Lawyer Ethics
and
the Government Attorney

International Municipal Lawyers Association

2020 Virtual Annual Conference

September 22, 2020

Table of Contents

PowerPoint Slides

Attachment A

Speech by Attorney General Robert H. Jackson (April 1, 1940)

Attachment B

Oath taken upon Admission to Maryland Bar

Attachment C

Recent Maryland Attorney Disciplinary Cases Involving Government Attorneys:

Attorney Grievance v. Markey, et al., 469 Md. 485 (2020)

Attorney Grievance v. Greenleaf, 438 Md. 151 (2014)

Attorney Grievance v. McDonald, 437 Md. 1 (2014)

Attorney Grievance v. Gansler, 377 Md. 656 (2003)

Attorney Grievance v. Smith, 442 Md. 14 (2015)

Attachment D

Excerpts from the ABA Model Rules of Professional Conduct:

Preamble, Rule 1.11, Rule 1.13, Rule 3.6, Rule 3.8, & Rule 4.2

Attachment E

Maryland Attorney General Opinions:

82 *Opinions of the Attorney General* 15 (1997) (Who is the Client?)

87 *Opinions of the Attorney General* 126 (2002) (Application of Conflicts Rules)

Attachment F

Attorney Grievance v. Frost, 437 Md. 245 (2014)

Lawyer Ethics and the Government Attorney

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1

Three Perspectives

- Court of Appeals of Maryland
  - State supreme court
  - Regulates practice of law in Maryland
  - Bar admission
  - Adopts rules of professional responsiblity
  - Attorney discipline

2

Three Perspectives

- United States Attorney's Office
  - Prosecutor
  - Special rules relating to prosecutors
- Maryland Attorney General's Office
  - Opinions and advice
  - Clearinghouse for ethics rules governing AAGs

3

A Higher Standard

- "The government wins when justice is done."
  - Frederick W. Lehmann
  - Justice Department inscription

4

A Higher Standard

- "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."
  - *Berger v. United States*, 295 U.S. 78, 88 (1935)

5

A Higher Standard

- Restating the premise in *Berger*:

The [government attorney] is the [adviser or] representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.

6

A Higher Standard

- Attorney General Jackson (April 1940):
  - "a rededication to the spirit of fair play and decency that should animate the [government attorney]"
  - "Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement, you can also afford to be just."

7

A Higher Standard

- Attorney General Jackson (April 1940):
  - "The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

8

A Higher Standard

- Attorney's oath in Maryland:
  - "demean myself fairly and honorably"
  - Uphold Maryland Constitution
  - Support and defend United States Constitution
- Constitutions
  - Structure of government
  - Limits on government
- Role of Government Attorney

9

Attorney Discipline Cases

- 2009 – 2019:
  - 599 attorneys sanctioned
  - 6 government attorneys

10

Attorney Discipline Cases

- Common violations – private attorneys:
  - Minimum standards
    - Competence (Rule 1.1)
    - Scope of representation (Rule 1.2)
    - Diligence (Rule 1.3)
    - Communication (Rule 1.4)
  - Money
    - Mishandling trust account
    - Unreasonable fee
    - Misappropriation

11

Attorney Discipline Cases

- Common violations – government attorneys:
  - Conduct prejudicial to the administration of justice (Rule 8.4(d))
  - Dishonesty (Rule 8.4(c))
  - Misuse of government property
  - Violation of rules relating to prosecutors
  - computers

12

Attorney Discipline Cases

- *Attorney Grievance v. Markey*
  - VA lawyers – "Forum of Hate"
  - Emails disparaging others on basis of sex, race, sexual orientation
    - During working hours
    - Government computers
    - Government email addresses
  - Two Maryland attorneys
  - Violation of Rule 8.4(d) (conduct prejudicial to the administration of justice) and Rule 8.4(e) (bias or prejudice)
  - Suspended indefinitely

13

Attorney Discipline Cases

- *Attorney Grievance v. Greenleaf*
  - Former Assistant State's Attorney
  - Chief deputy clerk, appellate court
  - Sexually explicit Internet conversations with undercover officer posing as 14-year girl
  - Arrested
  - Alford plea – probation before judgment
  - Violations of Rule 8.4(b) (criminal act), Rule 8.4(c) (dishonesty), Rule 8.4(d) (conduct prejudicial to administration of justice)
  - Disbarred

14

Attorney Discipline Cases

- *Attorney Grievance v. McDonald*
  - Deputy State's Attorney
  - "inappropriate relationship" with office manager
  - Embezzlement by office manager
  - Intervened on her behalf
  - Deleted emails from her computer
  - Violations of Rule 8.4(c) (dishonesty) & Rule 8.4(d) (conduct prejudicial to administration of justice)
  - "higher standard"
  - Disbarred

15

Attorney Discipline Cases

- "Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with intent to obtain a significant benefit or advantage for himself of another."
  - ABA, Standards for Imposing Lawyer Sanctions §5.21 (1992)

16

Some Rules to Know

- Preamble
- Rules relating to organizations
  - Rule 1.13 (organizational clients)
  - Rule 4.2 (communications with represented person)

17

Some Rules to Know

- Conflicts & government employment
  - Rule 1.11
- Rules for prosecutors
  - Rule 3.8 (special responsibility of prosecutor)
  - Rule 3.6 (trial publicity)

18

Preamble

- "A Lawyer's Responsibilities"
- "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government attorneys may include authority concerning legal matters that ordinarily reposes in the client in private client-attorney relationships."
- "[Government attorneys] may be authorized to represent several government agencies in intra-governmental legal controversies where a private attorney could not represent multiple private clients."

19

Who is the client?

- Government agency or entity
- Rule 1.13: Government attorney "represents the organization acting through its duly authorized constituents."
- Rule comment: Look to local law to determine who speaks for client.
- Government attorney may have duties beyond loyalty to agency or its agents

20

Multiple representation

- Two public agencies in same proceeding
  - Tribunal
  - Agency litigant
- Preamble:
  - Look to local law
  - Exception to conflict and imputation rules

21

Special Conflict Rules

- Government practice to private practice
  - Conflicts – Rule 1.11(a)
  - Imputation – Rule 1.11(b)
  - "Confidential government information" – Rule 1.11(c)
- Private practice to government practice
  - Conflicts – Rule 1.11(d)

22

Special Issues for Prosecutors

- *Attorney Grievance v. Gansler*
  - State's Attorney
  - Statements concerning investigations
    - Confessions
    - Details of evidence
  - Statement concerning plea offer in pending case
  - Statement concerning intent to prosecute

23

Special Issues for Prosecutors

- *Attorney Grievance v. Gansler*
  - "substantial likelihood of materially prejudicing an adjudicative proceeding"
  - Prosecutor speech more limited than defense speech
  - Violations of Rule 3.6
  - Reprimand

24

Special Issues for Prosecutors

- *Attorney Grievance v. Smith*
  - Assistant State's Attorney
  - Child sex abuse case
  - Plea bargain
  - Failure to provide statutory notice to victim
  - Victim had no opportunity to participate

25

Special Issues for Prosecutors

- *Attorney Grievance v. Smith*
  - "gross negligence in the discharge of the prosecutorial function"
  - Violated:
    - Rule 1.3 (diligence)
    - Rule 8.4(d) (conduct prejudicial to the administration of justice)
  - Indefinite suspension

26

Attachment A

Speech by Attorney General Robert H. Jackson

April 1, 1940

For Release Afternoon Papers
Monday, April 1, 1940

"THE FEDERAL PROSECUTOR"

An Address

by

ROBERT H. JACKSON,
Attorney General of the United States

Delivered at

The Second Annual Conference of
United States Attorneys

Great Hall
Department of Justice Building
Washington, D. C.

April 1, 1940
10 A.M.

THE FEDERAL PROSECUTOR

It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

These powers have been granted to our law-enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done - wanted crime eliminated - but also wanted the best in our American traditions preserved.

Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice. It is an unusual and rare instance in which the local District Attorney should be superseded in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his contact with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which his judgment should be overruled.

Experience, however, has demonstrated that some measure of centralized control is necessary. In the absence of it different district attorneys were striving for different interpretations or applications of an Act, or were pursuing different conceptions of policy. Also, to put it mildly, there were differences in the degree of diligence and zeal in different districts. To promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help, some degree of centralized administration was found necessary.

Our problem, of course, is to balance these opposing considerations. I desire to avoid any lessening of the prestige and influence of the

district attorneys in their districts. At the same time we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law.

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just, judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance. Reputation has been called "the shadow cast by one's daily life." Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. Whether one seeks promotion to a judgeship, as many prosecutors rightly do, or whether he returns to private practice, he can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.

The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many district attorneys from the embarrassment of what have heretofore been regarded as legitimate

expectations of political service. There can also be no doubt that to be closely identified with the intrigue, the money raising, and the machinery of a particular party or faction may present a prosecuting officer with embarrassing alignments and associations. I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and their prestige to participate in the operation of the machinery of practical politics.

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost

anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm - in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

In times of fear or hysteria political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases which deal with so-called "subversive activities." They are dangerous to civil liberty because the prosecutor has no definite standards to determine what constitutes a "subversive activity," such as we have for murder or larceny. Activities which seem benevolent and helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as "subversive" by those whose property interests might be burdened or affected thereby. Those who are in office are apt to regard as "subversive" the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term "Republican" and the term "Democrat"

were epithets with sinister meaning to denote persons of radical tendencies that were "subversive" of the order of things then dominant.

In the enforcement of laws which protect our national integrity and existence, we should prosecute any and every act of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of Congress, or dissemination of news or opinions. Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.

Another delicate task is to distinguish between the federal and the local in law-enforcement activities. We must bear in mind that we are concerned only with the prosecution of acts which the Congress has made federal offenses. Those acts we should prosecute regardless of local sentiment, regardless of whether it exposes lax local enforcement, regardless of whether it makes or breaks local politicians.

But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals. And the moral climate of the United States is as varied as its physical climate. For example, some states legalize and permit gambling, some states prohibit it legislatively and protect it administratively, and some try to prohibit it entirely. The same variation of attitudes towards other law-enforcement problems exists. The federal government could not enforce one kind of law in one place and another kind elsewhere. It could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. In spite of the temptation to divert our power to local conditions where they have

become pffensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly.

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Attachment B

Oath taken upon Admission to Maryland Bar

I do solemnly swear (or affirm)

that I will at all times demean myself fairly and honorably as an attorney and practitioner at law;

that I will bear true allegiance to the State of Maryland, and support the laws and Constitution thereof, and

that I will bear true allegiance to the United States, and

that I will support, protect and defend the Constitution, laws and government thereof as the supreme law of the land;

any law, or ordinance of this or any other state to the contrary notwithstanding.

Maryland Code, Business Occupations & Professions, §10-212.

Attachment C

Recent Maryland Attorney Disciplinary Cases Involving Government Attorneys

Attorney Grievance v. Markey, et al., 469 Md. 485 (2020)

Attorney Grievance v. Greenleaf, 438 Md. 151 (2014)

Attorney Grievance v. McDonald, 437 Md. 1 (2014)

Attorney Grievance v. Gansler, 377 Md. 656 (2003)

Attorney Grievance v. Smith, 442 Md. 14 (2015)

469 Md. 485
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE COMMISSION of Maryland
v.
James Andrew MARKEY and Charles Leonard Hancock

Misc. Docket AG No. 5, Sept. Term, 2019
|
June 26, 2020

Synopsis

Background: A petition for disciplinary or remedial action was filed against two member of the Bar of Maryland. The Circuit Court, Montgomery County, No. 468469-V, James A. Bonifant, J., filed an opinion concluding lawyers had violated the rules of professional conduct.

Holdings: The Court of Appeals, Watts, J., held that:

the conduct of attorneys in exchanging e-mails containing offensive statements about members of the Hispanic, Asian, and African American races, as well as derogatory statements about homosexual men and heterosexual women, many who were colleagues, violated the rules of professional conduct, and

indefinite suspension from the practice of law was warranted.

Indefinite suspension ordered.

McDonald, J., filed a concurring opinion.

Procedural Posture(s): Proceeding on Attorney Discipline.

****943** Circuit Court for Montgomery County, Case No. 468469-V

Barbera, C.J., McDonald, Watts, Hotten, Getty, Booth, Biran, JJ.

Opinion

Watts, J.

***488** This attorney discipline proceeding involves two lawyers who, for approximately seven years, while working for the federal government, participated in an exchange of e-mails among a group of federal government employees, who were also lawyers, ****944** using their official government e-mail addresses during work hours to make disturbingly inappropriate and offensive statements that demonstrated "bias or prejudice based upon race, sex, ... national origin, ... sexual orientation[,] or socioeconomic status," Maryland Lawyers' Rules of Professional Conduct ("MLRPC") [1] 8.4(e) (Bias or Prejudice), about Hispanic, Asian, and African American people, and people whom they referred to as gay men, who were their colleagues.

[1] Effective July 1, 2016, the MLRPC were renamed the Maryland Attorneys' Rules of Professional Conduct, or MARPC, and renumbered. We will refer to the MLRPC because the misconduct at issue occurred before this change.

James Andrew Markey and Charles Leonard Hancock, Respondents, members of the Bar of Maryland, worked as a Veterans Law Judge and an Attorney-Advisor, respectively, at the Board of Veterans' Appeals ("the Board"), which is part of ***489** the United States Department of Veterans Affairs ("the Department"). For approximately seven years, Markey, Hancock, and three other employees of the Board used their official Department e-mail addresses to participate in an e-mail chain that they called "the Forum of Hate" ("FOH"). They referred to themselves as FOH members. As members of the FOH, Markey and Hancock sent numerous e-mails that included statements about their Board colleagues that were highly offensive, and that frequently evinced "bias or prejudice based upon race, sex, ... national origin, ... sexual orientation[,] or socioeconomic status." MLRPC 8.4(e). As examples, in one instance, in response to a photograph of Hancock's son's all-white Little League team, Markey asked where the white sheets were and stated " '[b]onfire' after every victory[,]" referencing the Ku Klux Klan, and, in another, Markey referred to an African American woman Chief Veterans Law Judge as "a total b[****.]" Among many other examples, Hancock referred to the Chief Veterans Law Judge as a "Ghetto Hippopotamus" and "a despicable impersonation of a human woman, who ought to [have] her cervix yanked out of her by the Silence of the Lamb[s] guy, and force[-]fed to her." [2] The Veterans Affairs Office of Inspector General discovered the e-mails, the Veterans Administration terminated Markey, and Hancock voluntarily

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retired. Eventually, Markey's and Hancock's actions came to Bar Counsel's attention.

[2] The "*Silence of the Lambs*" is a movie about "a cannibalistic serial killer[.]" Green v. Franklin Nat'l Bank of Minneapolis, 459 F.3d 903, 907 & n.2 (8th Cir. 2006).

On May 30, 2019, on behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed in this Court a "Petition for Disciplinary or Remedial Action" against Markey and Hancock, charging them with violating MLRPC 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), 8.4(e) (Bias or Prejudice), and 8.4(a) (Violating the MLRPC).

On June 4, 2019, this Court designated the Honorable Alison L. Asti of the Circuit Court for Anne Arundel County to hear the attorney discipline proceeding. Bar Counsel and ***490** Markey filed a joint motion to transfer venue to the Circuit Court for Montgomery County because Markey lived in Montgomery County and Hancock lived in Frederick County. As a result, this Court designated the Honorable James A. Bonifant ("the hearing judge") of the Circuit Court for Montgomery County to hear the attorney discipline proceeding. On November 12, 2019, the hearing judge conducted a hearing.[3] On January 2, 2020, the ****945** hearing judge filed in this Court an opinion including findings of fact and conclusions of law, concluding that Markey and Hancock had violated MLRPC 8.4(d), 8.4(e), and 8.4(a).

[3] The hearing judge noted that, at the hearing, Hancock testified, introduced evidence, and called two character witnesses, whereas Markey was present but elected not to testify or to introduce any evidence.

On February 5, 2020, this Court scheduled oral argument for April 2, 2020. On March 17, 2020, due to the COVID-19 emergency, the Chief Judge of this Court issued an Administrative Order, postponing oral arguments that had been scheduled for April 2020 until further notice.[4] Bar Counsel filed a Request to Waive Oral Argument. On March 27, 2020, this Court issued a Show Cause Order, directing Markey and Hancock to show cause why oral argument should be heard. Markey has not filed a response to the Show Cause Order, or anything else, in this Court. Hancock filed a handwritten document indicating that oral argument was not necessary and that he did not object to the matter being considered on the record. On April 9, 2020, this Court issued an order granting the Request to Waive Oral Argument.

[4] On March 27, 2020, the Chief Judge of this Court issued another Administrative Order, rescheduling the oral arguments in question for May 2020.

For the below reasons, we indefinitely suspend Markey and Hancock from the practice of law in Maryland.

BACKGROUND

The hearing judge found the following facts, which we summarize.

***491** On December 15, 1988, this Court admitted Hancock to the Bar of Maryland. From September 1995 to January 31, 2016, Hancock worked for the Board as an Attorney-Advisor. Hancock's main job duty was to assist Veterans Law Judges with drafting opinions regarding appeals of dispositions of veterans' claims for benefits.

On December 14, 1994, this Court admitted Markey to the Bar of Maryland. In November 1995, Markey began working for the Board as an Associate Counsel. In October 2005, Markey was promoted to Senior Counsel. In December 2007, Markey became a Veterans Law Judge. As a Veterans Law Judge, Markey conducted hearings and issued opinions regarding appeals of dispositions of veterans' claims for benefits.

The hearing judge found that beginning in 2008, and continuing into 2015, Markey, Hancock, Chief Veterans Law Judge Dennis Chiappetta, and lawyers Bernard DoMinh and John Prichard,[5] all of whom were employees of the Board, exchanged numerous inappropriate and offensive e-mails using their official Department e-mail addresses. Markey, Hancock, Chiappetta, DoMinh, and Prichard referred to the e-mail chain as the Forum of Hate and referred to themselves as members of the FOH. The e-mails included, in the hearing judge's words, "many racist, misogynic, xenophobic, and homophobic statements."

[5] Chiappetta, DoMinh, and Prichard are not members of the Bar of Maryland.

The hearing judge provided numerous examples of such e-mails.[6] As one example, on January 14, 2008, an e-mail exchange consisted of the following:

[ ] DoMinh: Hooray! Eye weel be go-eeng choo San Peet weeth my boddy Jeeemi. We weel hav good time, si? Eet weel be FIESTA time!

***492** [ ] Markey: Thankfully he stays at his own house when he's there...so there will be limited social interaction. Perhaps we'll go out for a taco lunch or something.

***

****946** [ ] Hancock: His photo shows semi-bloated face, like AA's does. They BOTH gobble j[***]?

[ ] Markey: Yes, Regan's

[ ] DoMinh: HARSH!

[ ] Hancock: Hey Trendy – There may be a spot open in AA's Forum of Gayness.

[ ] DoMinh: Filled to capacity already between El Rojo and Baby Gap.

[ ] Markey: Don't forget Geezagher and Moran

[ ] DoMinh: They of the 'leaky reeky feaky' from their over-filled colostomy bags.

(Ellipses in original) (footnotes omitted). Markey acknowledged that, by referring to "a taco lunch[,]" he was mocking the Deputy Vice Chairman's nationality. The hearing judge explained that, "AA[,]" "El Rojo[,]" and "Baby Gap" were references to lawyers who worked at the Board. [7]

6 The hearing judge's findings of fact contains quotes from a total of ten e-mail exchanges.

7 In the conclusions of law, the hearing judge found that, in above-quoted e-mail, DoMinh was ridiculing a Deputy Vice Chairman of the Board's national origin by mocking his accent.

On December 7 and 8, 2010, e-mails contained the following:

[ ] DoMinh: Did A-Mack leak the BVA e-mail archive to Julian Assange?

[ ] Hancock: No, but he like to leak some semen his way.

[ ] Prichard: Apparently Assange is the one who leaks. Sabotaged condom gate.

***

[ ] Markey: DoMinh only likes the old Fireplace on DuPont.

[ ] DoMinh: Coincidence that Jimmy can immediately remember the names of a DuPont bar? I think not. Jimmy probably has frequent patron discounts there, too, like El verde scores at Bobby Van's.

***493** Close Encounters of the TURD kind indeed.

[ ] Hancock: Kind thought the same thing gate.

[ ] Markey: Yeah, walked into that one. Too easy for you guys.

I recall walking past that place on the way to the Brickskellar years ago ... and the door was propped open ... creepy looking clientele, and I'm no homophobe.

[ ] DoMinh: James sixth sense regarding his immediate unsettled first impression upon viewing the clientele through the open door at Fireplace is accurate. In the open forum public review website, Yelp DC, even gay dudes wrote to remark that The Fireplace is regarded as a s[***]hole in their community.

[ ] Hancock: Can we talk about gay stuff on the VA email system?

[ ] DoMinh: Riding the grommet comet ain't my thang.

[ ] Markey: Take me off the list.

[ ] DoMinh: Dupont is a TURD – world nation whose population engages in close encounters of the TURD kind.

(Ellipses in original) (brackets omitted).

On December 21, 2012, an e-mail exchange included the following statements:

[ ] Prichard: In another relevant bulletin, the 2nd floor ladies room at the Butte, Montana VA clinic is out of paper towels.

[ ] Markey: That's where baby t will be shipped when chairman Sullivan arrives

[ ] Hancock: Was that place named after G-Pot?

[ ] DoMinh: No. You're thinking of the VA Medical Center in the city of Giant Lard Ass Kentucky Fried Chicken Eater, North Dakota.

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[ ] Markey: Good xmas hate gate

[ ] DoMinh: This workplace just fills me with the Christmas spirit and goodwill towards all. I'm sure that G-POT, as a **947 self-professed Christian herself, feels the same love and charitable regard to all under her leadership as well. Oh, *494 right she's clinical a[**]hole. And a hypocrite, to boot. Scratch what I just said.

[ ] Hancock: Not to mention a despicable impersonation of a human woman, who ought to [have] her cervix yanked out of her by the Silence of the Lamb[s] guy, and force[-]fed to her. Whew, I might be hated out...

[ ] Markey: Holy s[***] gate, Batman. Never has morale been so low, and that's saying something.

(Ellipsis in original). Markey and Hancock acknowledged that "baby t" was short for "baby talk," and was a disparaging reference to the tone of voice of a woman who was a Vice Chairman of the Board. The hearing judge found that "G-Pot" was short for "Ghetto Hippopotamus," and was a specific reference to an African American woman Chief Veterans Law Judge.

On March 20, 2013, Hancock, Markey, and Chiappetta commented on a photograph of the Little League team of which Hancock's son was a member, and of which all of the members were white. On that date, an e-mail exchange included the following statements:

[ ] Hancock: First baseball practice. Not a Charo, Adrian, or BD in the bunch.

[ ] Markey: Nice, but where are the white sheets? Gotta start them when they are young.

[ ] Chiappetta: Come on James, that is the name of the kid's team: "The Maryland White Sheets."

[ ] Markey: Of Course, my bad. 'Bon fire' after every victory.

[ ] Hancock: Nice management hate. Bout time!!

The hearing judge found that that the terms "white sheets" and "Bon fire" were references to the Ku Klux Klan. The hearing judge found that the term "Charo" was "code for someone of Spanish descent[,]" the term "Adrian" was code for African Americans, and that "BD" were the initials of DoMinh, "who is Asian."

*495 On August 28, 2013, Markey, Hancock, and DoMinh commented on photographs of DoMinh receiving an award. The photographs had been digitally altered to include derogatory terms for people of Vietnamese ancestry. The e-mail exchange included the following statements:

[ ] DoMinh: This is the award they give at the Denver, Colorado VARO. [8]

[ ] Hancock: The sign will say one chicken wing for you, 200 for me when the next boss lady arrives.

