The petition was denied and while the motion for reconsideration was pending, Mr. Freeman served the minor's counselor with a subpoena *duces tecum* without giving notice to the state, the minor or the minor's representative. Mr. Freeman violated the rights of the minor victim by obtaining the records without a court order.

> Three aggravating factors were found: prior disciplinary offenses, pattern of misconduct and substantial experience in the practice of law.
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> Three mitigating factors were found: absence of dishonest or selfish motive, full and free disclosure to a disciplinary board or cooperative attitude toward the proceedings and remoteness of prior offenses. Mr. Freeman violated Rule 42, ARIZ.R.S.CT., ER 4.4(a).

The conduct was treated by Arizona under that state's rule analogous to our MRPC 4.4 ("a lawyer shall not use means that . . . violate the legal rights of [a third] person"). The original charges included an allegation that MRPC 3.4(c) had been violated, but this was dropped as part of a plea negotiation after the hearing officer found the charge not proven. Also, the disciplinary commission's report states: "there existed a legal dispute as to whether the holding of [an Arizona case] required Respondent to give notice to the State and Minor or Minor's representative prior to attempting to obtain the records through subpoena, and whether Respondent was permitted to subpoena such records absent an accompanying Court Order issued pursuant to [rule]."[13] Nonetheless a censure (reprimand) was imposed.

In a similar Arizona case, the respondent received a 60-day suspension for subpoenaing records regarding an alleged minor victim in connection with his defense of a criminal defendant accused of indecent conduct. *In re Telep*, Disc Comm No 08-2230; Arizona Supreme Court No. SB-10-0022-D (4/7/2010). That respondent not only failed to provide notice of the subpoena to the Minor and the State, but also engaged in two types of deceptive conduct, the Arizona commission found: (1) he made the subpoena returnable to the court or his office, thus suggesting that the court authorized the subpoena, and (2) when asked by the judge during a hearing about the location of the records, respondent Telep said he did not know the whereabouts; two days later he delivered them to the court and upon further inquiry it was shown that the records had been delivered to the respondent some 20 days prior.

An Indiana attorney received a private reprimand for a misuse of subpoenas in violation of Indiana Rules of Professional Conduct 4.4(a) (obtaining evidence in violation of legal rights of

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[13] *In re Freeman*, Disc. Comm. No. 06-2029 (before the Disciplinary Commission of the Supreme Court of Arizona), p 3 (December 19, 2008), approved, Arizona Supreme Court No. SB-09-003-D (2/24/2009).

another) and 8.4(d) (conduct prejudicial to the administration of justice) under the following circumstances:

> Respondent represented an insurance company. A third person made a claim against the company, asserting that an insured had caused personal injury to him. Before any legal action had been filed, Respondent served the third person on three separate occasions with a subpoena *duces tecum* commanding the . . . production of . . . documents. [*In re Anonymous*, 896 NE 2d 916 (Ind 2008).]

After holding that the relevant rule made it clear that "subpoenas under this rule are available only after an action has been filed," the Indiana Supreme Court held:

> By using subpoenas, Respondent purported to issue orders on behalf of a court, rather than simply making requests on behalf of an insurance company. Respondent's improper use of subpoenas tended to give the third party (who apparently was unrepresented) the false impression that he could be held in contempt of court if he failed to appear and produce the documents requested.
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> An offense of this gravity would usually have warranted discipline more severe than a private reprimand, but in light of the lack of adverse consequences and Respondent's cooperation with the Commission, the Court approves the agreed discipline. [*In re Anonymous*, *supra*.]

A Florida lawyer was suspended for 91 days for "prepar[ing] and sign[ing] a subpoena in a non-existent case in order to obtain the personal cellular telephone records of . . . an individual with whom he believed his wife to be having an extramarital affair." Referee's report, p1 n 1, approved by the Supreme Court of Florida in *The Florida Bar v Steinberg*, 977 So 2d 579 (Fla 2008) (table). Respondent was also required to undergo a psychiatric evaluation. The disciplinary referee found that, in addition to committing conduct prejudicial to the administration of justice, respondent Steinberg violated several rules against dishonesty.

The respondent in *Steinberg* received the records and used them to confront his wife. Aggravating factors found by the disciplinary referee were (1) selfish motive, and (2) substantial experience in the practice of law. The referee noted that respondent Steinberg probably violated criminal laws and stated: "The conduct is particularly shocking, and damaging to both the legal profession and public regard for it, because Respondent was previously employed as an assistant state attorney who was charged with the responsibility for prosecuting criminal offenses." Referee's

report, p 11. In terms of mitigation, the referee found (1) no prior disciplinary record, (2) personal or emotional problems, (3) good character or reputation, and (4) interim rehabilitation. The referee did not find remorse notwithstanding protestations to the contrary.

Finally, two cases from Kentucky resulted in discipline for misuse of subpoenas. One case, *Megibow v Ky Bar Ass'n*, 173 SW3d 618, 619 (Ky 2005), involved this factual scenario:

> In 2003, Curtis and Kathy Bailey engaged [respondent Megibow] to represent Mr. Bailey in his post-dissolution of marriage action involving child support and maintenance arrearage. In the course of the representation, [Megibow] served subpoenas *duces tecum* on the records custodians of two credit institutions, directing them to produce a complete payment history for Mr. Bailey from 1999 forward. However, [Megibow] failed to serve copies of the subpoenas on Bailey's former wife, Paula Sue Bailey or the Marshall County Attorney Child Support Office, a party to the action. He sought compliance with the subpoenas by a date certain. However, the subpoenas did not state a hearing date, nor were they issued in connection with a notice of deposition or court proceeding.

The Kentucky Supreme Court found that respondent Megibow violated Kentucky's Rule 3.4(c) (knowingly or intentionally disobeying an obligation under the rules of a tribunal), which is the rule at issue in this case, and Kentucky's Rule 4.1 (knowing false statement to third person) and reprimanded the lawyer and subjected him to remedial ethics education with the concurrence of the Kentucky Bar.

In *Munroe v Kentucky Bar Ass'n*, 927 SW2d 839 (Ky 1996), the lawyer committed three acts of misconduct in three separate cases: (1) failing to keep a client informed as required by RPC 1.4; (2) lack of diligence and failure to appear at a hearing for another client, coupled with a failure to communicate violation (RPC 1.4) and failing to answer the grievance; and (3) a violation of RPC 3.4(c). Here is the court's summary with respect to the latter violation:

> Munroe acknowledges in response to another charge that she "acted improperly" and violated CR 45.01 and thus Rule 3.4(c), knowingly disobeying an obligation under the rules of a tribunal. In a divorce action, she prepared and served a subpoena *duces tecum* on the parties' insurance agent to appear at Munroe's office with the parties' insurance record. She did not notice opposing counsel, and there was no notice of deposition or hearing date scheduled. Munroe claims that she used the ex parte subpoena to obtain information regarding her own client's home insurance policy, information known to opposing counsel. [*Munroe*, 927 SW2d at 840.]

Respondent Munroe was suspended for three months for all three cases. That suspension ran consecutive to another suspension she was serving. The opinion notes that respondent Munroe acknowledged her need to confront her problems and required a fitness hearing before her readmission (our reinstatement) to the practice of law. *Id.*, p 841.

Of course, each discipline case turns on its own unique facts to some extent. However, the foregoing survey of authorities shows a basis for the focus of the parties' arguments and the panel's analysis as to the appropriate level of discipline. As we have noted, the crux of the argument presented by the Administrator is that the panel's improper weighing of the aggravating and mitigating factors led it to impose a reprimand when a suspension was called for.

With regard to the aggravating factors asserted by the Administrator, we note first that there is ample basis for the panel's finding that selfishness and dishonesty did not motivate respondent. It is not disputed by the Administrator that respondent would likely have benefitted financially (as would his clients) had they not settled and allowed the appeal process to run its course. The panel noted that affirmance of the jury verdict was likely, as was some award of $958,000 in fees requested under the Whistleblowers' Protection Act, and that, with interest, the judgment amount could have grown to $10-12 Million.

However, the Administrator argues that respondent subpoenaed the messages "because he suspected something might be in them and . . . to retaliate . . . because of what he perceived to be defense efforts to thwart his obtaining those messages."[14] The Administrator's brief quotes portions of respondent's testimony from the hearing as to why he did not serve copies of the subpoena on counsel for the City and Kilpatrick. In brief, respondent testified that previous subpoenas resulted in "a woman from the city" calling SkyTel and telling SkyTel not to send the records. In light of these "dirty tricks," he feared "that if the other side had a copy of the subpoena in advance, that the records would be lost forever if the records even existed." Respondent knew he was violating a rule of civil procedure, but he "didn't consider not serving a copy of the subpoena to be a major breach in the ethics [rules]." He testified that he knowingly violated the court rule because: "I thought it was in the best interest of my clients and the public to see these text messages."

The panel carefully considered these admissions and weighed them with the other factors pertinent to determining the proper level of discipline, and it quite properly rejected anything that

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[14] Hearing Review Transcript, p 8.

smacked of an ends-justifies-the-means justification during both the misconduct and discipline phases of the hearing. It has not been shown that the panel erred in refusing to equate whatever motives respondent may have had in subpoenaing the texts, with dishonesty and selfishness.

And we have no basis to reject the panel's determination that respondent was in fact cooperative in these discipline proceedings, that he understood the nature of his misconduct, and felt remorse. Nor can we say that the panel's weighing of these factors against the mitigating factors of respondent's lengthy unblemished career and good reputation was unreasonable or in any way erroneous. However, we do have the responsibility to review decisions on discipline to assure consistency and continuity in the level of discipline imposed, and in discharging this responsibility this Board affords somewhat less deference to panel decisions on sanctions in light of the Board's own duty under *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW 2d 120 (2000), to use the American Bar Associations Standards for Imposing Lawyer Sanctions. *Grievance Administrator v Saunders V. Dorsey*, 02-118-AI; 02-121-JC (ADB 2005).

Although "attorney misconduct cases are fact-sensitive inquiries that turn on the unique circumstances of each case," *Grievance Administrator v Deutch*, 455 Mich 149, 166; 565 NW2d 369 (1997), our Court adopted the Standards in order to "promote consistency in discipline." *Lopatin*, 462 Mich 238. However, the Court did not intend the Standards to be applied mechanically:

> 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. [*Lopatin*, 462 Mich at 248 n 13.]

