FILED
ATTORNEY DISCIPLINE BOARD
September 27, 2022

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant/Cross-Appellee,

v

David Charron, P 39455,

Respondent/Appellee/Cross-Appellant,

Case No. 19-130-GA

Decided: September 27, 2022

Appearances

Kimberly L. Uhuru, for the Grievance Administrator, Petitioner/Appellant/Cross-Appellee
David Charron, In Pro Per, for Respondent/Appellee/Cross-Appellant

BOARD OPINION

Kent County Hearing Panel #4 issued an order of suspension with conditions on February 28, 2022, suspending respondent's license to practice law in Michigan for 60 days with conditions, effective March 22, 2022. The Grievance Administrator filed a petition for review seeking reversal of the hearing panel's finding that respondent did not violate Michigan Rule of Professional Conduct (MRPC) 3.4(c) and an increase in the discipline imposed to disbarment or at least a 180-day suspension. Respondent filed a cross-petition seeking dismissal of the formal complaint, or a reversal in the findings of misconduct, and a reduction in the discipline imposed. Respondent also filed a petition for stay. Thus, a notice of automatic stay of the hearing panel's order was issued on March 22, 2022, in accordance with MCR 9.115(K).

On June 15, 2022, the Attorney Discipline Board conducted review proceedings in accordance with MCR 9.118, which included a review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties. For the reasons discussed below, we affirm the hearing panel's findings of misconduct entirely, decline to reverse the panel's finding that respondent did not violate MRPC 3.4(c), and affirm the 60-day suspension with conditions imposed by the hearing panel.

I. Panel Proceedings/Background

On December 12, 2019, the Grievance Administrator filed a formal complaint against respondent alleging that he committed misconduct during his representation of Judd Schnoor, a defendant in an action filed by Glenn Morris in the Kent County Circuit Court to dissolve Morris, Schnoor, & Gremel, Inc. (MSG), an insurance business in which Mr. Schnoor was a 50% owner with Mr. Morris. The formal complaint specifically alleged violations of MRPC 3.4(c), 3.5(d), 6.5(a), 4.1, 8.4(b) and (c) and MCR 9.104(1)-(3).

The underlying facts, as set forth in the formal complaint and the parties' joint pre-hearing statement filed July 27, 2020, reveal that the referenced litigation was lengthy and contentious and ran through various Michigan state and federal courts starting in 2007 until it finally concluded in 2019. The hearing panel's misconduct report, issued on March 30, 2021, and sanction report, issued February 28, 2022, fully set forth these facts, but more importantly distilled down the allegations of misconduct to four distinct issues[1] and thoroughly discussed the factual and legal issues considered by the panel both in determining whether misconduct occurred and the appropriate sanction to impose. For that reason, both reports are attached as appendices to this opinion as Appendix A and Appendix B, and are incorporated by reference.

As for misconduct, the panel found that:

> Respondent did not "knowingly" violate the court's August 22, 2008 order by the transfer of MSG assets, in violation of MRPC 3.4(c), but based on the court's ruling that respondent engaged in contempt of court via the transfer, respondent violated MRPC 8.4(c) and MCR 9.104(1);

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[1] The issues highlighted by the panel on page 10 of the misconduct report were:

1. Transfer of the assets of MSG to NYPIA through a private sale by C&H pursuant to exercise of remedial rights with respect to its security interest while the August 22, 2008 Order was in force, in violation of MRPC 3.4 and MRPC 8.4(c). (Facts, ¶k.)

2. The statement in Respondent's brief to the Court of Appeals of October 21, 2013, indicating that the Circuit Court acted subserviently to a party, in violation of MRPC 3.5(d) and MRPC 6.5(a). (Facts, ¶r.)

3. Respondent's email of December 19, 2008 to Stek, in violation of MRPC 6.5(a), MRPC 4.1, and MRPC 8.4(b). (Facts, ¶l.)

4. Respondent's lack of candor to opposing counsel and to the court, in violation of MRPC 4.1.

> Respondent's statement in his appellate brief referring to the judiciary acting as "the bitch for the opposing party," violated MRPC 3.5(d); 6.5(a); and MCR 9.104(2);
>
> The disparaging nature of respondent's December 19, 2008 email message to Attorney Stek, as referenced in the formal complaint and introduced into evidence, was not enough to find a violation of MRPC 6.5(a);
>
> Based on the record presented, respondent did not make an expressly false statement to opposing counsel, in violation of MRPC 4.1(a);
>
> Respondent made misleading and hence false statements by omission of material facts, with the intent that the court and opposing counsel misinterpret respondent's technically truthful statements and interpretation of the facts and order, in other words, withholding the central fact of transfer of the MSG assets was a failure to make a statement in circumstances in which silence is equivalent to making such a statement, in violation of MRPC 4.1(a) and MRPC 8.4(b); and,
>
> Respondent's failure to openly disclose to the Circuit Court, as well as to opposing counsel, the latent futility of the order as worded because of C&H's own security interest, constituted a violation of MRPC 4.1, and 8.4(b) and (c); and, MCR 9.104(1), (2), and (3). [Misconduct Report 3/30/21, p 15-16, 17, 19, 23-24.]

As for the proper sanction, the panel noted that they considered each rule violation found "on its own in applying the appropriate Standard," and that after also considering all of the applicable aggravating and mitigating factors and relevant precedent, concluded that a 60-day suspension with conditions was appropriate.[2]

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[2] The conditions imposed by the panel require that within 60 days from the effective date of the order, respondent:

> 1. Provide to the Grievance Administrator and the Attorney Discipline Board evidence from a qualified medical provider either (a) that respondent has and is under treatment for Type II diabetes; that symptoms of brain fog and failure of judgment - conditions to which respondent has testified under oath that could be attributable to that disease - are controlled by medication and other treatment that is being consistently administered; and that he is not prone to suffer these effects; or (b) that he does not have Type II diabetes.
>
> 2. Provide to the Grievance Administrator and the Attorney Discipline Board evidence from Morris that he has agreed to accept monthly payments of a stated obligation, and that payments have been and are being made by respondent as promised.

II. Discussion

As for the panel's findings of misconduct, the Grievance Administrator argues on review that the panel erred in concluding that respondent did not violate MRPC 3.4(c) because the transfer of

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3. Provide to the Grievance Administrator and the Attorney Discipline Board evidence of consultation with either (a) a licensed counselor satisfactory to the Administrator or (b) the Lawyers and Judges Assistance Program to review respondent's unwillingness to take responsibility for his actions, and blaming of others for the consequences of his own conduct as evidenced by the record in this proceeding, and ability to accept responsibility for his conduct. The consultant shall provide to the Grievance Administrator and the Attorney Discipline Board a report of consultation and recommendations for further consultation or action.

4. Enter into, and provide to the Grievance Administrator and the Attorney Discipline Board a signed copy of, an agreement for mentorship with a mentor to be selected by respondent in collaboration with Judge Yates or a Circuit Court or Federal District Judge serving in Kent County and acceptable to this panel for consistent and regular consultation about respondent's practice and responses to challenges and situations demanding exercise of discretion and choice, including respect [sic] others in the process of practicing law and ethical obligations in decision making. Among the subjects for mentoring is, was the misconduct in this proceeding an aberration or is he likely to take a similar approach to facts and circumstances as they challenge respondent; and how can this risk, if any, be managed and avoided. The terms of the mentoring agreement shall provide:

   (a) The mentorship shall continue for one year from the date of agreement, subject to extension by reason of hiatus in mentoring availability. Respondent and the mentor shall meet at least once per month. All reasonable expenses of the mentor shall be paid by respondent.

   (b) Respondent shall provide the name and address of the selected mentor to the Grievance Administrator and the Attorney Discipline Board, and advise each of any change in the relationship promptly. A substitute mentor shall be identified as soon as possible in the same manner as the former mentor. The term of mentorship shall be extended by the amount of time between engagement of mentors.

   (c) Respondent shall provide a monthly written report of the mentor to the Grievance Administrator and the Attorney Discipline Board concerning the mentoring and how it is addressing the specific subjects of this Order as well as other matters affecting respondent's conduct as a lawyer.

   (d) The Grievance Administrator and the Attorney Discipline Board shall have the right to communicate with the mentor concerning the mentorship and its effect.

MSG assets occurred contrary to the court's August 22, 2008 order. That order stated, in relevant part:

> IT IS FURTHER ORDERED that Defendant R. Judd Schnoor shall not transfer assets of Morris, Schnoor, & Gremel, Inc. outside the ordinary course of business without authorization from the Court.

We have previously held that a hearing panel's findings of fact should be given deference whenever possible and their findings should stand when they are supported by the whole record. *Grievance Administrator v Ann Beisch*, DP 122/85 (ADB 1988); *Schwartz, v Walsh*, DP 16/83 (ADB 1984). When a hearing panel's findings are challenged on review, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296, 304 (1991). See also *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n 12 (2000) (citing MCR 2.613(C)). The question before the Board is whether the record as a whole is devoid of evidence upon which the panel could reasonably have based its decision. *Grievance Administrator v Robert D. Stein*, 09-3-GA (ADB 2011). The Board does not conduct a de novo review of the factual findings; nor does the Board substitute its own judgment for the judgment and credibility determinations of the panel. *Grievance Administrator v Carrie L. P. Gray*, 93- 250-GA (ADB 1996), lv den 453 Mich 1216 (1996).

The hearing panel found that respondent did not disobey the court's August 22, 2008 order, rather, he was "taking advantage of its words to effectuate a plan outside it that defeated the purpose of it." (Misconduct Report 3/30/21, p 15.) In other words, the panel found that respondent recognized that the August 22, 2008 Order prevented *Schnoor* from transferring MSG's interest in an asset of MS&G, Inc., outside the ordinary course of business. We find that the panel's analysis of the issue of whether respondent violated MRPC 3.4(c) reflects a thoughtful and thorough review of the evidence presented by both parties, including a recognition that under MCL 600.2106,[3] a court

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[3] Several written opinions of the trial court, court of appeals, and bankruptcy court were part of the 52 exhibits offered and admitted at the misconduct hearing. The Administrator's counsel advised the panel that she intended to rely on the factual findings set forth in those opinions (Tr 9/1/20, pp 13, 158), under MCL 600.2106 which provides that:

> A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall

order "shall be prima facie evidence . . . of all facts recited therein . . ." However, as is clear from their report, the panel did not simply rely on the court orders without further analysis.

The hearing panel's discussion of whether respondent violated MRPC 3.4(c) broke down the rule to its elements - knowing disobedience and open refusal to obey.[4] Notably, the panel's analysis specifically references relevant excerpts from respondent's testimony at the hearing and relevant passages from the admitted exhibits as support for the panel's findings and conclusions. We further note that the panel recognized that the rulings of the various courts in the underlying proceedings did not apply the standards and elements of MRPC 3.4(c) to respondent's conduct. We find that there is proper evidentiary support in the record for the panel's finding that respondent did not violate MRPC 3.4(c). Therefore, we affirm the panel's finding in that regard.

For the same reasons - a thoughtful and thorough review and analysis of the evidence presented by both parties - we affirm the panel's other findings that based on the court's ruling that respondent engaged in contempt of court via the transfer, he violated MRPC 8.4(c) and MCR 9.104(1); that respondent's statement in his appellate brief referring to the judiciary acting as "the bitch for the opposing party," violated MRPC 3.5(d); 6.5(a); and MCR 9.104(2); that respondent had an affirmative duty to inform Attorney Stek of relevant facts; and, his failure to disclose all material facts associated with the asset sale to the court, violated MRPC 4.1(a) and 8.4(b) and (c); and, MCR 9.104(1)-(3).[5]

We next turn to the sanction imposed by the hearing panel. The Grievance Administrator argues that the panel's failure to find a violation of MRPC 3.4(c) affected the severity of the sanction ultimately imposed by the panel. The Administrator seeks the Board's intervention to "ensure that discipline is imposed consistently in similar cases," arguing that the presumptive level of discipline was disbarment. Respondent's cross-petition also takes exception to the suspension imposed by the

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> be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree.

[4] The panel's analysis in this regard is specifically set forth in great detail on pages 11-16 of the misconduct report. (Appendix A.)

[5] Misconduct Report 3/30/21, pp 19-24. The Grievance Administrator has not requested review of the panel's findings that the disparaging nature of respondent's December 19, 2008 email message to Attorney Stek, as referenced in the formal complaint and introduced into evidence, was not enough to find a violation of MRPC 6.5(a), or that based on the record presented, respondent did not make an expressly false statement to opposing counsel, in violation of MRPC 4.1(a).

panel, but only as to their finding that his use of the term "bitch" toward the court in his appellate brief was conduct warranting a suspension. Respondent argues that he should have been reprimanded for his use of a "vernacular term" in his brief.

When it comes to reviewing questions involving the level of discipline imposed, the Board possesses a relatively high measure of discretion with regard to the appropriate level of discipline. *Grievance Administrator v August*, 438 Mich 296 (1991). The Board has much more leeway to correct a sanction that may seem at odds with prior precedent for the same or similar conduct. However, the Board also affords a certain level of deference to a hearing panel's subjective judgment on the level of discipline. *Grievance Administrator v Deutch*, 455 Mich 149, 166; 565 NW2d 369 (1997) ("attorney misconduct cases are fact-sensitive inquiries that turn on the unique circumstances of each case"). As for generally appropriate levels of discipline for certain conduct, we have previously held that "different circumstances can lead to adjustments in discipline and this Board is not inclined to simplistically characterize conduct by labels (e.g., 'assault') and then allow that characterization to dictate the level of discipline to be imposed irrespective of factual distinctions." *Grievance Administrator v Lisa M. Londer*, 07-127-JC (ADB 2008); citing *Grievance Administrator v Arnold M Fink*, 96-181-JC (After Remand) (ADB 2001), p 13, lv den, 465 Mich 1209 (2001).

Furthermore, the Board is more likely to exercise deference when the sanction ordered by the hearing panel is consistent with the level of discipline generally contemplated under the ABA Standards, is clearly within the historic range of discipline imposed for misconduct of a similar nature in other cases, and, significantly reflects certain assessments of the weight to be given to mitigating and aggravating factors based upon the panel's considered judgment with regard to the appropriate sanction.

Here, the panel determined that the applicable ABA Standards for each violation were as follows: reprimand, applying Standard 6.23, for respondent's contempt of court; suspension, applying Standard 7.2, or disbarment, applying Standard 7.1, for respondent's contemptuous comments about the trial court; disbarment, applying Standard 5.11(b), for respondent's misrepresentation of material fact in communication with opposing counsel and the trial court in December 2008; and, disbarment, applying Standard 6.11, for respondent's withholding of material information from the trial court in connection with the August 22, 2008 Order. (Sanction Report 2/28/22, pp 4, 18.)

Respondent argues that a suspension is excessive for his statement in a brief referring to the court as acting "as the bitch for the opposing party." We disagree. We find that the panel's consideration and analysis of the ABA Standards, aggravating and mitigating factors, and relevant case law that ultimately led to their decision to impose a short suspension with stringent and specific conditions, is a meaningful sanction within an appropriate range of discipline.

Finally, respondent argues that the panel should have granted his motion for summary disposition filed on June 3, 2020, and dismissed the formal complaint because of the expiration of a statute of limitations and/or laches. Respondent's motion was denied by the panel in a detailed order entered on July 14, 2020, and attached to this opinion as Appendix C. First, despite respondent's novel argument that a six-year statute of limitations *should* apply to disciplinary proceedings under MCL 600.5813,[6] the simple answer is that it appropriately does not. We agree with the Administrator's response to respondent's argument in this regard; statutes of limitations are wholly inappropriate in disciplinary proceedings. Conduct of a lawyer, no matter when it occurs, is always relevant to the question of an attorney's fitness to practice law.[7]

We also find that the panel appropriately denied respondent's claim of laches as a basis to dismiss the formal complaint. The formal complaint was filed as soon as legally practicable, and without unreasonable delay, respondent did not suffer substantial prejudice as a result of the passage of time between the underlying occurrences and the filing of the formal complaint, and there has been no showing that dismissal is otherwise appropriate - see *Grievance Administrator v Eric H. Clark*, 95-59-GA (ADB 1997). We therefore affirm the hearing panel's findings in this regard.

III. Conclusion

There is proper evidentiary support for the panel's finding that respondent did not violate MRPC 3.4(c), and for the findings of misconduct disputed by respondent. Given the hearing panel's well-reasoned and thorough discussion of the ABA Standards, the relevant aggravating and mitigating factors, and relevant prior case law, we adopt the panel's conclusions as to sanction and defer to their subjective judgment on the discipline imposed. Finally, respondent's motion for summary disposition was appropriately denied. There is no statute of limitations applicable to

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[6] MCL 600.5813 provides that: "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."

[7] Commentary to Rule 18 of the Model Rules for Lawyer Disciplinary Enforcement.

attorney disciplinary proceedings in Michigan and respondent was unable to show significant delay, nor could he demonstrate that he suffered substantial prejudice to satisfy a laches defense warranting dismissal of the formal complaint.

We therefore affirm the hearing panel's findings of misconduct in their entirety and affirm the panel's decision to impose a 60-day suspension with conditions.

Board members Michael B. Rizik, Jr., Linda S. Hotchkiss, M.D., Rev. Dr. Louis Prues, Karen D. O'Donoghue, Michael S. Hohauser , and Jason M. Turkish concur in this decision.

Board members Peter A. Smit and Alan Gershel concur in the majority's decision to affirm the hearing panel's findings of misconduct, but dissent with regard to the majority's decision to affirm the discipline imposed by the hearing panel. They would increase discipline to a 180-day suspension with conditions.

Board member Linda M. Orlans was recused and did not participate.

Attachment A

STATE OF MICHIGAN

FILED
ATTORNEY DISCIPLINE BOARD
March 30, 2021

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 19-130-GA

DAVID CHARRON, P 39455,

Respondent.
_____/

MISCONDUCT REPORT OF KENT COUNTY HEARING PANEL #4

PRESENT: William B. Dunn, Chairperson
Michael J. Kosta, Member
Victoria A. Vuletich, Member

APPEARANCES: Kimberly L. Uhuru, Deputy Administrator
for the Attorney Grievance Commission

David Charron, Respondent
In Pro Per

I. EXHIBITS

See Appendix A.

II. WITNESSES

Stanley Stek
David Charron, Respondent

III. PANEL PROCEEDINGS

In this proceeding[1] we are considering the Formal Complaint of Petitioner, the Grievance Administrator, Michigan Attorney Grievance Commission, filed December 12, 2019, that alleges Respondent, David Charron, violated certain rules of the Michigan Rules of Professional Conduct (referred to hereinafter as "MRPC") and the Michigan Court Rules (referred to hereinafter as "MCR") and therefore is guilty of professional misconduct and subject to discipline under MCR 9.104:

[1] We refer to our consideration of ADB Case No. 19-130-GA as "**this proceeding**" and to all matters before the judiciary referred to hereinafter as "**the case**."

i. Knowing disobedience of the rules of a tribunal, in violation of MRPC 3.4(c).

ii. Engaging in undignified or discourteous conduct toward a tribunal, in violation of MRPC 3.5(d).

iii. Failing to treat others in the legal process with courtesy and respect, in violation of MRPC 6.5(a).

iv. Making a knowingly false statement to a third person in the course of representing a client, in violation of MRPC 4.1.

v. Engaging in conduct involving dishonesty, fraud, deceit, misrepresentation . . . where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b).

vi. Engaging in conduct prejudicial to the proper administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1).

vii. Engaging in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2).

viii. Engaging in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

This matter was assigned to Kent County Hearing Panel #4 and scheduled for a virtual hearing in accordance with MCR 9.115(G) and ADB General Order 2020-2. A virtual hearing on the allegations contained in the Formal Complaint was held via Zoom on September 1, 2020.

The Complaint arises out of and is based on certain specific facts relating to lengthy and contentious litigation through Michigan and federal courts beginning in 2007 and concluding in 2019. The facts themselves are mostly undisputed; rather, it is the interpretation and significance of them that is contested.