[ ] DoMinh: ... or if G-POT become acting "Executive in Charge."

[ ] Hancock: Fat t[***] shouldn't manage a KFC for God's sake.

[ ] DoMinh: Here's another I-wish-it-were-true dream award.

[ ] Markey: How do you keep doing these? On the paint thing? Or at home?

[ ] DoMinh: Home. Put the kid to sleep yesterday night and killed time f[***]ing around with the latest grip and grin photo I got of me and Terry (two years after the fact).

[ ] Markey: hilarious.

(Ellipsis in original).

8 "VARO" stands for "Veterans Affairs Regional Office." Deloach v. Shinseki, 704 F.3d 1370, 1372-73 (Fed. Cir. 2013).

On September 11, 2013, Hancock, Markey, and DoMinh commented on a photograph of different employees of the Board. Markey and Hancock participated in the following e-mail exchange commenting on the photograph:

[ ] Hancock: Who's the chick beside A[.[9]] **948 Crazy in the top right pic; not the terrorist.

[ ] DoMinh: V[.] B[.]: BVA attorney 1995-97. I actually got introduced to Markey through her.

*496 [ ] Hancock: Like to have my pee pee introduced to her va jay jay.

[ ] Markey: No — pic is much better than how she looked in person.

9 To protect the privacy of other employees of the Board, we refer to them by their initials.

On the same date, e-mails also included the following statements:

> [ ] DoMinh: By the way, I just taught a BVA 101 class with A[.] S[.] as my wingman for the first time. She used to write for Markey. She is a sharp attorney and a pretty driven kid who looks like she's trying hard to make a mark at the BVA. I recall Markey saying at one time during her novitiate phase as a BVA newbie that that c[**]t G-POT kind of had a hard-on for her. I can't understand why. A[.] is a good kid. What made G-POT decide to f[***] with her?
>
> [ ] Markey: When that 30 day thing came out of nowhere, A[.] had a case on the 30 day list, and K[.] berated her for over a week about it...she was a total b[****] to her.
>
> [ ] DoMinh: Well that explains why during BVA 101 A[.] was particularly emphatic in her presentation about timeliness and the "30-day rule." She is still traumatized by G-POT rolling on her out of the blue like that.
>
> [ ] Hancock: Previously administered abuse can take awhile to leave. Sometimes never completely. Meanwhile, looked her up in the yearbook. Nice DSL's.
>
> [ ] DoMinh: You are in particularly randy mood today, Charles. Must've been a long cruise, huh, sailor?
>
> [ ] Hancock: Randy is too gay a word to use here.
>
> [ ] Markey: Nothings too gay for BD
>
> [ ] DoMinh: said Jim, his voice muffled by the closet he is in.

(Ellipsis in original). The hearing judge found that "DSLs" stood for "d[***-]sucking lips."

On September 19, 2013, Markey e-mailed Hancock, Chiappetta, DoMinh, and Prichard a news article regarding an employee of the Frederick County Sheriff's Office who had been suspended. Markey had edited the article by adding the ***497** following paragraph, which indicated that Hancock had supported the suspended employee:

> Some of his supporters — to include Chuck Hancock of Urbana — came to Thursday's hearing and got into a heated debate with an opponent. The opponent, a fast food working, basketball type playing man, indicated that such talk just wasn't cool. He left, timidly, when 11 people causally tossed ropes at him.

The hearing judge found that Markey used the phrase "fast food working, basketball type playing man" as a reference to African Americans, and that Markey's use of the term "tossed ropes" was a reference to the Ku Klux Klan's use of ropes to lynch African Americans.

On January 30, 2014, an e-mail exchange included the following statements:

> [ ] Markey: Meanwhile, I just saw BD leave for the evening. What, no nonpaid OT [10] tonight??
>
> [ ] Hancock: Insane.
>
> [ ] Markey: Ewok stayed later than him — I saw him leaving a few minutes later. WTF? [11]
>
> ****949** [ ] Hancock: Maybe a clandestine bj meeting has been arranged.
>
> [ ] Markey: You're on fire today Chuckles!!!
>
> [ ] Hancock: I clearly am filled with hate. Need to stop.
>
> [ ] Markey: No!! actually keeps it sane here.

The hearing judge found that Markey used the term "Ewok" as a reference to Ewoks, the teddy-bear-like creatures from the *Star Wars* franchise, and that he used the term to mock a Veterans Law Judge. The hearing judge found that the term "bj" was a reference to fellatio.

10 "OT" stands for "overtime[.]" Clark v. Champion Nat'l Sec., Inc., 952 F.3d 570, 589 (5th Cir. 2020).

11 "WTF" stands for " 'what the f[***].' " State v. Ravi, 447 N.J.Super. 261, 147 A.3d 455, 461 & n.9 (N.J. Super. App. Div. 2016).

***498** On March 26, 2014, an e-mail exchange consisted of the following:

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[ ] DoMinh: Nothing makes my day more than seeing a beachfeet selfie from a lazy Chief. Makes me want to punch out a nun.

[ ] Prichard: At least she was merciful enough not to show the rest of herself

[ ] DoMinh: Few things are more hurt-inducing than seeing her astride that mechanical bull with the only thing keeping me from seeing straight up her too-short-for-her-age skirt into her gash was the fortunate placement of angle and shadow.

[ ] Prichard: They started out using a real bull but it got tired.

[ ] DoMinh: In G-POT's case, the real bull didn't last long because she ATE it.

[ ] Hancock: And threw the bones at white people.

In addition to the e-mails above, on August 28, 2014, Hancock sent an e-mail referring to a woman Chief Veterans Law Judge as follows: "Thought of her on the train this morning when I read this sentence in a book I'm reading. True. Here's the sentence: 'you're so fat your c[**]t probably turns inside out when you sit down.' "

In 2015, during an unrelated investigation, the Veterans Affairs Office of Inspector General discovered the e-mails and began investigating Markey, Hancock, Chiappetta, DoMinh, and Prichard. On December 1, 2015, the Department issued a Notice of Proposed Action, informing Markey that the Department sought to remove him from his position. The Department filed a complaint against Markey with the United States Merit Systems Protection Board, alleging conduct unbecoming of a Veterans Law Judge and misuse of government resources. Markey filed a response, admitting that he had participated in the e-mails, but denying that his conduct constituted good cause for his removal. The United States Merit Systems Protection Board conducted a hearing, and on November 9, 2017, issued an opinion, finding good cause for Markey's ***499** removal from federal service. The Department terminated Markey.

Because Hancock was an at-will employee, he was not entitled to the United States Merit Systems Protection Board's process. On January 31, 2016, Hancock voluntarily retired. Afterward, the Social Security Administration hired Hancock with full knowledge of his participation in the e-mails that led to his departure from the Board. Hancock later resigned from the Social Security Administration to spend more time with his son, who according to the hearing judge, is a person with a disability. The hearing judge noted that, at the time of the hearing, Hancock worked as a substitute teacher, and volunteered assisting disadvantaged people and people experiencing homelessness.

The hearing judge found that Markey's and Hancock's misconduct was aggravated by substantial experience in the practice of law and a pattern of misconduct. The hearing judge found that Markey's misconduct was also aggravated by a refusal to acknowledge the wrongful nature of the ****950** conduct. In support of that finding, the hearing judge observed that "Markey was polite and otherwise appropriate with the [hearing judge,] and admitted [ ] the underlying facts of this matter." That said, the hearing judge stated that, although Markey was "not dismissive, he gave the impression that he was resigned to the fact that the Courts were going to do what they were going to do[,] regardless what he may present." The hearing judge pointed out that, in a letter to Bar Counsel, Markey stated: "I hope [that] the [Attorney Grievance] Commission will not take further action, but[,] if so, I am in no position to fight it." The hearing judge concluded that "Markey does not fully appreciate the seriousness of his actions and how they interfered with the administration of justice."

The hearing judge found that Markey's and Hancock's misconduct was mitigated by a lack of prior attorney discipline, cooperation with Bar Counsel's and the Office of Inspector General's investigations, and the imposition of other sanctions in the form of Markey and Hancock losing their jobs as a ***500** result of the e-mails.[12] The hearing judge observed that, although in his Answer to the Petition for Disciplinary or Remedial Action, Markey asserted that he was remorseful and had " 'good moral and ethical character[,]' " at the evidentiary hearing, Markey did not offer evidence of any mitigating factors.

12 As to Hancock, the hearing judge acknowledged that Hancock "resigned" from his position, but the hearing judge "accept[ed] that [Hancock] lost his employment due to his participation and statements made in the e[-]mails."

The hearing judge found that Hancock's misconduct was mitigated by remorse and good character and reputation. The hearing judge pointed out that, at the evidentiary

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hearing, Hancock testified that he was remorseful, that he felt "terrible" that his e-mails "may have hurt people[,]" and "that many of his comments in the e[-]mails were both inappropriate and offensive." The hearing judge found that Hancock's expression of remorse was sincere. The hearing judge noted that, at the evidentiary hearing, Hancock called two character witnesses, each of whom had served as a Veterans Law Judge for decades, and had worked with Hancock on several matters. The character witnesses testified that they had read Hancock's e-mails, and did not believe that the e-mails were representative of his character. One of the character witnesses testified that Hancock had treated her with respect, that she had never seen him act inappropriately with anyone else, and that she would have no reservations about working with him again. The hearing judge found that there were numerous letters of support that corroborated the testimony of the character witnesses.

STANDARD OF REVIEW

Where no party excepts to any of the hearing judge's findings of fact, we "treat the findings of fact as established[.]" Md. R. 19-741(b)(2)(A). [13] In an attorney discipline proceeding, ***501** this Court reviews without deference a hearing judge's conclusions of law, see Md. R. 19-741(b)(1), and determines whether clear and convincing evidence establishes that a lawyer violated an MLRPC, see Md. R. 19-727(c).

13 Neither Bar Counsel, Markey, nor Hancock excepts to any of the hearing judge's findings of fact.

DISCUSSION

(A) Conclusions of Law

None of the parties excepts to the hearing judge's conclusions of law, all of which we uphold.

**951 MLRPC 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice)

"It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice[.]" MLRPC 8.4(d).

According to the hearing judge, Markey and Hancock contended that the comments in their e-mails did not violate MLRPC 8.4(d) because the comments were intended to be humorous, and were spread in a small circle of people, without the expectation that the comments would ever be shared outside of the small group, *i.e.*, the comments were private and were not intended to become public. The hearing judge found that Markey and Hancock made "derogatory statements about Hispanic, Asian, African American, and gay men[,]" and women. The hearing judge determined that the e-mails were related to the practice of law and violated MLRPC 8.4(d). We conclude that the hearing judge's determinations are supported by clear and convincing evidence.

"[W]here ... a lawyer engages in conduct that is related to the practice of law[,]" the lawyer violates MLRPC 8.4(d) if the lawyer's conduct "would negatively impact [the] perception of the legal profession" of "a reasonable member of the public[.]" Attorney Grievance Comm'n v. Basinger, 441 Md. 703, 720, 109 A.3d 1165, 1175 (2015) (cleaned up). Where a lawyer engages in "purely private conduct—*i.e.*, conduct that is entirely unrelated to the practice of law—" the lawyer ***502** violates MLRPC 8.4(d) "if the lawyer's conduct is criminal or so egregious as to make the harm, or potential harm, flowing from it patent." Attorney Grievance Comm'n v. Paul, 459 Md. 526, 547-48, 187 A.3d 625, 637 (2018) (cleaned up).

In Attorney Grievance Comm'n v. Link, 380 Md. 405, 428-29, 844 A.2d 1197, 1211-12 (2004), this Court explained that conduct that impacts the image or perception of the court or the legal profession or that engenders disrespect for the court and the profession may violate MLRPC 8.4(d). We recognized that the phrase prejudicial to the administration of justice had been interpreted to include conduct that a lawyer engages in outside of the legal profession. See id. at 427, 844 A.2d at 1210. It is clear from the discussion in Link, id. at 428-29, 844 A.2d at 1211-12, however, that purely private conduct refers to conduct that is unrelated to the practice of law, *e.g.*, social interactions between a lawyer and a non-lawyer, rather than conduct that is unknown by the public.

In Link, id. at 428-29, 408-13, 844 A.2d at 1211-12, 1199-1202, we held that a lawyer's conduct was "purely private[,]" and that the lawyer did not violate MLRPC 8.4(d), where the lawyer engaged in a verbal altercation with two employees of the Motor Vehicle Administration. The lawyer

was "rude, boorish, insensitive, oppressive[,] and certainly insulting[.]" Id. at 428, 844 A.2d at 1211. This Court determined that the lawyer's conduct was unrelated to the practice of law because it did not occur "during the course of litigation or court proceedings[,]" id. at 426, 844 A.2d at 1210, and because, "[a]lthough [the lawyer] was representing a client at the time of the incident, that fact was not readily apparent or sought to be emphasized[; i]ndeed, the [lawyer] resisted informing the [employee who later filed a complaint against him] that he was a lawyer[,]" id. at 428, 844 A.2d at 1211. Applying the "patent harm" test, this Court concluded that the lawyer did not violate MLRPC 8.4(d) because his conduct was "neither criminal nor conduct of the kind that the harm or potential harm flowing from it [was] patent[.]" Id. at 429, 844 A.2d at 1212.

***503** In Basinger, 441 Md. at 720, 714, 109 A.3d at 1175, 1171, this Court held that a ****952** lawyer's conduct was related to the practice of law where the lawyer wrote letters to his sister-in-law, who was his client, and described his sister-in-law as, among other things, "A TRUE C [* *]T" who had "finally f[* * *]ed up one time too many"; and as "a reprehensible human being" with "worthless progeny." (Alterations in original). [14] In Basinger, id. at 707, 109 A.3d at 1167, the lawyer and his sister-in-law had entered into an attorney-client relationship in connection with her grandson's death during a motor vehicle accident. Within a month, the sister-in-law mailed an insurance company a letter in which she denied retaining the lawyer. See id. at 707-08, 109 A.3d at 1167. As a result, the lawyer sent his sister-in-law three letters containing disparaging remarks. See id. at 708, 109 A.3d at 1167-68.

14 In Basinger, 441 Md. at 718, 109 A.3d at 1174, this Court explained "that, in Link, by 'private,' this Court meant 'unrelated to the practice of law[,]' " as opposed to " 'not known or intended to be known publicly.' "

This Court determined that the lawyer's "statements were made at least partially in his capacity as [a] lawyer" because the lawyer's letters were on his firm's letterhead and had headings that referenced the sister-in-law's grandson's estate, the "purpose in mailing the first letter was to formally acknowledge the representation's termination[,]" and the letters included information regarding his actions on the client's behalf. Id. at 713, 109 A.3d at 1171. Applying the "reasonable member of the public" test, this Court held that the lawyer violated MLRPC 8.4(d) because his "conduct—in his capacity as [the sister-in-law]'s lawyer, putting into letters numerous insults (including the obscene, sexist word 'c[**]t') that were aimed at the letters' recipient [ ]—would negatively impact a reasonable member of the public's perception of the legal profession." Id. at 720, 109 A.3d at 1175 (second alteration in original).

Here, applying the reasonable member of the public test, the hearing judge concluded that "the insulting[,] demeaning ***504** language" that Markey and Hancock used in the e-mails would "undoubtedly bring[ ] the legal profession into disrepute in the eyes of a reasonable member of the public." We concur with the hearing judge's determination.

The hearing judge concluded that, in taking the position that the e-mails did not violate MLRPC 8.4(d) because there was no expectation that the e-mails would be shared outside of their group, Hancock misinterpreted this Court's holding in Link, as had the lawyer in Basinger. The hearing judge pointed out that the term "private" in Link meant unrelated to the practice of law, not undisclosed to or unknown by the public. As the hearing judge determined, Markey's and Hancock's conduct was related to the practice of law. When they made the statements in question, Markey and Hancock were a Veterans Law Judge and an Attorney-Advisor of the Board, respectively. By definition, the Board—*i.e.*, the Board of Veterans' Appeals—performs legal work. Both of Markey's and Hancock's positions were law-related and could be performed only by lawyers. Markey's main job duties were to conduct hearings and issue opinions regarding appeals of decisions concerning veterans' claims for benefits. Hancock's main job duty was to assist Veterans Law Judges with drafting opinions. Markey and Hancock made their statements using their Department e-mail addresses, and, as the hearing judge observed, mostly during work hours. The hearing judge found that, although Markey's and Hancock's statements did not directly pertain to a particular veteran or a particular appeal that was ****953** before the Board, in their statements, Markey and Hancock repeatedly referred to Board colleagues and Board-related matters.

For example, a review of the e-mail exchanges reveals that, on September 11, 2013, Markey discussed a change in rules at the Department and that a woman (an African American

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Chief Veterans Law Judge), whom he referred to as "a total b[****,]" berated another woman (a Board employee) about having "a case on the 30[-]day list[.]" Hancock responded concerning the woman who had the case on the 30-day list, that he had looked her up in the yearbook and she had "[n]ice ***505** [d***-sucking lip]s." In an e-mail exchange on January 30, 2014, Markey observed that another Board employee was leaving for the evening and suggested that the employee would not be getting "nonpaid OT[.]" Markey and Hancock discussed the timeframe that another employee left the office and the reason why. In an e-mail exchange on August 28, 2013, discussing an award that DoMinh received at a Veterans Affairs Regional Office, Hancock stated: "The sign will say one chicken wing for you, 200 for me when the next boss lady arrives."

The purpose of the Board is to conduct hearings and determine appeals of claims by veterans for compensation. All five of the participants in the e-mail chain were lawyers, and most of the Board colleagues to whom Markey and Hancock referred in the e-mails were also lawyers. One person was an African American woman Chief Veterans Law Judge about whom Markey and Hancock repeatedly made extremely disparaging remarks. Another person was a Board colleague to whom Markey referred in stating that the Chief Veterans Law Judge "was a total b[****] to her[,]" and who, Hancock said, had "nice [d***-sucking lip]s." Another person was a woman who was a Board colleague about whom Hancock stated: "Like to have my pee pee introduced to her va jay jay[,]" and about whom Markey stated: "No — pic is much better than how she looked in person." There was a Board colleague who, Hancock said, belonged to a "Forum of Gayness." And Markey referred to another Veterans Law Judge as "Ewok[.]" Markey and Hancock held positions of authority with the Board and used their federal government e-mail accounts during work hours to make offensive and derogatory remarks in e-mails that discussed Board-related matters and were about other Board colleagues who were also in positions of authority with the Board. Overall, Markey and Hancock made demeaning remarks about their colleagues and work, during times when they were supposed to be performing the work of the Board and made the demeaning remarks using resources provided to them by the federal government to do the Board's legal work. Under these circumstances, it would be difficult, if not impossible, ***506** to conclude that the conduct at issue was not related to the practice of law.

Because Markey's and Hancock's actions were related to the practice of law, the reasonable member of the public test applies. See Basinger, 441 Md. at 720, 109 A.3d at 1175. The inappropriate and offensive remarks in the e-mail chains would certainly negatively impact the perception of the legal profession of a "reasonable member of the public[.]" Id. at 720, 109 A.3d at 1175. Any reasonable member of the public's perception of the legal profession would be negatively affected upon learning that Markey and Hancock, a Veterans Law Judge and an Attorney-Advisor, used their Department e-mail addresses during work hours to repeatedly send such offensive e-mails about their colleagues in the legal profession over such a long period of time. The remarks not only demonstrated little regard for others who ****954** the Department employed in legal positions, but also evidenced little awareness of the professional trust and responsibility given to Markey and Hancock by the Department in their respective roles. A reasonable member of the public would not expect a Veterans Law Judge and Attorney-Advisor of the Board to conduct themselves in such an unprofessional manner in the workplace.

This case is distinguishable from Link, 380 Md. at 428, 411, 844 A.2d at 1211, 1201, in which the lawyer's conduct was unrelated to the practice of law because he was not acting as a lawyer when he got into a verbal altercation at an office of the Motor Vehicle Administration—which is open to the general public—and, during the altercation, the lawyer resisted advising the complainant that he was an attorney. By contrast, here, Markey and Hancock sent their e-mails mostly during work hours at their workplace (*i.e.*, the Board), using Department e-mail addresses, and talked about their colleagues and Board-related matters. That Markey and Hancock sent the e-mails using their Department e-mail addresses is significant, because, by definition, the e-mail addresses were provided to them by the Department for use in their work in the legal profession.

***507** As the hearing judge correctly explained, Markey's and Hancock's contention that the e-mails were not intended to be publicized lacked merit not only because a lawyer's conduct need not be publicly known to constitute a violation of MLRPC 8.4(d), but also because it would have been unreasonable for Markey and Hancock to expect that their remarks would not become publicly known. Under the Freedom of Information Act, 5 U.S.C. § 552, records of the federal government are generally available to members

of the public on request, see 5 U.S.C. § 552(a), subject to certain exemptions, see 5 U.S.C. § 552(b). As the hearing judge rightly observed, Markey and Hancock did not identify any exemption that would apply to their e-mails. Additionally, where, as here, a federal employee sends an e-mail using a government e-mail address, that e-mail is the property of the federal government, not the federal employee. See, e.g., United States v. Story Cty., Iowa, 28 F. Supp. 3d 861, 877 (S.D. Iowa 2014). Simply put, e-mails from federal government e-mail addresses can never be presumed to remain private—whether from federal employees to federal employee recipients or to members of the general public.

Additionally, as the hearing judge observed, regardless of Markey's and Hancock's intentions, their e-mails did not remain private. The e-mails were discovered by the Veterans Affairs Office of Inspector General, and subsequently gave rise to an opinion of the United States Merit Systems Protection Board. In that opinion, which the hearing judge admitted into evidence, the United States Merit Systems Protection Board observed that the e-mail chain was the subject of a government watchdog's blog post and articles by multiple news outlets, including *The Wall Street Journal*. [15] And, of ***508** course, the e-mail chain came to Bar Counsel's attention, and resulted in this attorney discipline proceeding. Plainly, any contention that Markey's ****955** and Hancock's conduct fit the definition of purely private conduct is wrong, even if purely private meant that the conduct was not to be publicly known, which it does not.

15 Indeed, the opinion of the United States Merit Systems Protection Board includes an excerpt from the blog, which stated:

> If I were a veteran and learned that my [Board] denial may have been decided by an individual who holds racist or sexist bias, I'd sure be speaking with a veterans law attorney. This is one more embarrassing event for your Department of Veterans Affairs. Only at the VA will you find adult professionals who think it's OK to distribute racist or sexist e[-]mail message[s] to others.

This excerpt shows that information about the e-mails became publicly known and commented upon.

In sum, the hearing judge rejected the argument that the e-mails were "purely private" and determined that Markey's and Hancock's conduct was "related to the practice of law[.]" The hearing judge concluded that Markey's and Hancock's conduct would negatively impact the perception of the legal profession of a reasonable member of the public. The hearing judge stated:

> Markey and Hancock participated in numerous derogatory statements about Hispanic, Asian, African American, and gay men. Using an objective standard required by the law, this Court finds the insulting demeaning language used by them in the e[-]mails undoubtedly brings the legal profession into disrepute in the eyes of a reasonable member of the public.

The hearing judge's conclusions are more than amply supported by clear and convincing evidence.

MLRPC 8.4(e) (Bias or Prejudice)

MLRPC 8.4(e) stated:

> It is professional misconduct for a lawyer to ... knowingly manifest[,] by words or conduct[,] when acting in a professional capacity[,] bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation[,] or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of [MLRPC 8.4(e).]