This is an unusual case in that respondent claims that he believed he had a duty higher than that imposed by the court rules to seek the text messages without notice to the opposing parties. Respondent also claims that his experience in this case led him to believe that the texts would not see the light of day had he complied with the rules. Respondent admits he consciously chose to violate the court rule requiring a copy of a subpoena to be sent to the opposing party, and, less consciously, to violate the court's order requiring documents produced pursuant to the subpoena to

be produced to the court. In its report on misconduct, the panel properly did not accept respondent's rationale for his conduct as legal justification, and the panel found that respondent violated MRPC 3.4(c).

The panel's report on discipline provides an exceptionally sound analysis of the parties' arguments. The panel correctly identified the presumptive sanction as that of suspension under ABA Standard 6.22. Both parties agree with this determination. Although we find that the panel carefully and conscientiously weighed the aggravating and mitigating factors proffered by the parties, we agree with the Administrator that there is insufficient mitigation here to justify the imposition of a reprimand. While a reprimand for conduct similar to that here is not unprecedented, we are of the considered opinion that respondent's knowing violation of the rules and of the court's order warrants a suspension in this case.

We cannot close without recognizing the excellent work of the panel below. The reports on misconduct and on discipline were thorough, well-written and assisted the Board greatly on review.

For the foregoing reasons, we will modify the panel's order of discipline by ordering that respondent's license to practice law in Michigan shall be suspended for 30 days.

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 voluntarily recused and did not participate.

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
State of Michigan,
Attorney Grievance Commission,
Petitioner,

ADB Case No. 09-47-GA

-vs-

MICHAEL L. STEFANI, P 20938,
Respondent.
_____/

MISCONDUCT REPORT OF TRI-COUNTY HEARING PANEL NO. 26

PANEL MEMBERS:

ANNE BAGNO WIDLAK, Chairperson
JAMES E. BAIERS, Member
BARRY GOLDMAN, Member

APPEARANCES: Attorney Grievance Commission
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BY: ROBERT E. EDICK

Appearing on behalf of Petitioner

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Lake Orion, Michigan 48362
BY: KENNETH M. MOGILL

Appearing on behalf of the Respondent

APPENDIX A

I. INTRODUCTION AND PREHEARING PROCEEDINGS

The Michigan Attorney Grievance Commission ("AGC" or "Petitioner") filed this Complaint against Respondent, Michael L. Stefani ("Stefani" or "Respondent"), with the Michigan Attorney Discipline Board on May 19, 2009. The Complaint arises out of Stefani's representation of Gary A. Brown and Harold C. Nelthrope in their lawsuit against the City of Detroit ("City") and then Mayor Kwame M. Kilpatrick ("Kilpatrick") in the Wayne County Circuit Court, Case No. 03-317557-NZ (the "Brown/Nelthrope case"). Stefani also represented Walter Harris in a similar termination case against the City and Kilpatrick. (Harris v. City of Detroit, *et.al.* Wayne County Case No. 03-337670-NZ, hereinafter the "Harris case")

Although not set forth in separate counts, based upon the parties' pre trial and post trial briefs and the closing arguments of counsel, Stefani is alleged to have committed acts of professional misconduct involving three issues:

1. Stefani faxed two subpoenas to Skytel in September, 2007, requesting the text messages between Kilpatrick and Christine Beatty ("Beatty") without serving a copy on opposing counsel; and, directed Skytel to send the text messages directly to Stefani's office as opposed to Judge Michael Callahan as required by a Court Order.

2. When Stefani received the text messages from Skytel in October 2007 he had knowledge that another lawyer, Kilpatrick, had committed a significant violation of the Rules of Professional Conduct in that Kilpatrick had committed perjury during his deposition and trial testimony in the Brown/Nelthrope case, and Stefani did not report this fact to the AGC until February 2008.

3. Stefani executed a confidentiality agreement in which he promised to keep the text messages between Kilpatrick and Beatty confidential in return for an $8.4 million dollar settlement of the Brown/Nelthrope and Harris cases, and that this conduct constituted the misdemeanor of compounding or concealing a crime in violation of MCL 750.149.

Stefani filed a timely Answer to the Complaint and a Motion for Partial Summary Disposition on the basis that MRPC 8.3(a) does not require that an attorney report alleged misconduct by another attorney to the AGC within a specified time period; that the allegations that Stefani violated MCR 9.104 are unconstitutionally vague and overbroad and did not provide him with fair notice of his alleged misconduct; and, the allegations that Stefani violated MCL 750.149 failed as a matter of law because the Michigan Rules of Professional Conduct do not prohibit a lawyer from using the possibility of presenting criminal charges against an opposing party in connection with representing a client in a civil claim. Briefs were submitted on these issues and a hearing was held before this Panel on September 15, 2009. At the conclusion of the hearing, this Panel issued an Order denying the Motion for Partial Summary Disposition, without prejudice.

This Panel also addressed one other procedural matter during the course of these proceedings. During Stefani's testimony at the hearing on October 8, 2009, he admitted giving the text messages between Kilpatrick and Beatty to a reporter with the *Detroit Free Press.* (Tr. 99-100, 10/8/09). Counsel for the AGC argued that this was inconsistent with testimony that Stefani had provided on four previous occasions and requested that this Panel allow the AGC to amend or supplement this Complaint to allege additional charges against Stefani in this

proceeding. (Tr. 102-103, 10/8/09). Briefs and a proposed Amended Complaint were filed and argument on the motion took place on October 26, 2009. After reviewing the briefs, hearing the arguments and reviewing the legal authorities, this Panel issued an Order Denying the Motion to Supplement the Formal Complaint on November 2, 2009.

II. EXHIBITS

The following exhibits were introduced and admitted, unless otherwise indicated, during the proceedings:

Petitioner's Exhibit 1: Subpoena dated August 18, 2004 issued by Michael L. Stefani to MCI Subpoena Compliance c/o Skytel Messaging Pager in Brown/Nelthrope case and attached Notice of Deposition for Photocopying Only directed to all counsel of record.

Petitioner's Exhibit 2: Court Order in Brown/Nelthrope case, August 26, 2004.

Petitioner's Exhibit 3: Plaintiff's Motion to Vacate Non-Comporting Order in the Brown/Nelthrope case, August 31, 2004.

Petitioner's Exhibit 4: Subpoena in the Brown/Nelthrope case issued to MCI Subpoena Compliance, c/o Skytel Messaging Pager, September 17, 2004.

Petitioner's Exhibit 5: Amended Order in Brown/Nelthrope case, September 27, 2004.

Petitioner's Exhibit 6: Subpoena in Brown/Nelthrope case to Skytel Corporation, September 25, 2007 with attached facsimile transmission confirmations.

Petitioner's Exhibit 7: Subpoena in Brown/Nelthrope case to Skytel Corporation, September 28, 2007 with attached facsimile transmission confirmation.

Petitioner's Exhibit 8: Plaintiff's Brief in Support of Motion For Attorney's Fees and Costs in the Brown/Nelthrope case, October 9, 2007.

Petitioner's Exhibit 9: Judgment in Brown/Nelthrope case, October 9, 2007

Petitioner's Exhibit 10: Plaintiff's Supplemental Brief in Support of Motion for Attorney's Fees and Costs in the Brown/Nelthrope case, undated.

Petitioner's Exhibit 11: Stefani hand-written notes, October 17, 2007.

Petitioner's Exhibit 12: Settlement Agreement effective October 17, 2007.

Petitioner's Exhibit 13: Escrow Agreement-NOT ADMITTED

Petitioner's Exhibit 13A: Revised Escrow Agreement-NOT ADMITTED

Petitioner's Exhibit 14: NONE

Petitioner's Exhibit 15: Settlement Agreement and General Release, effective November 1, 2007

Petitioner's Exhibit 16: Settlement Agreement and General Release, Harris case.

Petitioner's Exhibit 17: Confidentiality Agreement effective November 1, 2007.

Petitioner's Exhibit 18: E-mail from Mike Stefani, January 23, 2008.

Petitioner's Exhibit 19: Request For Investigation filed with AGC by Stefani on February 13, 2008.

Petitioners' Exhibit 20: E-mail from Sydney Turner, August 29, 2007.

Respondent's Exhibit A: Curriculum Vitae of Michael Stefani.

Respondent's Exhibit B: E-mail from Mike Stefani, August 29, 2007.

Respondent's Exhibit C: Article in Detroit Free Press, January 25, 2008

Respondent's Exhibit D: Transcript of Motion to Expedite before Judge Robert Colombo, January 25, 2008.

III. WITNESSES

Michael L. Stefani

Samuel E. McCargo

David D. Patton

Sidney L. Frank

James L. Howlett

Gary A. Brown

William P. Baer

James A. Bivens, Jr.

Ira L. Todd, Jr.

Walter S. Foreman

Angelo E. Iafrate

Honorable Michael J. Callahan

IV. SUMMARY OF TESTIMONY AND EVIDENCE

Stefani was called under the adverse witness statute by the AGC. Stefani has been licensed to practice law in the State of Michigan since 1969 and has been a hearing panel member for the Attorney Discipline Board since 1989. (Tr. 11, 10/8/09). He was the attorney for Plaintiffs Gary Brown and Harold Nelthrope in a whistleblower case against the City, then mayor Kilpatrick, and certain other defendants who were dismissed from the case prior to trial. (Tr. 12, 10/8/09). Brown was the Deputy Chief of the Detroit Police Department ("DPD") in the Professional Accountability Bureau and Nelthrope was a member of the DPD Executive Protection Unit. They alleged they were wrongfully terminated because they were involved in disclosing wrongdoing to the Internal Affairs Division of the DPD. Stefani also represented Walter Harris who was a police officer in the Executive Protection Unit who was discharged from the DPD and filed a similar whistleblower's action against the City of Detroit and Kilpatrick. (Tr. 14-17, 10/8/09). During the discovery phase of these cases, Stefani learned that Kilpatrick was licensed to practice law in the State of Michigan. (Tr. 18, 10/8/09).

Stefani testified that whistleblower cases against public bodies, and especially these cases against the City of Detroit and Kilpatrick, were very complicated and difficult. Cases can be even more difficult depending on the judge hearing the case since he believes some judges are

"politically active, and they often have some contact in their past with the people you are suing." (Tr. 18-21, 10/8/09).