The alleged misconduct in question occurred in 2008 and in 2013.[2] In the course of this proceeding, Respondent moved for Summary Disposition based on the running of a statute of limitations and the doctrine of laches, which this Hearing Panel denied. (Order Denying Respondent's Motion for Summary Dismissal of Complaint and Order Denying Petitioner's Motion for Summary Disposition, filed July 14, 2020.)

[2] In June of 2014, the Interim Grievance Administrator issued a Request for Investigation to Respondent related to the conduct that is the subject of Petitioner's Complaint in this proceeding. (ADB Case No. 19-130-GA.) (See Petitioner's Exhibit 2, Response and Brief in Opposition to Motion for Summary Disposition.) The record in this proceeding contains no further information concerning the Request for Investigation.

IV. FINDINGS REGARDING MISCONDUCT

The record in this proceeding is extensive but could be much greater and more informative if all records of proceedings in Kent County Circuit Court were available and reviewed. The Hearing Panel has considered certain specific facts - simplified (but believed accurately) from the contextual detail presented in the parties' pleadings and the record, including facts stipulated to by the parties in a Joint Pre-Hearing Statement filed July 20, 2020, which are presented below in sequence relevant to the Hearing Panel's disposition of this proceeding:

a. In June 2007, Glenn R. Morris (**"Morris**") filed suit in Kent County Circuit Court ("**Circuit Court**"), Case No. 07-06441-CR, to dissolve Morris, Schnoor & Gremel, Inc. ("**MSG**"), an insurance agency in which Morris and R. Judd Schnoor ("**Schnoor**") each owned (beneficially) a 50% interest. On August 10, 2007, the Court ordered Morris to sell his stock in MSG to Schnoor under the terms of an existing Stock Purchase Agreement between them. (August 10, 2007 Order, Petitioner's Exhibit 1.) The price of the Morris stock to be purchased by Schnoor was $2,500,000.00.[3] Schnoor paid Morris a lump sum of $235,804.00 and in October 2007 executed a promissory note ("**note**") for the balance, payable in monthly installments of $45,091.74 beginning December 2007. Pursuant to the Stock Purchase Agreement, Morris held a security interest in the transferred shares. After the transfer of Morris' shares to Schnoor, Schnoor was the sole shareholder, sole director, and sole officer of MSG. Respondent's then law firm, Charron & Hanisch, PLC ("**C&H**") represented Schnoor and MSG in the dissolution litigation and the stock transfer transaction, and in subsequent legal matters relevant to this proceeding.

b. Schnoor paid installments of the note to Morris until March 2008. On March 28, 2008,[4] Schnoor sought a preliminary injunction to restrain Morris from soliciting MSG clients, but that relief was not granted. (Respondent's Exhibit B-3.) Schnoor did not pay the note installments that were due beginning in April 2008.

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[3] This amount was not independently established by the Court but is apparently a result of value determination pursuant to the Stock Purchase Agreement. The August 10, 2007 Order stated: *"Specific performance of the sale of the Morris Trust Stock pursuant to the stock purchase agreement provisions is hereby ordered."* Neither the Stock Purchase Agreement nor the note were entered into evidence in this proceeding. The Order made no reference to a note or payment obligations, and did not obligate MSG in any way.

[4] The facts stipulated in the parties' Joint Pre-Hearing Statement refer to this event as occurring in April, but that is incorrect. The record of the hearing shows it occurred March 28, 2008. (Respondent's Exhibit B-3.) This discrepancy is not relevant to disposition of this proceeding.

c. The Joint Pre-Hearing Statement (at ¶7) notes that Judge Trussock assigned Case No 07-06441-CR to Judge Yates on May 1, 2008. Judge Yates had been appointed to the Circuit Court bench on April 22, 2008.[5]

d. C&H and MSG (but not Schnoor individually) executed an Account Stated, dated May 15, 2008 in which MSG agreed that it owed $286,730.95 to C&H as its legal counsel. (Petitioner's Exhibit 2.) On May 22, 2008, MSG authorized granting a security interest in all assets of MSG to secure its past and future indebtedness to C&H (Petitioner's Exhibit 3); and signed a Security Agreement documenting the grant of the security interest in all assets. (Petitioner's Exhibit 4.) This Security Agreement was drafted by Respondent, and was executed on behalf of C&H by Respondent and on behalf of MSG by Schnoor. A U.C.C. Financing Statement was filed with the Michigan Secretary of State on June 4, 2008. (Petitioner's Exhibit 6.) Schnoor also agreed to subordinate his own security interest in MSG assets to the security interest of C&H.[6] (Petitioner's Exhibit 5.)

e. In June 2008, Morris filed a Motion to compel specific performance of payment of the note by Schnoor.[7] (Petitioner's Exhibit 7.) On July 24, 2008, the Circuit Court issued an "Order Granting Plaintiff Glenn Morris' Motion for Specific Performance of R. Judd Schnoor's Payment Obligations" ("**July 24, 2008 Order**") in Case No. 07-06441-CR. (Petitioner's Exhibit 8; Respondent's Exhibit B-7.) The July 24, 2008 Order recited that it would be enforced by civil contempt.

f. Schnoor continued to not make payments on the note. On August 6, 2008, Schnoor filed a Motion for Reconsideration (Respondent's Exhibit B-8) of the July 24, 2008 Order on the basis that the August 10, 2007 Order being enforced made no provision for payment obligations, but only for delivery of a note in exchange for stock.[8]

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[5] By itself, this fact is irrelevant. However, Respondent has commented on Judge Yates' alleged inexperience and case mismanagement in the record in Case No. 07-06441-CH on appeal to the Michigan Court of Appeals and in this proceeding, as relevant to the disposition of that case.

[6] The record in this proceeding indicates that the C&H security interest was junior to a security interest of Fifth Third Bank.

[7] The Motion refers to the note balance being accelerated by reason of default in making installment payments. The August 10, 2007 Order does not refer to payment of installments or a lump sum. It is unclear from that Order what the payment obligations were. Although no Exhibits on this point were presented in evidence in this disciplinary proceeding, it appears that Morris filed an amended complaint seeking a judgment predicated on the acceleration clause, and Schnoor sought interlocutory review of the Circuit Court's decision to permit filing of the amended complaint, Michigan Court of Appeals No, 289405. *See infra*, Order Denying Plaintiff's [Morris] Motion to Hold Defendant R. Judd Schnoor in Civil Contempt, at Fact ¶m.

[8] The record in this case does not provide any further information regarding disposition of this Motion.

g. Evidentiary hearings in Case No. 07-06441-CR were held in August 2008 to determine whether Schnoor should be held in contempt for failing to pay the note. At a hearing on August 20, 2008, in which Schnoor's financial ability to pay the note was at issue, the Circuit Court agreed to grant an order precluding Schnoor from transferring assets.[9] (Respondent's Exhibit B-9.)

h. By an Order, dated August 22, 2008 ("**August 22, 2008 Order**") in Case No. 07-06441-CR, the Circuit Court ordered both Schnoor and MSG to produce financial statements to the Court, and further ordered that "Defendant R. Judd Schnoor shall not transfer assets of Morris, Schnoor & Gremel, Inc. outside the ordinary course of business without authorization from the Court."[10] (Petitioner's Exhibit 9.)

i. C&H also represented an entity known as MS&G, Inc. that operated a related insurance business out of the MSG office. MS&G, Inc. was not a subsidiary or affiliate of MSG, but was a contractor to MSG. The owners of MS&G, Inc. were Glenn Morris, Joshua Schnoor (son of Judd), and David Young, in equal shares. Joshua and David were negotiating Joshua's sale of his shares of stock in MS&G, Inc. to David. In connection with that, David proposed to have an asset (an AIG contract) of MSG transferred to MS&G, Inc., to which Respondent replied by email October 14, 2008 as follows:

> Yes, but timing is the key. Josh needs out first and then a deal needs to be struck with Morris, Schnoor & Gremel to

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[9] MR. STEK: . . . I'm going to ask the Court to put the entire corporation, as it presently exists, into a receivership so we can retain it. And I don't want him transferring anything else in the meantime.

* * *

I want an order that precludes him from engaging in any out of the ordinary business activity, and no transfers of business interests, or activity, or assets in the meantime.

* * *

THE COURT: . . . So, it will essentially be an order preventing dissipation of assets or transfer of assets . . . outside the ordinary course of business. (Respondent's Exhibit B-9, pp 106-07.)

The August 22, 2008 Order did not place MSG into receivership or impose any obligation on MSG. MSG was not liable for the note, nor was MSG a purchaser of Morris's stock. No relief was granted to Morris in the August 10, 2007 Order, and no obligation was imposed on MSG by that Order.

[10] The hearing transcript shows that the duration of the August 22, 2008 Order was to be for a "week or two." When issued, the August 22, 2008 Order had no time limit. This Order does not address the personal financial assets of Schnoor, the party liable for payment of the note, but constrains Schnoor only from transferring assets of MSG.

> assign its rights in the contract on some basis, Judd is presently restrained from disposing of company assets except in the ordinary course. Neither his nor the company's creditors are restrained. I may need to file a motion with Yates to have him approve the transfer. If I do that, the Court may look for consideration being paid to Morris, Schnoor & Gremel. If we show consideration, Glenn will want it and the Judge will likely order it to be paid to Glenn. In conclusion, we may need to offer some nominal consideration for the contract transfer and have me file a motion to get it approve[d]. Alternatively, we don't do this and argue that this was done in the ordinary course.

Petitioner and Respondent have also stipulated that Respondent sent another email in which he stated: "There are two ways we can handle this. We can tell [Judge] Yates about it or we can fly under the radar." (Joint Pre-Hearing Statement ¶34.)

j. On October 17, 2008, C&H notified MSG that it was terminating its representation of MSG due to its failure to perform its obligations to the law firm; and notified MSG of its intention to exercise its rights under Article 9 of the U.C.C. It advised MSG to seek other counsel.[11]

k. On November 7, 2008, Respondent executed an Asset Purchase Agreement on behalf of C&H for the sale of the assets of MSG in which C&H held a security interest to New York Private Insurance Agency, LLC ("**NYPIA**") (Petitioner's Exhibit 11); and executed a Bill of Sale dated November 21, 2008, selling the assets of MSG for $395,000.[12] (Petitioner's Exhibit 12.)

l. On December 19, 2008, counsel for Morris (Stek) communicated by email to Respondent stating:

> We have now received information from a number of sources which substantiate that Judd is in the process of facilitating a sale of the Agency and/or a portion of the assets of the Agency to a new entity created with Guy Heistand as an owner. Since this would be a direct violation of the Court's

[11] Respondent testified and displayed this letter at the hearing, but we do not see that it was offered or admitted into evidence. Respondent's testimony concerning the purpose of the letter is at Tr, pp 119-120. C&H continued as counsel of record for MSG and Schnoor until sometime in January 2009 - the precise date is not clear on the record - notwithstanding exercise of remedies under the C&H security interest referenced in Facts, ¶k.

[12] The record contains information that NYPIA discharged obligations senior to the lien of C&H, and for that reason the purchase price paid to C&H would not represent to total investment of NYPIA in purchasing the assets of MSG. NOTE: The sale of assets directly from a secured party to a buyer is permitted by and subject to the requirements of MCL 440.9106.

> prior orders (August 22, 2008) we have asked the Judge for the opportunity to meet with him this afternoon to discuss this situation including possibly seeking yet another Order. Are you available to meet with the judge this afternoon or would you like to participate by phone? Please let me know. I would otherwise like to head over soon. Thanks.

Respondent replied on December 19, 2008, as follows:

> I'm gone at 2 p.m. today but generally available Monday morning before 11 a.m. I also have blocks of time and other days next week. My cell phone is 616-706-6750. I suggest that you notice up a motion for a hearing and attach proof of all of the alleged misdeeds (or other paranoid rantings) to the motion and brief so that we have the opportunity to review and pick apart the false allegations before the time of the hearing. If you would like an evidentiary hearing on the subject of the motion, please schedule sufficient time for proofs. You already have a stay order which prohibits Judd Schnoor from doing the acts alleged by your email. If you believe he has violated the order, let's have a shoot out so we may disclaim you of the notion. (Petitioner's Exhibit 13.)

m. Respondent and Stek spoke by telephone on December 22, 2008 in response to Stek's December 19, 2008 email allegation. (Tr, pp 46-47; 85.) Stek says he was in Judge Yate's chambers for this call, but no reporter was present and there is no transcript of the call.[13]

n. On January 15, 2009, the Circuit Court in Case No. 07-06441-CR issued an Order Denying Plaintiff's [Morris] Motion to Hold Defendant R. Judd Schnoor in Civil Contempt for non-payment of note installments. (Respondent's Exhibit B-12.)

o. At a hearing February 9, 2009, in Case No. 07-06441-CR, Respondent disclosed to the Circuit Court that the assets of MSG had been transferred through a friendly U.C.C. sale by C&H to NYPIA. (Petitioner's Exhibit 15.)

p. On February 20, 2009, Morris filed a verified Complaint in the Circuit Court, Case No. 09-01878-CB, naming MSG, Respondent, C&H, and New York

[13] In subsequent pleadings, see *infra* Fact ¶p, Morris alleged in a verified complaint that on December 22, 2008, Respondent told the Circuit Court in Case No. 07-06441-CR that "no transfer of assets had occurred." In sworn testimony before this Hearing Panel, Stek reaffirmed this allegation (Tr, p 47); Respondent admits that he responded "no" to a narrower question: "whether Judd Schnoor had violated the restraining order by transferring the assets of MSG and I told him no." (Tr, p 144.) The testimony does not clarify that the narrower question was asked and whether the broader question was intended.

Private Insurance, LLC ("**NYPI**"),[14] as Defendants, alleging Counts of fraudulent transfer of the assets of MSG to NYPI, commercially unreasonable sale, common law fraud, and conversion. (Petitioner's Exhibit 14.) Morris filed a First Amended Complaint on March 19, 2009. (Respondent's Exhibit B-19.) In an Opinion and Order issued October 22, 2009, Respondent's Motion for Summary Disposition was granted as to all counts.[15] (Respondent's Ex B-15.)

q. On December 27, 2012, following extensive hearings on allegations in both Case No. 07-06441-CR (contempt allegations) and Case Nos. 09-01878-CB and 09-011842-CB (UFTA allegations), the Circuit Court issued:

(i) an Opinion and Order Setting Forth Findings of Civil Contempt in Case No. 07-06441-CR (the "**Contempt Order**") finding MSG and C&H jointly and severally liable for civil contempt of the August 22, 2008 order regarding transfer of assets of MSG and Respondent personally responsible for payment of Morris' legal fees in connection with the contempt proceeding (Petitioner's Ex 17); and

(ii) Findings of Fact, Conclusions of Law, and Verdicts, ruling that C&H held a valid security interest in asserts of MSG and that C&H was not responsible to Morris for any damages resulting from the U.C.C. Article 9 sale or for costs. (Petitioner's Exhibit 16.)

r. Respondent appealed the Contempt Order to the Michigan Court of Appeals, No. 31506. On October 21, 2013, Respondent filed a Brief on Appeal. (Respondent's Exhibit B-18.) In this brief at page 38, Respondent, in a section of the brief addressing the fact that more than 4 years had elapsed between the August 22, 2008 Order and the December 27, 2012 ruling on contempt, stated:

> Implied in the concept of contempt is that the exercise of the remedy be timely and calculated to achieve the objectives cited above. The trial court diminished its stature and the value of its contempt power by yielding it in the manner it did. Contempt is not a private remedy to employ years after all other civil remedies fail to produce desired results. Contempt does not make the court a guarantor of the collectability of judgments. The goal of contempt is respect

[14] This is apparently a renaming of NYPIA.

[15] A Motion of C&H for summary disposition as to the Count of common law fraud was also granted in this Order. By an Order Granting Partial Summary Disposition issued February 10, 2010, C&H's Motion for Summary Disposition as to Counts of commercially unreasonable sale and of conversion was granted. (Respondent's Exhibit B-17.)

> for the directives of the judiciary, not to furnish every complainant with a remedy by twisting of the facts of any given situation into a cause of action that may be remedied by the indemnification powers of contempt. ***When the judiciary acts as the bitch for complainant, we get rulings like this.*** (Emphasis added.)

s. While the appeal was pending, the Circuit Court conducted evidentiary hearings to determine attorney fees to be assessed against Respondent as a sanction pursuant to Contempt Order.[16] On January 28, 2014, the Circuit Court issued its Opinion and Order ("**January 28, 2014 Order**") awarding fees and costs to be paid by Respondent. (Petitioner's Exhibit 19.) On March 17, 2014, the Circuit Court issued a Final Judgment concerning the fees payable by Respondent. (Petitioner's Exhibit 20.) Respondent appealed this Order to the Michigan Court of Appeals, No. 321925.

t. On May 29, 2014, the Michigan Court of Appeals issued its unpublished Opinion in No. 315006 (Petitioner's Exhibit 23), combining appeals in Case No. 07-06441-CR and Case Nos. 09-01878-CB and 09-011842-CB, and affirming the Circuit Court's Orders. In addition, the Appeals Court stated at pages 58-59:

> Given the disrespectful and blatantly contemptuous statements made by attorney Charron in his appellate briefs regarding the trial court, we find the imposition of sanctions in accordance with MCR 7.216(C)(1)(b) (permitting actual or punitive damages or other disciplinary actions when a brief is "grossly lacking in the requirements of propriety") to be appropriate. See also *Grievance Administrator v Fieger*, 476 Mich 231, 250-252; 719 NW2d 123 (2006). Specifically, this determination is premised on the numerous ad hominem and pejorative comments made and endorsed by Charron as the signatory on his appellate briefs, which include but are not limited to such outrageous and unprofessional statements as, *"When the judiciary acts as the bitch for complainant, we get rulings like this."* (Emphasis added.) Such derogatory and undeserved comments serve no legitimate purpose, as they fail to advance Charron's legal theories and violate MCR 7.212(C)(6), which requires an appellant's brief to contain "[a]all material facts, both favorable and unfavorable, [to be] fairly stated *without argument or bias*." (Emphasis added.)
>
> Therefore, and in accordance with the authority granted by MCL 600.2445(1), we sanction attorney Charron one thousand dollars ($1,000) for his failure to abide by the rules established for this Court and the civility expected by practitioners of the law. See MRPC 3.5(d) (barring "undignified or discourteous conduct toward the tribunal").

[16] *See* Petitioner's Exhibit 17.

On March 5, 2015, the Michigan Supreme Court denied application for leave to appeal the Court of Appeals judgment. (Petitioner's Exhibit 25.)

u. A second panel of the Michigan Court of Appeals considered Respondent's appeal of the January 28, 2014 Order determining the amount of attorney fees awarded to Morris in Case No. 07-06441-CR, No. 321925, and on August 11, 2016, affirmed the Circuit Court's calculation of fees. (Petitioner's Exhibit 28.) The Michigan Supreme Court denied leave to appeal May 2, 2017. (Joint Pre-Hearing Statement, ¶73.)

v. Respondent filed a Petition for Chapter 7 Bankruptcy December 31, 2014. (Petitioner's Exhibit 24.) Morris filed an adversary proceeding objecting to discharge of Respondent's obligation to pay fees. (Petitioner's Exhibit 26.) The Bankruptcy Court denied Respondent's Motion for Summary Judgment and granted Morris' Motion for Summary Judgment on September 30, 2015, finding Respondent's actions as "willful" and "malicious" under Bankruptcy Code §523(a)(6), and thus not dischargeable. (Petitioner's Exhibit 27.)

w. Respondent appealed the Bankruptcy Court's decision to the Sixth Circuit Court of Appeals, which affirmed the Bankruptcy Court's ruling without hearing. (Petitioner's Ex 29.) Respondent filed for a writ of certiorari to the United States Supreme Court on February 25, 2019, which was denied April 22, 2019. (Petitioner's Ex 30.)