***509** As MLRPC 8.4(e)'s plain language makes clear, a violation of the provision is comprised of four components. To violate MLRPC 8.4(e), a lawyer must: (1) when acting in a professional capacity, (2) knowingly manifest by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or

socioeconomic status, (3) when such action is prejudicial to the administration of justice, and (4) not legitimate advocacy. To put the matter into criminal law terms, a violation of MLRPC 8.4(d) would be considered a lesser-included offense of a violation of MLRPC 8.4(e), as the latter includes all of the components of the former, plus additional ones.

Comment 4 to MLRPC 8.4 stated in pertinent part:

> Section (e) of this Rule reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in section (e) of this Rule and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession.

Here, the hearing judge determined that, as to Markey and Hancock, Bar Counsel had proven, by clear and convincing evidence, a violation of MLRPC 8.4(e). The hearing judge concluded that Markey's and Hancock's many inappropriate and offensive remarks in e-mails clearly constituted examples of knowingly manifesting bias and prejudice based upon race, sex, sexual orientation, national origin, and socioeconomic status. The hearing judge determined that Markey and Hancock were acting in a professional capacity when they made the statements at issue, and, as discussed above, their conduct was related to the practice of law and violated MLRPC 8.4(d), *i.e.*, was prejudicial to the administration of justice. The hearing judge concluded that Markey's and Hancock's ****956** e-mails clearly served no legitimate advocacy. We agree with all of the above.

***510** This is only the second case in which this Court has determined whether a lawyer violated MLRPC 8.4(e). The first was Attorney Grievance Comm'n v. Sanderson, 465 Md. 1, 65, 25-26, 213 A.3d 122, 159, 136 (2019), in which this Court held that a lawyer violated MLRPC 8.4(e) by approaching a social worker who had just testified at a hearing in a Child in Need of Assistance case and calling her a "baby-snatching b[****]." This Court determined that the lawyer was acting within his professional capacity at the time because of the temporal proximity between the hearing and the remark. See id. at 65, 213 A.3d at 159. This Court concluded that, based on the language alone, the lawyer knowingly manifested bias or prejudice based upon sex. See id. at 65, 213 A.3d at 159. Both MLRPC 8.4(e)'s plain language and this Court's holding in Sanderson support the conclusion that, in this case, the hearing judge's determination is supported by clear and convincing evidence.

The hearing judge's conclusion that, with the statements in the e-mail exchanges, Markey and Hancock knowingly manifested bias or prejudice based upon race, sex, sexual orientation, national origin, and socioeconomic status is supported by clear and convincing evidence. While participating in the e-mail chain, Markey demonstrated bias or prejudice based on race when, in response to a photograph of Hancock's son's all-white Little League team, Markey asked "where are the white sheets?" and stated " 'Bon fire' after every victory[,]" referencing the Ku Klux Klan. In another e-mail, Markey made up a story about a "fast food working, basketball type playing man" at whom "people causally tossed ropes[,]" casually and callously referring to the Ku Klux Klan's lynchings of African Americans.

Markey demonstrated bias or prejudice based on sex by calling an African American woman Chief Veterans Law Judge as "a total b[****,]" and by referring to another woman who was a colleague as "baby t[,]" which was short for "baby talk," a disparaging reference to that colleague's tone of voice. In one e-mail exchange in which participants were commenting on a photograph, Markey commented of a woman colleague ***511** that the "pic is much better than how she looked in person." As to statements demonstrating bias or prejudice based upon sexual orientation, the hearing judge concluded that Markey's and Hancock's "statements included multiple homosexual references and slurs to describe other male [ ] employees." In one e-mail, Markey stated that "[n]othing[']s too gay for" one of the e-mail participants. In another e-mail, Markey indicated that the same e-mail participant had gone to a gay bar and stated that the bar had "creepy[-]looking clientele[.]" As to bias or prejudice based on national origin, in one e-mail exchange, after one of the participants appeared to imitate a Spanish accent, Markey stated "[p]erhaps we'll go out for a taco lunch or something[,]" making a joke about a Deputy Vice Chairman's nationality.

Likewise, in the e-mails, Hancock made numerous statements demonstrating bias or prejudice based upon race, sex, sexual orientation, national origin, and socioeconomic status. Specifically, as to bias or prejudice based on race, Hancock referred to an African American woman Chief Veterans Law Judge as "G-Pot" (which was short for "Ghetto Hippopotamus"), and in response to DoMinh's remark that the Chief Veterans Law Judge had eaten a "bull," Hancock responded that she had "thr[o]w[n] the bones at white people." In an e-mail which included a photograph of Hancock's son's all-white Little League team, Hancock stated that there was not a ****957** "Charo, Adrian, or BD in the bunch." The hearing judge found that "Charo" was "code for someone of Spanish descent[,]" "Adrian" was "code for African Americans[,]" and "BD" referred to DoMinh, "who is Asian."

Concerning bias or prejudice based on sex, Hancock stated that the African American woman Chief Veterans Law Judge was "a despicable impersonation of a human woman, who ought to [have] her cervix yanked out ... and force[-]fed to her." Referring to a woman Chief Veterans Law Judge, Hancock stated she was "so fat [that her] c[**]t probably turns inside out when [she] sit[s] down." In one e-mail, Hancock stated that he had looked a colleague up in the yearbook and that she had "[n]ice DSL's" (which stood for "d[***-]sucking ***512** lips"). Hancock said of another colleague who was a woman that he would "[l]ike to have [his] pee pee introduced to her va jay jay," and referred to yet another colleague as "A[.] Crazy[.]"

Demonstrating bias or prejudice based on sexual orientation, in an e-mail, Hancock stated that two male colleagues "gobble[d]" another male individual's "j[***]" and stated that two male individuals belonged to a male colleague's "Forum of Gayness." In yet another e-mail, Hancock stated that "a clandestine bj meeting ha[d] been arranged" by a male colleague, referring to fellatio, and when Markey complimented him on the remark, Hancock responded: "I clearly am filled with hate. Need to stop." In response to a question about whether an employee leaked the Board e-mail archive to Julian Assange, Hancock responded: "No, but he like to leak some semen his way." In the same e-mail exchange, Hancock asked: "Can we talk about gay stuff on the VA e[-]mail system?" In another email exchange, in which one participant used the word "randy," Hancock retorted that "[r]andy is too gay a word to use here."

Hancock made statements demonstrating bias or prejudice based on national origin or race when he referred to a colleague as a "terrorist" and when he used derogatory terms to observe that the photograph of his son's all-white Little League team did not contain people of certain ethnic backgrounds. The hearing judge concluded that both Markey and Hancock participated in multiple e-mail exchanges that manifested bias and prejudice based on socioeconomic status. For example, in one exchange, an e-mail participant (DoMinh) referred to the location of a Veterans Affairs medical center as being in "the city of Giant Lard A[**] Kentucky Fried Chicken Eater, North Dakota." In another instance, as the hearing judge indicated, Hancock demonstrated bias or prejudice based on socioeconomic status when one e-mail participant suggested that the African American woman Chief Veterans Law Judge might be promoted to an executive position and he responded that she was a "[f]at t[*** who] shouldn't manage a KFC for God's sake."

***513** Without question, the remarks summarized above demonstrate that Markey and Hancock engaged in conduct that knowingly manifested bias or prejudice based upon race, sex, national origin, sexual orientation, and socioeconomic status. The hearing judge determined that Markey and Hancock "were acting in their professional capacity" when they made the comments at issue because they made the comments using Department email addresses and they sent the e-mails "largely during work hours." Also, the hearing judge concluded that, although none of the e-mails involved a specific case, the e-mails were aimed at their Board colleagues, including employees and supervisors, and were generally about the work performed by the Board. The hearing judge also determined that the statements were prejudicial to the administration of justice and plainly not in ****958** support of legitimate advocacy. We fully agree. Clear and convincing evidence supports the hearing judge's conclusions.

MLRPC 8.4(a) (Violating the MLRPC)

"It is professional misconduct for a lawyer to[ ] violate ... the" MLRPC. MLRPC 8.4(a). The hearing judge's conclusion that Markey and Hancock violated MLRPC 8.4(a) is supported by clear and convincing evidence. As discussed above, Markey and Hancock violated MLRPC 8.4(d) and 8.4(e).

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(B) Sanction

Without specifying whether the sanction should be an indefinite or definite suspension, Bar Counsel recommends that we suspend Markey and Hancock from the practice of law in Maryland. Hancock requests that we reprimand him. Markey has made no recommendation.

In Attorney Grievance Comm'n v. Slate, 457 Md. 610, 646-47, 180 A.3d 134, 155-56 (2018), this Court stated:

> This Court sanctions a lawyer not to punish the lawyer, but instead to protect the public and the public's confidence in the legal profession. This Court accomplishes these goals by: (1) deterring other lawyers from engaging in similar ***514** misconduct; and (2) suspending or disbarring a lawyer who is unfit to continue to practice law.
>
> In determining an appropriate sanction for a lawyer's misconduct, this Court considers: (1) the MLRPC that the lawyer violated; (2) the lawyer's mental state; (3) the injury that the lawyer's misconduct caused or could have caused; and (4) aggravating factors and/or mitigating factors.
>
> Aggravating factors include: (1) prior attorney discipline; (2) a dishonest or selfish motive; (3) a pattern of misconduct; (4) multiple violations of the MLRPC; (5) bad faith obstruction of the attorney discipline proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (6) submission of false evidence, false statements, or other deceptive practices during the attorney discipline proceeding; (7) a refusal to acknowledge the misconduct's wrongful nature; (8) the victim's vulnerability; (9) substantial experience in the practice of law; (10) indifference to making restitution or rectifying the misconduct's consequences; (11) illegal conduct, including that involving the use of controlled substances; and (12) likelihood of repetition of the misconduct.
>
> Mitigating factors include: (1) the absence of prior attorney discipline; (2) the absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith efforts to make restitution or to rectify the misconduct's consequences; (5) full and free disclosure to Bar Counsel or a cooperative attitude toward the attorney discipline proceeding; (6) inexperience in the practice of law; (7) character or reputation; (8) a physical disability; (9) a mental disability or chemical dependency, including alcoholism or drug abuse, where: (a) there is medical evidence that the lawyer is affected by a chemical dependency or mental disability; (b) the chemical dependency or mental disability caused the misconduct; (c) the lawyer's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (d) the recovery arrested the misconduct, and the misconduct's recurrence is unlikely; (10) delay in the attorney ***515** discipline proceeding; (11) the imposition of other penalties or sanctions; (12) remorse; (13) remoteness of prior violations of the MLRPC; and (14) unlikelihood of repetition of the misconduct.

(Cleaned up).

In assessing the appropriate sanction for Markey and Hancock, we consider that ****959** they violated MLRPC 8.4(d) and 8.4(e) by using Department e-mail addresses to make alarmingly inappropriate and offensive remarks about their colleagues that were both prejudicial to the administration of justice and evinced bias and prejudice on multiple grounds. In the context of concluding that Markey and Hancock violated MLRPC 8.4(d), the hearing judge found that "[t]he extremely offensive comments in [their] e[-]mails were deliberate[.]" All of the circumstances that the hearing judge found point to the conclusion that Markey and Hancock made the inappropriate and offensive remarks intentionally over a lengthy period of time. These were not spontaneous, impulsive, or out-of-character remarks or isolated incidents. Markey's and Hancock's misconduct clearly had the potential to undermine the work of the Board and the public's confidence in that work, as well as damage the public's perception of the legal profession, the Board, the Department, and the federal government at large.

The hearing judge found that the aggravating factors of substantial experience in the practice of law and a pattern of misconduct applied to both Markey and Hancock. The hearing judge found that the additional aggravating factor of a refusal to acknowledge the wrongful nature of the misconduct applied to Markey. The record supports the hearing judge's findings by clear and convincing evidence. And, we discern one additional aggravating factor that applies to both Markey and Hancock: multiple violations of the MLRPC.

The hearing judge found that the mitigating factors of a lack of prior attorney discipline, cooperation with Bar Counsel's and the Office of Inspector General's investigations, and the imposition of other sanctions in the form of loss of ***516**

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employment applied to both Markey and Hancock. We accept the hearing judge's determinations. [16]

16 We are aware that Hancock voluntarily retired from the Board. Although Hancock leaving the Board was voluntary and he obtained employment with the Social Security Administration, the hearing judge accepted that Hancock's loss of employment was due to the e-mail exchanges. We will not disturb the hearing judge's finding.

The hearing judge found that additional mitigating factors—remorse [17] and good character and reputation [18] —applied to Hancock. We do not disturb the hearing judge's findings of the additional mitigating factors as to Hancock.

17 In the document in which he requests a reprimand, Hancock concedes that he violated MLRPC 8.4(d), 8.4(e), and 8.4(a), but states: "I candidly admit that, to a reader of some of these messages, who was not aware of the context of the messages, an objective reading could result in the reader forming a negative image and perception of the legal profession." This acknowledgement of wrongdoing is extremely qualified, and seems to incorrectly suggest that only "some of" Hancock's remarks were wrongful, and/or that his offensive statements may have seemed less egregious in "context[.]" That said, we cannot determine that the hearing judge clearly erred in finding credible Hancock's testimony that he was remorseful.

18 Although Hancock presented the testimony of two witnesses who attested to his good character and provided character letters, according to comment 4 to MLRPC 8.4, a violation of MLRPC 8.4(e) in and of itself demonstrates a lack of character. Comment 4 states that a lawyer who violates MLRPC 8.4(e) "commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession." Although the comment to MLRPC 8.4 states that the conduct demonstrates a lack of character and the numerous e-mail exchanges between Markey and Hancock belie a finding of good character and reputation, given the evidence presented at the disciplinary hearing, we decline to conclude that the hearing judge's finding was clearly erroneous.

We conclude that the appropriate sanction for Markey's and Hancock's misconduct ****960** is an indefinite suspension for each from the practice of law in Maryland. Markey's and Hancock's remarks were egregious, were part of an approximately seven-year-long pattern, and were not stray, random, or isolated. Markey, Hancock, and the other participants in the e-mail chain referred to it as "the Forum of Hate," and referred to themselves as "members" of "the Forum of Hate." These ***517** circumstances establish that Markey and Hancock were making remarks that were intentionally offensive. The *modus operandi* of the group was for its members to regularly make deliberately offensive statements, and to praise each other for the statements. For example, after DoMinh made an offensive remark about an African American woman Chief Veterans Law Judge four days before Christmas 2012, Markey stated: "Good xmas hate gate[.]" Similarly, after Chiappetta, a Chief Veterans Law Judge, made a reference to the Ku Klux Klan, Hancock stated: "Nice management hate. Bout time!!"

Markey's and Hancock's statements demonstrating bias and prejudice speak for themselves and constitute abhorrent conduct without the need for any evidence that Markey and/or Hancock discriminated against a particular veteran in a case before the Board. Actual discrimination is not required to determine that Markey and Hancock glaringly violated MLRPC 8.4(e) when, acting in their professional capacities, they knowingly engaged in conduct demonstrating bias and prejudice that was prejudicial to the administration of justice and not in pursuit of legitimate advocacy. Comment 4 to MLRPC 8.4 explains that MLRPC 8.4(e) "reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system[,]" and that a violation "manifests a lack of character required of members of the legal profession." Markey's and Hancock's many inappropriate and offensive statements were demeaning of many groups of people in our society, an affront to the dignity of the legal profession, and cannot be tolerated from any members of the Bar of Maryland—especially ones who occupy positions of public trust.

Markey's and Hancock's misconduct warrants the same sanction even though Markey was a Veterans Law Judge and Hancock was an Attorney-Advisor. To be sure, Markey occupied a higher position of trust than an Attorney-Advisor and as a Veterans Law Judge was responsible for fairly and impartially making decisions with respect to claims by veterans and Hancock as an Attorney-Advisor assisted Veterans Law Judges with drafting opinions and did not

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have decision-making ***518** authority. Regardless of their positions, however, Markey and Hancock equally participated in the e-mail exchanges and the applicable aggravating and mitigating factors do not compel different sanctions. Although Hancock has the additional mitigating factors of remorse and good character and reputation, and Markey has the additional aggravating factor of a refusal to acknowledge the wrongful nature of the misconduct, those differences are counterbalanced by the circumstance that Hancock's statements were particularly egregious and that we do not give great weight to Hancock's additional mitigating factors. As but one example of the egregiousness of his statements, Hancock called a Chief Veterans Law Judge a "Ghetto Hippopotamus" and "a despicable impersonation of a human woman, who ought to [have] her cervix yanked out of her ...." In other examples, Hancock referred to people of different ethnicities as "Charo," "Adrian," and "BD[,]" he stated that he wanted to perform a sexual act with a woman colleague who was depicted in a photograph, and said that another woman colleague had "[n]ice DSL's." And these are just a few examples.

****961** Although we decline to disturb the hearing judge's findings with respect to remorse and good character and reputation, those mitigating factors are of limited significance in assessing the appropriate sanction for Hancock's misconduct. Hancock's expression of remorse was qualified; he acknowledged that only some of his remarks were wrongful and insisted that his statements were less offensive when read in context. And, although Hancock presented evidence in the form of character witnesses and letters, the comment to MLRPC 8.4 indicates that conduct violating MLRPC 8.4(e) manifests a lack of character. Hancock's statements in the e-mails demonstrate a lack of character; and it could be taken that the support for and against the mitigating factor of good character and reputation is in equipoise.

Bar Counsel contends that this attorney discipline proceeding is similar to In re Kahn, 16 A.D.3d 7, 10, 8, 791 N.Y.S.2d 36 (N.Y. App. Div. 2005), in which the Appellate Division of the Supreme Court of New York suspended for six months a ***519** lawyer who violated the New York rules of professional conduct that prohibited "conduct that adversely reflects on [one]'s fitness as a lawyer" and "undignified or discourteous conduct that is degrading to a tribunal[.]" For approximately thirteen years, the lawyer engaged in a pattern of making remarks that were inappropriate. See id. at 8-9, 791 N.Y.S.2d 36. For example, the lawyer regularly offered round peppermint candies to opposing counsel who were women by asking: "Do you want to suck one of my b[***]s?" Id. at 9, 791 N.Y.S.2d 36. Whenever opposing counsel indicated that the offer was offensive, the lawyer would respond: "If you're so damned refined[,] then why do you understand?" Id. On one occasion, the lawyer referred to a woman who was opposing counsel as "pig vomit on [his] shoes." Id. On another occasion, when the same opposing counsel was about to enter a courtroom, the lawyer yelled: "Here is the elephant, she's coming in. Who wants tickets? Come see the show." Id. Additionally, the lawyer made improper remarks about a thirteen-year-old girl who was his client and who had been arrested for prostitution, and in another instance, invited a woman who was opposing counsel to guess a fourteen-year-old client's bra size. See id. In separate occurrences, a friend warned the lawyer that his remarks were inappropriate, and opposing counsel asked him to refrain from vulgarity, but the lawyer continued his pattern of making inappropriate remarks. See id. at 9-10, 791 N.Y.S.2d 36.

In the attorney discipline proceeding, the lawyer requested a public censure, contending that his misconduct was mitigated by him cooperating with the Disciplinary Committee, beginning psychotherapy to address the problem, acknowledging his misconduct, and showing remorse by sending letters of apology after the disciplinary hearing. See id. at 8-9, 791 N.Y.S.2d 36. In contrast, the Disciplinary Committee recommended a six-month suspension, contending that a public censure would have been appropriate for "a single outburst or incident[,]" but a suspension was warranted for the lawyer's "pattern of abusive behavior[.]" Id. at 8, 791 N.Y.S.2d 36 (citations omitted).

***520** The Court adopted the Disciplinary Committee's recommendation, explaining that the lawyer's "persistent behavior warrant[ed] more than a minimum sanction[.]" Id. at 9-10, 791 N.Y.S.2d 36 (citations omitted). The Court observed that the lawyer's misconduct lasted for over a decade and did not involve isolated incidents. See id. at 8-9, 791 N.Y.S.2d 36. The Court determined that the lawyer's letters of apology did "little to ameliorate the harm inflicted by [his] abusive, vulgar[,] and demeaning comments, directed

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at female [opposing **962 counsel] and young clients[ ] alike." Id. at 9, 791 N.Y.S.2d 36.

We agree with Bar Counsel that, in certain respects, this attorney discipline proceeding is analogous to Kahn, but we conclude that the misconduct in this case is much more egregious. Like Kahn, Markey and Hancock engaged in a years-long pattern of regularly making remarks that were offensive or otherwise inappropriate, and that were "not limited to isolated incidents." Kahn, 16 A.D.3d at 8-9, 791 N.Y.S.2d 36. Similar to Kahn making offensive remarks about a woman who was opposing counsel as she entered the courtroom, id. at 9, 791 N.Y.S.2d 36, Markey and Hancock made offensive remarks in e-mails about an African American woman Chief Veterans Law Judge. [19] Just as Kahn asked women who were opposing counsel an inappropriate question laced with sexual innuendo, see id., Hancock spoke of women who were his colleagues in an inappropriate manner. [20] Although Kahn insulted woman in person rather than in e-mails to third parties, and Markey's and Hancock's offensive statements about women occurred in e-mails to others, the sentiment and disparagement of women is the same. The difference in the cases is that, *521 while Kahn made inappropriate and offensive remarks to and about women, see id., Markey and Hancock made a wide variety of contemptible and extremely offensive remarks about multiple groups of people, including women. In addition to disparaging and demeaning women in the e-mail exchanges, Markey and Hancock used vitriol to display bias and prejudice against many different groups of people who were not targeted by Kahn. The hearing judge expressly found that Markey did not appreciate the seriousness of his misconduct. And, like Kahn's letters of apology, Hancock's expression of remorse by no means rehabilitates the harm of his wide-ranging degrading and vulgar statements. Like Kahn's long-running misconduct, Markey's and Hancock's misconduct was persistent and certainly warrants more than a reprimand and, indeed, a sanction longer than a six-month suspension. See id. at 9-10, 791 N.Y.S.2d 36. On the whole, a comparison of this attorney discipline proceeding to Kahn persuades us that a more severe sanction—namely, an indefinite suspension—is warranted for Markey's and Hancock's misconduct. See id. at 10, 791 N.Y.S.2d 36. [21] An indefinite suspension protects the public's confidence in the legal profession **963 and deters similar misconduct by communicating that behavior of this type is simply not acceptable.

19 Kahn stated "[h]ere is the elephant, she's coming in. Who wants tickets? Come see the show." Kahn, 16 A.D.3d at 9, 791 N.Y.S.2d 36. Among other things, Markey referred to the African American woman Chief Veterans Law Judge as "a total b[****,]" and Hancock referred to her as a "Ghetto Hippopotamus[.]"

20 Kahn stated "Do you want to suck one of my b[***]s?", Kahn, 16 A.D.3d at 9, 791 N.Y.S.2d 36, and Hancock stated that a colleague had "nice [d***-sucking lip]s[,]" and with respect to another colleague that he would "[l]ike to have [his] pee pee introduced to her va jay jay."

21 In the filing regarding the recommendation as to the appropriate sanction, Bar Counsel contends that Markey's and Hancock's misconduct is similar not only to that in Kahn, 16 A.D.3d 7, 791 N.Y.S.2d 36, but also to the misconduct in Attorney Grievance Comm'n v. Marcalus, 442 Md. 197, 112 A.3d 375 (2015), in that the misconduct occurred over a protracted period of time. As Bar Counsel acknowledges, however, the misconduct in Marcalus is distinguishable. In Marcalus, id. at 200, 199, 112 A.3d at 376, this Court disbarred a lawyer who, among other misconduct, engaged in "sexting" with a female party in litigation in which he represented the opposing party. Significantly, the lawyer in Marcalus had been previously suspended from the practice of law twice. See id. at 210, 112 A.3d at 382. Because Marcalus involved a lawyer who had a history of prior attorney discipline, Marcalus does not provide guidance as to the appropriate sanction in this attorney discipline proceeding.