During discovery Stefani learned that city officials, including Kilpatrick, often used text messages to communicate with various executives. (Tr. 10/8/09). On or about August 18, 2004, Stefani issued a subpoena to MCI/Skytel in Washington, D.C., requesting copies of text messages between Kilpatrick and Beatty for the period of September 1, 2002 to October 31, 2002 and April 1, 2003 to May 31, 2003. The subpoena directed Skytel to produce those records at the offices of Luzod Court Reporting in Detroit. (Petitioner's Exhibit 1). This subpoena was accompanied by a Notice of Deposition for Photocopying Only to all counsel of record. Stefani admitted that he served the subpoena on Skytel only by mail, and if Skytel chose not to comply, he probably could not have enforced the subpoena through an order to show cause. However, it was his experience that often non-parties will voluntarily comply with a subpoena, even if not from the jurisdiction in which they are located. (Tr. 30-32, 10/8/09). Stefani admitted that he was aware of the fact that the Michigan Court Rules require a subpoena be served on opposing counsel. (Tr. 33, 10/8/09).

In response to the subpoena, counsel for Kilpatrick filed an Emergency Motion to Quash the Subpoena for the Skytel text messages. The basis for Kilpatrick's motion was that the text messages were subject to the "deliberative process privilege" and were not discoverable. (Tr. 35-36, 10/8/09). A hearing was held and on August 26, 2004 Judge Callahan issued an order that the text messages should be sent to him for an *in camera* inspection prior to being released to counsel. (Petitioner's Exhibit 2). Stefani filed a Motion to Vacate this order on August 31, 2004, for the reason that he was of the opinion that the written order did not comport with the

Judge's ruling from the bench and had been improperly submitted by attorneys for the defendants. (Petitioner's Exhibit 3).

On or about September 17, 2004, Stefani issued another subpoena to MCI/Skytel requesting the Kilpatrick/Beatty text messages, but directing Skytel to produce them to Judge Callahan in the Wayne County Circuit Court. (Petitioner's Exhibit 4). This subpoena was also served on all counsel of record. (Tr. 42, 10/8/09).

On September 27, 2004, Judge Callahan entered an Amended Order on Kilpatrick's Motion to Quash the Skytel subpoena, which deleted the reference in the first order that if the Court decided to release the Skytel records it would only be done "at the time of trial." (Petitioner's Exhibit 5). After the issuance of the second subpoena to Skytel directing the text messages be produced directly to Judge Callahan, Stefani testified that there was no other activity in connection with attempting to obtain the text messages until 2007. This was because the parties were busy working on a number of interlocutory appeals, engaging in settlement discussions, pretrial discovery and trial preparation. (Tr. 47-49, 10/8/09). Although Stefani acknowledged that he might be required to lay a foundation for the admissibility of the text messages even if used for impeachment of Kilpatrick or Beatty, he believed that Judge Callahan would allow the text messages to be admitted without additional authenticity or foundation. (Tr. 53-55, 10/8/09).

The jury trial of the Brown/Nelthrope case began in August 2007. After Beatty testified the issue of the text messages came up and Judge Callahan advised counsel that he had not received them from Skytel. Although the Judge offered to adjourn the proceedings until the text

messages could be obtained, counsel for all the parties, for a number of reasons, decided not to delay the trial and to proceed without obtaining the Skytel records. (Tr. 56-57, 10/8/09). After the conclusion of the case, the jury awarded Brown and Nelthrope, collectively, $6.5 million dollars. (Tr. 58, 10/8/09).

After the verdict, Stefani had his investigator and paralegal attempt to locate the original Skytel witness they had contacted regarding the text messages in 2004. When Stefani's investigator located the former Skytel employee who had received the 2004 subpoenas, he said "we [Skytel] didn't send them [the text messages] because a lady from the city called us and said they were filing another motion to quash and that we shouldn't send them until further order of the court". (Tr. 59, 10/8/09). Prior to Stefani issuing another subpoena to Skytel, counsel for Kilpatrick e-mailed copies of the Court's previous order regarding submitting the text messages to Judge Callahan. (Petitioner's Exhibit 20). (Tr. 69, 10/8/09).

Approximately a month later, on or about September 25, 2007, Stefani issued a third subpoena to Skytel requesting the text messages, but directed Skytel to produce those records at the offices of Stefani & Stefani in Royal Oak, Michigan. (Petitioner's Exhibit 6). This subpoena was issued even though the jury verdict in the Brown/Nelthrope case was returned on or about September 11, 2007. (Tr. 70, 10/8/09). Although Stefani did not know what he would find in the text messages if they were produced, he believed they might be relevant in connection with post-trial motions seeking attorney's fees under the Whistleblower Act. (Tr. 70-71, 10/8/09). A copy of this third subpoena was not served on defense counsel. Stefani said he did not serve it on the attorneys for Kilpatrick and the City: "Because when we talked to the former employee (Skytel), he told us that someone, a woman from the city, had called and said they were filing

another motion to suppress and not to send the records. I believe that if the other side had a copy of the subpoena in advance, that the records would be lost forever if the records even existed". (Tr. 72, 10/8/09).

After the jury verdict Judge Callahan told counsel he was being reassigned to the Court's Criminal Division and Stefani thought he might not continue to handle the Brown/Nelthrope case during post trial motions. (Tr. 73-74, 10/8/09). Stefani was concerned that if he provided a copy of the third Skytel subpoena to defense counsel they would seek another emergency motion to prevent Skytel from producing the text messages, and the case might be assigned to a judge "more sympathetic to the mayor and we would never see the text messages for whatever they held." (Tr. 75, 10/8/09).

Stefani admitted that not serving a copy of the post verdict Skytel subpoenas on defense counsel was a violation of the Michigan Court Rules and that it was not proper. (Tr. 75-76, 10/8/09). Although counsel for Kilpatrick had e-mailed Stefani a copy of the prior order directing the messages to be sent to Judge Callahan, Stefani thought that the order might not be in effect any longer since the jury verdict had already been returned. Stefani admitted that with regard to not considering the court order and having Skytel send the text messages directly to him "in hindsight, I didn't use the best judgment, but I can tell you that I, in good faith, did not think the order was still – anymore than the gag order was still binding." (Tr. 79, 10/8/09). He also testified "...But in hindsight today, I can see that, you know, I may have begin – been incorrect in my belief that the purpose of the order had been fully satisfied at the conclusion of the trial." (Tr. 82, 10/8/09).

On September 28, 2007, Stefani issued a fourth subpoena to Skytel seeking the same records, but making a technical change in how the text messages were described in the subpoena. (Petitioner's Exhibit 7, Tr. 87-88, 10/8/09). Once again, the subpoena directed Skytel to produce the text messages to the office of Stefani & Stefani and was not served on defense counsel. (Tr. 89, 10/8/09).

On or about October 5, 2007, Stefani received a compact disk ("CD") from Skytel that had two files on it, one for each time period of text messages requested in the September 28, 2007 subpoena. Stefani made two more copies of the CD off the original received from Skytel and printed out hard copies of the documents contained on it. (Tr. 94-96, 10/8/09). Stefani made the conscious decision not to turn over the CD or the documents to the Court or defense counsel because the defendants would bring a motion to suppress the text messages, and he believed if Judge Callahan was no longer involved in the case, there was a possibility that another judge would grant the defendant's relief and require him to turn over all copies of the text messages. (Tr. 98-99, 10/8/09).

When asked about what he did with the CD and printouts of the text messages, Stefani testified: "I kept them in different places. I kept one at home in my safe. I have a little safe at my house. I kept one in a safe at the office. And as a precaution against a judge ordering them destroyed, I gave one to the Detroit Free Press for safekeeping." He gave the copy of the CD with the text messages to the Free Press reporter within a day or two after he received them on or about October 5, 2007. (Tr. 100, 10/8/09).

Stefani said that he knew if the text messages became public it would not be in the best interest of his clients. His clients made it clear to him that they wanted to settle the case as soon as possible, and from that standpoint, Stefani believed it was in his clients' best interest that the messages not become public. He also reiterated that he believed if the messages were made available to a judge, other than Judge Callahan, the judge might be more sympathetic to the mayor and order the text messages destroyed. (Tr. 8-9, 11/12/09).

Stefani had a meeting with a *Free Press* reporter on or about October 7 or 8, 2007 to discuss the possibility of turning over the text messages under certain conditions. (Tr. 49-50, 11/12/09). A day or two later, on approximately October 9 or 10, 2007, the reporter called back and set up a lunch with Stefani. Stefani turned over the CD to the reporter and gave him suggestions as to how the newspaper could independently obtain the text messages. (Tr. 55-56, 11/12/09).

Stefani stated that when he received the text messages he did not have an actual trial transcript of the testimony of Beatty and Kilpatrick. He had extensive notes of the questions and answers from Beatty, but he said he did not have accurate notes with respect to the questions and answers given by Kilpatrick. (Tr. 60-61, 11/12/09).

On or about October 9, 2007, Stefani filed a Brief in Support of Motion for Attorney's Fees and Costs under the Michigan Whistleblower's Protection Act. The motion sought $958,688.50 in attorney's fees and $86,551.32 in costs. (Petitioner's Exhibit 8). When the original motion for attorney's fees was filed, Stefani says he did not have any specific evidence that Kilpatrick committed perjury, since he does not believe he had the text messages at the time

the motion was prepared. (Tr. 63-65, 11/12/09). On that same day, October 9, 2007, Judge Callahan entered a judgment on the Brown/Nelthrope verdict against Kilpatrick and the City, jointly and severally, in the amount of $3,600,000 for Gary Brown, $2,900,000 for Harold Nelthrope, interest through September 11, 2007 in the amount of $1,454,897.88, with the interest to continue to accrue from September 12, 2007 until the judgment was satisfied. (Petitioner's Exhibit 9).