Derived from these facts, there are four specific focuses of Petitioner's allegations of misconduct:

1. Transfer of the assets of MSG to NYPIA through a private sale by C&H pursuant to exercise of remedial rights with respect to its security interest while the August 22, 2008 Order was in force, in violation of MRPC 3.4 and MRPC 8.4(c). (Facts, ¶k.)

2. The statement in Respondent's brief to the Court of Appeals of October 21, 2013, indicating that the Circuit Court acted subserviently to a party, in violation of MRPC 3.5(d) and MRPC 6.5(a). (Facts, ¶r.)

3. Respondent's email of December 19, 2008 to Stek, in violation of MRPC 6.5(a), MRPC 4.1, and MRPC 8.4(b). (Facts, ¶l.)

4. Respondent's lack of candor to opposing counsel and to the court, in violation of MRPC 4.1.

Respondent has sought to present evidence relating to the occurrences summarized in Facts ¶¶ a-w above that we have considered extraneous to the allegations and our consideration of these allegations. Respondent has endeavored to further explain the injustice of the Circuit Court and Court of Appeals rulings as if this hearing panel was a further appellate body. The record before us clearly evidences exhaustive and careful consideration of Respondent's arguments by the Circuit Court and the Michigan Court of Appeals raised during nine years of litigation. A reading of the exhibits admitted in this proceeding will justify not only the deference due to them, but also a reliance on their conclusions. Respondent had ample opportunity to present his case to trial and appellate courts.

1. Transfer of MSG Assets: Violation of Court Order

This issue involves the relationship between facts presented in Facts ¶¶ b and k with those in Facts ¶¶ h and i. Respondent asks us to disregard conclusions of the Circuit Court and Court of Appeals that the sale of MSG assets by C&H in the exercise of its security interest violated the August 22, 2008 Order.

Respondent has argued that the August 22, 2008 Order applied only to conduct of Schnoor, as the obligor to Morris, regarding the assets of MSG. By its words, that Order did not apply to MSG itself, even though MSG was a party to Case No. 07-06441-CR.[17] Clearly, the value of MSG as a going concern would be relevant to Morris as holder of a security interest in the stock Morris had sold to Schnoor; and that at the time of that Order Schnoor was the sole shareholder and the sole officer and director of MSG, and the only person by which MSG could act. The August 22, 2008 Order did not grant Morris a security interest in assets of MSG. Respondent has stated that the Order was supposed to last for a couple of weeks, and he was surprised that it had no time limitation when it was issued. Nevertheless, Respondent was aware of the terms of the Order as issued in advance of the transfer of MSG assets.

Respondent notes that several months before the issuance of the August 22, 2008 Order, MSG had granted to C&H a security interest in all MSG assets to secure payment of outstanding and yet to be incurred legal fees of C&H, and that a U.C.C. financing statement had been filed to perfect C&H's security interest contemporaneously.[18] Respondent also notes that Morris was not a creditor of MSG - only of Schnoor.

It does not appear from the record that Respondent advised the Circuit Court in the hearings that resulted in the August 22, 2008 Order that Respondent held a security interest in the assets of MSG, which it could and would assert. Respondent testified in this proceeding that "[e]verybody knew these security interests were out there . . . The court knew Charron & Hanisch had a security interest. The court knew Fifth Third Bank had a security interest. The court knew Judd Schnoor had a security interest. The court also knew the priorities of these different security interests. There was no, you know, secret about any of this." (Tr, p 118.)[19]

When C&H exercised its creditor's remedy relating to the MSG assets in November 2008, neither Schnoor nor MSG was required to take any action to transfer the assets of MSG to NYPIA. Accordingly, Respondent argues that the exercise of the U.C.C. remedy resulting in a transfer of all MSG assets did not violate the August 22, 2008 Order. Respondent did not advise the Circuit

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[17] The effect of an order on other persons not a party to the matter in which an order is issued is a further issue in this proceeding, discussed *infra*.

[18] Facts, ¶d. The legitimacy of this security interest was attacked by Morris but was held to be for a valid consideration and a valid purpose. See Facts, ¶q.

[19] Respondent claims the Circuit Court and Morris' counsel had knowledge of these security interests because a financing statement was on file at the time of the August 22, 2008 Order, which was thus subject to it. (Tr, pp 117-18.) Respondent stated that specific information was available to the Circuit Court about these security interests, but this record is not included in these proceedings. The effect of perfection of a security interest by filing is to achieve priority over competing security interests and purchasers of the collateral. MCL 440.9322. The August 22, 2008 Order did not grant a security interest in MSG assets to Morris: it forbade Schnoor from disposing of them. The validity or priority of C&H's security interest is of no meaning in this proceeding.

Court that the MSG assets were being transferred at the time of the private sale to NYPIA (November 2008), or that the assets of MSG had been transferred until February 2009. When questioned December 22, 2008 (Fact ¶m), Respondent denied (in his words, Tr, p 144) that a transfer had occurred in violation of the Order.

The Complaint refers to emails relating to a proposed transaction involving sale of an asset of MS&G, Inc. in which MSG had an interest (Facts, ¶i) as key evidence of Respondent's intent to circumvent the August 22, 2008 Order. See Petitioner's Exhibit 17, pp 6-7. With regard to that transaction, Respondent recognized that the August 22, 2008 Order prevented Schnoor from transferring MSG's interest in that asset outside the ordinary course of business. Respondent's emails in this regard propose either to seek permission of the Circuit Court or "fly under the radar." The specific transaction discussed in these emails never occurred.

In the Contempt Order, the Circuit Court referred to a "treasure trove of emails" provided by a witness in the case relating to efforts of Respondent to assist in transferring the operating assets of MSG, which the Circuit Court considered as indicating Respondent's intent to circumvent, if not directly to violate, the August 22, 2008 Order. Petitioner's Exhibit 17, note 4.[20] The email we refer to in the preceding paragraph was such an email. The meaning of the option to "fly under the radar" appears to have been considered by the Circuit Court as expressing an intent to circumvent the August 22, 2008 Order. When coupled with the previous email [See Facts, ¶i], the ill-chosen phrase could have referred to treatment of the transfer as one in the ordinary course of business.

If the August 22, 2008 Order had the literal limited scope urged by Respondent, Respondent presents plausible argument that the courts have reached wrong conclusions based on the facts. Surely there is evidence that Respondent knew that Schnoor could not transfer the MSG assets. Schnoor had granted the security interest in the assets well before issuance of the August 22, 2008 Order, and Schnoor was not the transferor of the MSG assets in the sale to NYPIA.

However, in the Contempt Order the Circuit Court ruled, without discussion, that its August 22, 2008 Order applied to Respondent as attorney and agent for Schnoor by application of MCR 3.310(C)(4) (Petitioner's Exhibit 17, p 15), a ruling that was affirmed by the Court of Appeals. (Petitioner's Exhibit 23, p 7.)

Respondent argues in this proceeding, as he did in the Court of Appeals, that this was an incorrect and unsupported application of MCR 3.310(C)(4), and contrary to long established law on the coverage of orders, citing *Alemite Mfr. Corp. v Staff*, 42 F.2d 832,833 (CA 2, 1930).[21] Respondent provides this analogy:

> So, in essence, if my client was restrained from going to the Detroit Zoo on Saturday with his kids, the way Judge Yates read that court rule, I would be restrained from going to the Detroit Zoo with my kids on Saturday because I'm the attorney. There's no need for -- there's no discussion of me, you know, aiding and abetting Schnoor to violate this restraint. I am bound, as far as Judge Yates is concerned, in the same way that my client is bound. (Tr, p 109.)

[20] None of this "treasure trove" is provided in evidence in this proceeding.

[21] Respondent's Hearing Brief at 5.

Respondent had ample opportunity to convince the courts that have ruled in the several cases that underlie this proceeding of the wisdom of his legal analysis. Respondent has failed to win his arguments through extensive efforts in the courts. We accept the result of those efforts as they are.[22]

In considering whether Respondent has violated MRPC 3.4(c), the question for our consideration becomes whether Respondent "knowingly disobey[ed] an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."[23] We must consider two possible avenues in applying MRPC 3.4(c): (i) Was there knowing disobedience and (ii) if so, was there open refusal to obey with assertion of no valid obligation.

(i) Knowing disobedience

Violation of this Rule of Professional Conduct requires actual knowledge that conduct violates the rule of the tribunal before misconduct can be found. MRPC Terminology defines "knowingly," as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." This term differs from "reasonably should know," which denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.[24]

There is no question that Respondent was aware of the August 22, 2008 Order when Respondent caused the assets of MSG to be transferred from control of Schnoor. Respondent's conduct at the time of transfer and in subsequent confrontation with counsel for Morris by email, and later with Morris' counsel and Judge Yates by telephone, indicates either a purposeful intent to disobey the Order or a firmly held belief that the Order did not apply to the transfer. Respondent has asserted throughout the case and this proceeding that the August 22, 2008 Order did not prevent the transfer arranged through C&H.

A review of the exhibits and testimony leads us to the conclusion that Respondent consistently interpreted the August 22, 2008 Order in a literal sense - notwithstanding that his interpretation has been held to be wrong. This would support a conclusion that Respondent did not violate MRPC 3.4(c) by transferring assets of MSG pursuant to exercise of remedies for a valid security interest because he did not actually know that the transfer was disobeying the August 22, 2008 Order; that is, unless his actual knowledge can be inferred from the circumstances. Are the circumstances surrounding the Order enough to create an inference that Respondent actually knew that a transfer of the assets of MSG by means other than an act of Schnoor himself would be disobedient?

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[22] Respondent's argument discredits the probable purpose of the August 22, 2008 Order as intending to preserve the assets of MSG as value for Morris' security interest for payment of the stock sale price until Schnoor's claims of business interference had been resolved. Simply, Respondent could not transfer assets of MSG and thereby do what Respondent's client was forbidden to do. This is not a matter of a trip to a zoo. If X is forbidden from dumping hazardous waste into a pond, X's agent is not free to dump X's waste into the pond. The restraint is not a personal one. However, no legal argument has been presented that Respondent as attorney of record for Schnoor and MSG was as such uniquely obligated to broadly apply a reasonable intent of the August 22, 2008 Order to himself when it would not so affect similarly situated secured parties. This is an interesting subject but beyond the scope of our work.

[23] MRPC 3.4(c). The word "rules' includes rulings of the tribunal, not just the published court rules themselves. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, NINTH EDITION, American Bar Ass'n, 2019 at 376 and cases cited therein.

[24] MRPC Terminology.

Here we make note of certain findings of the Circuit Court in the Contempt Order (Petitioner's Exhibit 17):

> **The Court finds, as a fact, that Attorney Charron and Judd Schnoor were acutely aware the sale of MSG's assets violated the court order of August 22, 2008.** (Petitioner's Exhibit 17, p 6.)
>
> **Consequently, the Court has no doubt whatsoever that Mr. Schnoor and Attorney Charron were well aware of the court order prohibiting transfer of the assets of MSG outside the ordinary course of business. Beyond that, the Court finds as a fact that they understood that the sale of MSG's assets by C&H to NYPIA in November 2008 violated that court order.** (Petitioner's Exhibit 17, p 8.)
>
> **In simple terms, the record reveals a textbook example of contempt of court by Attorney Charron, who recognized that a court order prohibited all transfers of MSG's assets outside the ordinary course of business, yet took actions on behalf of his client (MSG) and his own law firm that did precisely what the court order forbade. That is, Attorney Charron siphoned all of the assets of MSG through his law firm and passed them on to NYPIA. These forbidden acts, when coupled with Attorney Charron's recognition of the impropriety of his conduct, compel the Court to find, by clear and convincing evidence, that Attorney Charron acted in contempt of the court order entered on August 22, 2008.** (Petitioner's Exhibit 17, p. 15-16)

Under MCL 600.2106, a court order "shall be prima facie evidence . . . of all facts recited therein . . ." If we were to rely on the court order without further analysis, we would conclude that Respondent knowingly disobeyed the August 22, 2008 Order.[25]

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[25] We acknowledge that the United States Bankruptcy Court also specifically found that Respondent "knowingly and intentionally transferred MSG assets in violation of the injunctive Order." (Petitioner's Exhibit 27 at 26):

> The Contempt Award in this case was based on the state courts' findings that the Debtor knowingly and intentionally transferred MSG's assets in violation of the Injunctive Order and that the Plaintiff incurred damages as a direct result of the Debtor's actions. Those factual findings also establish that the Debtor's actions were "willful" and "malicious' under § 523(a)(6). The Injunctive Order prohibited conduct that would, by definition, cause injury to the Plaintiff. By knowingly violating the Injunctive Order, the Debtor acted "willfully" because he either intended to cause injury to the Plaintiff, or could be substantially certain that injury would result. The Debtor also acted "maliciously" because his violation of the Injunctive Order was in conscious disregard of his duties to comply with the order. The damages awarded to the Plaintiff were a result of the Defendant's willful, malicious, and contemptuous actions.

Based on our review of the record in this proceeding, we conclude that Respondent believed then, as he asserts now, that he was skillfully NOT disobeying the Order but rather taking advantage of its words to effectuate a plan outside it that defeated the purpose of it. Respondent's interpretation of the August 22, 2008 Order was opportunistic and self-interested; and held to be incorrect. It is almost incredulous that a lawyer in similar circumstances would not question whether an act that defeated the purpose of a court order was a serious problem. The motive of Respondent on behalf of the client or Respondent's self-interest does not itself manifest actual or inferred knowledge of disobedience. Wrong and knowingly disobedient are different criteria. The rulings of the Circuit Court and the Court of Appeals did not apply the standard of MRPC 3.4(c) to Respondent's conduct in determining that he had disobeyed the Order and was guilty of contempt.

We have considered the cases on disobedience of a court order cited to us by Petitioner. First, as noted in Petitioner's Hearing Brief, it is axiomatic that courts speak through their written orders. *People v Hill*, 69 Mich App 41; 244 NW2d 357, 358 (1976). The words - and absence of words - in the August 22, 2008 Order are relevant. Even if the Circuit Court's application of MCR 3.310(C)(4) was correct and bound Respondent as agent of his client Schnoor - a proposition vehemently argued against by Respondent - the transfer of MSG assets was not an act of or on behalf of Schnoor. Even if we look behind the words of the August 22, 2008 Order to its reasonable intent, transfer of MSG assets through action of a prior perfected creditor of MSG, exercising its commercially acceptable remedies, was not covered by the Order. This differs sharply from the conduct in *Grievance Administrator v Ralph Musili*, 07-88-JC (ADB 2010) and *Grievance Administrator v Walter L. Baumgardner, Jr.*, 07-89-JC (ADB 2010), both cases arising from criminal prosecution. We have also considered *Grievance Administrator v Michael L. Stefani*, 09-47-GA (ADB 2011), in which the violation of a clearly applicable court order was intentional and purposeful by admission of the respondent.

(ii) Open refusal to obey, knowingly, based on absence of valid obligation

Did Respondent's actions constitute an "open refusal" to obey the Court's August 22, 2008 Order at the time of the violation? Because we have concluded that there was no knowing disobedience of the August 22, 2008 Order under MRPC 3.4(c), we do not need to consider the exception to application of it based on open refusal to obey. Nevertheless, we provide our thoughts on that subject.

Nothing in the record suggests that Respondent ever openly refused to obey the August 22, 2008 Order. Openness requires communication of a position. Respondent has asserted that the Order never applied to him, and has consistently pursued that position, but it was not until several months after the transfer of MSG assets that Respondent ever communicated that position. Instead, he denied that a violation of that Order had occurred. At best, he communicated that Stek and Respondent should go to court to have a "shoot out" about a claimed violation of the August 22, 2008 Order. Respondent either was notably silent about the transfer or aggressively denying that a transfer had occurred in violation of the Order. That is not the same as saying that a sale had occurred and that the Order did not apply to it. Indeed, Respondent's lack of openness about his plan and action to transfer MSG assets is a factor that mitigates against him in this proceeding, as discussed below.

Because we do not believe that the findings of the courts in this case have been based on the scienter standards of the MRPC, we decline to rule that Respondent violated MRPC 3.4(c),

although we consider this a very close call, particularly so when "actual knowledge" can be discerned from circumstantial inference. The question of whether a rule of professional conduct has been violated was not conclusively determined by the Court's finding Respondent guilty of contempt in violating its Order or dictated by the Court's findings of fact. Our findings and conclusion on this point in this proceeding should not be considered a rejection of the application of MCL 600.2106 or providing a basis for lawyers who violate orders to argue successfully that they misunderstood or truly believed X did not mean Y. Rather, we are willing in this case to accept that respondent's literal interpretation of the August 22, 2008 Order was not without basis, permitting us to conclude that Respondent did not "know" he was violating the Order so as to satisfy the scienter requirements of MRPC 3.4(c).

Respondent was held to be in contempt of court by reason of transfer of MSG assets, and on that basis we find that Respondent has committed misconduct as described in MRPC 8.4(c) and MCR 9.104(1).

2. <u>Respondent's Statements about the Judiciary</u>

Although Petitioner's Complaint focuses on the statement in Respondent's appellate brief referring to "the judiciary" acting "as the bitch for the opposing party" (Facts, ¶q), and the alleged profanity of that characterization, the Court of Appeals refers to a broader picture of disrespect of the court. In imposing sanctions for that contempt, the Court of Appeals stated:

> Specifically, this determination is premised on the numerous ad hominem and pejorative comments made and endorsed by Charron as the signatory on his appellate briefs, which include but are not limited to such outrageous and unprofessional statements as, "*When the judiciary acts as the bitch for complainant, we get rulings like this.*" (Emphasis added.)

The Court of Appeals referred to MRPC 3.5(d), which states that "a lawyer shall not engage in undignified or discourteous conduct toward the tribunal" as applicable. We have not reviewed the record the Court of Appeals referred to, but accept its characterization of Respondent's conduct, for which he was determined to be in contempt and was fined. See MCL 600.2106.

Respondent has sought to defend the specific exemplar of his statements under various rationales: reference to "bitch" is not profane based on contemporary usage; this was a statement in a brief and he did not publish it - the Court of Appeals did; it was a privileged utterance; Judge Yates was inexperienced and fell prey to the tactics and persuasion of opposing counsel, and needed education on how to be a judge; Judge Yates was bullied; Judge Yates and I are friends now; I paid the fine and that's all over . . . etc. etc.

We are not concerned with whether use of the term "bitch" is or is not profane. That is not relevant. The meaning of the statement is clear: the court is accused of subservience to a party, serving it rather than pursuing justice. (Tr, p 172.) The record is devoid of any apology for either the use of the word or for the accusation itself, which Respondent defends in pleadings and presentation (argument and testimony) to the panel. (Respondent's Hearing Brief, p 1; Tr, pp 171-72.)

The Court of Appeals found in the proceedings related to Case No. 07-06441-CR and Case Nos. 09-01878-CB and 09-011842-CB, that Respondent engaged in undignified or discourteous conduct toward the tribunal in violation of MRPC 3.5(d), and failure to treat others in the legal process with courtesy and respect in violation of MRPC 6.5(a). That finding is accepted as a violation for this proceeding. See MCL 600.2106. We note that if such words were uttered as a public comment rather than in judicial proceedings, they might be protected as free speech,[26] but the words in the underlying case are in the course of a matter before the judiciary. In addition, Respondent's conduct in this respect received community-wide publicity.[27] We find Respondent to have violated MRPC 3.5(d), MRPC 6.5(a), and MCR 9.104(2).

3. <u>Respondent's Communications with Stanley Stek</u>

On December 19, 2008, counsel for Morris communicated by email to Respondent that counsel had information that Schnoor was transferring MSG or assets of MSG ("Judd is in the process of facilitating a sale of the Agency and/or a portion of the assets of the Agency to a new entity created with Guy Heistand as an owner"), and that this needed to be reviewed by the Circuit Court immediately, as a violation of the August 22, 2008 Order. (Facts, ¶l.) Respondent's reply email on December 19, 2008, stated the Schnoor was bound by the Order, and in personally disparaging and combative terms, challenged Stek to bring the alleged violation before the Circuit by motion. (Facts, ¶m.) In that response Respondent neither admitted nor denied the truth of the information directly.