It is of no significance that, as Hancock emphasizes, his statements were never meant to be shared with anyone other than members of the FOH. In *522 Basinger, 441 Md. at 718, 109 A.3d at 1174, this Court explained that with respect to MLRPC 8.4(d), it does not matter whether a lawyer's misconduct was " 'not known or intended to be

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known publicly.' " Considering "whether other people knew of the lawyer's conduct ... would lead to the absurd result that whether a lawyer violated MLRPC 8.4(d) would depend on ... how much the lawyer's conduct was publicized." Id. at 716-17, 109 A.3d at 1173. This Court pointed out:

> Ultimately, it does not matter whether the lawyer's conduct was publicized before this Court considers the attorney discipline proceeding. By issuing an opinion that will become available to anyone with an internet connection, this Court will effectively inform the public of the lawyer's conduct. It would be ironic if we issued a publicly available opinion in which we recited the lawyer's conduct, then concluded that the lawyer's conduct could not have negatively impacted the public's perception of the legal profession because the public did not actually know of the lawyer's conduct.

Id. at 717 n.7, 109 A.3d at 1173 n.7.

We find no worth in Hancock's contention that, in light of Basinger, id. at 722, 109 A.3d at 1176, we should merely reprimand him. Both Markey's and Hancock's misconduct is far more egregious than Basinger's. Although Basinger made multiple offensive remarks, his insults were directed at one person and were limited to three letters that he sent over the course of four days. See id. at 708, 109 A.3d at 1167-68. By contrast, the e-mails in which Markey and Hancock participated spanned approximately seven years. Additionally, Markey and Hancock did not limit their expression of prejudice to one person, and instead demeaned and mocked a wide range of people in their e-mails. The hearing judge's opinion quotes ten different e-mail exchanges in which Markey and Hancock made remarks demonstrating bias or prejudice based upon race, sex, national origin, sexual orientation, or socioeconomic status. These statements included not only the obscenity "c[**]t[,]" which the lawyer in Basinger used, id. at 708, 109 A.3d at 1168, but also a wide array of other inappropriate and offensive remarks. As repugnant as Basinger's remarks were, ***523** they pale in comparison with some of the statements that Markey and Hancock made in their e-mails. Basinger offers no support whatsoever for Hancock's request for a reprimand.

Reprimanding either Markey or Hancock would be inconsistent with our goals of "protect[ing] the public and the public's confidence in the legal profession [by] deterring other lawyers from engaging in similar misconduct[.]" Slate, 457 Md. at 646, 180 A.3d at 155 (citation omitted). This is the second attorney discipline proceeding in which this Court has concluded that a lawyer violated MLRPC 8.4(e) —and, in the first one, Sanderson, 465 Md. at 74-75, 213 A.3d at 165, there were several additional MLRPC violations that warranted disbarment. Sanderson does not provide guidance as to the appropriate sanction in an attorney discipline proceeding like this one, in which the lawyers have violated MLRPC 8.4(d), 8.4(e), and 8.4(a). We agree with Bar Counsel that there is no case in Maryland that is directly on point with respect to the appropriate sanction.

We are essentially writing on a blank slate, and what we decide in this attorney discipline proceeding will become precedent ***964** for the sanctions imposed for similar misconduct by lawyers in the future. If we were to reprimand either Markey or Hancock, we would effectively be communicating to members of the Bar of Maryland and the public that making these types of inappropriate and offensive remarks is not serious misconduct. A reprimand or even a short suspension would beg the question of what, if any sanction, would be appropriate for a lawyer who violates MLRPC 8.4(e) by making a stray offensive comment, as opposed to many statements that are deliberate, egregious, and occur over a period of time. Markey's and Hancock's violations of MLRPC 8.4(e) were serious and flagrant, and warrant a sanction that makes clear to every Maryland lawyer and the public that such conduct is unacceptable. We must assure that lawyers do not evince bias or prejudice while acting in their professional capacities and that the principles of fairness and equal justice under the law are foremost in the legal profession.

***524** For the above reasons, we indefinitely suspend Markey and Hancock from the practice of law in Maryland. Markey is currently decertified and temporarily suspended from the practice of law in Maryland as a result of his failures to pay an annual assessment to the Client Protection Fund,

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provide information regarding his federal Tax Identification Number, and file a Pro Bono Legal Service Report and an Interest on Lawyers Trust Accounts Report for the period from January 1, 2018, through June 30, 2019. Markey's indefinite suspension will take effect immediately. Although Hancock is not currently suspended from the practice of law in Maryland, he is in inactive/retired status, and his indefinite suspension will also take effect immediately.

IT IS SO ORDERED; RESPONDENTS SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE 19-709(d), FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST JAMES ANDREW MARKEY AND CHARLES LEONARD HANCOCK.

McDonald, J., joins opinion and concurs.

McDonald, J., concurring

I join the opinion of the Court in this case. I add a few words to emphasize the seriousness of this case in that it involves government attorneys – one an administrative judge. As the Majority Opinion outlines, the conduct involved email communications during the attorneys' employment over government information systems.

Every Maryland attorney takes an oath to "at all times demean myself fairly and honorably as an attorney" and to uphold the State and federal constitutions. Maryland Code, Business Occupations & Professions Article, § 10-212. The lawyer's oath is not a rote formula recited solely to cross the threshold of bar admission, but a pledge for the duration of one's career. Those lawyers privileged to be in public service ***525** have a special obligation to exemplify those principles of fairness, probity, and adherence to constitutional values.

In the context of a disciplinary case involving a Deputy State's Attorney, this Court observed that the attorney was to be held to a higher standard of conduct due to his public position. *Attorney Grievance Comm'n v. McDonald*, 437 Md. 1, 46, 85 A.3d 117 (2014) (citing an American Bar Association publication that relates the disciplinary sanction to be imposed on a government attorney to the failure to maintain the public trust). While that case concerned a prosecutor, that norm applies to all government attorneys who exercise, or ****965** advise the exercise of, the sovereign powers of government – including those involved in the veterans' benefits system. *Cf. Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (in the veterans' benefits system, "the importance of systemic fairness and the appearance of fairness carries great weight"). The conduct here was contrary to the lawyer's oath and gave, at the least, the appearance that fairness and decency did not animate those charged with this important public service.

ORDER

Upon consideration of the Motion for Reconsideration of Effective Date of Sanction Imposed filed by Attorney Grievance Commission of Maryland, Petitioner, on July 16, 2020, and the lack of any response thereto, it is this 6th day of August, 2020,

ORDERED, by the Court of Appeals of Maryland, that the last two sentences of the last paragraph on page 41 of the opinion are replaced with the following sentences:

> Markey's indefinite suspension will take effect immediately. Although Hancock is not currently suspended from the practice of law in Maryland, he is in inactive/retired status, and his indefinite suspension will also take effect immediately.

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438 Md. 151
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND
v.
Robert John GREENLEAF.

Misc. Docket AG No. 2, Sept. Term, 2013.
|
May 16, 2014.

Synopsis

Background: Lawyer disciplinary proceedings were instituted against attorney who solicited for sexual acts a person whom attorney believed to be under the age of consent. The Circuit Court, Kent County, Paul M. Bowman, J., issued opinion finding that attorney had violated multiple professional rules.

Holdings: The Court of Appeals, Watts, J., held that:

evidence was sufficient to establish that attorney attempted to solicit sex from a person he believed to be a 14- or 15-year-old girl;

attorney's conduct violated professional rules; and

attorney's misconduct warranted disbarment.

Disbarment ordered.

Attorneys and Law Firms

****1067** Lydia E. Lawless, Assistant Bar Counsel (Glenn M. Grossman, Bar Counsel, Attorney Grievance Commission of Maryland), for Petitioner.

Robert John Greenleaf, for Respondent.

Argued before BARBERA, C.J., HARRELL, BATTAGLIA, GREENE, ADKINS, McDONALD and WATTS, JJ.

Opinion

WATTS, J.

***153** This attorney discipline proceeding concerns a Maryland lawyer who solicited for sexual acts a person whom the lawyer believed to be under the age of consent.

Robert John Greenleaf ("Greenleaf"), Respondent, while serving as the Chief Deputy Clerk of the Court of Special Appeals of Maryland, used the Internet to solicit for sexual acts a law enforcement officer who was posing as a fourteen-year-old or fifteen-year-old girl. Greenleaf's actions came to the attention of the Attorney Grievance Commission ("the Commission"), Petitioner.

On March 14, 2013, in this Court, Bar Counsel filed a "Petition for Disciplinary or Remedial Action" against Greenleaf, charging him with violating Maryland Lawyers' Rule of Professional Conduct ("MLRPC") 8.4 (Misconduct). On March 18, 2013, this Court assigned this attorney discipline ***154** proceeding to the Honorable Paul M. Bowman ("the hearing judge") of the Circuit Court for Kent County.

On July 25, 2013, the hearing judge conducted a hearing. On September 19, 2013, the hearing judge filed in this Court an opinion including findings of fact and conclusions of law, concluding that Greenleaf had violated MLRPC 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

On April 8, 2014, we heard oral argument. For the below reasons, we disbar Greenleaf.

BACKGROUND

In his opinion, the hearing judge found the following facts, which we summarize.

On November 8, 1979, this Court admitted Greenleaf to the Bar of Maryland. Between 1987 and 2004, Greenleaf served as an Assistant State's Attorney for Dorchester County, an Assistant State's Attorney for Caroline County, an interim State's Attorney for Caroline County, and a Senior Assistant State's Attorney for Dorchester County. On January 6, 2004, Greenleaf became the Chief Deputy Clerk of the Court of Special Appeals. Greenleaf's office ****1068** was located at the Robert C. Murphy Courts of Appeal Building.

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On March 8, 2010, Detective Sergeant Louis Gary Yamin ("DS Yamin") of the Baltimore Police Department was working undercover for the Cyber and Electronic Crimes Unit. DS Yamin had a Yahoo Messenger account with the username "ravens_ girl2003," which was connected to a Yahoo profile for a female named "Beth." On March 8, 2010, as "Beth," DS Yamin entered a Yahoo Messenger chat room entitled "Maryland Romance." In the chat room, a person with the username "delmarvan19901" initiated a private chat with "Beth," who almost immediately sent the message "14/f/balto. md[,]" which is Internet language for identifying oneself as a fourteen-year-old female in the Baltimore area. "delmarvan19901" began discussing sexual topics. "Beth" sent "delmarvan19901" ***155** two photographs that depicted a young teenage girl. "delmarvan19901" sent a photograph of himself.

In addition to sending the two photographs, "Beth" e-mailed "delmarvan19901," who sent a reply e-mail. DS Yamin learned that Greenleaf was using the IP address from which "delmarvan19901" had sent the reply e-mail. The IP address belonged to the Maryland Judiciary. DS Yamin matched the photograph that "delmarvan 19901" had sent with a photograph of Greenleaf from the Motor Vehicle Administration's database. Thus, it was established that while the Chief Deputy Clerk of the Court of Special Appeals, Greenleaf used a State-owned computer in the Robert C. Murphy Courts of Appeal Building to communicate with "Beth."

Greenleaf believed that "Beth" was a fourteen-year-old or a fifteen-year-old girl.[1] "Beth" repeatedly referred to her age and stated that she was a high school student. The hearing judge expressly rejected Greenleaf's allegation that he believed that "Beth" was an adult who was "role-playing" by posing as a fourteen-year-old or a fifteen-year-old girl.

1 It is undisputed that Greenleaf was aware "Beth" had a birthday in May. The record reflects that on May 2, 2010, Greenleaf greeted "Beth" in a chat stating "hi birthday girl." The hearing judge found that May 20, 2010, was established to be "Beth's" fifteenth birthday.

On approximately one hundred fifty separate dates, Greenleaf and "Beth" e-mailed and/or chatted with each other. On nearly half of those dates, Greenleaf used his computer at the Robert C. Murphy Courts of Appeal Building to communicate with "Beth."

Greenleaf's and "Beth's" conversations were "consistently sexually explicit." For example, Greenleaf asked "Beth" to describe her pubic hair, sexual history, bra size, and whether she was taking birth control.[2] Greenleaf often discussed arranging a meeting with "Beth" and described the sexual acts in which he wanted to engage with "Beth." Greenleaf ***156** "groomed" "Beth" for sexual activity by telling "Beth" that she seemed more mature than a fourteen-year-old or fifteen-year-old girl.

2 The record reflects that on March 19, 2010, Greenleaf asked: "Beth, do you want to have sex with me?"

In December 2010, on four separate occasions, Greenleaf sent "Beth" links to pornographic videos. Greenleaf last communicated with "Beth" on January 25, 2011. Finally, in January 2011, Greenleaf was arrested and was placed on administrative leave. On April 1, 2011, Greenleaf was permitted to retire from his position as the Chief Deputy Clerk of the Court of ****1069** Special Appeals. On May 31, 2012, Greenleaf tendered an *Alford* plea[3] to a charge of attempting to violate Md.Code Ann., Crim. Law (2002, 2012 Repl. Vol.) ("CR") § 11–203 (Sale or Display of Obscene Item to Minor). Greenleaf received probation before judgment.

3 "An *Alford* plea [ ] lies somewhere between a plea of guilty and a plea of *nolo contendere*. Drawing its name from *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), such a plea is a guilty plea containing a protestation of innocence." *Bishop v. State,* 417 Md. 1, 19, 7 A.3d 1074, 1085 (2010) (internal quotation marks and some citations omitted).

STANDARD OF REVIEW

In an attorney discipline proceeding, this Court reviews for clear error the hearing judge's findings of fact, and reviews without deference the hearing judge's conclusions of law. *See* Md. R. 16–759(b)(2)(B) ("The Court shall give due regard to the opportunity of the hearing judge to assess the credibility of witnesses."); *Attorney Grievance Comm'n v. Reno,* 436 Md. 504, 508, 83 A.3d 781, 783 (2014) ("[T]his Court reviews for clear error a hearing judge's findings of fact[.]"); Md. R. 16–759(b)(1) ("The Court of Appeals shall review de novo the [hearing] judge's conclusions of law."). This Court

determines whether clear and convincing evidence establishes that a lawyer violated the MLRPC. *See* Md. R. 16–757(b) ("The [Commission] has the burden of proving the averments of the petition by clear and convincing evidence.").

*157 DISCUSSION

A. Findings of Fact

The Commission does not except to any of the hearing judge's findings of fact. Greenleaf excepts to the hearing judge's finding that he believed that "Beth" was a fourteen-year-old or a fifteen-year-old girl. [4]

[4] Greenleaf also excepts to the hearing judge's finding that he sent "Beth" links to pornographic videos. We do not rule on the exception because, in the analysis, we do not address the links to pornographic videos found to have been sent by Greenleaf.

We overrule Greenleaf's exception, as the hearing judge did not clearly err, or err at all, in finding that Greenleaf believed that "Beth" was a fourteen-year-old or a fifteen-year-old girl. The record unequivocally demonstrates that "Beth": (1) identified herself as a fourteen-year-old girl; (2) repeatedly referred to her age; (3) stated that she was a high school student; and (4) sent two photographs that depicted a young teenage girl. [5] Although Greenleaf told "Beth" that he thought she was a woman in her thirties, the hearing judge credited DS Yamin's opinion that Greenleaf made the statement as part of his grooming "Beth" for sexual activity, not because Greenleaf actually believed that "Beth" was a woman in her thirties. The record is replete with evidence sufficient to establish that "Beth" identified herself as a fourteen-year-old girl; and, thus, there was sufficient evidence for the hearing judge to have independently rejected Greenleaf's claim to have believed Beth a "woman." Moreover, although a person must state that he or she is an adult to enter a Yahoo Messenger chat room, common sense dictates that a minor could enter a Yahoo Messenger chat room **1070 by falsely stating that he or she is an adult. We find no basis to disturb the hearing judge's express rejection of Greenleaf's allegation that he believed *158 that "Beth" was an adult who was "role-playing" by posing as a fourteen-year-old or a fifteen-year-old girl.

[5] The two photographs had been taken of a woman who was approximately thirty-years-old; however, the two photographs had been digitally altered so that they depicted a young teenage girl. We do not disturb the hearing judge's express rejection of Greenleaf's allegation that he had believed that the two photographs depicted a woman who was approximately thirty-years-old.

In addition to excepting to certain findings of fact, in an apparent attempt to establish mitigating circumstances, Greenleaf alleges additional facts: (1) he performed well as the Chief Deputy Clerk of the Court of Special Appeals; (2) at the time of his misconduct, he had just returned from sick leave, and was "trouble[ed]" at work because he had been transferred to a secluded office that was away from other employees; (3) he completed "mental health counseling" as a condition of probation; (4) he "suffered ignominy" because of his misconduct; and (5) he "has shown remorse" for his misconduct. The hearing judge did not find that Greenleaf: (1) performed well as the Chief Deputy Clerk of the Court of Special Appeals; (2) suffered from any personal or emotional problems; (3) attempted any kind of rehabilitation; (4) endured any embarrassment; or (5) showed any remorse. As this Court stated in *Attorney Grievance Comm'n v. Davy,* 435 Md. 674, 694, 80 A.3d 322, 333–34 (2013):

> [A]bsent indications that [a] hearing judge did not consider purported evidence of mitigating factors, where a hearing judge omits the purported evidence of mitigating factors from [the hearing judge's] opinion, [this Court] may interpret the omission to mean that the hearing judge did not credit the purported evidence of mitigating factors.

(Citation and internal quotation marks omitted). Here, the hearing judge neither credited nor rejected the alleged facts. [6] The record demonstrates that the hearing judge allowed Greenleaf to testify on his own behalf and proffer at length. We see no indication that the hearing judge did not consider Greenleaf's remarks. Given the nature of Greenleaf's proffer and testimony—*i.e.,* he performed well at work, he was in a

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secluded office, and he suffered embarrassment—it is evident ***159** that the hearing judge did not find this information to be mitigating. Even if the facts that Greenleaf alleges were accurate, it strains credulity that some of them—such as Greenleaf's work performance or his being moved to another office—would constitute mitigating factors. Thus, we do not adopt as mitigating factors the facts that Greenleaf alleges.

6 *Cf.* *Davy, id.* at 694, 80 A.3d at 333 ("We do recommend that, in an opinion in an attorney discipline proceeding, a hearing judge discuss —and either credit **or** discredit—all purported evidence of mitigating factors." (Emphasis in original)).

B. Conclusions of Law

The Commission does not except to any of the hearing judge's conclusions of law. Greenleaf excepts to the hearing judge's conclusion that he violated CR § 3–324 (Sexual Solicitation of Minor).[7] We overrule Greenleaf's exception and uphold all of the hearing judge's conclusions of law as to the MLRPC.

7 Greenleaf also excepts to the hearing judge's conclusions that he violated CR § 7–302 (Unauthorized Access to Computers and Related Material) and CR § 11–203 (Sale or Display of Obscene Item to Minor). We do not rule on the exceptions because, in our analysis, we rely solely on CR § 3–324.

MLRPC 8.4(b) (Criminal Act)

"It is professional misconduct for a lawyer to ... commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]" MLRPC 8.4(b).

****1071** Under CR § 3–324(b), "[a] person may not, with the intent to commit a violation of ... [CR] § 3–307[,] ... knowingly solicit ... a law enforcement officer posing as a minor[ ] to engage in activities that would be unlawful for the person to engage in under ... [CR] § 3–307[.]" Under CR § 3–307(a)(4), "[a] person may not ... engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old[.]" Under CR § 3–307(a)(5), "[a] person may not ... engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old."

***160** Here, clear and convincing evidence supports the hearing judge's conclusion that Greenleaf violated MLRPC 8.4(b) by violating CR § 3–324(b).[8] When he was at least twenty-one years old, Greenleaf knowingly solicited DS Yamin (who was posing as "Beth," a fourteen-year-old or fifteen-year-old girl) for sexual acts and/or vaginal intercourse; for example, Greenleaf asked: "Beth, do you want to have sex with me?"[9] Violating CR § 3–324(b) undeniably adversely reflects on a lawyer's fitness to continue to practice law.

8 Greenleaf's *Alford* plea was to a charge of violating CR § 11–203. That Greenleaf was not convicted of violating CR § 3–324(b) is of no consequence because a "conviction is not required to establish that an attorney violated M[L]RPC 8.4(b)RPC 8.4(b)[.]" *Attorney Grievance Comm'n v. Tanko,* 427 Md. 15, 47, 45 A.3d 281, 300 (2012) (citation omitted).

9 Although Greenleaf believed that "Beth" was a fourteen-year-old or fifteen-year-old girl, CR § 3–324(b) does not require that a person believe that the person being solicited is a minor; instead, CR § 3–324(b) simply requires that the person being solicited is either "a minor[ ] or a law enforcement officer posing as a minor[.]"

We reject Greenleaf's ludicrous contention that he did not violate CR § 3–324(b) because he did not intend to violate CR § 3–307 by immediately engaging in intercourse with "Beth" "then and there[,]" but instead was "prepar[ing] for the *future* [.]" (Emphasis in original). CR § 3–324(b) simply requires that, at the time of the solicitation, a person intends to violate CR § 3–307 at some point in the future—even if the person does not intend to immediately violate CR § 3–307.

MLRPC 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation)

"It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation[.]" MLRPC 8.4(c).

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Here, clear and convincing evidence supports the hearing judge's conclusion that Greenleaf violated MLRPC 8.4(c) by using his computer at the Robert C. Murphy Courts of Appeal Building to communicate with "Beth." Greenleaf's use of the computer in the workplace during work time to violate CR ***161** § 3–324(b) constituted conduct involving dishonesty. The Court of Special Appeals would neither expect, condone, nor excuse the use of a court computer for the purpose of solicitation of a minor for sex. Such egregious conduct in violation of a criminal statute designed to protect children clearly involved dishonesty as to Greenleaf's appropriate use of time and equipment. Greenleaf could not have reasonably expected to disclose this activity and remain employed as the Chief Deputy Clerk of the Court, or, for that matter, employed in any capacity by the Court. That said, a lawyer may, at times, make incidental personal use of computer equipment in the workplace without violating MLRPC 8.4(c). Use of computer equipment on multiple occasions—for nearly half of the one hundred fifty dates spanning almost eleven months, from March 8, 2010 through January 25, 2011—to commit the crime of solicitation a minor ****1072** for sex involved dishonesty as to Greenleaf's employer, the Maryland Judiciary (specifically, dishonesty as to his workplace activities). [10] In sum, it is the extensive use of the computer over a protracted course of time ***162** and that Greenleaf clandestinely used the computer to commit a crime, the solicitation of a minor—*i.e.,* that he secretly committed an offense in the workplace for which he knew his employment could be terminated—that causes us to conclude that his conduct constituted dishonesty in violation of MLRPC 8.4(c). [11]

10 Merriam–Webster's Dictionary defines "dishonesty" as a "lack of honesty or integrity" and a "disposition to defraud or deceive." Merriam–Webster's Online Dictionary (2014), *available at* < http://www.merriam-webster.com/dictionary/dishonesty>. Black's Law Dictionary, in turn, defines a "dishonest act" by reference to a "fraudulent act," which is described as "[c]onduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude." Black's Law Dictionary 501, 687 (8th ed. 2004). In *Attorney Grievance Comm'n v. Dore,* 433 Md. 685, 708, 73 A.3d 161, 174 (2013), the Honorable Sally D. Adkins explained that dishonesty under MLRPC 8.4(c) does not require a specific intent to deceive, stating:

> [I]n the context of [MLRPC] 8.4(c), there is a distinction between fraud and deceit on the one hand, and dishonesty and misrepresentation on the other hand.... [W]e made clear that specific intent [to deceive] is not a necessary ingredient of dishonesty or misrepresentation.