Judge Callahan referred the Motion for Attorney's Fees to facilitation. At the same time, Stefani and members of his staff were reviewing the text messages received from Skytel, and preparing a Supplemental Brief in Support of the Plaintiffs' Motions for Attorney's Fees and Costs. (Petitioner's Exhibit 10). The opening paragraph of the Supplemental Brief states that Kilpatrick and Beatty repeatedly lied in answering questions during their depositions and committed perjury during the trial of the Brown/Nelthrope case. The Supplemental Brief provided excerpts of several of the text messages between Beatty and Kilpatrick and came to the conclusion that "those records show unequivocally that both Ms. Beatty and Mayor Kilpatrick perjured themselves during depositions and at trial." (Petitioner's Exhibit 10, p. 2). The Supplemental Brief also stated that "although plaintiffs have had strong circumstantial evidence of this perjury, they have only recently acquired irrefutable direct evidence of it." (Petitioner's Exhibit 10, p. 3). Although the Supplemental Brief used the terms "perjury" and "irrefutable evidence," Stefani testified that he did not have a trial transcript for either Kilpatrick or Beatty and he was just going by his general recollection of the questions and answers he recalled during the trial, and the use of these adjectives were done primarily for the purpose of advocacy. (Tr. 76-77, 11/12/09).

When Stefani went to the facilitation on the issue of attorney's fees on October 17, 2007, he took copies of the Supplemental Brief similar to that as Petitioner's Exhibit 10. (Tr. 80, 11/12/09). Stefani intended to file the Supplemental Brief with the excerpts of the text messages if it was not possible to reach a global settlement in the Brown/ Nelthrope case, since he believed that the revelation of the text messages would be a good way to persuade the City and Kilpatrick to settle the case so his clients could get on with their lives. (Tr. 83, 11/12/09). Stefani advised his clients that he believed they had a very strong case on appeal, and that with interest running, an ultimate verdict after appeals could be in the neighborhood of $10 to $12 million. However, both of his clients indicated they were strongly in favor of settling the case rather than waiting for the appeals process and recovering more at a later date. (Tr. 84, 11/12/09).

At the facilitation on October 17, 2007, Stefani was seeking approximately one million dollars in attorney's fees and cost. After several hours of negotiations, the City came up with a proposed offer of $450,000 for attorney's fees. Stefani indicated that he would be willing to take $500,000 if there was a global settlement of the Brown/Nelthrope case as well as the Harris case. (Tr. 86-87, 11/12/09). According to Stefani, the City and Kilpatrick's attorneys indicated they were not authorized to negotiate a global settlement, and around that point, Stefani provided the facilitator with a manila envelope which contained a copy of the Supplemental Brief similar to Petitioner's Exhibit 10 with the excerpts of the Beatty-Kilpatrick text messages. Stefani asked the facilitator not to look at the contents of the envelope, and asked that the he merely give the envelope to Kilpatrick's lawyer, Samuel McCargo (Tr. 90-91, 11/12/09). After the facilitator provided McCargo with the envelope containing the Supplemental Brief including excerpts of the text messages, McCargo had the facilitator request that Stefani meet him in the parking lot,

where McCargo allegedly told Stefani he had "no idea" and he appeared to be visibly shaken.

McCargo asked if Stefani had filed the Supplemental Brief, and Stefani told him it would be filed either that day or the next day. McCargo asked Stefani if he could hold off filing it while he tried to contact "my people" to see if he could get authorization to negotiate a global settlement. Shortly thereafter, McCargo advised Stefani that they were able to contact Kilpatrick and he had authorized them to negotiate a global resolution and that John Johnson, of the City Law Department, would also be coming down to the facilitator's office. (Tr. 99-101, 11/12/09). After Johnson arrived and had a discussion with McCargo, Stefani and McCargo began negotiating a global settlement based upon Stefani's handwritten notes which were admitted as Petitioner's Exhibit 11.

During the negotiations, counsel for the defendants wanted to make sure the agreement provided that Stefani turn over all of the Skytel records in his possession, but they never asked him whether he had made the messages available to anyone prior to the negotiations. (Tr. 105, 11/12/09). Within a short period of time, the City agreed to pay $8.4 million to settle the Brown/Nelthrope and the Harris cases. (Tr. 108-109, 11/12/09). Later on October 17, 2007, Stefani and the attorneys for the City and Kilpatrick prepared a typewritten settlement agreement that required Stefani & Stefani to transfer ownership and surrender to Kilpatrick all "records, originals and copies, of the text messages from Skytel Messaging." (Petitioner's Exhibit 12). As part of the settlement, Stefani agreed to waive his request for attorney's fees against the defendants and only take the fee he was entitled to under his contingent fee agreement with his clients. He acknowledged that if he had pursued the motion for attorney's fees, it was possible,

although unlikely in his mind, that the trial judge could decide not to award any attorney's fees against the defendants. (Tr. 116-119, 11/12/09).

After signing the settlement agreement that is Petitioner's Exhibit 12, Stefani testified he contacted the reporter at the *Detroit Free Press* and had him return the CD of the text messages that Stefani had provided to him. Stefani never asked the reporter whether he had burned another CD or printed the text messages prior to returning the CD that Stefani had previously provided. (Tr. 123-124, 11/12/09). Stefani testified that he felt bad that McCargo never asked him about whether he had previously provided copies of the text messages to a third party, but he believed it was not his position to bring this up in connection with representing his clients, and if he had been asked about this by McCargo he would have answered truthfully. (Tr. 126-128, 11/12/09).

After the original settlement agreement of October 17, 2007, McCargo told Stefani the agreement would have to be broken into separate parts, one settlement agreement involving the terms of the Brown/Nelthrope and Harris settlement, and a separate agreement dealing with the confidentiality of the text messages. (Tr. 132-133, 11/12/09). McCargo told Stefani this was necessary because the *Free Press* had filed a freedom of information request. (Tr. 133, 11/12/09). Subsequently, the parties entered into a separate settlement agreement in the Brown/Nelthrope case (Petitioner's Exhibit 15), a settlement agreement in the Harris case (Petitioner's Exhibit 16), and a confidentiality agreement in connection with turning over the text messages to Kilpatrick's representatives. (Petitioner's Exhibit 17). All of these signed documents and the final settlement checks were exchanged between Stefani and McCargo on December 5, 2007. (Tr. 142-143, 11/12/09). The law firm of Stefani & Stefani's fees and costs

for the Brown/Nelthrope and Harris cases worked out to be $2,827,660. (Tr. 143-144, 11/12/09). On or about December 11, 2007, the parties appeared before Judge Callahan and placed the dismissal on the record, without referring to the confidentiality agreement. (Tr. 150-151, 11/12/09).

Petitioner's Exhibit 19 is a Request for Investigation of an Attorney filed by Stefani with the AGC on February 13, 2008. In the Statement of Facts, Stefani indicates that Kilpatrick was a defendant and witness in the Brown/Nelthrope case and that he believed Kilpatrick perjured himself "both during his depositions and during the trial." Stefani testified he did not file this request for investigation until after the *Free Press* had published the text messages, and had published quotes from ethics professors expressing the opinion that a lawyer had a duty to report perjury committed by another lawyer. Stefani said that he then went to the Michigan Rules of Professional Conduct ("MRPC"), since he was not familiar with the rule that required an attorney to report possible perjury by another attorney. He said the primary reason that he did not report Kilpatrick to the AGC back in October – November of 2007 was because he was not aware of a rule that required him to do so. (Tr. 153-154, 11/12/09). He also said he did not report it because he did not have a transcript of Kilpatrick's testimony, who gave very evasive answers, and he did not feel he had "good enough information to report a lawyer – to report that a lawyer committed perjury when I only had the messages and not the transcript." (Tr. 155, 11/12/09). He also said that sometime in November of 2007 the *Free Press* reporter told him that he might have an obligation under the Rules of Professional Conduct to report Kilpatrick. Stefani said he researched the rules, did not believe he had an obligation, and the more he thought about it, he believed he really did not have the proof to report the matter. Then when he

learned of experts who pointed out more specific provisions of the rules, he took another look, and believed he missed the appropriate rule on his first review in November, 2007. (Tr. 156-157, 11/12/09). Stefani did not believe reporting Kilpatrick's perjury to the AGC would violate the confidentiality agreement. (Tr. 158-160, 11/12/09).

Counsel for Stefani questioned him regarding his background as a lawyer and law enforcement officer. He got to know Gary Brown while he worked with the Detroit Police Department, and Brown consulted with Stefani shortly after his termination. (Tr. 173, 11/12/09). After the subpoena of September 17, 2004 was issued to Skytel directing the text messages be sent directly to Judge Callahan, Stefani did not follow up on whether the text messages were ever actually produced to Judge Callahan, but was under the assumption that they had been sent to him. (Tr. 182, 11/12/09) He and his firm members became very busy with three interlocutory appeals, one of which went to the Michigan Supreme Court, and were no longer focusing on the text messages, especially since they had no idea what they would contain or in what form they would be produced. (Tr. 183-184, 11/12/09) Following the testimony of Beatty in the Brown/Nelthrope trial, the issue of the text messages came up, and Judge Callahan said that he did not have them, and he asked that they be re-subpoenaed or re-sent. (Tr. 185, 11/12/09). Stefani had his legal assistant and investigator work on tracking down the Skytel employee whom they had dealt with back in 2004. They learned that there had been a change in ownership at Skytel, and it took them some time to locate where the text messages were now being kept. (Tr. 186-189, 11/12/09).

After the jury verdict, Stefani's Motion for Attorney's Fees was submitted, and he testified that he had actual time records from everyone in his firm who worked on the matter to

support the claim for approximately $958,000 in attorney's fees and $86,000 in costs. ('Tr. 190-191, 11/12/09). After receiving the text messages Stefani talked to Brown and Nelthrope about the likelihood of success on appeal, that they would continue to accrue substantial interest during the appeal process, and that the court could also award them significant attorney's fees. Nonetheless, Brown and Nelthrope indicated that the extended period taken for the lawsuit to proceed through trial had been very difficult on their families and they wanted Stefani to do whatever he could to settle the case without any appeals. (Tr. 198-199, 11/12/09).

Returning to the issue of the settlement, Stefani testified that he was not certain why McCargo requested that the original settlement agreement be re-drafted to include a settlement agreement and a separate confidentiality agreement with Kilpatrick and Beatty, and that decision was made solely by McCargo. (Tr. 218-220, 11/12/09) When Stefani was asked directly by the *Free Press* if there was a separate confidentiality agreement, he says he truthfully answered that there was, and that statement was published in the *Detroit Free Press* on January 25, 2008 (Respondent's Exhibit C).