In a telephone conference on December 22, 2008, allegedly from Judge Yates' chambers with the Judge present, Respondent denied that a transfer had occurred. Stek testified that the denial was categorical (Tr, p 47) and Respondent testified that the denial related to acts prohibited by the August 22, 2008 Order (Tr, p 143), and disputes that Stek asked a broader question.

There are two aspects of these communications for our consideration: (i) the disparaging nature of Respondent's message to Stek on December 19, 2008, and (ii) the alleged disingenuousness of that message and the denial on December 22, 2008. With regard to the first aspect, Petitioner's Complaint refers to the email text quoted in Facts, ¶l. Petitioner does not allege expressly that this text, referring to paranoid rantings, violated MRPC 6.5(a), but references violation of that rule as a ground for discipline. This is the only such communication cited in Petitioner's Complaint or introduced into evidence. Although we recognize that without context this was an insulting and disparaging characterization, we do not consider it to be enough to find a violation of MRPC 6.5(a). We have considered precedent footnoted below in this decision.[28]

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[26] See *Grievance Administrator v Geoffrey N. Fieger*, 01-55-GA (ADB 2004) and the extensive discussion therein. *Cf*, *Grievance Administrator v William A. Ortman*, 93-135-GA (ADB 1995).

[27] See Grand Rapids Press, June 4, 2014.

[28] *Grievance Administrator v Albert J. Dib*, 02-78-GA (ADB 2007), Respondent was accused of using a variety of demeaning terms to describe opposing counsel during 14 different depositions, in violation of MRPC 6.5(a), 8.4(a) and (c), and MCR 9.104(A)(4). The hearing panel determined that a reprimand was appropriate, and the Board agreed; *Grievance Administrator v R. Duncan MacDonald*, 00-4-GA (ADB 2001): The Board affirmed the hearing panel's decision to dismiss the formal complaint which alleged a violation of MRPC 6.5(a). Specifically, in a telephone call with opposing counsel, respondent called opposing counsel a "lying son of a bitch" and a "shyster." In *Grievance Administrator v John F. Vos*, 00-84-GA (HP Report

With regard to the second aspect of the communication at issue, Petitioner has asserted that Respondent attempted "to conceal the improper transaction" and thereby violated a duty of candor to opposing counsel. (Petitioner's Hearing Brief, p 7.) The Rules of Professional Conduct provide for a duty of candor to the judiciary in Rule 3.3. Rule 4.1, the rule prescribing a duty to all persons other than the lawyer's client, including opposing counsel, relates to truthfulness. As Comment to Rule 4.1 notes, that rule does not impose an affirmative duty to inform an opposing party of relevant facts. We do not construct a duty of "candor" from this rule but will consider the duty of truthfulness. As we consider the rules applicable to this part of our inquiry, we note that in the sale of MSG assets in November 2008, Respondent was acting on his and his law firm's behalf and had already notified Schnoor that he was terminating his representation of MSG and Schnoor. Although we focus on Rule 4.1 in this discussion, we note the relevance of Rule 8.4(b) that more broadly covers deceit and misrepresentation. In this regard, at all times in question Respondent appeared to be representing his client in the case. This itself appears to be deceitful.

MRPC 4.1(a) states: "**In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.**"[29] In addition, MRPC 8.4(b) declares that it is professional misconduct for a lawyer to "**engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer[.]**" Comment to MRPC 4.1(a) provides: "**A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.**" However, later in this Comment, under a caption "Fraud By Client," is this further elaboration: "**Making a false statement may include the failure to make a statement in circumstances in which silence is equivalent to making such a statement. Thus, where the lawyer has made a statement that the lawyer believed to be true when made but later discovers that the statement was not true, in some circumstances failure to correct the statement may be equivalent to making a statement that is false.**" Whether this portion of Comment was intended to apply only to correcting misrepresentations by a client or also to

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3/14/01) the hearing panel imposed an order of "no discipline" where respondent was found to have violated MRPC 3.5(c) (now 3.5(d)) when he directed undignified and discourteous comments toward a Workers Compensation Magistrate. Specifically, in the course of a disagreement over the use of an interpreter, respondent, in a hostile and threatening tone, claimed that the Magistrate had no authority to deny his use of an interpreter and would have no authority to stop him if he were to jump across the bench and choke him; respondent also called the Magistrate an "asshole" and advised him that they should "step outside" to settle their dispute.

[29] The Rule requires that the false statement be of a "material" fact. It is unquestionable that the fact the assets had been sold was material. We note that violation of MRPC 4.1(a) does not require adverse effect, only the act itself. Restatement of the Law Third, The Law Governing Lawyers, §98, comment c notes: "For professional discipline purposes, the lawyer codes generally incorporate the definition of misrepresentation employed in the civil law of tort damage liability for knowing misrepresentation, including the elements of falsity, scienter, and materiality. However, for disciplinary purposes, reliance by and injury to another person are not required."

independent statements of a lawyer is unclear.[30] We consider that the whole Comment is applicable to the Rule.

a. Was a false statement expressly made in the communications of December 19 and 22, 2008?

Stek's assertion in the December 19, 2008 email related precisely to the terms of the Order, and the later conference allegedly in Judge Yates' chambers, as to which there is no record, would have pertained to the subject of that which was ordered in the August 22, 2008 Order. If Stek's questioning on December 22, 2008, clearly broadened the inquiry from the terms of the Order to "has there been any transfer?" or words to that effect as he testified (Tr, p 47), then Respondent's unqualified answer "No" or unqualified words to that effect would have been false. Unfortunately, there is no record of the December 22, 2008 conference call, and the testimony of Stek and Respondent in this proceeding is in conflict.

The record in this proceeding invites speculation and second-guessing about many facts, and two constructs based on the same facts can be pursued to opposite conclusions. We do not find that the record dictates finding that Respondent violated MRPC 4.1(a) by making an expressly false statement to opposing counsel. There is more to be considered, however.

b. Was a statement that was knowingly false made by silence or concealment?

Petitioner's strongest evidence in support of this allegation is the Contempt Order. (Petitioner's Exhibit 17.) In that order, the Court found that Respondent left a false impression in his December 19, 2008 email response to opposing counsel:

> **. . . Of course, by that time,[31] all of the assets of MSG had already been sold by C&H to NYPIA, so at the very least, that email left a false impression that nothing had happened to diminish the value of the MSG stock in which Glenn Morris held a security interest. And in this respect, the e-mail speaks volumes about Attorney Charron's view of the proprietary of his firm's sale of the assets of MSG to NYPIA**. (Petitioner's Exhibit 17, p 7.)

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[30] Corresponding Comment to American Bar Association ("ABA") Model Rules of Professional Conduct (hereinafter the "Model Rules") Rule 4.1 includes the following language not adopted with the Michigan rule but clearly applicable to misrepresentation from any source: "**Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.**"

[31] "That time" refers to the time of the December 19, 2008 email exchange between Respondent and Attorney Stek at issue in this proceeding.

Petitioner's Exhibit 17 was admitted as part of the record herein, with consent of Respondent. MCL 600.2106 states:

> A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree.

The law on misrepresentation by silence or omission is plentiful, and applying the interpretative guidance provided by the Comment to MRPC 4.1,[32] presents challenges. To what extent does the Comment to Rule 4.1 seek to remind the lawyer of duties imposed by other law in relations with third persons (constraining bounds of advocacy), and to what extent does the Comment instruct that, regardless of the common law of fraud and other core values of the legal profession (confidentiality, loyalty to client), there is a transcendent duty not to do anything to mislead a third person in the course of representing a client, embodied in Rule 4.1? Or, to frame these questions alternatively: where does one draw the line between silence that helps your client (thus serving the duties of confidentiality and loyalty), and full disclosure when opposing counsel or parties may misapprehend a fact that is important to them in resolving a matter? The comment to MRPC 4.1 identifies the issue even if it does not clearly mark the boundary: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."

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

The foregoing maxims raise the question: When is it that one ought to speak? The leading contemporary case on silent fraud in Michigan is *M&D, Inc. v McConkey*, 231 Mich App 22; 585 NW2d 33 (1998). *M&D, Inc.* is somewhat unique in that it was decided by a special panel of seven judges of the Michigan Court of Appeals, convened for the purpose of resolving a conflict between

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

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

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

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

More recent cases have not diverged from the silent fraud doctrine outlined of *M&D, Inc.* In *Hord v Environmental Research Institute of Michigan*, the plaintiff relocated to Michigan to take a job and was laid off about a year later. 463 Mich 399, 400; 617 NW2d 543 (2000). Plaintiff alleged that he would not have accepted the job had he not been presented with a misleading "operating summary" for the company. *Id.* at 402. Plaintiff argued that the "operating summary" presenting financial data from 1991 was used to mislead him about the financial condition of the

company in 1992. *Id.* While a divided Court of Appeals accepted plaintiff's argument, the Michigan Supreme Court reversed and noted that "[p]laintiff had a simple, straightforward avenue to discover defendant's current financial condition. He simply had to ask." *Id.* at 407, quoting *Hord v Environmental Research Inst.*, 237 Mich App 95, 100; 601 NW2d 892 (1999) (Hoekstra, J., dissenting). The Court reaffirmed the *M&D, Inc.* holding that mere nondisclosure is insufficient to constitute silent fraud and noted that "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Id.* at 412; See *Buntea v State Farm Mutual Auto Insurance Co.*, 467 F Supp 2d 740, 745 (2006). ("The misrepresentation occurs when a party suppresses part of the truth when asked, not by mere nondisclosure.")

The record in this proceeding indicates that that this matter falls squarely within the *Hord* line of reasoning. *Hord* held that "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Id.* at 412. *Traxler v. Ford Motor*, 227 Mich App 276; 576 NW2d 398 (1998) involved an allegation that Ford Motor provided misleading answers to interrogatories. The *Traxler* court found that "Ford's answer was not simply a precise answer to a poor question; it was a dishonest answer, carefully crafted to mislead the reader. An impression can be so strong and so obviously what someone wanted to impart that it is a statement to that effect, in this case, a false statement." *Id.* at 403. *See also*, *The Florida Bar v Joy*, 679 So2d 1165, 1167 (1996) (finding that respondent Joy made false statements by omission of material facts by intending that opposing counsel misinterpret Joy's technically truthful statements).

Thus, with few exceptions and none that govern, the abundant Michigan law on this point returns us to the place where the interpretations of MRPC 4.1 left us: a Michigan lawyer has a duty to correct a misapprehension of fact, at least when that misapprehension arises from an express or tacit representation by the attorney.[33]

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[33] As additional legal analysis, The Restatement, The Law Governing Lawyers, in Reporter's Notes to Comment c to § 98, refers to the Restatement (Second), Torts, § 529 as to statements that are misleading because only partially true. § 529 states: "A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." Comment a to § 529 further explains: "A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue."

Under the Restatement, fraudulent misrepresentation occurs when a party makes a representation that omits additional or qualifying material information. It is not enough that the party is silent as to a material matter. A representation in some form must be made. Restatement, Torts, § 529 has not been relied upon by Michigan Courts when addressing the issue of fraudulent concealment, despite obvious opportunity (see cases above). In *Strand v Librascope Inc.*, 197 F. Supp. 743, 753 (ED Mich 1961), the District Court, cited § 529 in holding that in light of the representations made to the plaintiff regarding his order for computer components, the defendant's failure to disclose a reliable alternative was tantamount a misrepresentation. The court also refers to the special expertise of the defendant, which had exclusive superior knowledge about the products it was selling and their incompatibility for the buyer's intended use. The incompleteness of the representation makes it the functional equivalent of an affirmative fraudulent misrepresentation. Without a representation giving rise to a duty to disclose the entire truth of the matter there can be no fraudulent misrepresentation under § 529. We believe the requirements of the Restatements, as referenced, have been satisfied.

Respondent hid behind his narrow and technical interpretation of three distinct things: 1) the facts, 2) the Court's August 22, 2008 restraining order, and 3) Stek's December 19, 2008 email to him. These narrow and technical interpretations supported Respondent's personal financial interest. As the *Traxler* court stated, an impression can be so strong and so obviously what Respondent wanted to impart that it is a statement to that effect. Here, Respondent made misleading and hence false statements by omission of material facts, with the intent that the Court and opposing counsel misinterpret Respondent's technically truthful statements and interpretation of the facts and order. As such, we conclude that withholding the central fact of transfer of the MSG assets to have been a failure to make a statement in circumstances in which silence is equivalent to making such a statement, and thus find a violation of MRPC 4.1(a) and MRPC 8.4(b).

4. <u>Respondent's Lack of Candor to the Circuit Court and Opposing Counsel</u>

The court's three-day evidentiary hearing in August of 2008 was a key inquiry.[34] After the first day of the hearing, the trial court entered an order restraining Schnoor from transferring assets out of the ordinary course of business, at the request of Stek as counsel for Glenn Morris. This order was formalized on August 22, 2008. (Joint Pretrial Statement ¶23.)

In this proceeding, Stek testified about his request for the restraining order: ". . . I think that we raised it at the next hearing and the next hearing - each time that we had a hearing on that contempt, I wanted to make sure that the order continued in effect and it was reaffirmed . . . [,]" thereby precluding the transfer of assets other than in the normal course of business. (Tr, p 73.)

The court spent three days in an evidentiary hearing, determining whether Respondent's client should be held in contempt for failure to pay for the stock as ordered, and whether he had the ability to pay the obligation to MSC. During the three-day hearing, Stek asked for a restraining order to preserve all MSG assets, to which Respondent did not object. After the three-day hearing, the court formalized the restraining order. All the while, Respondent knew that the assets were encumbered by a security interest executed two and a half months earlier. Respondent knew that the assets were subject to dissipation, because Respondent's law firm's security interest could render the restraining order meaningless relative to them, unless, of course, the Order were to apply to the exercise of the security interest. Although Respondent has asserted that the Circuit Court, Stek, and Morris all knew of the C&H security interest, the basis for that assertion appears to rest on a filed financing statement, not open disclosure.

The court hearing was focused entirely on Schnoor's ability to pay Morris and it was clear the court viewed the restraining order as protecting Morris' claim in the event Schnoor could not pay under the note. Three inquiries were made regarding the status of the assets, one on each day of the hearing, and Respondent kept silent about the fact that the assets were encumbered.

What would have been the harm in an affirmative statement to the Circuit Court and counsel to Morris in the hearings leading up to the August 22, 2008 Order, that the lawyer had a prior security interest in the assets or that the lawyer, as holder of a prior security interest, had exercised or wished to exercise its security interest if there were no questions about its legitimacy in light of the Order? Was it because Respondent feared that the Court likely would have ordered other relief

[34] By its very nature, an evidentiary hearing is an inquiry into the facts at hand, particularly a contempt hearing. See: https://www.merriam-webster.com/dictionary/inquiry.

to protect Morris' interest, had the Court known the assets were encumbered by a security interest held by Respondent's law firm? As subsequent litigation bore out, the validity of the security interest and its rightful exercise has been acknowledged by the Courts. The extensive history of litigation provided in the record and adversity caused to many - parties, lawyers, and courts - resulting from Respondent's silence shows how misguided his determination was.

While Respondent's narrow and literal interpretation of the August 22, 2008 Order as worded may have been arguably technically correct, we conclude that Respondent's failure to openly disclose to the Circuit Court, as well as to opposing counsel, the latent futility of the Order as worded because of C&H's own security interest constitutes a violation of MRPC 4.1, and as a result, MRPC 8.4(b) and (c) and MCR 9.104(1), (2), and (3).

V. CONCLUSION

For the foregoing reasons, we find that Respondent engaged in undignified and discourteous conduct toward the tribunal, in violation of MRPC 3.5(d), and failed to treat others in the legal process with courtesy and respect, in violation of 6.5(a). We also conclude that respondent made a knowingly false statement to a third person, in violation of MRPC 4.1, and thus he also engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b). Finally, we also find that, based on the misconduct that supports these specific rule violations, Respondent engaged in conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(1) and MRPC 8.4(c); engaged in conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3). We do not, however, find that Respondent knowingly disobeyed an obligation under the rules of a tribunal. Thus, we find no violation of MRPC 3.4(c).

Having found that respondent engaged in misconduct as set forth above, a hearing shall be scheduled for the sanction phase of this matter.

ATTORNEY DISCIPLINE BOARD
Kent County Hearing Panel #4

By: /s/ William B. Dunn
William B. Dunn, Chairperson

Dated: March 30, 2021

APPENDIX A - EXHIBITS

Petitioner' Exhibits

Exhibit 1	Opinion and Order In Re Defendant/Counter-Plaintiff R. Judd Schnoor And Morris, Schnoor and Gremel, Inc.'s Motion for Summary Disposition as to Count One of the Counterclaim and Motion for Summary Disposition of the Verified Complaint, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated August 10, 2007.
Exhibit 2	May 15, 2008 Account Stated signed by R. Judd Schnoor and respondent.
Exhibit 3	May 22, 2008 Resolution of the Board of Directors of Morris Schnoor & Gremel, Inc. (MSG) regarding MS&G granting a security interest to Charron & Hanisch, PLC (C&H).
Exhibit 4	May 22, 2008 Security Agreement between MSG and C&H.
Exhibit 5	May 22, 2008 Subordination Agreement signed by R. Judd Schnoor.
Exhibit 6	June 4, 2008 UCC Financing Statement with attached filing acknowledgment, notice, and receipt.
Exhibit 7	Counter-Defendant Glenn S. Morris' Motion for Specific Performance, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc.* and *Morris, Schnoor & Gremel, Inc., v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated July 26, 2008.
Exhibit 8	Order Granting Plaintiff Glenn Morris's Motion for Specific Performance of R. Judd Schnoor's Payment Obligations, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated July 24, 2008.
Exhibit 9	Order directing Defendants to produce financial statements, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated August 22, 2008.
Exhibit 10	October 14, 2008 E-mails between respondent and Dave Young regarding potential purchase of MS&G assets.
Exhibit 11	November 7, 2008 Asset Purchase Agreement.
Exhibit 12	November 21, 2008 Bill of Sale.

Exhibit 13 December 19, 2008 E-mails between Stanley Stark and respondent.

Exhibit 14 Verified Complaint, *Glenn S. Morris v Morris, Schnoor & Gremel, Inc., David W. Charron and New York Private Insurance, LLC*, Kent County Circuit Court Case No. 09-01878-CB, dated February 20, 2009.

Exhibit 15 February 9, 2009 Motion Hearing transcript, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR.

Exhibit 16 Findings of Fact, Conclusions of Law, and Verdicts, *Glenn S. Morris v Morris, Schnoor & Gremel, Inc. and Charron & Hanisch, P.L.C.* and *Morris, Schnoor & Gremel Properties LLC, v Morris, Schnoor & Gremel, Inc., and Charron & Hanisch, P.L.C.*, Kent County Circuit Court Case Nos. 09-01878-CB and 09-011842-CB, dated December 27, 2012.

Exhibit 17 Opinion and Order setting forth findings of civil contempt, *Glenn S. Morris and The Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC*, Kent County Circuit Court Case No. 07-06441-CR, dated December 27, 2012.

Exhibit 18 Judgment, *Glenn S. Morris v Morris, Schnoor & Gremel, Inc., and Charron & Hanisch, P.L.C.*, Kent County Circuit Court Case No. 09-01878-CB, dated March 26, 2013.

Exhibit 19 Opinion and Order Awarding Attorney Fees to Plaintiff Glenn S. Morris and Against Attorney David W. Charron, *Glenn S. Morris and The Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC*, Kent County Circuit Court Case No. 07-06441-CR, dated January 28, 2014.

Exhibit 20 Final Judgment for Plaintiff Glenn S. Morris and Against Attorney David W. Charron, *Glenn S. Morris and The Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC*, Kent County Circuit Court Case No. 07-06441-CR, dated March 7, 2014.

Exhibit 21 Order Denying Non-Party David W. Charron's Motion for Reconsideration, *Glenn S. Morris and The Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC*, Kent County Circuit Court Case No. 07-06441-CR, dated May 1, 2014.