(Citations and internal quotation marks omitted). In this case, although Greenleaf did not make a false statement, the record demonstrates that his conduct involved dishonesty, as Greenleaf was certainly not candid with his employer about his extensive nefarious activities in the workplace. Indeed, Greenleaf, on nearly one half of one hundred fifty occasions, used his employer's computer to commit a crime while holding himself out to his employer to be an employee who was using his time to perform the duties of the employer in the workplace.

11 In an analogous case, in *Lawyer Disciplinary Bd. v. Markins,* 222 W.Va. 160, 663 S.E.2d 614, 616 (2008), an attorney violated West Virginia Lawyers' Rule of Professional Conduct ("WVLRPC") 8.4(c) (which is identical to MLRPC 8.4(c)) by accessing his wife's work e-mail account without her permission or knowledge, as well as the work e-mail accounts of several of the wife's co-workers, after suspecting that his wife was engaging in an extramarital affair with one of her clients. As a result, the West Virginia Lawyer Disciplinary Board ("the Board") charged the attorney with violating WVLRPC 8.4(c) on the basis that the attorney "engaged in the repetitive unauthorized access of [the wife's and co-workers'] e-mail accounts by improperly using various e-mail account passwords[.]" *Id.* at 618. Following a disciplinary hearing, the Board found that the attorney violated WVLRPC 8.4(c), and the attorney did not except to that conclusion. *Markins,* 663 S.E.2d at 618–19. Because the attorney did not except to the Board's conclusion, the West Virginia Supreme Court of Appeals did not analyze the basis for concluding that the unauthorized access as a violation of WVLRPC 8.4(c), but instead accepted the conclusion and imposed the sanction recommended by the Board. *Id.* at 619–22.

MLRPC 8.4(d) (Conduct Prejudicial to the Administration of Justice)

"It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice[.]" MLRPC 8.4(d). Generally, a lawyer violates MLRPC 8.4(d) where the lawyer's conduct negatively "impacts ... the public's perception ... of the courts or legal profession." *Reno,* 436 Md. at 509, 83 A.3d at 784 (citation and internal quotation marks omitted).

Here, clear and convincing evidence supports the hearing judge's conclusion that Greenleaf violated MLRPC 8.4(d). Greenleaf solicited for sexual acts a person whom he believed to be a fourteen-year-old or fifteen-year-old girl. Greenleaf was arrested and charged, and entered an *Alford* plea to a charge of attempting to violate CR § 11–203. Greenleaf's misconduct ****1073** tarnished the public's perception of both the legal ***163** profession and Greenleaf's employer, the Maryland Judiciary. [12]

12 At oral argument, Judge Lynne A. Battaglia directed Greenleaf's attention to the hearing judge's conclusion that he had violated MLRPC 8.4(d). Greenleaf replied that, while engaged in contact with "Beth," he did not tell "Beth" that he was a lawyer or a judicial employee. As Judge Battaglia effectively pointed out, the public has nonetheless learned that, while the Chief Deputy Clerk of the Court of Special Appeals, Greenleaf engaged in egregious misconduct, using Judiciary computer equipment in the Robert C. Murphy Courts of Appeal Building.

MLRPC 8.4(a) (Violating the MLRPC)

"It is professional misconduct for a lawyer to ... violate ... the" MLRPC. MLPRC 8.4(a).

Here, clear and convincing evidence supports the hearing judge's conclusion that Greenleaf violated MLRPC 8.4(a). As discussed above, Greenleaf violated MLRPC 8.4(b), 8.4(c), and 8.4(d).

C. Sanction

The Commission recommends that we disbar Greenleaf. Greenleaf asks that we reprimand him, "or, at worst," indefinitely suspend him from the practice of law with the right to apply for reinstatement after one year.

This Court sanctions a lawyer not "to punish the" lawyer, but instead "to protect the public and the public's confidence in the legal profession [.]" *Attorney Grievance Comm'n v. Worthy,* 436 Md. 633, 643, 84 A.3d 113, 119 (2014) (citation and internal quotation marks omitted). This Court protects the public by: (1) "deterr[ing]" other lawyers from engaging in similar misconduct; and (2) suspending or disbarring a lawyer who is "unfit to continue" to practice law. *Attorney Grievance Comm'n v. Gerace,* 433 Md. 632, 649, 72 A.3d 567, 577 (2013) (citation omitted).

In determining an appropriate sanction, this Court considers: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's ***164** misconduct; and (d) the existence of aggravating or mitigating factors." American Bar Association, *Standards for Imposing Lawyer Sanctions* ("ABA Standards") at III.C.3.0 (1992) (paragraph breaks omitted). [13]

13 "In determining an appropriate sanction," this Court often considers the ABA Standards. *Attorney Grievance Comm'n v. Gray,* 436 Md. 513, 522, 83 A.3d 786, 791 (2014).

> Aggravating factors include: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the [Commission]; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution; [and] (k) illegal conduct[.]
> ABA Standards at III.C.9.22 (paragraph breaks omitted).

> Mitigating factors include: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely

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> good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to [the Commission] or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; ****1074** (i) mental disability or chemical dependency including alcoholism or drug abuse when: (1) there is medical evidence that the [lawyer] is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the [lawyer]'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[;] (j) delay in disciplinary proceedings; (k) imposition of other ***165** penalties or sanctions; (*l*) remorse; [and] (m) remoteness of prior offenses.

ABA Standards at III.C.9.32 (paragraph breaks omitted). This Court has disbarred lawyers who violated MLRPC 8.4(b) by committing crimes that adversely reflected on the lawyers' fitness to continue to practice law, even if: (1) the lawyers did not violate MLRPC 8.4(c); and (2) this Court noted few (if any) aggravating factors. In *Attorney Grievance Comm'n v. Sheinbein,* 372 Md. 224, 261, 249–50, 812 A.2d 981, 1002, 995–96 (2002), without noting any aggravating factors, this Court disbarred a lawyer who committed the crime of obstructing and hindering a police officer by helping a murder suspect flee the country. Similarly, in *Attorney Grievance Comm'n v. Painter,* 356 Md. 293, 307, 305, 739 A.2d 24, 32, 31 (1999), this Court disbarred a lawyer who committed the crimes of battery and illegally transporting a handgun. The lawyer had abused his spouse and child. *See id.* at 305, 739 A.2d at 31. This Court stated: "[D]omestic violence is a serious problem in our society." *Id.* at 302, 739 A.2d at 29 (citation omitted). This Court noted one aggravating factor: a prior disciplinary offense, for which the lawyer received "a private reprimand[.]" *Id.* at 301, 739 A.2d at 29.

In another case in which a lawyer committed a crime, *Attorney Grievance Comm'n v. Dechowitz,* 358 Md. 184, 193, 186, 191, 747 A.2d 657, 661, 658, 660 (2000), without noting any aggravating factors, this Court disbarred a lawyer who committed the crime of possession of marijuana with the intent to distribute, and thus "was a drug dealer." In *Dechowitz, id.* at 192, 193, 747 A.2d at 661, this Court accepted the lawyer's concession that he had violated MLRPC 8.4(c), and stated that possession of drugs with the intent to distribute "generally results in disbarment."

Here, as to the duty violated and Greenleaf's mental state, Greenleaf intentionally solicited for sexual acts "Beth," whom he believed to be a fourteen-year-old or fifteen-year-old girl. In other words, Greenleaf deliberately preyed on, and intended ***166** to violate, a person whom he believed to be under the age of consent.

As to the potential injury caused by Greenleaf's misconduct, Greenleaf could have solicited a minor for sexual acts or sexually abused a minor if "Beth" had actually been a minor. In other words, Greenleaf had the mindset to solicit, violate, mentally scar, and destroy the innocence of a child. In this case, no injury actually occurred due to Greenleaf's misconduct only because "Beth" was not in reality a minor capable of being injured by Greenleaf.

Eight aggravating factors accompany Greenleaf's misconduct. First, Greenleaf obviously had the selfish motive of sexual gratification. Second and third, Greenleaf engaged in a pattern of egregious misconduct and committed multiple offenses by communicating with "Beth" on approximately one hundred fifty separate dates. Fourth, Greenleaf has refused to acknowledge his misconduct's wrongful nature; indeed, ****1075** Greenleaf: (a) outrageously asks us to give him "credit ... for not taking matters further" with "Beth"; [14] (b) attempts to shift the blame for his misconduct to his employer by contending that he was "trouble[ed]" at work because he had been transferred to a secluded office that was away from other employees; and (c) belittles his misconduct's egregiousness in a manner that is woefully inappropriate under the instant circumstances, *e.g.,* indicating that his actual plans for "Beth" were for the future. Fifth, Greenleaf's victim, a purported minor, was vulnerable. Sixth, Greenleaf has

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substantial experience in the practice of law; he has been a lawyer for over thirty years, was a prosecutor for seventeen years, and at the time of the offense was serving as the Chief Deputy Clerk for the Court of Special Appeals. Seventh, Greenleaf has shown indifference to rehabilitating himself; the hearing judge did not find that Greenleaf had made any attempt to seek professional ***167** help. Eighth, Greenleaf engaged in illegal—indeed, criminal—conduct.

14 Disturbingly, Greenleaf goes so far as to state: "As [Greenleaf]'s record of accomplishments show, he has the capability and intelligence to arrange an assignation if he so desired."

Only one mitigating factor accompanies Greenleaf's misconduct: the absence of a prior disciplinary record. We reject Greenleaf's contention that his misconduct is mitigated by such circumstances as the lack of: (1) in-person contact between himself and "Beth"; (2) child pornography; and (3) misconduct that arose out of representation of a client. A lawyer's misconduct is not mitigated by the lawyer's refraining from engaging in even more egregious and inappropriate misconduct. Similarly, we reject Greenleaf's contention that his misconduct is mitigated by other penalties in the form of being placed on probation and leaving his position as the Chief Deputy Clerk of the Court of Special Appeals. Receiving a sentence and losing one's job are the natural and foreseeable consequences of committing a crime, and crimes against children are among the most heinous crimes of all. Here, Greenleaf did not lose his job; he was permitted to retire. Greenleaf's misconduct is not mitigated by his being placed on probation or leaving his job.

We are more than satisfied that disbarment is the appropriate sanction for Greenleaf's egregious misconduct. Greenleaf deliberately solicited and preyed on a person whom he believed to be under the age of consent. Greenleaf had the intent to violate, mentally scar, and destroy the innocence of a child. Greenleaf is a sexual predator who is a danger to the public and is "unfit to continue" to practice law. *Gerace,* 433 Md. at 649, 72 A.3d at 577 (citation omitted).

Sheinbein, Painter, and *Dechowitz* lead to the inescapable conclusion that disbarment is the appropriate sanction for Greenleaf's egregious misconduct. If disbarment is the appropriate sanction for an obstructionist, a domestic abuser, and a drug dealer, then disbarment certainly is also the appropriate sanction for a sexual predator like Greenleaf. The solicitation of minors is a deplorable crime that cannot be tolerated in our society, much less tolerated when committed by an attorney, employed by the Judiciary and using State-owned computer ***168** equipment to commit the crime in the workplace. *Cf. Painter,* 356 Md. at 302, 739 A.2d at 29 ("[D]omestic violence is a serious problem in our society." (Citation omitted)).

Our conclusion that disbarment is the appropriate sanction for Greenleaf's egregious misconduct is unassailable, given ****1076** that: (1) Greenleaf violated MLRPC 8.4(c) by using his computer at the Robert C. Murphy Courts of Appeal Building to communicate with "Beth"; (2) Greenleaf communicated with "Beth" on approximately one hundred fifty separate dates; (3) there are eight aggravating factors, including a pattern of misconduct, refusal to acknowledge the wrongful nature of his misconduct, and indifference to rehabilitation; (4) the only mitigating factor is the absence of a prior disciplinary record; and (5) the Commission recommends that we disbar Greenleaf.

Greenleaf's reliance on *Attorney Grievance Comm'n v. Childress,* 364 Md. 48, 770 A.2d 685 (2001) is untenable. In *Childress, id.* at 64, 67, 52, 770 A.2d at 695, 696, 688, this Court adopted the Commission's recommendation by indefinitely suspending from the practice of law, with the right to apply for reinstatement after one year, a lawyer who violated MLRPC 8.4(d) by using the Internet to solicit minors for sex. [15] This Court acknowledged that the lawyer's "misconduct seriously undermined public confidence in the legal profession. The public is becoming increasingly aware that preying by adults on children via the Internet is a grave social problem." *Childress,* 364 Md. at 65, 770 A.2d at 695. Unlike in the instant attorney discipline proceeding, in *Childress,* this Court did not identify any aggravating factors, and we found the following mitigating factors: (1) the absence of a prior disciplinary record; (2) remorse; and (3) mental disability in the form of "major depressive episodes and ... obsessive compulsive disorder [,]" and rehabilitation in the form of treatment by "a board-certified psychiatrist," who opined that: (a) the treatment ***169** was "a 'rousing success' "; (b) the lawyer was " 'a different person' in comparison to when [the psychiatrist] first met" the lawyer; (c) "[t]here ha[d] been a 'tremendous decrease in [the lawyer's] obsessive-compulsive symptoms' "; (d) "there was 'an insignificant risk' that [the lawyer] would again" solicit minors for sex; and (e) the lawyer "d[id] not meet the DSM–IV [16] criteria for

pedophilia or any other sexual disorder." *Id.* at 65–66, 770 A.2d at 695–96.

15 In *Childress,* 364 Md. at 67, 770 A.2d at 696–97, this Court mandated that any application for reinstatement "address [the lawyer]'s then current psychiatric evaluation and describe any psychiatric treatment since the hearing[.]"

16 "DSM–IV" stands for the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition.

To be perfectly clear, we caution that *Childress* does not stand for the proposition that, generally, solicitation of a minor merits a sanction that is less than disbarment. "The severity of the sanction depends on the circumstances of each case ... and any mitigating factors." *Attorney Grievance Comm'n v. Bocchino,* 435 Md. 505, 536, 80 A.3d 222, 240 (2013) (citation and internal quotation marks omitted). Indeed, in *Childress,* this Court stated: (1) "we must ... consider certain circumstances ... that mitigate the sanction[,]" *Childress,* 364 Md. at 65, 770 A.2d at 695; and (2) an indefinite suspension was the appropriate sanction "[i]n light of all of the circumstances, including the recommendation of" the Commission. *Id.* at 67, 770 A.2d at 696.

For a myriad of critical reasons, we distinguish *Childress* from the instant attorney discipline proceeding. First, in *Childress,* the lawyer did not violate MLRPC 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation); by contrast, here, Greenleaf violated MLRPC 8.4(c) by using his computer at the Robert C. Murphy Courts of Appeal Building to solicit ****1077** "Beth." Second, in *Childress,* this Court did not find any aggravating factors; by contrast, here, we find eight aggravating factors, including a pattern of misconduct, refusal to acknowledge the wrongful nature of his misconduct, and indifference to rehabilitation. Third, in *Childress,* 364 Md. at 65–66, 770 A.2d at 695–96, this Court found three mitigating factors: (1) the absence of a prior disciplinary record; (2) remorse; and (3) mental disability in the form of "major depressive episodes ***170** and ... obsessive compulsive disorder[,]" and rehabilitation in the form of treatment by "a board-certified psychiatrist"; by contrast, here, the only mitigating factor is the absence of a prior disciplinary record. Fourth, in *Childress, id.* at 64, 770 A.2d at 695, oddly, the Commission did not recommend disbarment; by contrast, here, the Commission recommends disbarment.

Fifth—and perhaps most importantly—in *Childress, id.* at 64, 770 A.2d at 694, although this Court held that the lawyer violated a Virginia statute that criminalized solicitation of minors, [17] this Court did not determine whether the lawyer violated MLRPC 8.4(b) (Criminal Act). In *Childress, id.* at 51, 770 A.2d at 687, the Commission charged the lawyer with violating only MLRPC 8.4(d); thus, this Court did not determine whether the lawyer violated any other MLRPC. In other words, in *Childress,* this Court was silent as to whether the lawyer committed a criminal act that adversely reflected on the lawyer's fitness to continue to practice law. Accordingly, in *Childress,* this Court did not apply the proposition that, generally, disbarment is the appropriate sanction for a lawyer's misconduct where the lawyer commits a crime that establishes that the lawyer is unfit to continue to practice law. *See* *Sheinbein,* 372 Md. at 261, 249–50, 812 A.2d at 1002, 995–96 (This Court disbarred a lawyer who committed the crime of obstructing and hindering a police officer by helping a murder suspect flee the country.); *Painter,* 356 Md. at 307, 305, 739 A.2d at 32, 31 (This Court disbarred a lawyer who committed the crimes of battery and illegally transporting a handgun; the lawyer had abused his spouse and child.); *Dechowitz,* 358 Md. at 193, 186, 747 A.2d at 661, 658 (This Court disbarred a lawyer who committed the crime of possession of marijuana with the intent to distribute.). By contrast, here, Greenleaf violated MLRPC 8.4(b) by violating CR § 3–324(b); in other ***171** words, Greenleaf committed a crime that establishes that he is unfit to continue to practice law. [18]

17 The General Assembly of Maryland did not enact CR § 3–324 until years after the lawyer in *Childress* used the Internet to solicit minors for sex.

18 In addition to *Childress,* Greenleaf relies on the Commission's 2011 reprimand of an attorney "for conduct implicating [CR] § 11–306" (House of Prostitution). A reprimand by the Commission does not constitute precedent, and thus does not bind this Court in subsequent attorney discipline proceedings.

Although Greenleaf does not expressly rely on either case, we discuss and distinguish *Attorney Grievance*

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Comm'n v. Thompson, 367 Md. 315, 329–31, 786 A.2d 763, 772–73 (2001) and *Attorney Grievance Comm'n v. Mitchell,* 308 Md. 653, 655, 521 A.2d 746, 747–48 (1987), in which this Court adopted the Commission's recommendations by indefinitely suspending lawyers who violated MLRPC 8.4(b) (or the predecessor to MLRPC 8.4(b)). In *Thompson,* 367 Md. at 329, 786 A.2d at 772, the lawyer stalked a thirteen-year-old boy. This Court noted only one aggravating factor: vulnerability of the victim. *See id.* at 331, 786 A.2d at 773. This Court noted that the following four mitigating factors "prevented disbarment": ****1078** (1) the absence of a prior disciplinary record; (2) remorse; (3) cooperative attitude towards the attorney discipline proceeding; and (4) mental disability in the form of "nonexclusive homosexual Ephebophilia[,]" which "involves a sexual attraction to pubescent boys[,]" and rehabilitation in the form of "treatment for his disorder and ... limit[ing] his contact with children." *Thompson,* 367 Md. at 331, 320, 786 A.2d at 773, 766–67 (footnote omitted). In *Mitchell,* 308 Md. at 654, 521 A.2d at 747, the lawyer fellated a thirteen-year-old boy. This Court did not note any aggravating factors, and noted one mitigating factor: mental disability in the form of "manic depressive reaction disorder and compulsive homosexual pedophilia[,]" and rehabilitation in the form of "extensive treatment[.]" *Id.* at 654, 521 A.2d at 747 (internal quotation marks omitted). In contrast to *Thompson* and *Mitchell,* here, Greenleaf violated MLRPC 8.4(c) by using one of the Maryland Judiciary's computers to solicit "Beth"; Greenleaf's misconduct is accompanied by eight aggravating factors, such as a pattern of misconduct, refusal to acknowledge the wrongful ***172** nature of his misconduct, and indifference to rehabilitation; there is a sole mitigating factor (*i.e.,* the absence of a prior disciplinary record); the hearing judge did not find that Greenleaf had been diagnosed with any mental disability; and the Commission forcefully recommends that we disbar Greenleaf, identifying him as "a sexual predator" in its written recommendation and at oral argument.

In sum, we agree. Greenleaf is, indeed, a sexual predator who is a danger to the public and is "unfit to continue" to practice law. *Gerace,* 433 Md. at 649, 72 A.3d at 577 (citation omitted). For the above reasons, we disbar Greenleaf.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE 16–761(b), FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST ROBERT JOHN GREENLEAF.

All Citations

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437 Md. 1
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND
v.
John Mark McDONALD.

Misc. Docket AG No. 38, Sept. Term, 2012.
|
Feb. 21, 2014.

Synopsis

Background: Disciplinary proceedings were brought against attorney. After referral, the Circuit Court, Queen Anne's County, Diane O. Leasure, J., determined that attorney had violated rules of professional conduct.

Holdings: The Court of Appeals, Harrell, J., held that:

attorney violated rules, and

disbarment was warranted.

Disbarment ordered.

Attorneys and Law Firms

****120** Lydia E. Lawless, Assistant Bar Counsel (Glenn M. Grossman, Bar Counsel, Attorney Grievance Commission of Maryland), for petitioner.

David G. Whitworth, Esq. (Whitworth Smith LLC, Edgewater, MD), for respondent.

Argued before BARBERA, C.J., HARRELL, BATTAGLIA, GREENE, ADKINS, McDONALD, and WATTS, JJ.

Opinion

HARRELL, J.

***6** John Mark McDonald was admitted to the Bar of this Court on 13 December 1995. After serving as an Assistant State's Attorney in Kent, Talbot, and Queen Anne's Counties, McDonald was appointed Deputy State's Attorney for Queen Anne's County in January 2003. On 12 September 2012, the Attorney Grievance Commission (the "Commission"), acting through Bar Counsel, filed against McDonald a Petition for Disciplinary or Remedial Action (the " Petition"), pursuant to Maryland Rule 16–751(a)(1). The Petition alleged that McDonald engaged in a pattern of misconduct related to an "inappropriate relationship" between him and Melissa Knotts, the former office manager for the State's Attorney's Office for Queen Anne's County (the "Office"), by using improperly his position to "fix" traffic citations issued to Knotts as a personal favor to Knotts, facilitating knowingly Knotts taking leave to which she was not entitled, interfering with the criminal investigation and prosecution of Knotts for embezzling funds from the Office, and deleting (without proper authority) emails from Knotts's former work computer the day after her employment was terminated. Based on the alleged pattern of misconduct, the Petition charged McDonald with violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 8.4(a), [1] 8.4(b), [2] 8.4(c), [3] and 8.4(d). [4]

1 MLRPC 8.4(a) makes it professional misconduct to "violate or attempt to violate the Maryland Lawyers' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

2 MLRPC 8.4(b) makes it professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

3 MLRPC 8.4(c) makes it professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

4 MLRPC 8.4(d) makes it professional misconduct to "engage in conduct that is prejudicial to the administration of justice."

***7** The matter was referred to a judge who was specially assigned to the Circuit Court for Queen Anne's County for hearing and the filing of findings of fact and proposed conclusions of law. An evidentiary hearing, spanning five non-consecutive days of testimony and argument, commenced in the Circuit Court on 10 January 2013 and concluded on 31 January 2013.

For reasons explained here, based on the evidence received during the evidentiary hearing, our due consideration of the hearing judge's Memorandum of Findings of Fact and Proposed Conclusions of Law, and the Exceptions and

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Recommendations for Sanctions of the parties, we disbar McDonald from the practice of law in Maryland.

I.

A. The Hearing Judge's Findings of Fact

The hearing judge filed a Memorandum of Findings of Fact and Proposed Conclusions of Law on 16 April 2013. We ****121** summarize the hearing judge's findings of fact based on the categories of misconduct alleged by Bar Counsel.