Samuel E. McCargo also testified. He represented Kilpatrick in the Brown/Nelthrope case. (Tr. 40, 11/18/09) McCargo never advised Stefani that he was waiving Kilpatrick's assertion of any privilege as to the text messages. He also believed that the Court Order of September, 2004 requiring the messages to be delivered to Judge Callahan remained in effect. (Tr. 42-43, 11/18/09). After Judge Callahan requested that the text messages be re-subpoenaed during the trial in 2007, McCargo had one of his associates send an e-mail and a copy of the September 27, 2004 Court Order to Stefani and his partner Frank Rivers reminding them that the

Skytel records "must be delivered directly to the courtroom," and attached a copy of the court order. (Petitioner's Exhibit 20).

McCargo did not become aware that Stefani had re-subpoenaed the Skytel records until October 17, 2007 during the facilitation on the attorney's fee issue. (Tr. 44, 11/18/09). McCargo testified that he believed he was specific in asking Stefani about all copies of the text messages and he was advised "that there were no other sets of text messages other than the ones in his safe and the one at home". (Tr. 45-46, 11/18/09). Nonetheless, McCargo believed that the Brown/Nelthrope case was "destined to settle" even if the defense counsel had known a copy of the messages had been delivered to the *Free Press.* (Tr. 47, 11/18/09). However, had he known that the *Free Press* already had copies of the text messages, McCargo testified it was unlikely that there would have been a confidentiality agreement "consistent with the ones we did execute", and he was not sure what could have been done at that point to settle the case or resolve the privilege issues, but in any event, it would not have been done in the way it was done on October 17, 2007. (Tr. 47-48, 11/18/09). McCargo was also of the opinion that the jury verdict would not be reversed on appeal, and that he recommended the case be settled even before the facilitation on October 17, 2007 when he was first advised that Stefani had the text messages. He was also convinced that if the City or Kilpatrick pursued an appeal, not only would it be unsuccessful, but the award would grow significantly and it would cost the City a lot of additional money. (Tr. 48-49, 11/18/09).

McCargo testified that he could have pursued a motion before Judge Callahan to suppress the Skytel records on the basis that they had not been submitted to the court for an *in camera* review, but he chose not to pursue that option. He also believed that there was a strong

indication from Judge Callahan that he would most likely release the records without screening them. (Tr. 51-52, 11/18/09).

McCargo always was of the opinion that after the original October 17, 2007 settlement agreement was signed by the parties, that a separate confidentiality agreement would be prepared and executed at a later date. (Tr. 52-53, 11/18/09). The reason for the separate confidentiality agreement was to provide Beatty and Kilpatrick with a mechanism to assert any privileges they might have with respect to the material contained in the text messages. It was not the purpose of the separate confidentiality agreement to keep anything from the public or the *Free Press* in an unlawful manner. (Tr. 53-54, 11/18/09).

The AGC's last witness in its case was Judge Michael J. Callahan. Judge Callahan presided over the Brown/Nelthrope trial in Wayne County Circuit Court. He recalls issuing the court order that the Skytel text messages were to be reviewed by him and not to be turned over to counsel until he was persuaded whether they could be used for impeachment purposes on the basis that a witness may have committed perjury. (Tr. 5-6, 12/4/09). If Callahan had received the text messages during the course of the trial he would have gone over them and would have let the lawyers argue whether or not there was a privilege that would have prevented their disclosure. But he would have allowed the messages to be used and presented to the jury concerning any statements between Kilpatrick and Beatty about the firing of Gary Brown. He testified "that was absolutely going to the jury." (Tr. 8, 12/4/09).

After Beatty testified, Callahan recalled Stefani asking for the text messages, and he told all the lawyers that he did not have them. He offered to adjourn the trial for a sufficient amount

of time for the lawyers to obtain the Skytel text messages. If there had been an adjournment and the Skytel records were sent to Judge Callahan he would have reviewed them prior to allowing them to be used at trial. (Tr. 8-9, 12/4/09). Judge Callahan is of the opinion that when Stefani obtained the text messages through the subpoenas issued after the jury verdict, Stefani violated the Judge's orders that the text messages be produced to him for an *in camera* review. (Tr. 10, 12/4/09). Judge Callahan said that despite any claims of privilege, he believed that any text messages involving the firing of Gary Brown would have been allowed into evidence. (Tr. 11-12, 12/4/09). He would also have denied any objections to messages showing that Kilpatrick and Beatty had testified falsely concerning their relationship. (Tr. 12, 12/4/09).

Judge Callahan also intended to award attorney's fees to Stefani if there had not been a settlement of the entire matter. (Tr. 16-17, 12/4/09).

Judge Callahan knows that lawyers are required to report to the AGC when they have substantial knowledge that a lawyer may have committed misconduct. He did not report Stefani for violating his court order because he felt Stefani was going to be brought up on charges, and "wasn't aware that there was a rush for me to call, to dial up the Attorney Grievance Commission and say, hey, I think he did something wrong." (Tr. 19, 12/4/09). However, he would have reported misconduct if the AGC had not taken action on its own. (Tr. 19, 12/4/09).

Judge Callahan believes the attorneys should have fully advised him about the confidentiality agreement regarding the text messages at the time he approved the dismissal of the Brown/Nelthrope case. (Tr. 20-21, 12/4/09).

Stefani then called nine witnesses who all testified that he has a reputation for truthfulness and honesty in their personal relationships with him and in the community. (Tr. 61-86, 11/18/09).

V. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

1. Respondent committed misconduct when he sent subpoenas to Skytel without serving them on the Defendants and not having the text messages sent to Judge Callahan as required by a court order.

There is no question of fact here. As explained above, Respondent admits both that he sent the September 25, 2007 and September 28, 2007 subpoenas to Skytel without serving them on the Defendants as required by MCR 2.305(A) (5) and that he had the text messages sent to his law firm and not to Judge Callahan for *in camera* review as required by the October 2004 court order. The question before the panel is only whether these actions constitute misconduct under the Rules of Professional Conduct.

MRPC 3.4(c) states that a lawyer shall not, "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." According to his Post-Hearing Argument (p. 12, footnote 2), Respondent acknowledges, "that just because he felt *morally* justified in not serving a copy of the subpoena on counsel for Defendants, that did not justify his ignoring a court rule and that he is prepared to accept the consequences for that."

Respondent argues, however, that his failure to serve the subpoenas on Defendants was justified for the following "case specific reasons:"

a) Someone from the City of Detroit Law Department had surreptitiously contacted Skytel in September 2004 and told Skytel not to comply with the subpoena directing it to provide the records directly to Judge Callahan.

b) In his experience it was not so unusual in litigation for a copy of the subpoena not to be served on all parties; while that did not change the requirements of the court rule, it informs why the failure to follow that court rule did not rise to the level of misconduct required to constitute a violation of the Rules of Professional Conduct.

c) Stefani was very concerned that there was a very high probability that the text messages would never see the light of day if the Defendants were given another chance to prevent their production.

d) Suppressing the text messages or preventing their production under the subpoena would perpetuate the Mayor's claim that the Brown/Nelthrope verdict was the result of only one African-American being on the jury and would clearly not be in the public interest (Respondent's Post-Hearing Argument, p. 15).

He also argues, in the footnote quoted above, that "no harm resulted from Stefani not serving the subpoena on defendants" since the text messages would have been admitted in any event. In plain English: (a) The other side started it; (b) Everybody does it; (c) If he followed the Rules, he might not get what he wanted; (d) He was fighting the good fight, and in any event he didn't hurt anybody.

This Panel does not find these arguments persuasive. With respect to violation of the court order requiring that the text messages be delivered to the court, Respondent argues that he

believed that order had expired. He also believed Judge Callahan was no longer assigned to the case, and his replacement might not view the matter as favorably. Further, Respondent argues, his good character and reputation for truthfulness are evidence that he would not have knowingly violated a court order.

If Respondent believed the court's order expired when the trial ended, this Panel is at a loss to explain what authority the Respondent believed he retained to issue a subpoena at all. This Panel is similarly at a loss to find any evidence from which the Respondent could have reasonably concluded that Judge Callahan was no longer handling the case. Even if there were such evidence, the panel is surprised to hear Respondent argue that the fact that a case might be reassigned to a less sympathetic judge justifies the violation of a court order. Finally, without taking anything away from Respondent's character and reputation, this Panel finds that his character and reputation failed to prevent him from knowingly violating the court order in this case.

In this Panel's opinion, the arguments presented by the Respondent in this regard provide rationalizations for his conduct; they do not provide legal justification for it. Accordingly, this Panel finds the Respondent did knowingly disobey an obligation under the rules of a tribunal in violation of MRPC 3.4(c) and thereby committed misconduct.

2. Respondent did not commit misconduct by waiting until February 13, 2008 to report Kilpatrick's alleged perjury to the Attorney Grievance Commission.

The Formal Complaint alleges that Stefani committed professional misconduct in violation of MCR 9.104(A)(1), MCR 9.104(A)(4), MRPC 8.3(a) and MRPC 8.4(a) because he waited until February, 2008 to report to the AGC that Kilpatrick had given false testimony during the Nelthrope/Brown litigation. Notwithstanding the fact that Stefani ultimately did file a

Request for Investigation of An Attorney (Request For Investigation) with the AGC regarding Kilpatrick, the Petitioner urges the Panel to conclude that Stefani's delay in filing the Request was the equivalent of a complete failure to report and constituted professional misconduct.

The central facts pertaining to this issue are not in dispute: Stefani became aware that Kilpatrick was a licensed Michigan attorney during the discovery phase of the Nelthrope/Brown litigation. (Tr. 18, 10/8/09). Stefani admitted at the hearing of this matter that he had first reviewed the text messages that exposed the falsity of Kilpatrick's testimony in early October, 2007. (Tr. 37-38, 11/12/09). The Nelthrope/Brown case was settled and the terms of the settlement were placed on the record before the Honorable Michael Callahan on December 11, 2007. (Tr. 74, 10/8/09). The record further shows that Stefani did not report Kilpatrick's wrongdoing until he filed a Request for Investigation on February 13, 2008. (Tr. 4, 11.12.09; Petitioner's Exhibit 19).