Exhibit 22 Order Denying Non-Party David W. Charron's and Charron & Hanisch PLC's Motion for New Trial, *Glenn S. Morris and The Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC*, Kent County Circuit Court Case No. 07-06441-CR, dated May 1, 2014.

Exhibit 23 Unpublished Opinion, *Glenn S. Morris and The Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC, v Morris Insurance Agency, and David W. Charron and Charron & Hanisch P.L.C.*; *Glenn S. Morris v Morris, Schnoor & Gremel, Inc., Charron & Hanisch P.L.C., and David W. Charron and New York Private Insurance, LLC*; *Morris, Schnoor & Gremel Properties L.L.C., v Morris, Schnoor & Gremel, Inc., and David W. Charron and Charron & Hanisch P.L.C., and New York Private Insurance, LLC.*; and *Glenn S. Morris v Morris, Schnoor & Gremel, Inc., and David W. Charron, and Charron & Hanisch P.L.C. and New York Private Insurance, LLC*, Michigan Court of Appeals Case Nos. 315006, 315007, 315702, 315742 (LC Nos. 07-006441-CR, 09-001878-CB, 09-011842-CB, 09-001878-CB), dated May 29, 2014.

Exhibit 24 Respondent's Bankruptcy Petition dated 12/30/14.

Exhibit 25 Order Denying Application for Leave to Appeal *Glenn S. Morris and Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC v Morris Insurance Agency, Inc. v David W. Charron and Charron & Hanisch P.L.C.*, Michigan Supreme Court Case No. 150023 (COA No. 315006, Kent CC No. 07-06441-CR), dated March 5, 2015.

Exhibit 26 Glenn S. Morris' Complaint Objecting to Discharge, *In Re: David W. Charron; Glenn S. Morris and Glenn S. Morris Trust v David W. Charron*, U.S. Bankruptcy Court Western District of Michigan, Case Nos. 14-07970, 15-80086, dated April 10, 2015.

Exhibit 27 Opinion and Order Denying Defendant's Motion for Summary Judgment and Granting Plaintiffs' Cross Motion for Summary Judgment, *In Re: David W. Charron; Glenn S. Morris and Glenn S. Morris Trust v David W. Charron*, U.S. Bankruptcy Court Western District of Michigan, Case Nos. 14-07970, 15-80086, dated September 30, 2015.

Exhibit 28 Opinion re: attorney fee sanctions *Glenn S. Morris and Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC v Morris Insurance Agency, Inc. v David W. Charron and Charron & Hanisch P.L.C.*, Michigan Court of Appeals Case No. 321925, Kent County Circuit LC No. 07-06441-CR, dated August 11, 2016.

Exhibit 29 Order, *In Re: David W. Charron; Glenn S. Morris and Glenn S. Morris Trust v David W. Charron*, U.S. Court of Appeals for the Sixth Circuit Case No. 18-1117, dated October 26, 2018

Exhibit 30 Denial of Certiorari, *In Re: David W. Charron; Glenn S. Morris and Glenn S. Morris Trust v David W. Charron*, U.S. Supreme Court Case No. 18-1130 (LC 18-1117), dated April 22, 2019.

Respondent's Exhibits

Exhibit B-1 February 22, 2008 Hearing Transcript regarding Motion for Summary Disposition, Motions to Compel and Motion to take Attorney's Deposition, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR.

Exhibit B-2 Docket Entries *Glenn S. Morris and Glenn S. Morris Trust v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated December 10, 2008.

Exhibit B-3 March 28, 2008 Hearing Transcript regarding Motion for Preliminary Injunction, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR.

Exhibit B-4 Opinion and Order In Re Defendant/Counter-Plaintiff R. Judd Schnoor And Morris, Schnoor and Gremel, Inc's Motion for Summary Disposition as to Count 1 of the Counterclaim and Motion for Summary Disposition of the Verified Complaint, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated August 10, 2007.

Exhibit B-5 Plaintiff/Counter-Defendant Glenn S. Morris' Motion for Clarification of Case Evaluation Award and, In the Alternative, to Send the Matter Back to Case Evaluation Before the Prior Panel, Notice of Hearing, Certificate of Service and cover letter, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated July 1, 2008 .

Exhibit B-6 Counter-Defendant Glenn S. Morris' Motion for Specific Performance of Counter-Plaintiff Schnoor's Payment Obligations, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated June 16, 2008.

Exhibit B-7 Order Granting Plaintiff Glenn Morris's [Sic] Motion for Specific Performance of R. Judd Schnoor's Payment Obligations, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated July 24, 2008.

Exhibit B-8 Defendant/Counter-Plaintiff's Schnoor's Motion for Reconsideration, *Glenn S. Morris v R. Judd Schnoor v Morris, Schnoor & Gremel, Inc., v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated August 6, 2008.

Exhibit B-9 August 20, 2008 Evidentiary Hearing Transcript (partial), *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc.,* And *Morris, Schnoor & Gremel, Inc., v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR.

Exhibit B-10 Order Directing Defendants to Produce Financial Statements, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated August 22, 2008.

Exhibit B-11 November 10, 2006 Eviction Notice to Morris, Schnoor and Gremel, Inc.

Exhibit B-12 Order Denying Plaintiff Glenn Morris's [sic] Motion to Hold Defendant R. Judd Schnoor in Civil Contempt, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc.*, Kent County Circuit Court Case No. 07-06441-CR, dated January 15, 2009.

Exhibit B-13 Corporate documents for MS&G, Inc.

Exhibit B-14 October 14, 2008 e-mails between respondent and Dave Young.

Exhibit B-15 Opinion and Order Granting In Part, and Denying In Part, Defendants' Motions for Summary Disposition, *Glenn S. Morris v Morris, Schnoor & Gremel, Inc., David Charron, Charron & Hanisch, P.L.C., and New York Private Insurance, LLC*, Kent County Circuit Court Case No. 09-01878-CB, dated October 22, 2009.

Exhibit B-16 Order Denying Defendants' Motion to Disqualify Judge and Counsel, *Glenn S. Morris v Morris, Schnoor & Gremel, Inc., David Charron, Charron & Hanisch, P.L.C., and New York Private Insurance, LLC*, Kent County Circuit Court Case No. 09-01878-CB, dated October 22, 2009.

Exhibit B-17 Order Granting Motion for Partial Reconsideration and Granting Summary Disposition on Counts Two and Four, *Glenn S. Morris v Morris, Schnoor & Gremel, Inc., Charron & Hanisch, P.L.C., and New York Private Insurance, LLC*, Kent County Circuit Court Case No. 09-01878-CB, dated February 4, 2010.

Exhibit B-18 Appellant Charron & Hanisch PLC's and Charron's Brief on Appeal, *Glenn S. Morris and The Glenn S. Morris Trust v R. Judd Schnoor and MADCAP Enterprises, LLC,* And *MADCAP Enterprises, LLC, v Morris Insurance Agency, Inc.*, Michigan Court of Appeals Case No. 315006, Kent County Circuit LC No. 07-06441-CR, dated October 21, 2020.

Exhibit B-19 First Amended Complaint, *Glenn S. Morris v Morris, Schnoor & Gremel, Inc., David Charron, Charron & Hanisch, P.L.C., and New York Private Insurance, LLC*, Kent County Circuit Court Case No. 09-01878-CB, dated March 6, 2009.

Exhibit B-20 Not admitted.

Exhibit B-21 Petition for Writ of Certiorari, *David W. Charron v Glenn S. Morris and Glenn S. Morris Trust*, U.S. Supreme Court Case No. 18-1130 (LC 18-1117), dated February 25, 2019.

Exhibit B-22 July 26, 2017 Asset Purchase Agreement; and Bankruptcy Court Order approving sale of NYPIA assets, dated August 23, 2017.

Exhibit B-23 Respondent's exhibits from February 9, 2008 hearing, *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, Kent County Circuit Court Case No. 07-06441-CR.

Attachment B

STATE OF MICHIGAN

FILED
ATTORNEY DISCIPLINE BOARD
February 28, 2022

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 19-130-GA

DAVID CHARRON, P 39455,

Respondent.
_____/

SANCTION REPORT OF KENT COUNTY HEARING PANEL #4[1]

PRESENT: William B. Dunn, Chairperson
Michael J. Kosta, Member
Victoria A. Vuletich, Member

APPEARANCES: Kimberly L. Uhuru, Deputy Administrator
for the Attorney Grievance Commission

David Charron, Respondent
In Pro Per

I. EXHIBITS

Respondent offered three Exhibits for this hearing, listed below. Respondent's Exhibit 1 was admitted without objection. After discussion concerning its lack of probative value, Respondent's Exhibit 2 was admitted. Respondent's Exhibit 3 was admitted but considered as unnecessary and cumulative in light of respondent's unchallenged sworn testimony that he was active in the Real Property Law Section of the State Bar of Michigan. (Respondent's Hearing Brief for Imposing Lawyer Sanctions, p 10.)

Respondent's Exhibit 1 — September 2, 2008 evidentiary hearing transcript (partial - pp 39, 95-96), *Glenn S. Morris v R. Judd Schnoor and Morris, Schnoor & Gremel, Inc. and Morris, Schnoor & Gremel, Inc. v Morris Insurance Agency, Inc.*, 17th Circuit Court Case No. 07-06441-CR.

[1] This Discipline Report is referred to herein as "this Discipline Report."

Respondent's Exhibit 2	April 17, 2013 evidentiary hearing transcript (partial - pp 96-102), *Glenn S. Morris and the Glenn S. Morris Trust v R. Judd Schnoor and Madcap Enterprises, LLC v Morris Insurance Agency, Inc.*, 17th Circuit Court Case No. 07- 06441-CR.
Respondent's Exhibit 3	Michigan Real Property Law Review, Spring 2007, Vol. 34, No. 1, Counting on Redivision Rights, p. 7.

II. WITNESS

David Charron, Respondent

III. FINDINGS AND CONCLUSIONS REGARDING SANCTIONS

A. INTRODUCTION

As stated in the Misconduct Report of Kent County Hearing Panel #4, filed April 30, 2021 (the "Report")[2], this panel found that David Charron committed professional misconduct as listed following:

a) engaged in undignified or discourteous conduct toward the tribunal, in violation of MRPC 3.5(d);

b) failed to treat others in the legal process with courtesy and respect, in violation of MRPC 6.5(a);

c) in the course of representing a client, made a knowingly false statement to a third person, in violation of MRPC 4.1;

d) engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b);

e) engaged in conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(1) and MRPC 8.4(c);

f) engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,

g) engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

[2] Definitions used in this Discipline Report and not otherwise defined herein shall have the meaning ascribed to them in the Report.

This panel heard evidence in oral argument June 7, 2021, regarding appropriate sanction for the misconduct. The panel's analysis and findings follow.

B. GOVERNING LEGAL STANDARDS

Panels of the Michigan Attorney Discipline Board ("ADB") have been directed by the Michigan Supreme Court to determine an appropriate sanction for professional misconduct by following the analytical framework set forth in the American Bar Association's Standards for Imposing Lawyer Sanctions (referred to herein as the "Standards" and each a "Standard"). In *Grievance Administrator v Lopatin*, 462 Mich 235, 244 (2000), ("*Lopatin*"), the Supreme Court explained that the basic goal of the attorney disciplinary system, as stated in MCR 9.105 is to protect the public, the courts, and the legal profession. To that end, the Court directed ADB panels to conduct a three-step analysis in determining an appropriate sanction for attorney misconduct.[3]

The panel is to make initial inquiry into three factors: 1) what ethical duty did the attorney violate, and 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 actual or potential injury or a serious or potentially serious injury. *Lopatin*, at 239.

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

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

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[3] At note 13 of its decision, the Court observed that the Standards may not fit all facts and circumstances precisely or provide the exclusive basis for determining a sanction, and instructed panels such as ours to apply our reasoned consideration and judgment, observing precedent:

> 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.

C. LEGAL ANALYSIS

In this proceeding the panel found numerous violations of rules for which sanctions may be imposed. Each one must be considered on its own in applying the appropriate Standard. Each subsection below corresponds to the list in Section III A above. With respect to each, we will consider the duty violated, the lawyer's mental state, and to what extent was there injury caused by the misconduct, or as applicable under the Standards, an adverse effect on legal proceedings or adverse reflection on the lawyer's fitness. Following these considerations, we will make an initial determination as to the appropriate sanction. The effect of multiple violations will be considered as an aggravating factor at the conclusion.[4]

1. Transfer of MSG Assets: Violation of Court Order - Report Section 1, pp 11-16.

Finding: Respondent engaged in conduct that was prejudicial to the proper administration of justice, in violation of MCR 9.104(1) and MRPC 8.4(c).

In November 2008, respondent caused the assets of MSG to be transferred to a third person pursuant to exercise of respondent's law firm's security interest in MSG assets granted in March 2008 for payment of legal fees and expenses being incurred by MSG. As a result of the transfer, respondent's law firm was paid outstanding fees and expenses, and MSG had no further assets, thereby rendering ineffectual the August 22, 2008 Order. In December 2012, the Kent County Circuit Court issued a Contempt Order that held respondent liable for civil contempt of the August 22, 2008 Order by causing the assets to be transferred and imposed a penalty therefore.

Although the panel did not find that respondent "knowingly" disobeyed the August 22, 2008 Order as required to find a violation of MRPC 3.4(c)[5] the panel determined that the disobedience as found by the Circuit Court in its Contempt Order constituted a violation of MRPC 8.4(c) and MCR 9.104(1).

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[4] "The [S]tandards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors (see Standard 9.22)." https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.pdf at 7.

[5] This conclusion by the panel determined no violation of MRPC 3.4(c) based on the definition of "knowingly" in MRPC 1.0 (Terminology, *see* note 6, *infra*), although the panel considered its determination to be a "very close call." For the record, we note that Petitioner's Exhibits 17 and 27 provide conclusions of the Circuit Court and of the Bankruptcy Court, respectively, among them that respondent's violation of the August 22, 2008 Order was knowing and intentional, and willful and malicious. *See* Report, p 14. Were the findings of these courts dispositive, the appropriate sanction for respondent's misconduct would be disbarment, applying Standard 6.21.

By acting in contempt of a court order, the misconduct interfered with a legal proceeding. Respondent's misconduct was prejudicial to the administration of justice and thus violated a duty to the legal system. As noted by Petitioner (Petitioner's Brief Regarding Sanctions, p 4) and as evident from the facts recited in the Report (pp 3-10) relating to extensive devotion of judicial resources to this conduct and its effect, we consider the interference to be serious.

The diversion of MSG assets from the operations of MSG and hence potential recourse for payment of Schnoor's obligations to Morris caused by respondent's misconduct clearly caused or had the potential to cause injury to a party in ongoing litigation at the time of the transfer. (Tr 9/1/20, pp 55-56.)

The most applicable Standard for sanctioning the misconduct found, singularly, is Standard 6.2, which reads as follows:

> 6.2 Abuse of the Legal Process
>
> 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:
>
> 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
>
> 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.
>
> 6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

Because the panel has not found that respondent acted knowingly,[6] the presumptive level of discipline, subject to aggravating or mitigating circumstances, is described in Standard 6.23.

2. Respondents Statements about the Judiciary - Report Section 2, pp 16-17.

Findings: (a) Respondent engaged in undignified or discourteous conduct toward the tribunal, in violation of MRPC 3.5(d);

(b) respondent failed to treat others in the legal process with courtesy and respect, in violation of MRPC 6.5(a); and

(c) respondent engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2).

By reference in an appellate pleading to the trial court acting "as the bitch" for the opposing party, respondent has engaged in undignified or discourteous conduct toward a tribunal, a violation of MRPC 3.5(d) and has failed to treat with courtesy and respect persons involved in the legal process in violation of MRPC 6.5(a) and MCR 9.104(2). By violating those rules, respondent has also violated MRPC 8.4(a) and (c). As a result, respondent has violated duties as a professional.

The brief in which this reference occurs was written by respondent seeking to overturn the Contempt Order. The pleading was written to obtain a benefit for respondent. In the Misconduct portion of this proceeding respondent has defended his conduct. (Report, p 16.) Respondent claims that he did not publish his accusation - the Court of Appeals did (*id*.) - yet his own words were written in a public document. The particular reference to the trial court acting as the bitch was noted by the Court of Appeals as one of "numerous ad hominem and pejorative comments made and endorsed by" respondent in his appellate briefs. (Petitioner's Exhibit 23, p 58.) There is no question that respondent intended to say what he did, and the exposure of it and the fallout from it was to be expected. Although the decision of the Court of Appeals was "unpublished" that does not mean it was not available for anyone to see.[7]

The most applicable Standard for this conduct considered singularly is 7.0. We have found that respondent knowingly engaged in the conduct and consider whether Standard 7.1 or 7.2 is most appropriate.

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[6] We note that the definition of "knowingly" as used in MRPC 3.4(c) is found in MRPC 1.0, Terminology as "denotes actual knowledge of the fact in question . . . [which] may be inferred from circumstances." The definition of "knowledge" in Standards III, Definitions, is "conscious awareness of the nature or attendant circumstances of the conduct." We do not see a dispositive difference in the two definitions.

[7] *See* https://courts.michigan.gov/courts/coa/opinions/pages/opinionsorders.aspx.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Respondent engaged in this conduct in an appellate brief intended to benefit respondent and his law firm in appealing a contempt order against both. This satisfies a requirement for applying Standard 7.1. Did the conduct cause injury to a client or the legal system; and was that injury "serious or potentially serious?"[8]

The Report (p 17) notes that this particular accusation quoted in the Court of Appeals opinion was publicized in an area newspaper. (Report, note 27.) The Court of Appeals considered this language, along with other "disrespectful and blatantly contemptuous statements" made by respondent in briefs regarding the trial court as basis for sanctioning respondent "for his failure to abide by rules established for this Court and the civility expected by practitioners of the law." (Report, p 9.) This action indicated that the Court of Appeals considered the conduct to be injurious to the legal system and of a serious nature.

As mitigation specifically on this subject, respondent repeats (Respondent's Hearing Brief for Imposing Lawyer Sanctions, p 13) his assertion that *he* did not broadcast his characterization of the trial court to the public: that he only communicated the statement to the three person hearing panel of the Court of Appeals, and "buried the inflammatory statement in his appellant (sic) brief," which the court "had the means to censure (sic) and remove . . . from the brief if *it* did not want to include it in the public record." (Emphasis added.)

Injury is not measured only at a public level. We agree that the intended pejorative statement about Judge Yates was designed to impugn the validity of the court's findings and conclusions, and hence the legal system - whether or not publicized. But we also regard respondent's effort to blame the court for his misconduct not only as absurd but indicative of the egocentric and disdainful attitude of respondent about his duties as a lawyer.

Petitioner proposes a sanction of suspension under Standard 7.2, which applies in the case of less than serious or potentially serious injury; and seeks a sanction of suspension if considering this violation singularly. We believe that the conduct could be considered as having serious or potentially injurious effect for which disbarment under Standard 7.1 is the presumptive sanction, considering this a singular offense.

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[8] In the appeal of the Contempt Order, respondent represented himself and his law firm as "clients." That respondent was found in contempt for this conduct was necessarily injurious to his "client."

3. Respondent's Communication with Stanley Stek - Report Section 3, pp 17-23.

Findings:

(a) In the course of representing a client, respondent made a knowingly false statement to a third person, in violation of MRPC 4.1;

(b) respondent engaged in conduct that involved dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflected adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b);

(c) respondent engaged in conduct that was prejudicial to the proper administration of justice, in violation of MCR 9.104(1) and MRPC 8.4(c); and

(d) respondent engaged in conduct that was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

In November 2008, respondent had caused the assets to be transferred pursuant to exercise of respondent's law firm's security interest granted in March 2008. (Report, Facts, ¶ k.) In December 2008, respondent and opposing counsel Stek exchanged email messages on the subject of whether assets of MSG had been transferred. (Report, Facts, ¶ l.)