1. Ticket Fixing

Bar Counsel's admitted evidence (credited by the hearing judge) reflected that, on five occasions between December 2008 and April 2011, McDonald entered (or arranged for the entry of) dispositions of *nolle prosequi* for traffic citations issued to Knotts. During their respective consecutive tenures as the State's Attorney for Queen Anne's County, Frank M. Kratovil, Jr. (now a judge of the District Court of Maryland) and Lance G. Richardson maintained the same policy regarding motor vehicle citations or criminal charges involving employees of the office, which policy required immediate self- ***8** reporting by any employee who received a citation or was charged, so that the State's Attorney could determine whether the use of a special prosecutor was necessary, and "did not permit an attorney from abusing the office he or she holds by entering a *nolle prosequi* on charges or citations as a favor to employees...." Although McDonald cross-examined Richardson regarding exceptions to this policy against showing favoritism to employees, each of the instances brought up by McDonald were deemed to be "vastly different than what occurred with the citations issued to Knotts." Any claim by McDonald that the Office had a policy of showing favoritism to employees in regards to citations or charges was found by the hearing judge to be "without merit." McDonald's explanation that he entered, or caused to be entered, *nolle prosequi* for Knotts's citations in exchange for information she provided about ongoing drug investigations, in conformity with a policy or practice of the Office to encourage such exchanges, was not credible. In an email McDonald sent to Knotts on 29 April 2010, he listed favors he performed for her, including " [f]ive fixed tickets." The hearing judge found ultimately that "each *nolle prosequi* entered by the Respondent or at his behest for traffic citations issued to Knotts was done as a personal favor to her and without any legitimate business purpose." Based on these findings, the hearing judge concluded, by clear and convincing evidence, that McDonald violated MLRPC 8.4(a) and (d).

2. Interference with the Prosecution of Knotts for Embezzlement

The hearing judge considered Bar Counsel's evidence regarding McDonald's alleged interference with Knotts's embezzlement prosecution by looking: first, at his alleged attempts to intimidate or corrupt the State's witnesses against Knotts; next, at McDonald's alleged attempts to influence Steven Trostle, the Special Prosecutor assigned to prosecute the case against Knotts; and, finally, at McDonald's alleged obstruction of justice regarding the Knotts prosecution.

***9** *Attempts to intimidate or corrupt the State's witnesses*

The hearing judge made three factual findings regarding Bar Counsel's evidence tendered to prove McDonald's alleged attempts to intimidate or corrupt the State's witnesses against Knotts. The first finding was that McDonald's choice to resign from the Office shortly before a murder trial he was scheduled to prosecute was not an attempt to influence Richardson by forcing him to choose between conceding to McDonald's wishes regarding the Knotts prosecution or being left in the lurch on the murder trial. The hearing judge found credible McDonald's explanation that he left the Office as Deputy when he did because he felt he could not return to the Office if he testified in support of Knotts's anticipated Motion to Enforce ****122** Plea Agreement in the criminal case arising from her theft from the Office. Second, the judge found that certain text messages sent by McDonald to Richardson did not rise to the level of a threat. Third, she resolved that statements made by McDonald to Robert Penny, an investigator for the Office, and April Pyle, an administrative assistant for the Office, that the Office would "go down" if Knotts "went down," were not threats, but were efforts to protect the Office from looking bad if Knotts's defense attorney filed the anticipated Motion to Enforce Plea Agreement. The hearing judge concluded that "[a]lthough [McDonald] was clearly trying to influence the outcome of Knotts's criminal case and acted inappropriately in his quest to do so, the testimony does not establish that he tried to intimidate or corrupt Richardson and Penny."

Attempts to influence Trostle

The hearing judge reached a similar outcome regarding the evidence surrounding McDonald's interactions with Trostle. In response to Bar Counsel's allegations that McDonald urged Trostle to be lenient with Knotts and attempted to influence Trostle's prosecutorial decision-making, the hearing judge concluded that "although [McDonald] attempted to influence the outcome of the Knotts prosecution, his actions in that regard—however inappropriate as they may have been—do not ***10** rise to the level of attempting to intimidate or corrupt an officer of the court."

Alleged Obstruction of Justice

The hearing judge made the following factual findings concerning whether McDonald's actions regarding the embezzlement prosecution of Knotts constituted obstruction of justice. Promptly following McDonald's meeting with Richardson and Penny on the day Knotts confessed to the embezzlement, at which meeting he agreed not to involve himself in Knotts's prosecution, McDonald: (1) told Penny there was a problem with the *Miranda* advisements Penny gave Knotts; (2) called Penny to ask whether criminal charges would be filed and, when Penny answered in the affirmative, "asked Penny to call Richardson to dissuade him from filing charges and went so far as to suggest that the county's human resources office be contacted and a meeting arranged to resolve the issues without the necessity of filing criminal charges"; and, (3) asked about the amount of restitution due. On 6 July 2011, the day that criminal charges were filed against Knotts, McDonald called repeatedly the police sergeant who was on his way to serve Knotts with the criminal summons and also emailed Richardson to ask what would happen to the charges if restitution were paid immediately (implying that he thought Knotts could pay it right away). Between July 6 and July 15 of 2011, McDonald, while employed still as the Deputy State's Attorney, asked R. Stewart Barroll, Esq., a local attorney, to represent Knotts in the embezzlement case. McDonald stated that he would see to it that any fees related to the representation would be paid. McDonald also represented to Barroll that a plea agreement had been reached already and, thus, his representation of Knotts would more than likely involve only the sentencing.

From 15 July 2011 until 8 September 2011 (the day McDonald resigned), McDonald had "daily or near-daily communications" with Richardson, Penny, and Pyle about the Knotts prosecution. "By way of example, [McDonald] sought information about the status of the case, questioned how the case ***11** would proceed and how the matter was being handled by the Special Prosecutor." McDonald contacted Trostle to ask, among other things, if he would be seeking an indictment of Knotts and, if so, ****123** whether McDonald could be contacted at that time so he could assist Knotts in surrendering herself and being released as soon as possible. After learning that Trostle was considering an indictment, McDonald attempted to persuade Richardson and Penny to intervene and to persuade Trostle not to indict or, alternatively, appoint a new Special Prosecutor to the case. McDonald sent text messages later to Richardson suggesting that the payment of restitution should resolve the case, that further prosecution was mean-spirited, and that the indictment sought by Trostle would be "over the top."

The hearing judge found that "during this same time period, [McDonald] was in constant contact with Knotts and her criminal defense attorney." McDonald "requested that Barroll have a subpoena issued for McDonald to testify as a character witness." He also suggested possible defenses to Barroll. Additionally, during a pre-trial conference on 21 October 2011, McDonald called Trostle, after the Special Prosecutor refused to speak to McDonald on an earlier call on Barroll's cell phone, and persisted in asserting that Richardson and Knotts reached previously a binding plea agreement.

Addressing McDonald's assertion that the prosecution of Knotts violated an enforceable plea agreement reached with her on the day she confessed the embezzlement to Richardson and Penny, the hearing judge found that McDonald's "conduct in actively and intentionally interfering in the Knotts prosecution is not mitigated or justified by his belief that an enforceable plea agreement to a misdemeanor charge had been reached between Richardson and Knotts," because, "[e]ven if a plea agreement had been reached, any attempt to enforce the plea agreement rightly belonged with Knotts's defense attorney, not [McDonald]." The judge also found that "no justification [existed] for [McDonald] involving himself in the matter due to his belief that the amount of restitution paid was more than it should have been. That, again, was a matter to be ***12** addressed by Knotts's defense counsel, not [McDonald]." She concluded that McDonald's "actions ran afoul of what was appropriate behavior for a senior member of [the State's Attorney's Office]—an office that coincidentally was the victim of Knotts's embezzlement," and that "[t]here is no getting around the fact that the Respondent's personal

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feelings for Knotts clouded his judgment and caused him to inappropriately involve himself in her prosecution."

3. Alleged Falsification of Timesheets and Abetting a Fraud

Bar Counsel's evidence (credited by the hearing judge) revealed that the Office required employees to submit timesheets, on a bi-weekly basis, indicating the amount of hours worked and leave taken. Knotts would submit all employees' timesheets to Richardson at the end of each period for his approval and signature. In early 2011, Richardson discovered inaccuracies in Knotts's timesheets. When Richardson confronted Knotts about the inaccuracies, she indicated that McDonald "donated" non-sick leave to her. As it turned out, McDonald and Knotts devised an arrangement in which McDonald would complete and sign two timesheets on his behalf for a single pay period, with one sheet reflecting his actual hours worked and another indicating that he had used non-sick leave on certain days. Knotts would submit the second timesheet if she chose not to work on a day in which McDonald indicated that he took leave. For that same time-period, Knotts would complete her own timesheet showing that she had worked on days when she had not worked in fact. When Richardson discovered their arrangement, he told McDonald and Knotts that he did ****124** not approve of it, and, to his knowledge, the practice was not repeated again. The hearing judge concluded from this that the Commission did not prove by clear and convincing evidence that McDonald falsified timesheets, violated a county policy, or abetted Knotts in committing a fraud.

***13** *4. Alleged Unauthorized Access by McDonald to Knotts's Office Computer*

The hearing judge made the following factual findings regarding the allegations of McDonald's unauthorized access to Knotts's office computer. McDonald accessed Knotts's computer the day after her employment was terminated and began deleting personal emails. Richardson confronted McDonald in the process, told him that Knotts's former office was a crime scene, and requested that McDonald leave. After informing Richardson he had been deleting personal emails and moving them to the "trash bin" on her computer, McDonald apologized and departed the office. The hearing judge inferred also that McDonald "did not access [Knotts's] computer to delete or change any documents related to the office's bank accounts or financial ledgers" because the testimony showed that Knotts kept the financial records in hard-copy, not electronically, a fact widely known in the Office.

The hearing judge rejected Bar Counsel's arguments that: (1) because McDonald was subpoenaed as a character witness for Knotts in her criminal case, the email communications between them could have been relevant in her case; and, (2) her emails could contain information regarding her spending habits, which would be relevant to the investigation:

> The court notes that [McDonald] accessed Knotts's computer the day after her employment was terminated —there was no evidence that [McDonald] knew at that time that he would be subpoenaed as a character witness in a case for which charges had not as yet been filed. Secondly, Knotts confessed her theft to Richardson and Penny the day before. Thirdly, and perhaps most importantly, no evidence was presented that the office employees, including [McDonald], were put on notice that her office and/or her computer was, in fact, a designated crime scene. There was credible evidence presented that the attorneys in the office would, on a fairly regular basis, have access to Knotts's computer to retrieve templates for forms and other documents necessary for their work as Assistant State's Attorneys. Although [McDonald's] reasons for entering her office ***14** on the day in question were admittedly for a different purpose, it has not been satisfactorily proven to the court that the access to her computer was wholly impermissible.

The hearing judge concluded that "[a]lthough [McDonald's] decision to enter Knotts's office and to delete personal emails from her office computer may not have been the wisest decision," the evidence did not prove sufficiently that McDonald's "actions amounted to criminal behavior as alleged by [Bar Counsel]."

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B. The Hearing Judge's Proposed Conclusions of Law

The hearing judge concluded that Bar Counsel proved by clear and convincing evidence that McDonald's ticket fixing and "unjustified and intentional interference with the prosecution of Knotts's criminal case" were prejudicial to the administration of justice and, thus, violated MLRPC 8.4(d). Based on that conclusion, the hearing judge also found that McDonald violated MLRPC 8.4(a). As to the charged violations of MLRPC 8.4(b) and 8.4(c), the hearing judge concluded that the Commission did not prove by clear and convincing evidence that McDonald's conduct rose "to ****125** the level of obstruction, corruption or criminal behavior," or that it constituted "a finding of dishonesty, fraud, deceit, or misrepresentation."

II.

A. Our Standard of Review

We recently explained our standard of review applicable to attorney disciplinary cases:

> This Court has original and complete jurisdiction over attorney discipline proceedings in Maryland. We review the hearing judge's conclusions of law under a non-deferential standard. The hearing judge's findings of fact will be deemed correct if (1) they are not clearly erroneous, or (2), at the Court's option, if neither party filed exceptions to them. If determined to be established, the findings of fact are then used to determine the legal propriety of the legal conclusions of law and the appropriate sanction. We must ***15** determine whether there is sufficient evidence to support the hearing judge's legal conclusions, by a clear and convincing standard of proof.

Attorney Grievance Comm'n v. Kremer, 432 Md. 325, 334, 68 A.3d 862, 867–68 (2013) (internal citations and quotation marks omitted).

B. The Parties' Exceptions

Both parties filed exceptions to the hearing judge's Findings of Fact and Proposed Conclusions of Law. Bar Counsel takes no exceptions to the hearing judge's factual findings, but raised four exceptions to the proposed conclusions of law. McDonald raised initially fourteen numbered Exceptions, and later filed four numbered Supplemental Exceptions, challenging several of the hearing judge's factual findings, procedural issues arising before, during, and after McDonald's merits hearing, and the hearing judge's proposed conclusions of law as to his having violated Rules 8.4(a)Rules 8.4(a) and 8.4(d)8.4(d).[5] Additionally, each party filed responses to the other party's exceptions. We address first McDonald's exceptions to the hearing judge's factual findings, before addressing, in turn, McDonald's exceptions concerning procedural matters and both parties' exceptions to the proposed conclusions of law.

[5] On 15 May 2013, Bar Counsel filed a Motion to Strike a portion of McDonald's original Exception numbered 2, regarding material that was sealed by the hearing judge, and original Exception numbered 3, in its entirety, which concerns statements made during the peer review process. The Commission filed a second Motion to Strike, on 20 May 2013, arguing that portions of interrogatories attached to McDonald's Response to Bar Counsel's Exceptions and Recommendation for Sanctions, which are not a part of the record of this case, should be stricken. In an Order filed on 30 May 2013, we deferred ruling on those Motions and McDonald's Responses to the Motions to Strike. Having given due consideration to the arguments of both parties, Bar Counsel's Motions are granted.

1. McDonald's Exceptions to the Factual Findings

McDonald's original Exceptions numbered 5, 6, and 8 through 11 contest factual findings of the hearing judge. Underlying our analysis of those Exceptions is the "fundamental ***16** principle that the factual findings of the assigned judge in an attorney disciplinary proceeding 'are *prima facie* correct and will not be disturbed on review

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unless clearly erroneous.' " *Attorney Grievance Comm'n v. Sheridan,* 357 Md. 1, 17, 741 A.2d 1143, 1152 (1999) (quoting *Attorney Grievance Comm'n v. Glenn,* 341 Md. 448, 470, 671 A.2d 463, 474 (1996)). A hearing judge's factual finding is not clearly erroneous "[i]f there is any competent material evidence to support [it]." *YIVO Inst. for Jewish Research v.* **126 *Zaleski,* 386 Md. 654, 663, 874 A.2d 411, 416 (2005). We conclude that each of the Exceptions, for the reasons set forth below, shall be overruled.

Exceptions Numbered 5 and 6

McDonald's fifth and sixth Exceptions concern the hearing judge's factual findings regarding the entry of *nolle prosequi* dispositions by McDonald as to Knotts's motor vehicle citations. In his fifth exception, McDonald argues that the hearing judge erred by finding that the *nolle prosequi* entries were personal favors, and without a legitimate business purpose. In the first part of Exception numbered 5, McDonald claims that the hearing judge misconstrued the evidence by finding that Richardson and Kratovil did not have reason to believe Knotts was a confidential source of information. According to McDonald's interpretation of the evidence, Kratovil and Richardson testified merely that they had no knowledge whether she was a confidential source of the Office. Respondent continues that Richardson's and Kratovil's lack of knowledge as to whether Knotts was a confidential source was not inconsistent with McDonald's assertion that he entered *nolle prosequi* dispositions for her benefit in exchange for information because, in his position as a Deputy State's Attorney in charge of illegal drug prosecutions, McDonald worked with confidential sources of whom other people in the Office, including the two State's Attorneys, were unaware.

We do not agree that the hearing judge misconstrued the evidence. Kratovil was asked whether he had reason to believe that Knotts was a confidential source. He replied "I had no knowledge of that." Kratovil testified also that he *17 would have wanted to know if one of his employees was a confidential source. Similarly, Richardson testified that he "would absolutely need knowledge" of the favorable disposition of public charges of one of his employees because of the potential repercussions. It would be McDonald's responsibility, as his Deputy State's Attorney, he continued, to inform him of any such dispositions. The witness maintained that the notion of Knotts having been a confidential source of information is "absolutely absurd." Although McDonald testified, as outlined in his relevant Exception, that he had confidential sources of whom the others were unaware, the only testimony to support his assertion that Knotts was one of those sources, and that he entered *nolle prosequi* dispositions for five of her citations in exchange for providing information on drug investigations, was Knotts's arguably self-serving testimony. Knotts testified on direct-examination that she provided information in exchange for the *nolle prosequi* entries; however, on cross-examination, she admitted that she did not provide any information with the intent that McDonald would enter a *nolle prosequi* on her behalf, and that he never told her that he would enter a *nolle prosequi* for her only if she provided information on drug investigations. We find no error in the hearing judge's conclusion that the evidence did not support McDonald's claim that his *nolle prosequi* entries were made in exchange for information from Knotts. The testimony of Richardson and Kratovil on that subject was found to be more credible than McDonald's and Knotts's testimony.

In the latter half of his fifth exception and in his sixth exception, McDonald argues that the hearing judge committed clear error and abused her discretion by finding credible the testimony of Richardson regarding the propriety of the entries of *nolle prosequi* by McDonald on Knotts's behalf. McDonald's argument consists mostly of meritless finger-pointing and personal attacks on Richardson, propped-up by snippets of testimony (devoid of **127 context) and the reiteration of arguments that were, in our view, rejected properly by the hearing judge. The lack of merit in McDonald's argument is highlighted by his assertion that it was clear error for the hearing *18 judge to find credible Richardson's testimony on the subject of the Office policy or practice regarding *nolle prosequi* dispositions, in part, because "it is the only matter of substance that the trial court found Mr. Richardson testified credibly about." The latter part of McDonald's assertion is not only disingenuous,[6] it would be unavailing in support of the claim of clear error, even if it were true, because, in assessing credibility, the hearing judge "was entitled to accept-or reject-all, *part,* or none of the testimony of any witness." *Attorney Grievance Comm'n v. Walter,* 407 Md. 670, 678, 967 A.2d 783, 788 (2009) (emphasis added); *see also* *Attorney Grievance Comm'n v. Usiak,* 418 Md. 667, 687, 18 A.3d 1, 13 (2011) ("The judge is at liberty to pick and choose what evidence to believe and what evidence to disbelieve, as well as what weight to give (or not) to any piece of evidence."). In other words, the hearing judge could find permissibly Richardson credible on the subject of the *nolle prosequis,* even if the judge

found that Richardson's testimony on all other subjects was not credible. We overrule Respondent's Exceptions numbered 5 and 6.

6 The subject of the *nolle prosequis* is the only section of the hearing judge's Memorandum Opinion that comments directly on the credibility of any part of Richardson's testimony. Although the hearing judge found that some of the arguments posed by Bar Counsel, which were based in part on the testimony of Richardson, were not supported by the quantum of evidence necessary ("clear and convincing"), in the hearing judge's view, nowhere in those portions of the Memorandum does the hearing judge attribute the shortfalls of Bar Counsel's evidence to a lack of credibility on the part of Richardson. McDonald's attempt to paint the hearing judge's assessment of Richardson's testimony with a different brush is only one of many examples of artistic liberties taken by him with the facts and circumstances of this case.

Exception Numbered 8

In his Exception numbered 8, McDonald argues that "[t]he Court's finding that [McDonald] called an officer repeatedly while the officer was on his way to serve a summons is not supported by the evidence and is, thus, clear error." Respondent submits the following assertions in support of his clear error argument: (1) Bar Counsel offered no evidence that McDonald attempted to prevent Sergeant Bruce Layton ***19** ("Sgt. Layton"), the officer at issue, from serving a criminal summons on Knotts; (2) Bar Counsel did not call Sgt. Layton as a witness; (3) Bar Counsel presented no evidence that McDonald knew Sgt. Layton was serving a summons on Knotts; (4) Robert Penny's testimony that Sgt. Layton showed him McDonald's name as the caller identification for a single phone call was insufficient support for the hearing judge's factual finding; and, (5) Sgt. Layton is the only person who could testify concerning the number of calls he received and whether the contact number in his phone's memory associated with McDonald "is a number belonging exclusively to [McDonald]." Declaring victory, McDonald concludes that the hearing judge's finding is "based upon nothing more than speculation and conjecture."

We disagree with McDonald's assessment of the evidence. The hearing judge's factual finding is based apparently upon the following testimony elicited from Penny concerning his trip with Sgt. Layton, on 6 July 2011, to serve a criminal summons on Knotts:

> Sergeant Layton and I got in his unmarked police cruiser and we began heading north and we were probably in ****128** the car three to five minutes and in those police cars, Your Honor, the center console is, basically, a metal box. It's not like your standard luxury car, per se. It's like a metal box and as we're heading out of town, I can hear what sounded like his phone vibrating and it would go through a ring cycle and then it would stop and then it would immediately start again. It went through this cycle three, four, five times so I made a comment to Sergeant Layton do you need to get that. Sergeant Layton ... grabbed the phone. I observed Sergeant Layton look at it and then he turned the screen to me so I could see it and I don't know how he had the contact listed, if it was just John Mark or John Mark McDonald, but I could clearly draw the conclusion that it was Mr. McDonald ringing the phone. So I, basically, told Sergeant Layton we're continuing with the mission at hand and just keep going.

***20** It is also worth noting Penny's additional testimony that McDonald called him (Penny) earlier on 6 July 2011 to ask if criminal charges would be filed that day against Knotts and became upset when Penny responded in the affirmative. Respondent proceeded to make several requests to prevent the charges from being filed, with which either Penny declined to, or could not, comply.

In light of Penny's testimony, the bases for McDonald's argument that the hearing judge's finding was in clear error suggests that McDonald fails to recognize "the use of inferences in the fact-finding process," in which judges, when acting as the finder of fact, "routinely apply their common sense, powers of logic, and accumulated experiences in life

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to arrive at conclusions from demonstrated sets of facts." *In re Gloria H.,* 410 Md. 562, 577, 979 A.2d 710, 718 (2009) (quoting *Robinson v. State,* 315 Md. 309, 318, 554 A.2d 395, 399 (1989)). The hearing judge, acting as the fact-finder in this case, could infer rationally that the repeated calls received by Sgt. Layton's phone, occurring one after the other, all came from the same caller, and that the number associated with McDonald's name in Sgt. Layton's phone's memory was being used, in fact, by McDonald, particularly in light of McDonald's attempt earlier that day (not to mention on other occasions) to intervene in the criminal charging process of Knotts.

Exception Numbered 9

McDonald's Exception numbered 9 challenges the hearing judge's finding that "[a]fter the Knotts case was assigned to Trostle, Richardson removed himself from any further control over the prosecution" of Knotts. McDonald argues that the hearing judge's finding is "completely contradicted by the evidence and testimony in this case," and relies on three pieces of evidence and testimony in support of this argument.

First, McDonald refers to an email sent by Richardson to Trostle, on 19 September 2011, asking him to agree not to oppose probation before judgment if Knotts agreed not to say harmful things about the operation of the Office under Richardson's ***21** tenure. McDonald posits that this email contradicts Trostle's testimony that Richardson "stood down" and did not influence thereafter the Special Prosecutor. Furthermore, McDonald asserts that the original plea offer from Trostle, according to the testimony of Knotts's attorney (Barroll), did not include an offer of probation before judgment, and that at that time Knotts was considering filing a Motion to Enforce Plea Agreement that "would have included evidence that, not only did Mr. Richardson violate the plea agreement, but he knowingly overcharged the restitution owed in the case."