Stefani argues that although he reviewed the text messages in October of 2007, he did not have "knowledge" of the Kilpatrick's misconduct sufficient to trigger his duty to report under MRPC 8.3(a) until January, 2008 when the *Detroit Free Press* published excerpts from the text messages and compared them to excerpts from the trial transcript in the Nelthrope/Brown case. (Tr. 53-54, 11/12/09). Stefani also testified that he was not aware that he had a duty to report until the *Detroit Free Press* quoted several ethics specialists who indicated that he had a duty to report Kilpatrick's misconduct to the AGC. (Tr. At 54).[1]

[1] Stefani also testified that the primary reason he did not report Kilpatrick's misconduct is that he was unaware of the provisions of MRPC 8.3(a). However, the Panel finds that argument unavailing because it is a maxim of the law that ignorance of the law is no excuse. *Curley v Beryllium Development Corp,* 281 Mich 554 (1037).

Michigan Rule of Professional Conduct 8.3(a) requires attorneys to report wrongdoing by other attorneys to the AGC: "(a) lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission." *Id.*[2] However, the Rule is silent with regard to a time frame within which the attorney must notify the agency and our research has not disclosed any Michigan cases that address how soon after learning of another lawyer's misconduct the attorney must contact the AGC. Accordingly, we turn to courts in other jurisdictions for guidance in applying MRPC 8.3(a) to the evidence in this record.

The Supreme Court of Louisiana interpreted a disciplinary rule analogous to MRPC 8.3(a) and held that an attorney should report another attorney's wrongful conduct "promptly" after learning about it. *In re Riehlman,* 891 So 2d 1239, 1247 (2005). The court reasoned that "(t)he need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer.[3] This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented." *Id.*

In *Riehlman*, supra, the court found that Riehlman had committed professional misconduct after he waited five years to report to the disciplinary authorities that his now-deceased friend, a prosecuting attorney, had confessed to Riehlman that he had intentionally

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[2] The official Comment to MRPC 8.3(a) provides some guidance as to what kinds of circumstances should be considered in determining whether a delay in reporting becomes so egregious that it can fairly be classified as the equivalent to a failure to report. The drafters of the Comment observe that "(r)eporting a violation is especially important where the victim is unlikely to discover the offense." *Id.* The Comment also cautions that "(t)his rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." *Id.*

[3] Citing Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform,* 16 GEO J LEGAL ETHICS 259, 298 (Winter 2003).

suppressed blood evidence that would have exculpated a man whom he was prosecuting for armed robbery. The court held that under those facts, Riehlman had violated the rule because he failed to "promptly" report the prosecuting attorney's misconduct and there was no reason to have waited five years to come forward with the information. *See also, In re Anderson,* 171 Vt 632 (2000) (holding that respondent had failed to protect client assets and thus committed professional misconduct by waiting nine months to report that his law partner was continuously mishandling client funds.); and *In re Himmel,* 125 Ill2d 531 (1989) (held, Himmel committed professional misconduct when he failed to disclose to the state disciplinary administrator the fact that he had knowledge that a former attorney for his client had converted the client's funds and the former attorney had continued to convert many other clients' funds after Himmel learned of his wrongdoing.)

Thus the discrete issue before this Panel is whether, under all the relevant circumstances, Stefani's delay in reporting Kilpatrick's false testimony was the functional equivalent of a complete failure to report and warrants a finding of professional misconduct. Several general principles are relevant to this analysis. The fundamental purpose of disciplinary proceedings is not intended as punishment for wrongdoing, but as protection of the public, the courts and the legal profession. MCR 9.105. The Preamble to the Michigan Rules of Professional Conduct ("Preamble") instructs that "(t)he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Later, the Preamble explains that "(t)he rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." *Id.*

The Preamble also addresses the conflict that often arises when an attorney's multiple responsibilities intersect:

> "In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from a conflict between the lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Responsibility prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules."

MRPC 1.0, *Preamble.*

Thus, it is clear that the duty to report another attorney's misconduct must be harmonized with another essential duty that arises in litigation: when serving as an advocate, a lawyer "should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MRPC 1.3, *Comment.* He or she must "....zealously assert the client's position under the rules of the adversary system." MRPC 1.0, *Preamble.* In the context of the issue of Stefani's duty to report, The Restatement (Third) of the Law Governing Lawyers, Section 5, provides that the requirement to report misconduct "...is commonly interpreted not to require a lawyer involved in litigation or negotiations to make a report until the conclusion of the matter in order to minimize harm to the reporting lawyer's client." *Id.*

Reviewing the evidence in the record against the standards cited above, we first conclude that Stefani acquired sufficient knowledge of Kilpatrick's wrongdoing when he reviewed the text messages in October, 2007 to trigger his duty to report under MRPC 8(a). To demonstrate that an attorney "knew" something in the context of the Michigan Rules of Professional Conduct, one must prove that he or she had actual knowledge of the fact in question. MRPC 1.0, *Preamble.* An individual's knowledge may be inferred from circumstances. *Id.*

We are not persuaded by Stefani's testimony that he could not have had the requisite knowledge of the Kilpatrick's wrongdoing because he did not have a transcript of the Nelthrope/Brown trial and it was only when the *Detroit Free Press* published the text messages that he acquired sufficient knowledge of the misconduct to have a duty to report it. (Tr. 53; 60-61; 155, 11/12/09). In Stefani's view, he was not required to comply with MRPC 8.3(a) until he "had sufficient proof to report the Mayor for perjury." (Respondent's Post-Hearing Argument at 26; Tr. 77, 11/12/09). However, under a plain reading of the Rule, Stefani was not required to amass sufficient evidence to prove the crime of perjury, but only to acquire knowledge that raises "...a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer." MRPC 8.3(a). The Comment to the Rule notes that the term "substantial" as used in the Rule refers to the seriousness of the *possible* offense and not the quantum of evidence of which the lawyer is aware." (Emphasis added). MRPC 8.3, *Comment.* Thus, Stefani's position that he had to collect enough evidence to prove perjury is not supported and we decline to import any such requirement into MRPC 8.3(a).

In addition, we agree with the Petitioner's assertion that Stefani's own language in Plaintiff's Supplemental Brief in Support of Their Motion for Attorney Fees and Costs (Supplemental Brief) in the Nelthrope/Brown litigation (Petitioner's Ex 10) illustrates that he had enough knowledge of the Kilpatrick's false testimony to trigger his obligation to report it to the AGC. There were three significant facts about which Kilpatrick gave testimony during the Nelthrope/Brown case that were directly contradicted by the text messages, and Stefani described them with great specificity in his Supplemental Brief. First, Kilpatrick denied during the case that he and Beatty fired Brown. According to Stefani's Supplemental Brief, "the text messages between the two of them clearly demonstrate that Brown was fired [by them]."

(Petitioner's Ex 10, Supplemental Brief at 7-8). Second, Kilpatrick had also denied throughout the litigation that his office had leaked the identity of Harold Nelthrope to the media, which was similarly discredited by the text messages according to the Supplemental Brief. *Id* at 8. Finally, Kilpatrick testified at trial that he and Beatty had never had any romantic relationship; according to the Supplemental Brief, the text messages revealed "a longtime love affair between them." *Id* at 3. Thus, Stefani argued that "although plaintiffs have had strong circumstantial evidence of this perjury, they have only recently acquired irrefutable direct evidence of it." *Id* at 3.

This Panel believes that the Supplemental Brief illustrates that at the time Stefani drafted the brief in November, 2007, he had knowledge that Kilpatrick had committed a significant violation of the Rules of Professional Conduct that raised a substantial question as to Kilpatrick's honesty, trustworthiness, or fitness as a lawyer within the meaning of MRPC 8.3(a).

However, the analysis cannot end there. The issue before this Panel is not limited to the question of when Stefani acquired sufficient knowledge to trigger his duty to report, because he also had a concomitant duty under the Rules of Professional Conduct in his role as an advocate for his clients. This Panel also believes that the nature of Kilpatrick's professional misconduct influences the outcome in this matter.

At the time Stefani obtained knowledge of the false testimony in October of 2007, the Nelthrope/Brown case was still in active litigation. The record reflects that the Nelthrope/Brown litigation was not settled and dismissed with prejudice until December 11, 2007. (Tr. at 74, 10/8/09.). Until the conclusion of that litigation, Stefani had a clear duty as an advocate to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf... [and to] zealously assert the client's position under the rules of the adversary system." MRPC 1.3, *Comment*; MRPC 1.0, *Preamble.*

Stefani testified at the hearing in this matter that his clients very much wanted to settle the case and he did not believe that it would be in their best interest if the text messages became public. (Tr 8-9; 84, 11/12/09). His clients had advised him that the protracted litigation had taken a toll on them and their families and they wanted to settle the case without any appeals. (Tr 198-199, 11/12/09). As an experienced litigator, Stefani believed that the private revelation of the text messages to Kilpatrick and the City of would persuade them to settle the case and would permit his clients to move on with their lives. (Tr 83, 11/12/09).

Viewing Stefani's conduct in terms of his role as an advocate, it was not unreasonable for him to refrain from reporting the false testimony until the litigation had ended in order to protect what he considered his clients' best interests. MRPC 1.3, *Comment;* MRPC 1.0, *Preamble.* This conclusion is also consistent with The Restatement (Third) of the Law Governing Lawyers, Section 5, which provides that a lawyer's duty to report another attorney's misconduct "...is commonly interpreted not to require a lawyer involved in litigation or negotiations to make a report until the conclusion of the matter in order to minimize harm to the reporting lawyer's client." *Id.* The case was finally settled and dismissed with prejudice on December 11, 2007. Accordingly, a period of some 2 months elapsed between the end of the litigation and Stefani's contact with the AGC. This Panel has concluded that a delay of that length does not convert Stefani's actions into a failure to report pursuant to MRPC 8.3(a).

The circumstances surrounding Kilpatrick's professional misconduct inform our decision as well. His false testimony during the Nelthrope/Brown litigation ended at the conclusion of the trial. While obviously reprehensible, that misconduct did not continue after Stefani's duty to report arose when he learned of Kilpatrick's false testimony through the text messages. That stands in contrast to the situations where the harm caused by the offending attorney continued to

cause injury due to a delay in reporting or a failure to report that occurred in the *Riehlman, Anderson,* and *Himmel* cases discussed earlier in this Report. This Panel believes that this fact distinguishes Stefani's situation from the attorneys disciplined in those cases, because Stefani's delay in reporting Kilpatrick did not contribute to an ongoing pattern of harm.

Accordingly, this Panel finds that, under the narrow facts and unique circumstances of this case, Stefani's Request for Investigation was not untimely and therefore he did not violate MRPC 8.3(a), MRPC 8.4(a), MCR 9.104(A)(1), or MCR 9.104(A)(4).