In response to a statement by Stek saying that he or his client Morris had information that substantiated that Schnoor was in the process of selling the agency (MSG) or a portion of its assets, respondent sent an email response, said by the trial court in its Contempt Order (Petitioner's Exhibit 17, p 7) to be "reassuring," stating:

> You already have a stay order which prohibits Judd Schnoor from doing the acts alleged by your email. If you believe he has violated the order, let's have a shoot out so we may disclaim you of the notion.

By that time, all of the assets of MSG had already been sold by C&H to NYPIA, so at the very least - as viewed by the trial court (*id*.) - that e-mail left a false impression that nothing had happened to diminish the value of the MSG stock in which Morris held a secured interest. (Petitioner's Exhibit 17, p 7.)

This email exchange was followed by a telephone conversation among Stek, respondent, and Judge Yates (Report, Facts, ¶ m) in which respondent denied that the assets had been

transferred.[9] We make note here that at the time of this exchange, respondent had taken steps to substitute other counsel for Schnoor. (Tr 9/1/20, pp 129-130.) Respondent had already signed documents for substitution but in his testimony said he was uncertain whether he had received an order of substitution. He stated that he believed he was technically representing Schnoor in the December 2008 exchange.[10] Although respondent as "technical" counsel may have owed duties to Schnoor, none of respondent's conduct appears to have served Schnoor's interests, but only those of respondent.

The Report explores the law of misrepresentation by silence. Here, respondent gave a truthful answer to a narrow aspect of the question but withheld information necessary for a complete answer. In the Report, the panel explored case law and found that the failure to say that the assets had been transferred violated MRPC 4.1. Testimony indicates that respondent intended to provide information to the extent he wished to interpret the question, regardless of how the question may have been asked.[11] (Tr 9/1/20, p 17.) Simply, he intended not to reveal that the MSG assets had been transferred. There was more than silence: respondent dissembled by providing an answer he knew to be unresponsive to the question asked for the purpose of hiding the truth.

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[9] Respondent would not admit in the Misconduct Hearing that Judge Yates was present or a participant on this call. (Tr 9/1/20, pp 143-144.) The Court of Appeals Unpublished Opinion (Petitioner's Exhibit 23, p 16) contains the following statement indicating that Judge Yates was clearly a participant in the call:

> . . . Charron and Charron & Hanisch suggest the trial court 'improperly inferred facts' by using information or communications obtained from an exchange that occurred on December 22, 2008 when counsel for Morris and MSG Properties approached the trial court based on rumors pertaining to the imminent sale of MSG's assets. Charron and Charron & Hanisch attempted to disqualify the trial court judge, alleging he engaged in ex parte communications with counsel for Morris. Notably, Charron participated by telephone in the exchange, and the trial court declined to recuse itself from further proceedings. A review of the record does not indicate that Charron & Hanisch followed the requisite protocol in seeking to disqualify the trial judge. [Citations omitted.]

[10] We accept for purposes of this Order that respondent was representing a client at the time of the December 2008 email exchange and telephone call, as respondent has urged, despite his having done all he could to end the representation of Schnoor prior thereto.

[11] Here we note that Stek testified that he asked a broader question relating to transfer of the assets, to which respondent denied as having occurred, but respondent claims that the question related solely to violation of the words of the August 22, 2008 Order and his response was only to the narrow specific question. (Report, p 17.) In analyzing this based on facts most favorable to respondent, we consider how dissembling can be misrepresentation. If considered on facts less favorable to respondent - a direct denial that transfer had occurred - there is a clear and unarguable violation of MRPC 4.1.

Respondent has asserted that the language of Comment to MRPC 4.1 qualifying a requirement that a lawyer be truthful when dealing with others on a client's behalf "generally has no affirmative duty to inform an opposing party of relevant facts" would preclude a conclusion that failing to reveal a relevant fact could be a misrepresentation.[12]

In our view, the failure to provide a relevant fact was not - as regards the December 2008 exchange - a matter of an affirmative duty to disclose. In this discussion we are not finding a duty to volunteer information out of context. This failure was in response to inquiry to which the information was directly related and failure to give a complete answer to a question that misleads the questioner is a violation of MRPC 4.1. *See* Board Opinion in *Grievance Administrator v Michael L. Stefani*, 10-113-GA (ADB 2013).

Respondent also posits that MRPC 4.1 is qualified by MRPC 1.6 and would not require disclosure of confidences or secrets of a client. (Tr 6/7/21, p 15.) This is incorrect. MRPC 4.1 is not so conditioned by its terms; and Comment to MRPC 1.6 provides expressly that MRPC 4.1 requires a lawyer to disclose information relating to the representation.

In addition, if respondent was representing Schnoor at the time of the December exchange (Tr 9/1/20, p 130), we do not conclude that the information regarding respondent's having caused a transfer of assets of MSG was in any respect a confidence or secret[13] of Schnoor. In his testimony at the Misconduct Hearing, respondent stated:

> The sale was not clandestine. This is an insurance agency whose assets got sold. All right. Insurance companies are highly regulated in the State of Michigan. Every single relationship with an insurer has to be reassigned to the new company. Agent's (sic) If you go to the OFIS website, you will see that all of these types of reassignments are done in real time. All you need to do on the website is just type in New York Private Insurance Agency or Morris, Schnoor & Gremel, Inc. and see who's being transferred and you get the data in real time. That's how the insurance world works. None of that was clandestine. And we filed - you have into evidence our UCC filings. When we sold to New York Private Insurance Agency, we filed UCC statements. We told the world, hey, this guy owes us money. We didn't hold back or conceal it in any way. [Tr 9/1/20, pp 165-166.]

Further, respondent has argued throughout this case that he was not bound by the August 22, 2008 Order, and could act on his and his law firm's behalf without regard to it. His argument that he was protecting his fired client by not revealing a relevant fact is not only legally incorrect, it is specious.

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[12] Comment [1] to the ABA Model Rules of Professional Conduct Rule 4.1, on which MRPC 4.1 is based, adds this language not present in the Michigan Comment: "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

[13] The terms "confidence" and "secret" are defined in MRPC 1.6(a).

Whether respondent was representing a client in his misleading response in the December exchange is relevant only to whether the violation we found is of MRPC 4.1 (and hence MRPC 8.4(a) and 8.4(b)) or exclusively under MRPC 8.4(b). In any case, we conclude that respondent engaged in intentional deception for which sanction provided in either Standard 5.1 or Standard 6.1 may apply. The misconduct in question - misrepresentation, dishonesty, or deceit - is a violation of a duty to the public, to which Standard 5.1 would apply, as well as a duty to the legal system, to which Standard 6.1 would apply.

Standard 6.1. Because Judge Yates was present in the December 22, 2008 conference call, Standard 6.1 is facially appropriate when conduct of this nature is considered singularly, subject to mitigating or aggravating circumstances.

> **6.1 False Statements, Fraud, and Misrepresentation**
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:
>
> 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
>
> 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
>
> 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
>
> 6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

Application of this Standard requires actual or potential injury to a party or an adverse effect on a legal proceeding, and a measurement of seriousness of the injury or effect. As we have found that respondent acted with intent not to disclose and thereby misrepresent the status of transfer of assets of MSG, Standard 6.11 seems to be the presumptive place to begin analysis.

Respondent has claimed that no injury or adverse effect on legal proceedings resulted from his misrepresentation. First, the damage - dissipation of the assets standing behind the stock value - had already occurred and would not be undone even if a full disclosure had been made in the December exchange. The record supports that respondent's exercise of UCC remedies to enforce the security interest held by C&H to cause a transfer of MSG assets, the fact not disclosed in December, was legal and withstood attack as a fraudulent transfer notwithstanding that it violated the August 22, 2008 Order. The voidability of the transfer was litigated but not ordered. (Tr 9/1/20, p 8; and references cited). Second, respondent argues that it was only a short time between the misrepresentation in December and the full disclosure of the transfer on February 9, 2009, and no prejudice to anyone's interests resulted by reason of withholding the information in December. In the meantime, on January 15, 2009, the trial court issued an Order (Respondent's Exhibit B-12) denying Morris' motion to hold Schnoor in contempt of the order to pay Morris for the stock, which respondent claims abrogated the purpose of the August 22, 2008 Order.

Measured by time and effect alone between the lie and discovery of the truth, the lie (in contrast to the transfer of the assets) resulted in little harm to Morris, Stek, or the trial court, and of itself had little practical effect on a legal proceeding. Although Stek did not immediately pursue further action to unearth the truth or to obtain another order of the trial court as he said he might have done (Tr 9/1/20, pp 44-46),[14] proceedings continued in the matter based on information obtained by Stek within a few days of the misrepresentation.

We must also consider whether making the misrepresentation to the court concerning a material fact had a significant adverse effect on a legal proceeding. The misrepresentation involved a material fact, one that eventually was held to be contempt of court.

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

Standard 6.11 requires either serious (or potentially serious) injury to a party or a serious (or potentially serious) adverse effect on a legal proceeding. The Standards define[15] "injury" as harm that results from the lawyer's misconduct. We conclude that there was "little or no" injury to a party as a result of respondent's misconduct in violation of MRPC 4.1.

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[14] A further Order preventing transfer of the assets would not have been effective to restrain the transfer already made. Efforts to void the transfer as a fraudulent conveyance were unsuccessful.

[15] Standards Part III, Definitions.

Although the misrepresentation by dissembling and failure to reveal the truth was made to a court, we do not find that the misrepresentation itself had a serious adverse effect on a legal proceeding. Although the then-undisclosed transfer of assets itself had an adverse effect on a legal proceeding - we have accepted the ruling that the transfer was contempt of court - the transfer itself is not the misconduct examined under Standard 6.1.

Accordingly, as to this area of misconduct, we conclude that the facts and our conclusions about them as they pertain to injury or effect on a legal proceeding do not themselves call for application of sanctions under the literal terms of Standard 6.11. We have also considered application of Standard 6.12. This Standard applies when a lawyer knows that material information is being "improperly" withheld from a court, and the withholding causes an injury to a party or an adverse effect on a judicial proceeding. We conclude that the information was not properly withheld. However, despite the intentional obfuscation, we cannot attribute injury to Morris or adverse effect on a legal proceeding as a result of it for application of Standard 6.12.

Standard 5.1. Application of Standard 5.1 is appropriate in the case of misconduct for violation of MRPC 4.1 and under MRPC 8.4(b).

> **5.1 Failure to Maintain Personal Integrity**
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:
>
> 5.11 Disbarment is generally appropriate when: (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.
>
> 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

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

This Standard does not evaluate materiality of a fact or law misrepresented or the existence or degree of injury to a party or adversity on a legal proceeding. What is measured when applying this Standard is intent and how, if at all, the misconduct reflects on the lawyer's fitness to practice.[16]

Standard 5.1 provides a four-part stratum of disciplinary consequence - disbarment, suspension, reprimand, and admonition - depending on the severity of the misconduct. In each stratum it is necessary to find that the lawyer's conduct in some degree reflects adversely on the lawyer's "fitness to practice." Disbarment (Standard 5.11(b)) is an appropriate sanction when the conduct is "intentional" and the dishonesty, etc. "seriously" adversely reflects on the lawyer's fitness to practice. Suspension (Standard 5.12) is appropriate when the conduct is "knowing" and reflects "seriously" adversely reflects on fitness to practice.[17] Reprimand (Standard 5.13) is appropriate when the conduct is "knowing" but the reflection on fitness is less than "seriously" adverse.

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[16] In the Michigan Rules of Professional Conduct, Rule 8.4(b) combines the dishonesty, etc. with criminal conduct offenses, whereas in the Model Rules of Professional Conduct, misconduct involving criminal conduct adversely reflecting on the lawyer's fitness is the subject of Rule 8.4(b), and dishonesty, etc., without consideration of reflection on lawyer fitness - a per se violation - is the subject of Rule 8.4(c). Standard 5.1 applies to both Model Rules and to Michigan Rule 8.4(b).

[17] It has been noted in prior ADB matters that Standard 5.12 omits mention of dishonesty, etc. misconduct, and refers only to certain criminal conduct, thus on its face precluding presumptive application of suspension for conduct not specified. *See*, e.g., *Grievance Administrator v Arnold M. Fink*, 96-181-JC (ADB 1998), at 8; *Grievance Administrator v Kenneth P. Williams*, 03-08-GA (ADB 2005), at 6. In applying *Lopatin* n 13 (*see*, n 3, *supra*), we are charged with interpolating among the Standards to reach a conclusion that best fits the misconduct and a reasonable discipline for it. As stated in *Grievance Administrator v Robin H. Kyle*, 13-14-GA (ADB 2016), at 9:

> [T]he Standards 'do not provide rigid guidelines for a level of discipline to be imposed in every conceivable factual situation.' *Grievance Administrator v Harvey J. Zamek*, 98-114-GA; 93-133-FA (ADB 1999). They are 'not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct.' ABA Standards, p 6. Nonetheless, under *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), they are the starting point for the discharge of 'our responsibility on review to examine the factors affecting the assessment of the appropriate level of discipline in light of the ABA Standards and applicable Michigan precedents and attempt to ensure continuity and proportionality in discipline.' *Grievance Administrator v Kathy Lynn Henry*, 09-107-JC (ADB 2010). [*Grievance Administrator v Michael L. Stefani*, 10-113-GA (ADB 2013), p 14, citing *Grievance Administrator v Valerie Colbert-Osemuede*, 09-46-GA (ADB 2012), pp 13-14.]

Knowing or Intentional Misconduct. A factor in ascertaining the presumptively appropriate sanction under Standard 5.1 is the state of mind of the lawyer. Standard 5.11(b) links "intentional" conduct with disbarment, and Standards 5.12 and 5.13 link "knowing" conduct with suspension or reprimand, respectively. In finding a violation of MRPC 4.1, we have characterized respondent's conduct with respect to the December 2008 exchange to have been intentional in withholding a material fact. (Report, p 23.)

Fitness to practice. No evidence or argument was presented at either the misconduct hearing or the discipline hearing addressing the subject of fitness to practice law. The panel made no finding, nor did it previously draw any conclusion on this subject in the Report.

We believe it is reasonable to conclude in this case that the dishonesty found in the violation of MRPC 4.1 and MRPC 8.4(b) reflects adversely on the respondent's fitness to practice law, however temporally; and the threshold for considering a sanction under Standard 5.1 is thus met. Because of respondent's intentional misrepresentation of a material fact to counsel for a party and to the court, we characterize the misconduct as seriously adversely reflecting on respondent's fitness to practice law. Deceptive conduct in a legal proceeding violates the most fundamental duty of an officer of the court. *See People v Costa*, 56 P.3d 130, 135 (Colo. O.P.D.J., 2012).

Based on the foregoing, the presumptive sanction for the misconduct found, singularly, is disbarment under Standard 5.11(b), subject to consideration of aggravating and mitigating circumstances.

4. Respondent's Lack of Candor to the Circuit Court and Opposing Counsel - Report Section 4, pp 23-24.

Findings:

(a) In the course of representing a client, respondent made a knowingly false statement to a third person, in violation of MRPC 4.1;

(b) respondent engaged in conduct that involved dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b);

(c) respondent engaged in conduct that was prejudicial to the proper administration of justice, in violation of MCR 9.104(1) and MRPC 8.4(c); and

(d) respondent engaged in conduct that was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

The Report concluded that respondent's non-disclosure of his law firm's security interest at the time an order to preserve the assets of MSG was requested and issued (the August 22, 2008 Order) constituted a violation of MRPC 4.1 and MRPC 8.4(b) and (c) and MCR 9.104(1), (2), and (3). Because the misrepresentation found involves a court, the duty violated was to the legal system as to which Standard 6.1 would apply. Because a we have found that respondent misrepresented a material fact by silence, Standard 5.1 would also be applicable.

Respondent stated in the Misconduct Hearing (Tr 9/1/20, p 118) that "Everybody knew these security interests were out there."[18] We understand respondent's assertion to mean that an order to preserve assets of MSG would be subject to prior perfected security interests held by creditors not party to the case.[19] C&H was such a creditor. Just how "everybody knew" of these prior interests beyond constructive notice provided by filed financing statements was not shown in the Misconduct Hearing.

As to knowledge of Stek and the court of the C&H security interest itself, respondent has noted that the financial records of Schnoor and MSG had been subpoenaed in conjunction with the hearings held in August and September 2008 to determine whether Schnoor was in contempt of an order to pay for the stock purchased from Morris. As Respondent's Exhibit B-9 (a partial transcript of the August 20, 2008 hearing) indicates (p 105), the MSG records that would reveal the C&H security interest had not been furnished as of August 20, 2008. Production of financial records of Schnoor was ordered by the trial court as part of the August 22, 2008 Order.

The record in this proceeding does not inform as to when the documents were actually provided to Stek and the court pursuant to the subpoena or the August 22, 2008 Order. Respondent's Sanction Hearing Exhibit 1, containing a partial transcript of a hearing September 2, 2008, in Case No. 07-06441-CR, shows that Stek examined Schnoor about the C&H security interest. We accept that Stek, Morris, and the trial court had actual knowledge of the C&H security interest by September 2, 2008, but not before August 22, 2008, the date of the Order purporting to address Stek's request to prevent disposition of the assets of MSG. The record does not support, and appears to refute, respondent's contention that Judge Yates knew about the C&H security interest when the August 22, 2008 Order was issued.

Respondent did not inform the trial court or Stek of the C&H security interest, or of any other interest in the MSG assets that gave claimants established prior rights in the assets as collateral in conjunction with the formulation of the August 22, 2008 Order.

Respondent testified at the Discipline Hearing that he did not know of the wording of the August 22, 2008 Order on September 2, 2008, the date of a hearing at which the financial affairs of Schnoor were the subject of examination (Tr 6/7/21, p 48) when a hearing was held. Respondent's Exhibit B-9 shows a file stamp of Charron & Hanisch evidencing receipt August 22, 2008.

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[18] *See also* Tr 9/1/20, pp 165-166, quoted in Section 3 above. In addition to the security interest held by C&H, there were other secured creditors of MSG with UCC Financing Statements in the record.

[19] As noted in the Misconduct Report, n 1, the term "case" refers to matters before the judiciary.

And, if respondent did not know of the unlimited time of the Order, he also did not know that it applied only to acts of Schnoor but not more broadly to acts concerning assets of MSG. A broader scope was described on August 20, 2008 (*See* Respondent's Exhibit B-9, pp 106-108) and respondent had to believe the Order was broader than it was until he actually saw it. There is no record provided to us to explain the absence of formal objection by respondent to the unlimited duration of the August 22, 2008 Order although the fact that the Order did not follow the limitation agreed to by respondent is mentioned often by respondent in his pleadings and in hearings in this proceeding. But once respondent became aware of the terms of that Order, we can surmise that he believed he could protect his own interests through exercise of the C&H security interest, which he considered as outside the scope of the August 22, 2008 Order - a view that he continued to advance in this proceeding despite rulings of the trial court and the appellate court to the contrary. Bringing such a possibility to the attention of the court was not in respondent's self-interest.

From respondent's testimony and the record disclosed by the exhibits in this proceeding, respondent stated that he believed that he and C&H were not bound by the August 22, 2008 Order. Only Schnoor, one of respondent's clients in the matter, was affected by the Order, but the absence of attack on the Order encourages inference of intent to circumvent it or to take advantage of its articulation. Such intent was noted by the trial court and the Court of Appeals as this matter continued. (Petitioner's Exhibit 17.)

That neither Stek nor the trial court saw a need to address their knowledge of the C&H security agreement in relation to the August 22, 2008 Order is also opened to question. Did Stek conclude that the Order as issued applied to any dissipation of assets of Schnoor and of MSG by any creditor, including respondent and his law firm? Would Stek have concluded without question that the Order would apply at least to respondent as lawyer for Schnoor and MSG- a conclusion that respondent has argued was contrary to accepted law? (Report, p 12-13.) It seems unlikely that Stek and the court concluded that C&H's security interest was not subject to the August 22, 2008 Order. Why this matter was not addressed by Stek or the trial court is puzzling, but not relevant in our judgment.