****129** The email from Richardson to Trostle does not support a determination of clear error. First, the text of the email indicates that Richardson floated the probation before judgment idea to Trostle as a suggestion, not as a demand, and then only if Knotts's attorney requested it. Second, McDonald points to no evidence in the record to demonstrate that Richardson's suggestion influenced Trostle actually. Third, whether Knotts was planning to file a particular motion in her criminal case, and what the factual allegations in that motion would be, have no bearing on our consideration of the present case.

The second piece of evidence McDonald relies on is what he alleges to be testimony that Richardson contacted McDonald, Michael Pappafotis, and Jane Miller[7] in an attempt to persuade each of them not to testify on Knotts's behalf regarding the alleged plea agreement. Yet again, McDonald advances a very liberal interpretation of the actual testimony in this case. As to Pappafotis, Richardson testified, in the portion of the transcript McDonald refers us to, that he did call Pappafotis, but denied that he did so in an effort to persuade him not to testify on behalf of Knotts. Additionally, Pappafotis testified, in response to McDonald's counsel asking if Richardson tried to dissuade him from testifying, "I wouldn't say that [Richardson] ***22** tried to dissuade me." As to Miller, McDonald refers us to portions of the transcript where she testified that Richardson called her and, among other things, "had a discussion with [her] about how in Mrs. Knotts's case that the plea wasn't really a plea, and that [Miller] must have misunderstood." Moreover, Richardson testified "No" in response to McDonald's counsel questioning him about whether he tried to dissuade Miller from testifying. McDonald does not point to evidence in the record suggesting that Richardson tried to dissuade McDonald from testifying. The testimony McDonald refers us to does little to convince us that the hearing judge's finding that Richardson relinquished control over Knotts's prosecution was "completely contradicted" by the evidence in this case.

[7] Michael Pappafotis and Jane Miller are attorneys who were called as witnesses by McDonald to testify regarding the alleged binding plea agreement between Richardson and Knotts occurring on the day of Knotts's confession that she embezzled money from the Office.

Finally, McDonald relies on his own testimony that Richardson directed Penny to send an email to Trostle asking that the Knotts case stay in the District Court (as opposed to the Circuit Court), and that the email must have been removed from the State's Attorney's file that was subpoenaed. This testimony does not demonstrate that the hearing judge's finding is clear error.

Competent and material evidence was before the hearing judge on which to find that Richardson surrendered control of Knotts's prosecution to Trostle. Bar Counsel elicited

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testimony from Trostle that, although Richardson had communications with him, Trostle, as the Special Prosecutor, had control over the case and was not influenced by Richardson. Accordingly, the relevant finding was not clearly erroneous. Respondent's Exception numbered 9 is overruled.

Exception Numbered 10

McDonald argues in this Exception that the hearing judge lacked evidence from which to find that McDonald "contacted Steven Trostle during the first week of August of 2011 ... [and] told Trostle that [McDonald] would be receiving a subpoena to testify [requested by Knotts's lawyer so ****130** that he could be a character witness on Knotts's behalf]," because neither Trostle nor McDonald, the only two parties to the ***23** conversation, testified to that as a fact. McDonald contends the evidence shows that McDonald "was giving Mr. Trostle the courtesy of letting him know that he may be a character witness for Ms. Knotts," and that a subpoena was not issued until after Trostle opined that it would be improper for McDonald to be a character witness for Knotts. The transcript of Trostle's testimony, however, reveals the following colloquy between Trostle and McDonald's counsel concerning Trostle's first conversation with McDonald:

> Q Okay. Can you place that first conversation in time?
>
> A I believe it was in the first week of August [2011].
>
> Q So it was after you got this August 2nd letter, if you got it?
>
> A I can't say. Keep in mind, that letter may have just been provided to me, not so much by mail to my office, but it may have been printed, put in the file and sent to me with the file. I believe I received the file, also, in that first week of August.
>
> Q At that point, he did tell you that he was being subpoenaed as a character witness on [Knotts's] behalf, is that correct?
>
> A When you say he, you're referring to your client?
>
> Q Mr. McDonald.
>
> A He did indicate that, I believe.

This testimony undercuts McDonald's recollection of the evidence, and demonstrates that the hearing judge's finding was not clearly erroneous. This Exception is overruled.

Exception Numbered 11

McDonald argues that the evidence contradicts the hearing judge's finding that "at all relevant times," during the investigation and prosecution of Knotts, McDonald was Deputy State's Attorney. We disagree again with McDonald's interpretation of the evidence. Although it is correct that some of the events relevant to McDonald's misconduct in relation to the Knotts case occurred after his last day working physically in the State's Attorney's Office (on 8 September 2011), an ***24** email from an employee of that Office's Human Resources Department, which was admitted into evidence, confirms that McDonald's actual separation date was pushed back until 1 December 2011, after the relevant events took place (Knotts pled guilty and was sentenced on 21 October 2011). Accordingly, the hearing judge's finding was not clearly erroneous. This Exception is overruled.

2. McDonald's Exceptions Concerning Procedural Matters

Exception Numbered 1

In his opening Exception, McDonald argues that the Petition for Disciplinary or Remedial Action filed by Bar Counsel should be dismissed because "no evidence was introduced that establishes Bar Counsel had the authority to bring this action." McDonald grounds this argument on his general denial, in his Answer to the Petition, that Bar Counsel was authorized or directed by the Commission to bring the case against him, and that Bar Counsel failed to prove such authority at trial. McDonald relies on *In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), for the proposition that "[d]ue process applies to attorney disciplinary proceedings." That case, however, does not advance McDonald's position. *Ruffalo* stands for the proposition that an attorney ****131** facing disbarment is "entitled to procedural due process, which includes fair notice of the charge." 390 U.S. at 550, 88 S.Ct. at 1226, 20 L.Ed.2d 117. There is no question that the Petition was sufficient to put McDonald on notice of the charges against him. McDonald offers no legal authority supporting the proposition that a lack of demonstrative proof regarding Bar Counsel's actual authority to file the Petition constitutes a deprivation of procedural due process. Bar Counsel averred

in the Petition that it was filed upon direction from the Commission to Bar Counsel on 28 June 2012, pursuant to Maryland Rule 16–751(a)(1). At a minimum, this established apparent authority and a presumption of propriety. We agree with Bar Counsel that McDonald's mere denial of the averment does not overcome the presumption nor does it establish ***25** affirmatively that Bar Counsel lacked authorization from the Commission to file the petition. Accordingly, McDonald's Exception is overruled.

Exception Numbered 2 and Like Numbered Supplemental Exception

McDonald argues here that the hearing judge committed clear error by granting Bar Counsel's Motion in Limine prohibiting McDonald from "cross-examining Petitioner's witnesses regarding bias." McDonald complains that he was prejudiced by not being allowed to conduct cross-examination (or admit impeachment evidence) concerning: (1) complaints filed with the Commission against other attorneys; (2) alleged extra-marital affairs of Bar Counsel's witnesses; (3) Richardson's and Penny's alleged motive to lie for political reasons; and (4) Richardson's and Penny's alleged interference with McDonald's private practice clients and/or potential clients. McDonald seeks remand of the case to re-open the records for further cross-examination and impeachment evidence.

McDonald's Exception lacks merit for four reasons. First, neither Bar Counsel's Motion in Limine nor the hearing judge's ruling on that Motion effected a blanket exclusion, as McDonald suggests, on McDonald's admission of evidence regarding bias of Bar Counsel's witnesses. The hearing judge ruled that McDonald would not be permitted to offer or elicit the following evidence: (1) testimony regarding the alleged extra-marital affairs of any witnesses, (2) testimony regarding any person's motivation for filing a grievance with the Commission, and (3) information regarding McDonald's peer review hearing. The hearing judge found that these areas of possible inquiry were not relevant, but stated that other issues concerning the credibility of Bar Counsel's witnesses would be "fair game."

Second, we do not conclude that the hearing judge committed clear error in excluding, on the ground of relevance, the information regarding the motivations behind grievances filed against other attorneys and the alleged extra- ***26** marital affairs of any witnesses. Although attorneys are afforded wide latitude in cross-examination concerning matters of credibility, a judge has discretion to prevent the admission of evidence that is irrelevant or unfairly prejudicial to the witness. *See* Md. Rule 16–757(a) ("The hearing of a disciplinary or remedial action is governed by the rules of evidence and procedure applicable to a court trial in a civil action tried in a circuit court."); Md. Rules 5–401 to –404 (defining relevance and its general scope); *see also* *State v. Cox,* 298 Md. 173, 178, 468 A.2d 319, 321 (1983). It was permissible for the hearing judge to conclude that evidence of grievances concerning other attorneys and romantic relationships of the witnesses concerned collateral matters ****132** that are not probative significantly of the witnesses' character for truth or veracity.

Third, McDonald's complaints that he was prohibited unfairly from exploring Richardson's and Penny's alleged motivations to lie for political reasons or their alleged interference with McDonald's private practice clients appear to us to be baseless. The hearing judge's ruling did not preclude McDonald from attempting to explore those areas on cross-examination or through other impeachment evidence. Furthermore, McDonald does not direct our attention to any portions of the record where the hearing judge prevented him otherwise from offering or admitting such evidence.

Fourth, the hearing judge's ruling excluded properly evidence regarding McDonald's proceedings before a peer review panel in the present case.[8] Peer review hearings are ***27** confidential, and speech, conduct, or writings made as part of a peer review hearing are privileged. Md. Rule 16–723(a). Therefore, the hearing judge concluded appropriately that evidence from McDonald's peer review hearing was irrelevant. *Usiak,* 418 Md. at 682 n. 9, 18 A.3d at 10 n. 9 ("[E]vidence that was presented to the Peer Review Panel, and its assessment of that evidence, is irrelevant to our review of the evidence presented at Respondent's actual disciplinary evidentiary hearing."). Accordingly, McDonald's Exception numbered 2 is overruled.

[8] Md. Rule 16–743(a) describes the purpose of the peer review process:

> The purpose of the peer review process is for the Peer Review Panel to consider the Statement of Charges and all relevant information offered by Bar Counsel and the attorney concerning it and to determine (1) whether the Statement of Charges has a substantial basis and there is

> reason to believe that the attorney has committed professional misconduct or is incapacitated, and, if so, (2) whether a Petition for Disciplinary or Remedial Action should be filed or some other disposition is appropriate. The peer review process is not intended to be an adversarial one and it is not the function of Peer Review Panels to hold evidentiary hearings, adjudicate facts, or write full opinions or reports.

In his Supplemental Exception numbered 2, McDonald seeks to bolster the bias argument from Exception numbered 2 by submitting email exchanges between Richardson and Assistant Bar Counsel in this matter that McDonald received, after the evidentiary hearing, in response to a Maryland Public Information Act request. McDonald argues that the emails demonstrate a personal relationship between Assistant Bar Counsel and Richardson revealing evidence of bias. Not only are the emails irrelevant because they were exchanged after the record was closed in the present case, but the content of them appear to consist only of jokes having no bearing on the substance of the case nor do they indicate that any improper bias was present at the time of McDonald's evidentiary hearing. McDonald's Supplemental Exception numbered 2 is overruled.

Exception Numbered 4 and
Supplemental Exception Numbered 1

In Exception numbered 4, McDonald perceives that the hearing judge erred in denying his motion to strike Richardson's testimony for alleged sequestration violations. As Bar Counsel points out, however, McDonald's attorney never moved actually to have testimony stricken based on violation of a sequestration order.[9] The ****133** record reflects that Richardson ***28** was called as a rebuttal witness by Bar Counsel, and indicated, during cross-examination by McDonald's attorney, that he read in a newspaper that other witnesses in the case alleged during their testimony that Richardson engaged in misconduct by "fixing" tickets for family and friends. McDonald's counsel then asked Richardson whether any specific person told him about McDonald's testimony during the hearing, and Richardson replied "Nobody told me what his testimony was." Richardson explained that he was asked by Assistant Bar Counsel whether he knew who Joe Gilberto and Andrew Langer were, who happened to be the people for whom Richardson allegedly "fixed" tickets, and that he "put[ ] two and two together."

9 There was an order for general sequestration. The hearing judge agreed to grant McDonald's oral motion for sequestration and told the witnesses at the beginning of the hearing, "[Y]ou'll need to remain in the hallway until you're called to testify. It also means you can't discuss your testimony or the case with anybody else until it is concluded." The only witnesses who were called in Bar Counsel's case-in-chief and on rebuttal were Richardson and Penny. The judge noted to each of them at the end of their testimony in Bar Counsel's case-in-chief that they were being excused at that time, but were subject to re-call on rebuttal.

McDonald's attorney complained subsequently, at a bench conference, that the judge's sequestration order had been "grossly violated," but indicated that he did not know who violated it, and could not offer any specific evidence of the alleged violation. Assistant Bar Counsel explained that Richardson was asked about the allegations against him for the purpose of preparing his rebuttal testimony, but that Richardson was not told about any specific testimony that occurred during the hearing. Additionally, when Assistant Bar Counsel expressed umbrage at the suggestion she was implicated in a sequestration violation, McDonald's counsel explained that he was not accusing her of a violation and that he did not know, in fact, who was responsible for the violation he alleged. The hearing judge indicated that there was nothing the court could do without specific evidence of a sequestration violation and who committed it. Thereafter, McDonald's counsel made no motion to strike Richardson's testimony.

***29** Regarding his Supplemental Exception numbered 1, McDonald attached several emails he received, after the evidentiary hearing in this case in response to his Public Information Act request, and argues that they constitute evidence that Assistant Bar Counsel violated the sequestration order and dissembled during the bench conference before the hearing judge regarding her role in the drama.

The emails McDonald submits, however, do not prove that a violation occurred. Rather, their content is consistent with Assistant Bar Counsel's representations to the hearing judge at the bench conference. Nowhere in the emails does Assistant Bar Counsel mention the testimony of any other witness to

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either Richardson, Penny, or Pyle. McDonald claims that the emails demonstrate that Assistant Bar Counsel violated the sequestration order by sending a defense exhibit (Exhibit 18) to Richardson before he gave his rebuttal testimony, and that Assistant Bar Counsel "was also speaking to sequestered witnesses during the trial via telephone on a repeated basis."

Sequestration prohibits attorneys from "disclos[ing] to a witness excluded under th[e] Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence." Md. Rule 5–615(d)(1). Assistant Bar Counsel forwarded the exhibit to Richardson on 30 January 2013, the day before it was introduced by McDonald's counsel in his defense case-in-chief, and, thus, was not in violation of the order in this case or the Rule. Although several emails indicate that Assistant Bar Counsel ****134** asked sequestered witnesses to call her, those emails contain no indications that any ensuing discussions involved information revealed to the witnesses in violation of the sequestration order. The emails McDonald relies on appear to be consistent with Assistant Bar Counsel's representation to the hearing judge that her communications were for the purpose of preparing rebuttal testimony.

McDonald also complains in this Supplemental Exception that Richardson and other witnesses emailed each other an online news article about McDonald's case. McDonald offers ***30** no legal authority, however, to support his assertion that the witnesses violated the order by reading a news article or that his suggested remedy—striking their entire testimony—would be appropriate even if the sharing of the article constituted a violation. McDonald submitted copies of an email chain in which Pyle copied what appears to be a news report about McDonald's case from an Internet source into the body of an email and sent it to Richardson, without adding any commentary of her own, on 29 January 2013. Richardson, in turn, forwarded the email from Pyle, without any commentary by him, to Penny. The news story copied into the emails discusses portions of McDonald's testimony in the disciplinary hearing, as well as the testimony of Miller during McDonald's defense case. The exchange of emails took place two days before Penny and Richardson were recalled by Bar Counsel to give rebuttal testimony.

Although the emails between the three witnesses was probably improper, we do not conclude that this assumed violation requires, as McDonald requests, that we remand this case to the hearing judge for consideration of a sequestration violation and potential striking of testimony. When the hearing judge advised the witnesses regarding sequestration, she did not prohibit expressly them from reading news articles about the case. Moreover, even though Penny and Richardson were recalled as rebuttal witnesses after having noted, presumably, the news story in the email chain, the subjects of McDonald's and Miller's testimony discussed in the news story appear unrelated to the subjects to which Penny and Richardson testified on rebuttal. [10] Thus, nothing Penny and Richardson may have learned from the news story about the prior testimony of McDonald or Miller resulted in the "artificial harmony ***31** of testimony that prevents the trier of fact from truly weighing all the testimony[, or] ... the outright manufacture of testimony," which Md. Rule 5–615 is intended to prevent. *Redditt v. State,* 337 Md. 621, 629, 655 A.2d 390, 394 (1995) (quoting *Hurley v. State,* 6 Md.App. 348, 351–52, 251 A.2d 241, 244 (1969)); *see also* *Erman v. State,* 49 Md.App. 605, 624, 434 A.2d 1030, 1042 (1981) (holding that a trial court did not abuse its discretion by denying a motion to exclude testimony of a witness, for an alleged sequestration violation, where "no impermissible harmonization of testimony could be inferred from [the witness's] reading of the newspaper, in the absence of any evidence that this testimony was based on what he read").

10 Although Richardson admitted, during his rebuttal testimony, that he recalled reading a news story discussing another witness's allegation that Richardson was involved in ticket fixing, the news report copied in the email exchange received in post-hearing "discovery" by McDonald does not discuss that subject. In light of numerous references in the hearing transcript to members of the press being in the courtroom during the proceedings, it seems more likely that Richardson read some other news account of the trial.

The hearing judge's response that nothing could be done without specific evidence of a violation was proper under the circumstances. The judge did not commit "clear ****135** error by not striking the testimony of Lance Richardson" when no motion to strike was made at that time. None of the evidence presented by McDonald in this Supplemental Exception changes matters. McDonald's Exceptions are overruled.

Exception Numbered 7

McDonald argues in Exception numbered 7 that the hearing judge committed clear error by allowing into evidence personnel records of a deputy sheriff. In support of his argument, McDonald relies on *Montgomery County v. Shropshire,* 420 Md. 362, 23 A.3d 205 (2011), and Maryland Code, State Government Article, § 10–627. McDonald's exception mischaracterizes the evidence once again. The evidence in question is a chain of emails between McDonald and Knotts that was forwarded to a deputy sheriff, and intercepted during an investigation of that deputy. The only information in the emails related to the deputy sheriff was redacted for purposes of presentation during the hearing in McDonald's disciplinary case. The evidence contained no personal information about the deputy sheriff, and therefore was not a personnel record, i.e. it was not related to " 'the hiring, discipline, promotion, dismissal, or any matter involving an employee's status.' " ***32** *Shropshire,* 420 Md. at 378, 23 A.3d at 215 (quoting *Kirwan v. The Diamondback,* 352 Md. 74, 83, 721 A.2d 196, 200 (1998)); *see also* *Md. Dep't of State Police v. Md. State Conf. of NAACP Branches,* 430 Md. 179, 195, 59 A.3d 1037, 1046 (2013) (holding that records regarding complaints against State Police officers, which would be exempt from disclosure when unredacted, where no longer exempt "[a]fter the names of State Police troopers, the names of complainants, and all identifying information [we]re redacted"). We conclude, therefore, that the hearing judge committed no error in admitting the evidence, and overrule McDonald's Exception.

Exception Numbered 12

McDonald's Exception numbered 12 combines a confusing conglomerate of factual arguments, legal propositions, and citations to legal authorities, compressed into a grand plan of persuading us that "[t]he *nolle prosequi* of the traffic tickets of Ms. Knotts is beyond the revisory power of the Court." To explain the reasons why McDonald's Exception is misguided, we consider his arguments piecemeal.

McDonald begins this Exception by arguing again that he entered the *nolle prosequi* dispositions in exchange for confidential law enforcement information provided by Knotts. He contends that because he did not violate Knotts's fundamental fairness rights or violate speedy trial doctrine when he entered *nolle prosequis* in her favor, there is no issue for a court to review. McDonald continues that he was prejudiced by the hearing judge because his refusal to testify, on the record and in front of members of the press, regarding confidential law enforcement information relayed by Knotts was held against him. As stated above, the hearing judge did not find credible McDonald's claim that Knotts was a confidential law enforcement source of the Office and that he entered *nolle prosequi* dispositions in accordance with Office policy in exchange for the information she provided. We perceive no error in that finding. Because there was competent and credible evidence from other witnesses that Knotts was not a confidential source, and Knotts's own testimony on that subject was self- ***33** contradictory, McDonald was not prejudiced by the hearing judge's finding.

McDonald then repeats some of the same arguments from his Exceptions numbered ****136** 5 and 6 before referring us to portions of appellate opinions, [11] a Maryland Attorney General's opinion, [12] the Maryland Code, [13] and the Maryland Constitution [14] regarding the responsibilities of a prosecutor and the circumstances in which a prosecutor's decision to enter *nolle prosequi* in a particular case may be reviewable by the courts. Based on his interpretation of those authorities, McDonald contends that the circumstances of this case do not present the type of limited circumstances in which a court in any context may second-guess a prosecutor's entry of *nolle prosequi.*

11 *Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); *Hook v. State,* 315 Md. 25, 553 A.2d 233 (1989); *Murphy v. Yates,* 276 Md. 475, 348 A.2d 837 (1975); *Alther v. State,* 157 Md.App. 316, 850 A.2d 1211 (2004); *Mora v. State,* 123 Md.App. 699, 720 A.2d 934 (1998); *Ross v. State,* 117 Md.App. 357, 700 A.2d 282 (1997); *Middleton v. State,* 67 Md.App. 159, 163, 506 A.2d 1191 (1986), *overruled by* *Fairbanks v. State,* 331 Md. 482, 629 A.2d 63 (1993).

12 84 Op. Att'y Gen. 73 (1999).

13 McDonald refers to "Annotated Code of Maryland Article 10, Section 34," which was repealed in 2008 and re-enacted as Md.Code, Crim. Proc. Art., § 15–102.

[14] McDonald cites Article 5, § 9 of the Maryland Constitution, the only potentially pertinent part of which reads: "The State's Attorney shall perform such duties and receive such salary as shall be prescribed by the General Assembly."

The authorities McDonald relies on, however, are inapposite and his thesis overly broad. If this were an appeal from a judgment in a hypothetical *State v. Knotts* in which we were asked to determine whether *nolle prosequi* was entered improperly or without authorization in that case, his arguments regarding reviewability might, perhaps, carry weight.[15] This ***34** is, however, an entirely separate proceeding in which we (and the hearing judge) are considering whether McDonald abused his position as Deputy State's Attorney and violated the MLRPC. No one questions whether McDonald, as Deputy State's Attorney, had fundamental authority to enter a *nolle prosequi* disposition, when appropriate to do so. The question is whether he did so outside of the scope of his lawful duties and authority of his office and for the corrupt purpose of performing personal favors for Knotts. Thus, in presiding over the present case, we do not intend to hem-in the breadth of a prosecutor's legitimate discretion in pursuing (or not) charges, but we determine the point at which a prosecutor's discretion is exercised illegitimately so as to overstep the bounds of ethical conduct. On this point, we offer the sound reasoning of the Supreme Court of Indiana in *In re Christoff,* 690 N.E.2d 1135 (Ind.1997), where a county prosecutor and his chief deputy were disciplined for conspiring together to threaten a political rival by pursuing disciplinary charges against the rival in a case they decided previously not to prosecute:

[15] To be clear, we are not conceding that McDonald's arguments regarding reviewability would be meritorious even in such a hypothetical. We are illustrating merely why, under the circumstances of this case, we need not even consider whether his arguments have merit.