3. Respondent did not commit the offense of compounding or concealing an offense in violation of MCL § 750.149 nor commit misconduct under MRPC 8.4(b) or MCR 9.104(A) (1)-(5).

Paragraphs 36-47 of the AGC's Complaint allege that by executing the Settlement Agreement of October 17, 2007 (Petitioner's Ex. 12) and the Confidentiality Agreement of November 1, 2007 (Petitioner's Ex. 17) Stefani promised to conceal "irrefutable evidence of Kilpatrick's perjury in return for the $8,400,000 settlement [which] constitutes the misdemeanor offense of compounding or concealing a felony in violation of Section 149 of the Michigan Penal Code, MCL 750.149." (Formal Complaint, Para. 46). If proven, this would be a violation of MRPC 8.4(b) as well as the similar provision contained in MCR 9.104(A) (5).

MRPC 8.4(b) provides that it is "professional misconduct for a lawyer to [commit] a violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Similarly, MCR 9.104(A) (5) provides that a lawyer shall not engage in "conduct that violates a criminal law of a state or of the United States."

There was no evidence that Stefani was ever charged with, let alone convicted under this statute. However, an attorney does not need to be charged or convicted of a violation of a criminal law under the Rules of Professional Conduct to be found to have committed professional misconduct. The burden of proof is a preponderance of the evidence with regard to the decision on the issue of misconduct. MCR 9.115(J) (3).

The specific criminal statute which Stefani is alleged to have violated is MCL 750.149, entitled "Compounding or Concealing Offense." It provides in pertinent part:

> "Any person having knowledge of the commission of any offense punishable...by imprisonment in the state prison, who shall take any money, or any gratuity or reward, ...upon an agreement or understanding, express or implied, to compound or conceal such offense, or not to prosecute thereof, or not to give evidence thereof, shall, where such offense, of which he or she so had knowledge, was punishable in any other manner, he or she is guilty of a misdemeanor..."

In *Balcom v Zambon*, 254 Mich App 470 (2002), the Court of Appeals analyzed this statute and held that to sustain a charge of compounding or concealing, the following elements must be established:

> "(1) the existence of an agreement to not prosecute or to conceal a crime, or to decline to provide evidence in a criminal prosecution;
>
> (2) knowledge of the commission of a crime; and
>
> (3) the receipt of some valuable consideration." *Id.* at 480.

The *Balcom* court acknowledged that with only minor stylistic changes, the statute has remained virtually the same since 1871, and despite this long history, there have only been a handful of cases that have ever cited the statute.

The crux of the AGC's argument that Stefani violated this statute is based upon the execution of the October 17, 2007 Settlement Agreement in the Brown/Nelthrope and Harris

cases (Petitioner's Ex. 12), and the Confidentiality Agreement of November 1, 2007. (Petitioner's Ex. 17). Since the provisions dealing with the Kilpatrick/Beatty text messages is virtually the same in both documents, and the Confidentiality Agreement provides that it "supersedes all previous understandings, written or oral, between the parties with respect to the subject matter" (Petitioner's Ex. 17, Section. 8), only the provisions of the Confidentiality Agreement need be analyzed.

In this Agreement, Brown, Nelthrope, Harris and Respondent made certain agreements with regard to the Skytel text messages Respondent obtained in connection with the 2007 subpoenas. Similarly, confidential records that Kilpatrick and the City obtained during discovery regarding Brown, Nelthrope and Harris were also required to be returned to them. Specifically, Respondent and his law firm agreed to "transfer ownership of and surrender to counsel and/or representatives designated by Kilpatrick, all original records and all copies of such records made by them of records obtained from Skytel...and to maintain in the strictest confidence, the contents of any and all of the K&B records that came into their custody or control, or to which they have had access." (Section 4(a)). Additionally, Respondent agreed "not to disclose such records in any fashion, including pleadings in court relating to the resolution and settlement of claims of damages, attorney fees and/or costs." (Section 4(b)). Section 7 provided that "All provisions of this Agreement are intended to be interpreted and construed in a manner to make such provisions valid, legal and enforceable."

The issue before this Panel is whether the AGC has carried its burden of proof that these agreements by Respondent violated MCL 750.149.

The first element of concealing an offense is an agreement to "conceal a crime, or to decline to provide evidence in a criminal prosecution". *Balcom, supra* at 480. In this case, the

alleged offense being concealed was the perjury committed by Kilpatrick and Beatty in their depositions and testimony during the Brown/Nelthrope trial. The record contains no evidence concerning the criminal charges actually filed against Kilpatrick and Beatty nor the actual offenses to which they pleaded guilty. There is no evidence that Respondent declined to provide evidence in the criminal prosecution.

The Confidentiality Agreement provides that all of the originals and copies of the Skytel records that Respondent had would be surrendered "to counsel and/or representatives designated by Kilpatrick." There does not seem to be any dispute that Skytel still had the text messages that could have been obtained by prosecutors in connection with any perjury charges against Kilpatrick and Beatty. Stefani testified that if he had been ordered to reveal the existence of the text messages by a subpoena or court order he would have complied. Since Section 7 of the Confidentiality Agreement sets forth the parties' intent that it be construed to be "legal and enforceable" Respondent could have complied with a subpoena or court order and disclosed the existence of the messages without violating the Agreement.

Stefani also had provided the text messages to the *Detroit Free Press* in October 2007 before entering into the Settlement or Confidentiality Agreements. Although he obtained the CD containing the text messages back from the reporter after executing the final Confidentiality Agreement, based upon articles published in the *Free Press* it seems most likely that it either made copies of the text messages or took extensive notes before returning the CD.

The second element of concealing an offense is that the party has knowledge of the commission of a crime. During his testimony Stefani testified he did not have a trial transcript of Kilpatrick or Beatty at the time he obtained the text messages and he did not have extensive notes from Kilpatrick's trial testimony. Thus, he claimed he did not have sufficient information

to establish perjury. However, in Respondent's unfiled Supplemental Brief for Attorney's Fees and Costs he quoted excerpts from the Skytel messages and argued that they showed "unequivocally that both Ms. Beatty and Mayor Kilpatrick perjured themselves during depositions and at trial." (Petitioner's Ex. 10, p. 2).

While Stefani may not have had sufficient evidence to establish a crime by Kilpatrick or Beatty beyond a reasonable doubt, the Panel is persuaded that he had sufficient evidence that they may have committed perjury, and thus Respondent had "knowledge of the commission of a crime", sufficient to satisfy the second element of the offense under MCL 750.149.

As to the third element, this Panel is not persuaded that the AGC has carried its burden of proof that Respondent received any "valuable consideration" over and above what he was entitled to under his fee agreement with his clients. The Judgment issued in the Brown/Nelthrope case (Petitioner's Ex. 9) provided that plaintiffs were to receive the jury verdict of $6.5 million dollars, plus statutory interest through September 11, 2007 of $1,454,897.88, for a total award against Kilpatrick and the City of $7,954,898. Interest would continue to accrue at the statutory rate until the Judgment was satisfied.

Additionally, plaintiffs may have been entitled to attorney's fees and costs under the Whistleblower's Protection Act. Stefani filed a motion seeking an additional $958,688.50 for attorney's fees and $86,551.32 in costs. The Settlement Agreement in the Brown/Nelthrope case was $8,000,000 which included and resolved their claim for an additional award of over $1,000,000 in attorney fees, costs and additional statutory interest. Although there is some discretion in connection with awarding attorney's fees, Judge Callahan testified he would have awarded attorney's fees if there had not been a settlement (Tr. 16-17, 12/4/09).

Thus, the $8,000,000 settlement in the Brown/Nelthrope case was actually substantially less than what would have been the ultimate judgment amount after adding attorney's fees, costs and additional interest. The parties actually acknowledged this in the Confidentiality Agreement by agreeing that responses to inquires concerning the terms of the settlement was to "advise such persons or entities that Plaintiffs agreed to accept an amount substantially less than the full amount they were entitled to in order to avoid the uncertainty of a trial or an appeal..." (Petitioner's Ex.17, Section 4(c)).

With regard to the Settlement Agreement in the Harris case for $400,000, there is nothing in the record to indicate that this amount was excessive and included any additional consideration to Respondent for his execution of the Confidentiality Agreement. (Petitioner's Ex. 16).

Respondent received his attorney's fees from the settlement of these cases pursuant to the fee agreement he had with his clients. There is no claim that the fees were excessive or included any additional amount for Respondent's execution of the Confidentiality Agreement. In fact, Respondent's fees were actually less than he would have received had he pursued his clients' right to collect statutory attorney's fees under the Whistleblowers' Act, additional statutory interest and the allowable costs of prosecuting the action. This is simply not a case where Respondent received any additional consideration for turning over the Skytel messages to Kilpatrick. Thus, the third element of MCL 750.149 requiring consideration for the concealing an offense is not present in this case.

It is this Panel's finding that the AGC has failed to carry its burden of proof that Respondent committed a violation of MCLA 750.149. Therefore, Respondent did not violate MRPC 8.4(b) or MCR 9.104(A) (5).

The Complaint also raises the broader issue of whether attorneys in negotiating the settlement of civil actions may either threaten criminal proceedings against an opposing party, or enter into a settlement agreement to either explicitly or impliedly refrain from instigating a prosecution.

This Panel has reviewed American Bar Association Formal Opinion 92-363 issued by the Standing Committee on Ethics and Professional Responsibility ("ABA Opinion") which has been favorably quoted by the Attorney Discipline Board in *Grievance Administrator v Oehmke*, ABD No. 91-96-GA (1993). The ABA Opinion dealt with this issue under the Model Rules of Professional Responsibility which are identical to MRPC 8.4(b). The ABA Opinion held in pertinent part:

> "The Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim, to refrain from presenting criminal charges against the opposing party as part of a settlement agreement, provided that such agreement does not violate applicable law." (ABA Opinion, p. 1).

While the ABA Opinion acknowledges that a lawyer must not run afoul of any criminal statute involving compounding or concealing a crime, it points out that the Model Penal Code dealing with compounding or concealing crime allows "an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense." (ABA Opinion, p. 3). As previously discussed, this Panel finds that Respondent did not violate MCL 750.149 based on the facts in this record.