The panel considers it incredible that respondent decided to proceed without caution or any evident concern about the terms of the August 22, 2008 Order, and then hide the result when probed. Respondent has spent years litigating his decision to pay himself with his former client's[20] assets, in the process requiring expenditure of money and other resources for himself, his client Schnoor, Morris, and trial courts, appellate courts, and bankruptcy courts over more than 10 years of fruitless litigation, with great loss to many. (Tr 9/1/20, pp 170-171.)

The Report did not consider or make a finding about violation of MRPC 3.3(a)(1) captioned Candor Toward the Tribunal. The Report found a violation of MRPC 4.1 and MRPC 8.4(b) and (c) because respondent did not advise the trial court or Stek of the right of C&H to exercise its security interest in frustration of the purpose of the August 22, 2008 Order as discussed at the August 20, 2008 hearing and as drafted by the court. Comment to MRPC 3.3 contains language similar to Comment to MRPC 4.1, which we have discussed at length in Section III. C 3 above:

[20] Report, Facts, ¶ j.

> There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

The applicable Standard for failing to provide information to a court that is material - as the existence of a right held by respondent as Schnoor's and MSG's lawyer claimed to be superior in right to assets of MSG that were to be retained while certain procedures were pending was clearly determined to be - is 6.1 (see Section C 3 above). Standard 6.11 calling for disbarment requires an intent to deceive the court by improperly withholding material information, causing serious or potentially serious injury to a party or significant or potentially significant adverse effect on legal proceedings. Standard 6.12 calling for suspension does not require intent to deceive but only knowledge that material information is improperly withheld, causing injury or potential injury to a party or an adverse or potentially adverse effect on a legal proceeding.

We conclude that respondent did not neglect to inform the court and Stek - he intentionally did not do so, with protection of his own interest at stake. The interest of the client was irrelevant to his withholding of information as his willingness to take advantage of the Order was evident. (Report, Facts, ¶ i.) While the C&H security interest in MSG assets was at some point disclosed, it was not until after the August 22, 2008 Order, which as worded provided respondent cover to circumvent its obvious intent. We can only conclude that respondent intended to deceive the court by not revealing the effect of that Order's limitations relating specifically to the C&H security interest - or respondent's intent to satisfy his quest for legal fees by diverting the MSG assets. Respondent did not take the risk that revelation of the C&H security interest could have resulted in a modified Order that affected respondent.

Respondent has downplayed the importance of the August 22, 2008 Order relative to his transfer of MSG assets because the contempt motion filed by Morris against Schnoor, in furtherance of which the August 22, 2008 Order was entered, was denied in January 2009. (Tr 6/7/21, pp 51-52.) But at the time of the non-disclosure, which led to the Order not expressly preventing C&H from exercising its rights in the asset collateral, the fate of the contempt order had not been determined - as it had not been at the time of the transfer of the assets, also - and thus the result of non-disclosure of the poison pill had the potential to be significantly adverse to a legal proceeding and to cause economic injury to Morris. We measure the effect of misconduct by the facts and circumstances at the time. Were subsequent events to be relevant, we would note that the action of sale by C&H of the MSG assets was contempt of the August 22, 2008 Order.

The generally appropriate sanction based on this misconduct, singularly, is disbarment under Standard 6.11 subject to consideration of aggravating and mitigating circumstances.

5. Summary

In the foregoing Sections, we have identified the following generally appropriate sanctions for misconduct found, subject to aggravating or mitigating factors:

> (i) Reprimand, applying Standard 6.23, for respondent's contempt of court.

(ii) Suspension, applying Standard 7.2, or disbarment, applying Standard 7.1, for respondent's contemptuous comments about the trial court.

(iii) Disbarment, applying Standard 5.11(b), for respondent's misrepresentation of material fact in communication with opposing counsel and the trial court in December 2008.

(iv) Disbarment, applying Standard 6.11, for respondent's withholding of material information from the trial court in connection with the August 22, 2008 Order.

D. RELEVANT AGGRAVATING AND MITIGATING FACTORS

As invited by Standard 9.1, we have considered and address the following aggravating and mitigating factors in deciding what sanctions to impose. Our considerations are based on the record in this proceeding, including sworn testimony of respondent.

1. Aggravation

(a) Standard 9.22(a) *selfish motive*

Respondent's central, if not only, purpose in any of the conduct considered in this Discipline Report was getting his legal fees and expenses paid. Respondent's Hearing Brief for Imposing Lawyer Sanctions states (p 9) that C&H "had no choice but to liquidate [the client]'s assets to recoup its investment in the litigation."

(b) Standard 9.22(d) *multiple offenses*

In this proceeding, we have identified four areas of misconduct and violations of nine rules governing professional conduct.

(c) Standard 9.22(g) *refusal to acknowledge wrongful nature of conduct*

Other than assuring the panel that respondent apologized to Judge Yates for referring to him as the "bitch" for the opposing side, respondent has not in this proceeding admitted he was wrong at any time on any subject or conceded the appropriateness of this proceeding. Respondent continues to blame outside forces, dispute factual and legal conclusions found or determined by others through years of litigation, sought through this proceeding to retry the matter, and in general assert superiority of legal skill and interpretations in constant disagreement over facts and law. It remains to be respondent's view that there was "no potential or actual injury caused by the misconduct." (Respondent's Hearing Brief for Imposing Sanctions, p 11.)

Respondent's Hearing Brief for Imposing Sanctions (p 14) captures the picture well:

> This entire dispute [the Formal Complaint] could have been avoided if the trial court had drafted the injunction differently or addressed the issue involving the meaning of the Injunction on February 9, 2009 when the sale of the assets became known by Judge Yates. It is unfair to penalize Respondent for the trial court's delayed epiphany about the sale.[21]

The Discipline Hearing transcript reveals a continuing message that respondent was an unknowing victim of perfidy or incompetence of the trial court and Court of Appeals that developed unique standards to punish respondent for saving jobs in the Rockford area. Confession of an act is sarcastically framed as "should have known" he would violate a court rule that respondent has tried to convince us as well as the Court of Appeals was uniquely and without precedent applied to him as the attorney; or "should have known" that by conducting the sale and saving jobs in Rockford he would be found in contempt. (Tr 6/7/21, pp 44-45.) Respondent's sarcasm permeates the record.

(d) Standard 9.22(i) *substantial experience in the practice of law*

Respondent has practiced law since 1986. He has held a leadership position in the Real Property Law Section of the State Bar of Michigan.

(e) Standard 9.22(j) *indifference to making restitution*

Looking at the record as a whole, respondent - on behalf of his client Schnoor - resisted payment for Morris' stock because Morris allegedly diverted business from Schnoor after Morris was forced to sell his stock to Schnoor. The ability to sell the assets of MSG, depriving Morris of the value of the company, was a "victory" in defeating Morris by despoiling the company for everyone, including Schnoor. Although the transfer of assets was deemed a valid action in exercise of a legally superior right, respondent was forced to pay legal expenses incurred by Morris in fruitless pursuit of payment for his stock. Respondent sought to discharge that obligation through personal bankruptcy but was denied; and continued to litigate that subject through mid-2019. This was not "indifference" in terms of laxity but a purposeful resistance to meet an obligation. Compare 9.32(d), the counterpart mitigating factor: timely good faith effort to make restitution or to rectify consequences of misconduct. The fact that restitution is compelled is not itself an aggravating factor. What is aggravating were the efforts to avoid paying it, and the delay in addressing the obligation.

2. Mitigation

(a) Standard 9.32(a) *absence of prior disciplinary record*

No record of previous discipline is reported.

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[21] The sale took place in November 2008. Nothing on February 9, 2009, could have changed that or any subsequent acts of respondent.

(b) Standard 9.32(b) *absence of selfish motive*

Respondent claims (*id*, p 12) there was no selfish motive because C&H was entitled to receive payment of its fees and received no more than was due to it. The problem for this proceeding is that the lawyer violated an Order of a court to get himself paid while his client and a party entitled to protection of the Order were adversely affected. We cannot credit this as a mitigating factor.

(c) Standard 9.32(c) *personal and emotional problems*

Respondent's Hearing Brief for Imposing Lawyer Sanctions (p 10), which is sworn testimony, alludes to marital stress and effects of diabetes in December 2008 as well as to completing undertakings for the Real Property Law Section of the State Bar of Michigan in the summer and fall 2008. We assume the truth of respondent's litany.

As to marital stress in December 2008: respondent's dissembling words and withholding information after being confronted with information that an order of the court had possibly been violated covered in Section C 3 above seems not to be dictated to specific marital stress. He has defended his conduct vigorously, justifying his response, denying its effect and even refusing to admit the court was present on the call, and now wants to blame his ex-wife for it too. His personal upheaval may explain respondent's insulting and combative response to Stek, but we did not find misconduct in that response. (Report, p 17.)

As to the work cited for the Real Property Law Section, that may be laudatory but has no bearing on respondent's ability to perform all his activities as a lawyer and as a citizen who is a lawyer in compliance with the rules of professional conduct. To the contrary, it should expect higher standards of behavior.

(d) Standard 9.32(h) *physical disability*; or
Standard 9.32(i) *mental disability*

Respondent states in his Hearing Brief for Imposing Lawyer Sanctions (p 10) that he was diagnosed with severe Type II diabetes in mid-December 2008 and that the effect of high blood sugar "made [Respondent's] foggy headed, impulsive, and aggressive when driving an automobile, and contributed to the lapses in judgment reflected in this grievance."[22]

Accepting respondent's claim that he was diagnosed with severe Type II diabetes as a physical disability, for this mental condition to be a mitigating factor Standard 9.32(i) requires:

(1) medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

[22] This reference to lapses in judgment is a rare if not the only instance of concession of error as a matter of fault in the record in the proceeding. Respondent otherwise defends his conduct as unknowing or correct, or the result of unprecedented application of law.

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

In the absence of such corroboration we cannot accept respondent's mitigation claim. Although diabetes may be a serious problem, we do not consider it to mitigate all that went before and that followed.

(e) Standard 9.32(d) *timely good faith effort to pay restitution*

Respondent became obligated to pay attorney fees to Morris as a result of an order finding respondent in contempt of a court order - a matter that was appealed and evaded for several years. Respondent claims to have paid Morris $64,000, at the rate of $1,500 per month. Mathematically, and assuming regular payment, that means that respondent has been paying Morris for about 3½ years. It has been 8½ years since the Contempt Order was entered, and nearly 6 years since the Bankruptcy Court ruled that the obligation to pay fees was not dischargeable. Although we do not have all facts possibly relevant, it does not appear that restitution has been made timely or willingly. Under Standard 9.4(a) restitution that is compelled is not mitigating.

Respondent says that imposing discipline could interfere with his obligations to make restitution: "Discontinuing Charron's ability to practice law will discontinue those payments." (Respondent's Hearing Brief for Imposing Lawyer Sanctions, p 12.)

(f) Standard 9.32(e) *full and free disclosure to discipline board and cooperative attitude toward proceedings*

We note that respondent has filed two pleadings in this proceeding after the required filing date. The fact that respondent finds mitigation for all reasons permitted under the Standards demonstrates that he does not appreciate the importance of his misconduct or his professional responsibilities.

Respondent claimed that the Grievance Administrator's assertion that his evidential failure to substantiate mental incapacity related to diabetes (Tr 6/7/21, pp 32-34) was an "attack on my diabetes situation," (Tr 6/7/21, p 45) following which respondent again complained that all his doctors from back then are dead and that he was not to blame for the claim [Complaint in this proceeding] being filed "lately."

Our reading of pleadings and testimony of respondent in this proceeding reveals an unrelenting disdain for the basis of it (what the courts did to him beginning in 2008), the prosecution of it, and the adjudication of it all inconveniently for respondent.

(g) Standard 9.32(f) *inexperience in the practice of law*

Respondent claims that his inexperience caused him not to know that he could not violate an order governing - in his mind - only the personal behavior of his client; and that the court's interpretation of MCL 3.310(C)(4) was a unique modification of common law. In our view, only a reckless and arrogant lawyer would choose to disregard a court's order or interpret it narrowly to allow himself to defy its obvious purpose for his own benefit. Respondent was not inexperienced in the law. He was thumbing his nose at it. His assertion of this as a mitigating factor is an aggravating factor, just rearguing a case lost.

(h) Standard 9.32(g) *character or reputation*

Respondent offers a self-assessment that he is a person of fine character and reputation. There is no corroborating evidence of this. Respondent called no witnesses or offered no affidavits - leaving us to draw conclusions without aid. The fact that he raised four children by himself is good but no more than expected of any parent. He continues in his Hearing Brief for Imposing Lawyer Sanctions (p 13) to blame the Court of Appeals for publicizing his "inflammatory statement" and failing to "censure (sic)" before making the record public.

Respondent lauds his involvement with Real Property Law Section, which he served as Chair in 2007 and by reason thereof is an ex-officio member of the Council - not an "appointee" as claimed. His attendance as an ex-officio member is voluntary. His work on behalf of the bar and a charitable organization is noted. Nothing is so distinguishing to ameliorate the effect of his misconduct or bear on what discipline should be warranted. His purported importance as a bar leader demands greater, not lesser, ethical conduct.

Respondent offered his Discipline Hearing Exhibit 2 to show the regard Judge Yates had for his skills even after having found him in contempt of court (Contempt Order). This exhibit can be read in several ways - one of which is meaningfully complimentary, as so stated by Judge Yates in commending both Stek and respondent for being able to argue endlessly entertainingly; but it can also be read for another purpose: it's time you quit trying his case and get on with something else: I've had enough of it over the last 5 years. In any event, we do not find it persuasive of meriting influence on the sanction to be determined.

(i) Standard 9.32(j) *delay in disciplinary proceedings*

This subject is not raised in Respondent's Hearing Brief for Imposing Lawyer Sanctions, but was noted by the panel in its Order Denying Respondent's Motion for Summary Dismissal of Complaint by reason of laches. Throughout this proceeding respondent has often alluded to the length of time between the occurrences in later 2008 through 2012 and the filing of the Complaint in late 2019 as preventing a good defense and otherwise prejudicial. *(See* for example Tr 6/7/21, p 45.) The panel denied that motion but indicated it would address this as a mitigating factor in considering discipline.

<u>*Delay itself*</u>: The Grievance Administrator notified respondent June 9, 2014, (Exhibit 2, Petitioner's Response and Brief in Opposition to Respondent's Motion for Summary Dismissal) of a Request for Investigation of his conduct based on the May 29, 2014 opinion of the Court of

Appeals, which was publicized in a local newspaper June 4, 2014. The Grievance Administrator has stated this publicity was the first information the Administrator had of respondent's conduct. There is no record in this proceeding of a response by respondent to the Request for Investigation or of further action by the Administrator until the Complaint was filed in December 2019 to commence this proceeding.

No record was made in this proceeding of the reason for the delay other than in Petitioner's Response to Respondent's Motion for Summary Dismissal of Complaint, to the effect that the continuation of the case at appellate and then bankruptcy courts (Facts ¶¶ u, v, and w) over the intervening 5 years made further proceedings untimely; and it was not until denial of a writ of certiorari in April 2019 that it was it timely to take action.

We accept that as an excuse for delay but note that 13 years has passed since the first of the events that are the subject of this proceeding occurred and 7½ years since the events were made known. We also note that application for leave to appeal the May 29, 2014 opinion was denied March 5, 2015 (Facts ¶ t), further finalizing the basis for this proceeding. Additional appellate and bankruptcy proceedings that ensued (Facts ¶¶ u, v, and w) were not related to the facts that underlie this proceeding. Continued investigation of, and prosecution of a grievance based on, the facts existing at the time of the Administrator's notice of investigation was not legally precluded.[23]

Effect of Delay: Respondent has said throughout these proceedings that this case should never have been brought - it's stale, irrelevant to today's facts, and just unearths old issues. (Tr 6/7/21, pp 118,168; Tr 6/7/21, pp 44-45, 49.) In addition, respondent complains that hearing transcripts are not available to prove facts relating to the matter but has not suggested how such missing records relate to his conduct or counters the allegations of it rather than to the case itself, which as we observed repeatedly during these proceedings, respondent has sought to retry on the merits. Respondent has not asserted what missing records would prove if available. There is no dispute about the facts on which this proceeding is based. There is no testimony or record unavailable to dispute the facts, other than the testimony of respondent's doctors who, respondent claims, have all died (Tr 6/7/21, p 45) so there was no one who could provide respondent's claim of mental disability was caused on by diabetes, as called for under Standard 9.32(h) or (i).[24]

(j) Standard 9.32.(k) *imposition of other penalties or sanctions*

The Administrator noted that contempt sanctions were imposed against respondent by the trial court in the amount of $363,506.77 and by the Court of Appeals in the amount of $1,000. (Per the Respondent's Answer to Formal Complaint, p 21, he paid the $1,000.00 fine "in a timely manner.") The trial court sanctions are being paid pursuant to what respondent describes as a voluntary payment plan. (Respondent's Hearing Brief for Imposing Lawyer Sanctions, p 11.) Because this was forced or compelled restitution, these are not mitigating factors.

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[23] The investigation of facts and prosecution of a grievance was not stayed by respondent's bankruptcy proceeding, pursuant to 11 U.S. Code 362(b)(4).

[24] The only testimony that respondent had a mental disability - described as foggy-headedness - related to his driving a car. (*Supra*, n 22 and related text.) The panel accepted his sworn testimony that he was diagnosed with Type II diabetes, without challenge.

E. DISCIPLINE

On one hand, respondent has practiced law for 35 years without having been implicated in reported disciplinary process other than this proceeding and he appears to be making efforts to pay his debt to Morris, ordered by the trial court as contempt sanctions, in a manner that respondent claims is satisfactory to Morris. This proceeding involves facts occurring up to 13 years ago, with most recent about 8 years ago.

On the other hand, respondent had until mid-2019 kept the case and its fallout alive and active in various courts keeping it current and unresolved. Respondent lacks remorse for his conduct and asserts that what underlies this proceeding was incorrectly decided as a matter of law notwithstanding his exhaustive and unsuccessful efforts to validate that claim; that external circumstances are to blame for the events for which he is charged, and that this proceeding is itself improper and unfair. In most respects, we find respondent's defenses lacking merit, sympathy, and even credulity. In over 11 years of litigation relating to his contempt and its consequences he has commanded many judicial resources, in mostly futile efforts, and has challenged every allegation or finding of misconduct in this proceeding. He has not admitted to misconduct in any respect. Respondent has demonstrated in this proceeding similar (though less colorful) disrespect and arrogance as the record shows he did for other parties and the court in the case underlying it.

In seeking to identify an appropriate discipline we have multiple possibilities based on the Standards themselves as summarized in this Report, running the gamut from reprimand to disbarment, and the presence of numerous aggravating circumstances and few mitigating circumstances. We see a talented lawyer whose approach to matters seems to encourage conduct of a reckless and arrogant manner to the detriment of others and himself. Given similar opportunity or necessity, based on the record in this proceeding we are concerned that respondent seems likely to engage in similar behavior.

We have considered the Board's decision in *Grievance Administrator v Ralph E. Musilli*, 07-88-JC and *Grievance Administrator v Walter L. Baumgardner, Jr.*, 07-89-JC (ADB 2017), (collectively referred to as "*Musilli*") as instructive. In that case, a court ordered the respondents' firm to deposit a certain sum in dispute in a neutral escrow account and to not transfer any assets of respondents' firm until that deposit had been made. Respondents violated that order by not transferring funds into the escrow account and by transferring firm assets. Respondents were held in criminal contempt for violating the court's order. The Board disagreed with the hearing panel's imposition of a 30-day suspension, and increased the suspension to 180 days for the purpose of triggering reinstatement proceedings under MCR 9.123(B) and 9.124.