In negotiating settlements which are in the best interests of their clients, lawyers are confronted with the dual responsibilities of acting with all reasonable diligence in representing a client within the bounds of their professional responsibility. (MRPC 1.3) The Official

Comments to MRPC 1.3 provide that a lawyer must "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and must act with "zeal in advocacy upon the client's behalf." In this case, Stefani testified that he had clear instructions from his clients to settle the cases rather than fight an appeal which would take years to resolve through the appellate process.

As such, this Panel finds that the agreement by Stefani to turn over the text messages to Kilpatrick's counsel or representative did not violate the general obligations imposed upon attorneys under MCR 9.104(A) (1)-(3).

VI. CONCLUSION

Based on this Panel's finding of misconduct as set forth in Section V. 1 of this Report, a separate hearing to determine the appropriate discipline will be scheduled pursuant to MCR 9.115(J) (2).

TRI-COUNTY HEARING PANEL NO. 26

Anne Bagno Widlak, Chairperson

James E. Baiers, Member

Barry Goldman, Member

DATED: March 2, 2010

STATE OF MICHIGAN

ATTORNEY DISCPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission

Petitioner,

Case No. 09-47-GA

v.

MICHAEL L. STEFANI, P 20938

Respondent.

_____/

DISCIPLINE REPORT OF TRI-COUNTY HEARING PANEL NO. 26.

PANEL MEMBERS:

ANNE WIDLAK, Chairperson
JAMES E. BAIERS, Member
BARRY GOLDMAN, Member

APPEARANCES:

ATTORNEY GRIEVANCE COMMISSION
BY: Robert E. Edick
211 West Fort Street, Suite 1410
Detroit, MI 48226-3236

Appearing on behalf of Petitioner.

MOGILL, POSNER & COHEN
BY: Kenneth M. Mogill
27 East Flint Street, 2nd Floor
Lake Orion, MI 48362

Appearing on behalf of Respondent.

APPENDIX B

I. EXHIBITS

None offered.

II. WITNESSES

Krystal A. Crittendon.

III. FINDINGS AND CONCLUSIONS REGARDING DISCIPLINE

A. INTRODUCTION.

In our Misconduct Report of March 2, 2010, this panel found that Michael Stefani committed professional misconduct when he knowingly disobeyed obligations under the rules of a tribunal in violation of MRPC 3.4 (c). *"Fairness to Opposing Party and Counsel, MRPC 3.4."* The evidence established - indeed, Mr. Stefani admitted - that he both violated an order of the trial judge by having the Skytel text messages sent directly to his own office rather than to the judge, and ignored a court rule by failing to serve a copy of a subpoena for the text messages on opposing counsel. (Tr. 75-76, 10/8/09). On April 1, 2010, the panel heard evidence and oral argument regarding an appropriate sanction for that misconduct. The panel's analysis and findings appear below.

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 following the analytical framework set forth in the American Bar Association's (ABA) Standards For Imposing Lawyer Sanctions. In *Grievance Administrator v Lopatin, 462 Mich 235, 244 (2000),* the Supreme Court explained that the basic goal of the attorney disciplinary system is to protect the public, the courts, and the legal profession (citing MCR 9.105). To that end, the

Court directed ADB panels to conduct a three step analysis in determining an appropriate sanction for attorney misconduct.

The panel makes its 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? *Id* at 239.

Second, the panel must select a sanction that corresponds to the type of misconduct committed by the attorney from the ABA's Recommended Sanctions for a variety of types of misconduct.

Finally, after identifying the ABA's Recommended Sanction for the particular misconduct, the panel must 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. *Id* at 240, citing ABA Standard 9.1.

C. LEGAL ANALYSIS

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

This panel already determined during the misconduct phase of this action that Mr. Stefani violated his duty under MRPC 3.4(c), and that he did so knowingly. *Misconduct Report of Tri-County Hearing Panel No. 26 at 25.* The ABA Standards classify this misconduct as an abuse of the legal process. ABA Standard 6.2.

The panel must now determine the extent of the actual or potential injury to the legal process caused by Mr. Stefani's misconduct. Petitioner argues emphatically that Mr. Stefani

caused actual injury because the City of Detroit incurred some $600,000 in legal fees in connection with the lawsuit the *Detroit Free Press* brought against it under the Freedom of Information Act (FOIA Litigation). Under Petitioner's "but for" reasoning, there would have been no need for the FOIA Litigation if Mr. Stefani had given the text messages to Judge Callahan, filed his supplemental brief containing references to the text messages, or refused Mr. McCargo's suggestion that they redraft the settlement documents. *Petitioner's Memorandum of Law Re: Sanctions,* at 2. But for Mr. Stefani's failure to reveal the text messages, according to Petitioner, the *Free Press* would not have had to seek court intervention to obtain them, and the City would not have had to incur the costs of defense in the FOIA litigation.

The evidence does not support Petitioner's argument and its attempt to connect Mr. Stefani's misconduct in the Brown/Nelthrope case with the City of Detroit's legal bills for its defense of the FOIA Litigation is untenable. First, the suppression of the text messages prior to the FOIA Litigation was not the result of Mr. Stefani's single-handed efforts, but the result of intense negotiations among all of the attorneys involved in the settlement of the Brown/Nelthrope case. It strains logic to place the entire blame on him. In addition, the evidence showed that Mr. Stefani's role in the FOIA Litigation was in reality quite peripheral: he was not an attorney of record and his only appearance in the case was as a fact witness. Krystal Crittendon, Corporation Counsel for the City, testified at the sanctions hearing in this matter that Mr. Stefani played no active role as an attorney in the litigation with the Free Press. (Tr. at 15, 4/1/10). Accordingly, the panel finds that Mr. Stefani's misconduct did not cause actual injury to the legal process.

However, the panel finds that his misconduct did create the potential for harm, even though no actual injury occurred. We reject Mr. Stefani's attempt to minimize the impact of his

misconduct on the legal process using a "no harm, no foul" rationale. Mr. Stefani's admitted failure to serve opposing counsel with a copy of the subpoenas for the text messages and failure to submit the text messages to the Court for review created a palpable risk that text messages that may have contained privileged or other confidential material may have been released to the general public without first being redacted. Our conclusion is not altered by the fact that, according to the hearing testimony of both Judge Callahan and Sam McCargo, the text messages likely would have gone to the jury in any event and become part of the public record of the trial. That testimony does not diminish the fact that Mr. Stefani's misconduct created the *potential* for injury to the legal process *at the time he committed the misconduct.* (Tr. 11-12, 12/4/09; Tr. 51-52, 11/18/09). If we were to adopt Mr. Stefani's rationale in this regard it would provide little or no incentive to future attorneys to observe their duties under the Michigan Rules of Professional Conduct and the Michigan Court Rules. Accordingly, we find that Mr. Stefani's misconduct created the potential for injury to the legal process.

2. Determination of the ABA Recommended Sanction.

The ABA Standards provide that "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) failure to obey any obligation under the rules of a tribunal..." *ABA Standards For Imposing Lawyer Sanctions, Standard 6.2.* ABA Standard 6.22 provides that "(s)uspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding." Due to Mr. Stefani's admitted violation of a Court rule, the panel's finding that he knowingly disregarded Judge Callahan's

order, and the fact that his misconduct created potential injury, the panel has concluded that the applicable ABA Recommended sanction is suspension.

3. Relevant Aggravating and Mitigating Factors.

Petitioner characterizes Mr. Stefani's failure to disclose to defense counsel his service of the subpoenas as a retaliatory or vengeful act that we should consider as an aggravating factor within the meaning of ABA Standard 9.22 (b). Aggravation or aggravating circumstances are defined as "...any considerations or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standard 9.21.* After reviewing the authorities cited in *Petitioner's Memorandum of Law Re: Sanctions,* we have concluded that Mr. Stefani's failure to disclose the subpoenas certainly constituted misconduct, but did not rise to the level of an aggravating factor. The cases cited by Petitioner are distinguishable on their facts: *In Re Lackey,* 333 Or 215 (2002) (court imposed a one year suspension for a former judge advocate who disclosed client confidences and secrets to the press out of a desire to embarrass or injure the officers of the Oregon National Guard); *GA v Krupp,* Case No 96-287-GA (ADB 2002) (affirming the imposition of a 90-day suspension after attorney affirmatively misrepresented to the court and opposing counsel that his client's psychiatrist had written a letter in support of his client's fitness for custody of her children, when in fact he knew that his client had written it); and *People v Putler,* 35 P 3d 571 (2001) (imposing a three month suspension after deputy district attorney knowingly and intentionally represented to an at large murder suspect that he was a public defender who would assist the suspect in his effort to surrender).

Furthermore, we 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, 11/18/09).

D. DISCIPLINE.

Accordingly, the panel declines to impose the ABA Recommended Sanction of suspension. In light of the foregoing mitigating factors, we impose the sanction of reprimand[1] without conditions. *MCR 9.106(3).* We are confident that this very public 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"[2] because it openly and permanently memorializes Mr. Stefani's wrongdoing. In light of the nature of his misconduct, we conclude that a reprimand sufficiently addresses the issues raised by that misconduct and we do not think that suspending Mr. Stefani's right to practice law on this record would advance the basic goal of the disciplinary system in Michigan.

IV. PRIOR DISCIPLINE

None

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[1] The ABA Standards provide that a "reprimand, also known as a censure or public censure, is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice." *ABA Standard 2.5.*

[2] *Grievance Administrator v Lopatin,* 462 Mich 235, 244 (2000); MCR 9.105.

V. ITEMIZATION OF COST

Attorney Grievance Commission:	
(See Itemized Statement filed 04/30/10)	$ 602.42
Attorney Discipline Board:	
Hearing held 09/15/09	$ 155.00
Hearing held 10/08/09	$ 624.50
Hearing held 10/26/09	$ 209.50
Hearing held 11/12/09	$ 950.50
Hearing held 11/18/09	$ 416.50
Hearing held 12/04/09	$ 393.50
Conference Call 02/08/10	$ 4.92
Hearing held 04/01/10	$ 259.00
Hearing held 04/30/10	$ 602.42
Administrative Fee [MCR 9.128(B)(1)]	$1,500.00
TOTAL:	**$5,115.84**

TRI-COUNTY HEARING PANEL NO. 26

Anne Widlak

Anne Widlak, Chairperson

James E. Baiers (by AW with permission

James E. Baiers, Member

Barry Goldman (by AW with permission

Barry Goldman, Member

Dated: June 23, 2010