The Board in *Musilli* discussed the requirement of Standard 6.21 and 6.22 that a violation of a court order be knowing. We have determined that respondent in the proceeding did not knowingly violate the August 22, 2008 Order, although we have noted that at least two courts have determined to the contrary. In *Musilli*, respondents asserted that they did not believe the order was legal or valid. In this proceeding, respondent similarly argues that the August 22, 2008 Order did not apply to him. The *Musilli* respondents argued financial hardship in funding the escrow as an excuse - that their firm could become insolvent, but conceded that they did not raise that concern with the court. In this proceeding, respondent has testified that his law firm needed to get paid to keep it operating and that transferring the assets in satisfaction of a security interest was

necessary for the continued operation of C&H. Although the C&H prior security interest in MSG assets was disclosed to the opposing party and the court pursuant to subpoena, the import of it in terms of the August 22, 2008 Order was not presented to the court at any time in advance of exercise of the security interest, and was intentionally not disclosed.

In *Musilli*, the Board noted (at p 6) that injury need not be to a person's economic interests but to the court's authority. We have concluded in this proceeding that the contempt was injurious to both. We have also noted that the violation in this proceeding was for the benefit of the lawyer.

We believe we would be correct in imposing a sanction of suspension from practice for 180 days. This discipline would require respondent to seek reinstatement by petition under MCR 9.123(B) However, given the time span between the misconduct that was the subject of this proceeding and the filing of the complaint, and in the absence of other reported alleged misconduct, we propose a lesser impact on respondent's ability to practice while imposing solutions that may serve a longer and broader purpose of protecting the public, which is the goal of discipline. Our concern is that respondent seems so confident in and defensive of his conduct in the matter of this proceeding that he seems likely to compromise professional conduct standards given similar challenges and opportunities. We would like that not to happen. We are hopeful that respondent will engage in examination of what we observe as self-destructive behavior that impacts others, and recognize and avoid misconduct and its consequences.

We will enter an order suspending respondent from the practice of law for 60 days, but require respondent to meet certain conditions. These conditions are: Within 60 days from the effective date of the Order,

1. Provide to the Grievance Administrator and the Attorney Discipline Board evidence from a qualified medical provider either (a) that respondent has and is under treatment for Type II diabetes; that symptoms of brain fog and failure of judgment - conditions to which respondent has testified under oath that could be attributable to that disease - are controlled by medication and other treatment that is being consistently administered; and that he is not prone to suffer these effects; or (b) that he does not have Type II diabetes.

2. Provide to the Grievance Administrator and the Attorney Discipline Board evidence from Morris that he has agreed to accept monthly payments of a stated obligation, and that payments have been and are being made by respondent as promised.

3. Provide to the Grievance Administrator and the Attorney Discipline Board evidence of consultation with either (a) a licensed counselor satisfactory to the Administrator or (b) the Lawyers and Judges Assistance Program to review respondent's unwillingness to take responsibility for his actions, and blaming of others for the consequences of his own conduct as evidenced by the record in this proceeding,

and ability to accept responsibility for his conduct. The consultant shall provide to the Grievance Administrator and the Attorney Discipline Board a report of consultation and recommendations for further consultation or action.

4. Enter into, and provide to the Grievance Administrator and the Attorney Discipline Board a signed copy of, an agreement for mentorship with a mentor to be selected by respondent in collaboration with Judge Yates or a Circuit Court or Federal District Judge serving in Kent County and acceptable to this panel for consistent and regular consultation about respondent's practice and responses to challenges and situations demanding exercise of discretion and choice, including respect others in the process of practicing law and ethical obligations in decision making. Among the subjects for mentoring is was the misconduct in this proceeding an aberration or is he likely to take a similar approach to facts and circumstances as they challenge respondent; and how can this risk, if any, be managed and avoided. The terms of the mentoring agreement shall provide:

   (a) The mentorship shall continue for one year from the date of agreement, subject to extension by reason of hiatus in mentoring availability. Respondent and the mentor shall meet at least once per month. All reasonable expenses of the mentor shall be paid by respondent.

   (b) Respondent shall provide the name and address of the selected mentor to the Grievance Administrator and the Attorney Discipline Board, and advise each of any change in the relationship promptly. A substitute mentor shall be identified as soon as possible in the same manner as the former mentor. The term of mentorship shall be extended by the amount of time between engagement of mentors.

   (c) Respondent shall provide a monthly written report of the mentor to the Grievance Administrator and the Attorney Discipline Board concerning the mentoring and how it is addressing the specific subjects of this Order as well as other matters affecting respondent's conduct as a lawyer.

   (d) The Grievance Administrator and the Attorney Discipline Board shall have the right to communicate with the mentor concerning the mentorship and its effect.

IV. SUMMARY OF PRIOR MISCONDUCT

None.

V. ITEMIZATION OF COSTS

Attorney Grievance Commission:		
See Itemized Statement filed 6/7/21		$ 14.65
Attorney Discipline Board:		
Hearing held 3/12/20		$ 218.00
Hearing held 9/1/20		$ 835.50
Hearing held 6/7/21		$ 272.50
Administrative Fee		$1,500.00
	TOTAL:	**$ 2,840.65**

ATTORNEY DISCIPLINE BOARD
Kent County Hearing Panel #4

By: _____
William B. Dunn, Chairperson

Dated: February 28, 2022

Attachment C

STATE OF MICHIGAN

FILED
ATTORNEY DISCIPLINE BOARD
July 14, 2020

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 19-130-GA

DAVID CHARRON, P 39455,

Respondent.
_____/

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISMISSAL OF COMPLAINT AND ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

Issued by the Attorney Discipline Board
Kent County Hearing Panel #4

Respondent timely filed a Motion for Summary Disposition (captioned Motion for Dismissal, "Respondent's Motion") pursuant to MCR 2.116 under the hearing panel's Amended Scheduling Order. Petitioner timely filed a Response and Brief in Opposition to Respondent's Motion (captioned Response and Brief in Opposition to Summary for Disposition, "Petitioner's Response").

A. Respondent's Motion

Respondent's Motion is based on application of a statute of limitations and on laches; and concedes that there is no genuine issue of any material fact in this matter. (Respondent's Motion, p 1.) In support of these bases for dismissal respondent correctly notes that the complaint alleges misconduct based on occurrences dating back to 2008. Respondent was given notice of request for investigation of misconduct based on these occurrences June 9, 2014, (Petitioner's Response p 5, Ex 2][1] and the occurrences were intertwined in proceedings initiated by respondent and by others relating to conduct involving the respondent that were not resolved until the United States Supreme Court denied respondent's Petition for Writ of Certiorari on April 22, 2019. (Petitioner's Response, p 5, Ex 3.) The complaint in this case was filed December 12, 2019.[2]

[1] The Michigan Court of Appeals unpublished opinion in proceedings involving these occurrences, Docket Nos. 315006, 315007, 315702, and 315742 on which the request for investigation appears to be based was issued May 29, 2014.

[2] Solely as a matter of observation, we note that the request for investigation was initiated less than 30 days after issuance of the opinion of the Michigan Court of Appeals that determined the nature and effect of the conduct for which respondent may be responsible. That request, notice to respondent, was issued barely outside six years from the first of the chain of events that perpetuated the alleged misconduct, then unknown to the Attorney Grievance Commission; and the complaint was filed within six years from the date of the opinion of the Michigan Court of Appeals, which detailed the occurrences that provide the basis for the

1. Statute of Limitation

Respondent argues that proceedings of the Attorney Grievance Commission and the Attorney Discipline Board undertaken under the authority delegated by the Michigan Supreme Court are subject to application of statutory limitations on the bringing of actions, specifically MCL 600.5813. Contrary to this general assertion, the Attorney Discipline Board has stated in applying the Michigan Court Rules governing Professional Disciplinary Proceedings (MCR 9.100-9.264) that those rules "contain no limitation as to the amount of time the Grievance Administrator has to conduct an investigation and there is no statute of limitation applicable to bringing of charges of attorney misconduct." *Grievance Administrator v Jay A. Bielfield*, ADB 87-88, at p 5.

In arguing the incorrectness of *GA v Bielfield*, respondent seeks to characterize the right of the Michigan Supreme Court to discipline lawyers as derived from the Michigan Legislature, based on the wording of a certain statute, Section 904 of the Revised Judicature Act, 1951 P.A. 236 (MCL 600.904); hence, in its rules and proceedings as to the regulation of lawyers, the Court is subject to legislative regulation, including in this case statutory limitation on the bringing of actions. Contrary to this assertion, the statute cited does no more than recognize a fact that the Michigan Supreme Court has the exclusive jurisdiction to organize and regulate the bar under the Michigan Constitution of 1953, art 6 §5. See *Grievance Adm'r v Lopatin*, 462 Mich. 235 (2000).

Respondent states that application of a statute of limitation would be called for by MCR 9.115(A), which provides that "Except as otherwise provided in these rules,[3] the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel."

Even if that provision of the Court Rule governing Professional Disciplinary Proceedings calls for application of statutes limiting the time for bringing disciplinary proceedings, there is no statute of limitation in Michigan law that by its terms applies to a disciplinary proceeding. Respondent asserts that MCL 600.5813 provides such a statute of limitation:

> Sec. 5813. All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.

Respondent cites *AG v Harkins*, 257 Mich App 564 (2003), in support of applying this statute of limitation against governmental action. The term "personal action" relates to enforcement of "an obligation imposed on the defendant by contract or delict; that is, it is the contention that he is bound to transfer some dominion or to perform some service of to repair some loss." See *Harkins*, at 570, citing *Black's Law Dictionary* (6th ed). Respondent claims that the prayer for relief in the complaint by inclusion of discipline "including restitution owed" constitutes a personal action

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complaint. While various appellate and related proceedings were pending, the investigation continued to pend; and within 8 months after apparently final judicial action, the complaint was filed. Even if the statute of limitation applied as respondent contends, it may have been satisfied. However, we draw no conclusions on this subject and it is not germane to our decision on application of a statute of limitations, which is based on legal rather than factual analysis.

[3] As noted in *Bielfield*, there is no statute of limitation in the Court Rules governing Professional Disciplinary Proceedings.

to which MCL 600.5813 applies. This language of the prayer for is proforma. In this case, no restitution is being sought against respondent for damages to others, and no theory has been advanced in the complaint or other pleadings to date that would cause restitution to third persons to be ordered as a matter of discipline. There is no "personal action" in this proceeding to which MCL 600.5813 would apply.

Accordingly, we find that there is no statute of limitation applicable to the proceeding in this matter, and respondent's Motion to Dismiss on this basis is **DENIED, with prejudice**.

2. Laches

This equitable doctrine is well-described in *Public Health Department v Rivergate Manor*, 452 Mich 395 (1996), as quoted by respondent (Respondent's Motion, p 12) as a tool to remedy "inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert," citing *Lenawee Co v Nutten*, 234 Mich 391 (1926). In *Grievance Administrator v Eric Clark*, 95-59-GA (ADB 1997), cited by petitioner (Petitioner's Response, p 4], the Attorney Discipline Board stated that a respondent must, at a minimum, show significant delay and a clear demonstration of substantial prejudice in arguing that a case should be dismissed based on laches.

Two central questions must be considered: (1) Was there delay in asserting a legal right when it was practicable to do so? (2) Has respondent established "inconvenience" - meaning has respondent been substantially prejudiced in defending the complaint?

We first observe that the occurrence of alleged misconduct would not usually be known to the disciplinary agencies of the Michigan Supreme Court until they have been made aware of it by inquiry, communication, or complaint or, as in this case, external publicity (Petitioner's Response, Ex 1), and therefore it would not be practicable to assert that misconduct until its occurrence is known. As stated by petitioner, which we accept in the absence of contrary information, there was no knowledge of the alleged misconduct by the Grievance Administrator until May 2014 - six or seven years after the occurrences began. This knowledge then prompted a request for investigation, giving notice to respondent that the conduct detailed in the request, the same conduct that is the subject of this case, was basis for finding of misconduct. Respondent has not presented any evidence that the investigation requested was concluded, satisfied, or resolved by respondent or that respondent was given any reason to believe that the matters under investigation were resolved. The legal right was asserted in 2014. Petitioner has described the ongoing appeals as germane to its complaint. (Petitioner's Response, p 5.) Based on our consideration of the materially undisputed history of the litigation presented in the complaint, we conclude that the complaint was filed as soon as legally practicable, and without unreasonable delay.

As to the question of substantial prejudice to respondent as a result of the passage of time between the occurrences and the filing of petitioner's complaint, respondent states (Respondent's Motion, pp 3, 13) that he discarded his files pertaining to state court litigation in 2016; that Executive Orders pertaining to the COVID-19 virus in place since March 23, 2020 have ordered that his "non-essential law office" be closed and that state courts, including Kent County Circuit Court have been physically closed so that access to records is not available; and that his staff who assisted him in the litigation matters germane to the complaint have left his employ and are no longer available to help him recreate the past.[4]

[4] Respondent presents a litany of arguments that there is no harm to anyone to be remedied by these proceedings; that he has made amends with Judge Yates and with opposing counsel; that lawyers deserve the same safeguards as other citizens including security against stale demands, relief from prolonged fear

Respondent discarded his files in 2016 - two years after the request for investigation was issued and while litigation involving the facts and legal issues germane to this case was yet in progress - as a matter of convenience to respondent. We also understand that prosecution of appellate processes and related legal proceedings and the passage of time in that process until a justiciable case of misconduct based on a final record could be brought was a matter often in respondent's control, and clearly not in petitioner's control.

Respondent asserts that his discarded files contain "all of the factual support for the defense of this action;"[5] and that he has no realistic chance of defending himself in this case (which he refers to as "the current dispute") without access to the records. Respondent does not assert that the discarded files contain the only source of factual support for defense or that the files and records are irretrievable in any form. Respondent has not shown what records are necessary to defend the complaint that are not already a part of the record in this case or accessible by means other than a physical file box in respondent's office; or that he has made any effort to obtain those records.

The Executive Orders allowed businesses otherwise ordered to be closed to declare "critical infrastructure workers." Respondent could have simply declared himself such and gone to his office if doing so was necessary to defend these proceedings. Further, pursuant to Executive Order 2020-110, which rescinded the Stay at Home order, law offices were no longer ordered closed as of June 1, 2020. Respondent does not state that he did not access his office, only that orders had been issued concerning that access. The relevance of access to respondent's office between March 23 and June 1, 2020 has not been shown, particularly because, as represented by respondent, none of the records and none of the staff are available there to help him anyway.

Respondent could have accessed state courts, including Kent County Circuit Court, records at all times since the complaint was filed because these courts' case files are available online. It is unclear why respondent could not access the case file remotely or if he could not, why he could not order the documents needed over the last three months. Moreover, pursuant to the courts' COVID-19 information page, the courts could have been contacted if the matter was urgent.

There is no evidence respondent contacted the courts and was unable to make arrangements to examine the case files.

Respondent presents no support for why any of the discarded records or testimony of witnesses are needed for his defense on charges of misconduct. It is not unreasonable for this panel to consider that the record in the case as adjudicated through the courts over years provides the basis for the complaint and for a hearing on whether the material facts, about which there is no genuine issue, constitute misconduct. In our view there is no evidence discarded or in memory lost that bears on the question of whether there is disciplinable misconduct under the Rules.

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of litigation, and general inconvenience; and sometimes claims are politically motivated; no "client, attorney or judge" has advocated for this proceeding; and there is no justice denied by dismissing the complaint. (Respondent's Motion, pp 3, 11, 13.) We have considered these arguments and do not find them to satisfy the need to show substantial prejudice by reason of passage of time between the reported conduct in 2014 and filing the Complaint in light of continuing litigation of matters germane to these proceedings in the interim.

[5] Respondent states that he "reasonably believed" he would never need the factual support for defense of this case. Whether that belief was "reasonable" is beyond the scope of this Order. In this regard, the disposition of the request for investigation of June 2014 is relevant.

Respondent has not sustained his burden of establishing substantial prejudice or significant delay in the practicable assertion of a violation of the rules of professional conduct. Respondent has not provided any basis for this panel to conclude that the Grievance Administrator has acted in bad faith.[6]

Respondent's Motion for Dismissal for laches is **DENIED, without prejudice**. The panel requests the parties to provide to us for consideration at the hearing on discipline to be held in this case information concerning respondent's response to the request for investigation, disposition of the request for investigation, and the continuation of the matter until filing of the complaint that would bear on the reasonableness of the roughly five-year period that elapsed.

B. Petitioner's Request

Petitioner's Response includes a request for summary disposition in its favor on the disciplinary charges asserted in its complaint. If we were to contemplate entering summary disposition in favor of petitioner based on this request pursuant to MCR 2.116(I)(2), respondent would be entitled to notice of our intent and to respond. *Haji v Prevention Ins. Agency, Inc*, 196 Mich App 84 (1992). In this regard, however, we note, and agree with, the statements made by petitioner in the Introduction to Petitioner's Response:

> Summary disposition should rarely be granted in attorney discipline proceedings. Even though summary disposition under MCR 2.116 can be sought in a disciplinary proceeding, the Attorney Discipline Board's preference is for the development of a full hearing record so that the Board and the Supreme Court can better perform their respective functions regarding attorney discipline. *Grievance Administrator v Fieger*, 94-186-GA (ADB 1996) ("*Fieger I*"). The Board in *Fieger I* explained the need for hearing panels to exercise restraint when ruling on motions for summary disposition for the following reasons:
>
> 1. Disciplinary proceedings are for the protection of the public, not simply for the resolution of private disputes (*Id.*, p 7);
>
> 2. Certain questions may not be appropriate for summary disposition given the lack of discovery in disciplinary proceedings (*Id.*, pp 7-11); and,
>
> 3. Disciplinary proceedings are already streamlined, [so] the benefit to be gained by summary disposition is not as great as it is in circuit court, and it may often be as easy to try the case as it is to determine whether there is an issue of fact (*Id.*, pp 11-12).

[6] Respondent refers often to a nemesis (JK) in his Motion. Petitioner has stated that the complainant in this case was not JK. Although the panel notes the contemporaneous knowledge of JK about the progress of this case, there is no evidence presented that the Grievance Administrator has acted in bad faith in filing the complaint and prosecuting this case.

> The hearing panel should take into consideration the Attorney Discipline Board's general preference for development of a full record in determining whether to grant a motion for summary disposition.

Under our Amended Scheduling Order, the parties are to prepare and submit to the panel a joint pre-hearing statement in which the material facts to be stipulated and those to be litigated are set forth. Petitioner's request for summary disposition in its favor is **DENIED, without prejudice**.

C. Respondent's Requests

Respondent states that he "has requested extensions of deadlines in this action due to the virus and has been denied twice." (Respondent's Motion, p 3.) The Attorney Discipline Board file in this case shows the following:

- A request for an adjournment in this matter was made by the AGC on January 29, 2020 and the panel granted that request and reset a hearing scheduled for February 6, 2020 to March 12, 2020.

- On March 10, 2020, respondent filed an Emergency Motion for Adjournment of the March 12, 2020 hearing because he thought he might have exposed himself to the COVID-19 virus. The panel denied that request, but (1) allowed respondent and petitioner to participate by telephone and (2) changed the hearing to a pre-trial teleconference. Respondent attended the pre-trial conference without objection. At the pre-trial conference the parties agreed to a Scheduling Order for the case. Timing of the hearing was not the basis of the request.

- On March 24, 2020, respondent filed a Motion for Extension of Deadlines in Scheduling Order and Adjournment of Hearing Date, and on March 30th, the ADB issued an Amended Scheduling Order responding to the Motion substantially extending the dates but not for the time spans requested. The Amended Scheduling Order was issued pursuant to General Order ADB 2020-1 Regarding Operations in Light of COVID-19.

So while it is true that respondent's requests for adjournment and for extension were not granted exactly on the terms requested, it is untrue that respondent has not been granted relief from attending an in-person hearing - the purported basis for his request for adjournment; or that times to meet certain benchmark dates in the process have not been extended - substantially - in a manner that accommodated respondent.

The record shows that respondent "requested extension of deadlines" once and was granted "extension of deadlines" once. Respondent's misleading and disparaging comments about adjudicative processes in which he is involved are noted.

ATTORNEY DISCIPLINE BOARD
Kent County Hearing Panel #4

By: /s/ William B. Dunn
William B. Dunn, Chairperson

Dated: July 14, 2020