> By our decision today, this Court does not seek to impair the exercise of prosecutorial authority or discretion. The key element of culpability in the respondents' actions was their use of the prosecutorial powers to further their self-interests.... Use of prosecutorial authority becomes improper when the sole or overriding motivation for exercising it is the prosecutor's personal benefit or gain, and not to further the ****137** public interest of effective law application and enforcement.
>
> 690 N.E.2d at 1141.

Next, McDonald embraces a student-authored law review article[16] for the propositions that: (1) the courts may run afoul of the constitutionally-mandated separation of powers by ***35** disciplining prosecutors; and, (2) ethical codes for lawyers fail generally to provide adequate guidance for prosecutors. To suggest that we will (or the hearing judge did) violate separation of powers principles by presiding over this disciplinary proceeding, or that the MLRPC lack sufficient guidance for McDonald to have known, as a prosecutor, whether he would violate his ethical obligations in committing the relevant acts alleged, is fallacious. Prosecutors are not exempt from discipline under the Rules of Professional Conduct. Indeed, some of the rules are framed specifically with the conduct of prosecutors in mind. *See* MLRPC 3.8(a)-(e). Furthermore, we do not conclude that the rules McDonald is charged with violating in this case—prohibiting any lawyer from violating or attempting to violate the MLRPC; committing criminal acts that reflect adversely on a lawyer's honesty, trustworthiness, or fitness; engaging in dishonest conduct, or engaging in conduct that is prejudicial to the administration of justice—provided insufficient guidance from which an experienced Deputy State's Attorney should have surmised that entering *nolle prosequi* dispositions as personal favors to his co-worker, who also happened to be a person with whom he had an emotional attraction, would be unethical. Although McDonald maintains again that his entry of *nolle prosequi* dispositions in the five traffic citation cases were in accordance with Office policy as exchanges for confidential law enforcement information provided by Knotts, the hearing judge found rather that he did so as a personal favor and not for a legitimate purpose, and, as explained above, we perceive no clear error in that result.

[16] Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power,* 57 Duke L.J. 131 (2007).

McDonald continues in his Exception by contending that the manner in which he entered *nolle prosequi* dispositions cannot constitute a violation of MLRPC 8.4(d) because those actions did not involve a "systemic abuse of discretion," arguing that no reported appellate decision in any court in the United States addresses whether a prosecutor can be sanctioned for entering *nolle prosequi* improperly. The hearing judge found that McDonald entered improperly *nolle prosequi* for illegitimate purposes on five occasions over a period of two and a half years, which, in our view, constitutes

a systemic abuse of prosecutorial discretion. Moreover, as Bar Counsel points ***36** out, cases in which prosecutors have been disciplined for entering impermissible *nolle prosequis* do exist. *See, e.g., In re Jackson,* 27 So.3d 273 (La.2010) (lawyer disbarred for using his position as Assistant City Attorney to enter *nolle prosequi* prior to the arraignments of civilians who paid him to represent them in DWI cases).

Finally, McDonald concludes his Exception with what can best be described as a non-sequitur: "[t]he Respondent is not charged with violating office policy, nor is he charged with conflict of interest." This last gasp assertion has no bearing on whether McDonald violated Rule 8.4(a)-(d)Rule 8.4(a)-(d) by entering *nolle prosequi* dispositions as personal favors to Knotts, or the authority of the hearing judge and this Court to consider such actions in an attorney disciplinary ****138** matter. Accordingly, we overrule McDonald's Exception.

Exception Numbered 14

McDonald argues in this Exception that "Maryland Rule 16–757 [17] has not been complied with in this case." We issued an Order on 16 May 2013, denying McDonald's Motion to Dismiss for Failure to Comply with Maryland Rule 16–757, which he filed prior to his Exceptions, but with the same arguments as in this Exception. [18] We shall not revisit McDonald's ***37** Rule 16–757Rule 16–757 arguments. His Exception numbered 14 is overruled.

17 McDonald's Exception refers specifically to subsections (c) and (e) of Rule 16–757Rule 16–757 ("Judicial Hearing"), which read:

> ... (c) Findings and Conclusions. The judge shall prepare and file or dictate into the record a statement of the judge's findings of fact, including findings as to any evidence regarding remedial action, and conclusions of law. If dictated into the record, the statement shall be promptly transcribed. Unless the time is extended by the Court of Appeals, the written or transcribed statement shall be filed with the clerk responsible for the record no later than 45 days after the conclusion of the hearing. The clerk shall mail a copy of the statement to each party.
> (e) Transmittal of Record. Unless a different time is ordered by the Court of Appeals, the clerk shall transmit the record to the Court of Appeals within 15 days after the statement of findings and conclusions is filed.

18 Although McDonald's Motion was filed prior to his Exceptions, our Order was not issued until after McDonald filed his Exceptions, which explains perhaps the duplication of arguments.

Supplemental Exceptions Numbered 3 and 4

In Supplemental Exceptions numbered 3 and 4, McDonald asks this Court to remand this case to the hearing judge, pursuant to *Attorney Grievance Commission v. Lee,* 387 Md. 89, 874 A.2d 897 (2005), so that he may offer evidence that became available to him only after the merits hearing. McDonald submits as "new" evidence a chain of emails, between Richardson and employees in the Human Resources Department of the State's Attorney's Office, and argues that they demonstrate a contradiction in Richardson's hearing testimony and thus undermine his credibility.

The emails, which were exchanged on 18 January 2013 (after Richardson's testimony in Bar Counsel's case-in-chief), do not conflict with Richardson's testimony. Although the emails do indicate that Richardson lacked some knowledge about the County's leave policies, that revelation does not contradict the testimony he gave earlier. On direct examination by Bar Counsel, Richardson testified about the arrangement by which McDonald "donated" personal leave to Knotts by completing alternate and misleading timesheets. He stated that he believed the arrangement "wasn't appropriate," and was not authorized by him. He described also how McDonald donated previously sick leave to Knotts by following the standard practice of the Office, e.g., by filing a form with the Human Resources Department. When asked if there was a standard practice for donating personal or annual leave (the types of leave involved in the transactions Richardson deemed inappropriate), Richardson testified:

> I don't believe you can give annual leave and, I mean, the only thing I had ever seen was sick leave and that's all I was aware that you were capable of donating and the rationale is if someone is sick, that's something you don't have any control over, as opposed to vacation or personal. No, I don't

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> believe you can ever donate those. It was to help out someone who's in need.

****139** ***38** Richardson's testimony does not indicate that he professed to know definitively the County's policies, and is not inconsistent with the emails on which McDonald relies in Supplemental Exception numbered 3. This Exception is overruled.

In Supplemental Exception numbered 4, McDonald again asks us to remand the case so that the hearing judge may reassess Richardson's credibility. In this Exception, McDonald argues that a chain of two emails indicates that Richardson entered *nolle prosequi* as personal favors for other persons, which, McDonald contends, contradicts Richardson's testimony at trial. The emails McDonald submits were sent in March 2013, two months after McDonald's hearing in the present case concluded, and do not concern any matters occurring before or during McDonald's hearing. These emails are not relevant, and we will not ponder further upon McDonald's Supplemental Exception numbered 4, which is overruled.

3. The Parties' Exceptions to the Proposed Conclusions of Law

Bar Counsel's Exceptions

Bar Counsel takes exception to the hearing judge's proposed conclusions of law concerning four bases of disciplinary charges against McDonald. More specifically, Bar Counsel takes exception to the hearing judge's conclusion that McDonald's acts of (1) "ticket-fixing" on behalf of Knotts, (2) intentional interference with the criminal prosecution of Knotts for embezzlement, (3) creating and submitting falsified timesheets on behalf of Knotts, and (4) accessing Knotts's computer on 6 July 2011 (following her termination from employment in the Office) did not violate MLRPC 8.4(c). Additionally, Bar Counsel takes exception to the conclusion that the ticket-fixing scheme did not violate MLRPC 8.4(b), and that accessing Knotts's computer did not violate MLRPC 8.4(b) or (d). McDonald's Exception numbered 13 challenges the hearing judge's conclusion that he violated MLRPC 8.4(a) & (d). As we shall evaluate in detail below, we sustain each of Bar Counsel's exceptions regarding MLRPC 8.4(c) and (d), ***39** and overrule McDonald's Exception concerning MLRPC 8.4(a) & (d). Because the sanction we shall impose based on McDonald's violations of 8.4(a),[19] (c), and (d) would not change if we granted Bar Counsel's Exceptions 1 and 4 as they relate to 8.4(b), we need not consider the merits of Bar Counsel's arguments within those Exceptions concerning MLRPC 8.4(b).

19 The judge concluded that McDonald violated 8.4(a) based on her conclusion that McDonald violated 8.4(d) when he entered *nolle prosequis* for Knotts's traffic citations and interfered intentionally with her criminal prosecution for embezzlement. Bar Counsel filed no exception to the judge's conclusion regarding 8.4(a), nor does McDonald present us with a valid reason to disturb that conclusion. Accordingly, we adopt the judge's proposed conclusion of law that McDonald violated 8.4(a).

We first address Bar Counsel's Exceptions regarding MLRPC 8.4(c). The hearing judge concluded that Bar Counsel failed to prove, by clear and convincing evidence, that any of McDonald's charged conduct constituted violations of 8.4(c), which prohibits attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." Unfortunately, the hearing judge's Memorandum Opinion lacks sufficient specificity to allow us to determine precisely why she concluded as she did. In the Conclusions of Law section of the Memorandum Opinion, the hearing judge stated merely that "the Petitioner did not prove by clear and convincing evidence that the Respondent violated MLRPC 8.4(c)," because "[a]lthough the court finds that the Respondent engaged ****140** in conduct that is prejudicial to the administration of justice ... such conduct does not rise to the level of criminal behavior or constitute a finding of dishonesty, fraud, deceit or misrepresentation."

We suspect that the judge's conclusion regarding 8.4(c) may be the result of a misinterpretation of that Rule. Under Rule 8.4(c)Rule 8.4(c), "[i]t is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The four types of misconduct enumerated in the Rule proscribe a broad universe of misbehavior. "[D]ishonesty" is the broadest of the four terms, and encompasses, *inter alia,* "conduct evincing a lack of honesty, probity ***40** or integrity in principle; [a] lack of fairness and straightforwardness.... Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Attorney Grievance Comm'n*

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v. Sheridan, 357 Md. 1, 25, 741 A.2d 1143, 1156 (1999) (quoting *In the Matter of Shorter,* 570 A.2d 760, 767–68 (D.C.App.1990) (alterations in original)). Applying these principles, we conclude that the following facts concerning each of the four categories of misconduct alleged by Bar Counsel convince us, as clear and convincing evidence, of MLRPC 8.4(c) violations.

As to the ticket fixing, there is no question that McDonald caused *nolle prosequi* dispositions to be entered for Knotts on five separate occasions. The hearing judge found that, in entering *nolle prosequi* for Knotts on those occasions, McDonald abused his position as Deputy State's Attorney in order to perform personal favors, with no legitimate law enforcement business purpose, for an employee with whom he had "an intense, and at times obsessive, infatuation." In our view, that is sufficient evidence from which to conclude that McDonald violated MLRPC 8.4(c) in each of those five instances. Although of greater breadth than the discretion of District Court judges who adjudicate most traffic citations, the discretion of a prosecutor to enter *nolle prosequi* for such a citation should be based on an "honest appraisal of the facts and the law." *See In re: Formal Inquiry Concerning Judge A. Jerome Diener and Judge Joseph L. Broccolino, Jr.,* 268 Md. 659, 304 A.2d 587, (1973) (removing two District Court judges from the bench for issuing favorable judgments in traffic violation cases of friends and business associates). The evidence proves clearly and convincingly that McDonald's five *nolle prosequi* entries were made without an honest assessment of the facts and the law. The lack of integrity, fairness, and straightforwardness exhibited in McDonald's egregious misuse of the power afforded to him as a prosecutor in performing acts of favoritism for his love interest constitute dishonesty under the Rule. [20]

20 In Bar Counsel's first Exception and McDonald's response, the parties dispute whether McDonald entered, or caused to be entered, surreptitiously the *nolle prosequis* or did so without authorization from the officers who issued the citations. We need not resolve those disputes to arrive at the conclusion that McDonald violated 8.4(c).

***41** Regarding McDonald's interference with Knotts's embezzlement prosecution, there are four factual findings made by the hearing judge that we view as sufficient to sustain an 8.4(c) violation: (1) McDonald attempted on multiple occasions to speak directly to Trostle after the special prosecutor told him that he would communicate no longer with him about the case; (2) McDonald was "in constant contact with Knotts and her criminal defense attorney" during the same time period in which he was contacting continually Richardson and ****141** Trostle about the case; (3) McDonald conducted himself in a manner that "ran afoul of what was appropriate for a senior member of [the State's Attorney's Office]—an office that coincidentally was the victim of Knotts's embezzlement;" and, (4) McDonald was "actively and intentionally interfering in the Knotts prosecution," despite his early and ongoing assurances that he would not involve himself in the case. The hearing judge found additionally, and we agree, that McDonald's interference in the embezzlement prosecution was not justified or mitigated by his claims that Trostle was violating an assertedly enforceable plea agreement between Richardson and Knotts and that the amount of restitution was inflated. When viewed in their totality, these facts demonstrate that McDonald's actions with regard to Knotts's embezzlement prosecution bespeak a lack of integrity and probity that constitute dishonesty under Rule 8.4(c)Rule 8.4(c).

The evidence concerning McDonald's timesheets also proves clearly and convincingly acts of dishonesty. The hearing judge's conclusion regarding the timesheets seems to contradict her own factual findings. She found that McDonald signed timesheets, on more than one occasion, indicating that he took leave on days when he worked actually. Moreover, the hearing judge found that McDonald did so knowingly after instructing Knotts that she could claim thereby to be working on days on which she would, in fact, not work actually. It may ***42** be that the hearing judge viewed the evidence as being insufficient to prove that McDonald perpetrated a fraud, an offense which requires a specific intent to deceive; however, that level of proof is not necessary for a conclusion of dishonesty. *Attorney Grievance Comm'n v. Dore,* 433 Md. 685, 707–08, 73 A.3d 161, 174 (2013). By signing inaccurate timesheets and providing them to Knotts with the knowledge that she would then use them as a basis for concealing her own inaccurate timesheets, and which would result in an inaccurate accounting of the State's human resources, McDonald committed dishonest acts in violation of MLRPC 8.4(c).

The hearing judge's factual findings are also sufficient, in our view, to hold that McDonald violated MLRPC 8.4(c) when he accessed Knotts's Office computer the day after her termination. The hearing judge found that McDonald went into Knotts's former office, knowing she had been terminated for embezzlement the day before, and began

deleting emails. Although the hearing judge concluded that there was nothing "nefarious or illegal" in his actions, we conclude that the evidence is sufficient to find that he acted dishonestly. McDonald's entry into Knotts's former office occurred within hours of his attempts to interfere with the issuance of criminal charges against her and the serving of the summons upon her. The hearing judge relied on the fact that there was nothing to indicate that Knotts's office was a crime scene, but given McDonald's knowledge of the progress of the case against her and the fact that he accessed her computer "admittedly for a different purpose" than other employees who used her computer for legitimate business had, indicates that McDonald knew he was acting inappropriately. Moreover, it is clear that McDonald entered Knotts's former office and deleted emails from her computer without authorization from the State's Attorney. Regardless of whether the evidence was sufficient to prove a criminal act by McDonald, it was sufficient to prove a dishonest act in violation of MLRPC 8.4(c). Accordingly, we sustain Bar Counsel's Exceptions numbered 1 and 4 as they pertain to MLRPC 8.4(c).

***43** We conclude, additionally, that the evidence regarding McDonald's access to Knotts's computer proves, by clear and ****142** convincing evidence, a violation of MLRPC 8.4(d). McDonald knew, according to the factual findings, that Knotts had been fired and was being investigated for embezzlement. By entering her office and using her computer, without authorization under those circumstances, McDonald knew or should have known that his conduct could be affecting a criminal investigation, even if that was not his purpose in deleting the email files. His conduct did affect indeed the course of the investigation, even if the emails he deleted were not related to her embezzlement, because he caused Richardson, after discovering McDonald in Knotts's office logged onto on her computer, to dedicate time and resources of the State's Attorney's Office to recovering the deleted emails and determining whether they were relevant to the investigation. McDonald's actions, therefore, were prejudicial to the administration of justice. Accordingly, we sustain Bar Counsel's Exception numbered 4 as it pertains to MLRPC 8.4(d).

McDonald's Exception Numbered 13

In this Exception, McDonald makes several contentions challenging the hearing judge's finding that McDonald violated MLRPC 8.4(a) and (d), in part, by interfering with the criminal prosecution of Knotts. First, he argues that he was deprived of procedural due process because the hearing judge's proposed conclusion of law relied on facts not alleged in the Petition. He recites a litany of facts in the judge's Memorandum not alleged in the Petition.

A petition for disciplinary or remedial action is a notice pleading that "will be deemed sufficient [s]o long as the petition informs the attorney of the misconduct charged in language which is clear and sufficiently specific to enable the attorney to prepare a defense.... [N]o specific form or detail is required to satisfy this threshold requirement." *Attorney Grievance Comm'n v. Tanko,* 408 Md. 404, 420–21, 969 A.2d 1010, 1020 (2009) (internal quotation marks and citations omitted). We conclude that the Petition in this case was sufficient ***44** to put McDonald on notice of the charges against him. Furthermore, McDonald points to no authority to support the proposition that every material fact relied on ultimately by the hearing judge from the admitted evidence must have been alleged in the Petition. There is no such authority, nor shall this opinion be the first of that kind.

The rest of McDonald's Exception consists mainly of arguments (about evidence) that have been considered and rejected in our consideration of his other Exceptions, and evidentiary matters for which he failed to object during the hearing. McDonald cites three cases as legal support for his argument that his actions did not constitute violations of 8.4(d). First, he fastens on *Attorney Grievance Commission v. Link,* 380 Md. 405, 844 A.2d 1197 (2004), for the proposition that " '[w]hen purely private, non-criminal conduct is implicated, the harm or potential harm must be 'patent' in order for conduct to rise to the level of conduct prejudicial to the administration of justice.' "[21] Although *Link* does stand for that proposition, we distinguished *Link* from cases such as the present one where the attorney's conduct interferes with or affects pending litigation. *See Attorney Grievance Comm'n v. Hall,* 408 Md. 306, 331, 969 A.2d 953, 968 (2009). McDonald turns also to ****143** *Attorney Grievance Commission v. Rand,* 411 Md. 83, 981 A.2d 1234 (2009), and *Attorney Grievance Commission v. Kalil,* 402 Md. 358, 936 A.2d 854 (2007), for the proposition that "minimally intrusive conduct" does not violate Rule 8.4(d)Rule 8.4(d). The hearing judge found apparently, and we agree, that McDonald's conduct in attempting persistently to interfere with nearly every stage of, and nearly every person involved in, the investigation

and prosecution of Knotts for embezzlement was more than "minimally" intrusive. We overrule McDonald's Exception numbered 13.

21 McDonald attributes incorrectly this quotation to *Link* directly. In fact, the quotation is from our opinion in *Attorney Grievance Commission v. Rand,* 411 Md. 83, 96, 981 A.2d 1234, 1242 (2009), in which we paraphrased the holding of *Link.*

***45** In light of our disposition of the parties' exceptions to the hearing judge's findings of fact and conclusions of law (and of those findings and conclusions not excepted to), we conclude that Bar Counsel proved, by clear and convincing evidence, that McDonald committed several violations of MLRPC 8.4(a), (c), and (d) in fixing tickets on Knotts's behalf, interfering in her prosecution for embezzlement, assisting in her use of inaccurate timesheets, and accessing her work computer to delete emails following her termination.

C. Sanction

Unsurprisingly, the parties arrive at significantly different recommendations for the appropriate sanction in this case. Bar Counsel recommends disbarment, even if we were to overrule its Exceptions. Conversely, McDonald argues that, at worst, a reprimand may be appropriate under the circumstances. Our guiding principle in determining sanctions for ethical violations is our "interest in protecting the public and the public's confidence in the legal profession." *Attorney Grievance Comm'n v. Pennington,* 387 Md. 565, 595, 876 A.2d 642, 660 (2005). The "purpose of attorney disciplinary proceedings is not to punish the lawyer, but to protect the public as well as to deter other lawyers from engaging in similar misconduct." *Pennington,* 387 Md. at 596, 876 A.2d at 660. In light of the violations that were proved, and our analysis of the aggravating and mitigating factors discussed below, we agree with Bar Counsel's recommendation that McDonald be disbarred from the practice of law in Maryland.

We look often to the American Bar Association's (ABA) *Standards for Imposing Lawyer Sanctions* (1992) for guidance in determining an appropriate sanction, including whether any aggravating factors are present in relation to the misconduct. *Attorney Grievance Comm'n v. Walker–Turner,* 428 Md. 214, 233, 51 A.3d 553, 564 (2012). We conclude that a number of the aggravating factors enumerated in Standard 9.22 are present in McDonald's case: (1) all of McDonald's conduct was committed under the influence of dishonest or selfish motives (9.22(b)) arising out of his choice to allow his ***46** infatuation for Knotts to overbear his professional integrity and responsibilities; (2) McDonald engaged in a pattern of misconduct (9.22(c)), and (3) committed multiple offenses (9.22(d)), by fixing five tickets over a period of more than two years and interfering at almost every juncture of the prosecution of Knotts for embezzlement; (4) McDonald refuses to acknowledge the wrongful nature of his conduct (9.22(g)) and continues to point the finger at what he alleges to be improprieties of witnesses in the case against him, even where their alleged conduct, if true, would not excuse or mitigate the impropriety of his own conduct; and (5) having worked as a prosecutor for over a decade before the events in this case occurred, McDonald had substantial experience in the practice of law (9.22(i)) that should have given him an experiential basis from which to know his actions were unethical.

The only mitigating factor applicable in this case is the lack of a prior ****144** disciplinary record (Standard 9.32(a)). This is diluted, to some extent, by the number of offenses McDonald committed and the extended period of time over which he committed them.

Prosecutors must be "held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice." *Attorney Grievance Comm'n v. Gansler,* 377 Md. 656, 697, 835 A.2d 548, 572 (2003). Furthermore, "[d]isbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another." ABA, *Standards for Imposing Lawyer Sanctions* 5.21 (1992). We conclude that, although McDonald resigned from his position as Deputy State's Attorney, disbarment is the appropriate sanction for McDonald's misconduct, including his abuse of his former position as a government official, in order to protect the public, maintain the public's confidence in the legal profession, and deter similar misconduct by public officials in the future.

***47 IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE 16–761(b), FOR WHICH SUM JUDGMENT IS**

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ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION OF MARYLAND AGAINST JOHN MARK MCDONALD.

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377 Md. 656
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND
v.
Douglas F. GANSLER.

Misc. AG No. 81, Sept. Term, 2002.
|
Nov. 12, 2003.

Synopsis

In an attorney disciplinary proceeding against prosecutor, the Court of Appeals referred petition for hearing. The Circuit Court, Frederick County, Julie R. Stevenson, J., found a single violation of rule applicable to extra-judicial comments. Bar Counsel and prosecutor filed exceptions. The Court of Appeals, Battaglia, J., held as a matter of first impression that: (1) comments about a defendant's confession, decision to offer plea bargain, and apprehension of perpetrators of two murders violated disciplinary rule applicable to extra-judicial statements; (2) some comments were within safe harbor of disciplinary rule allowing attorney to make extra-judicial statement about information contained in a public record since a broad definition of "public record" applied to case against prosecutor; (3) for future cases the "public record" is limited to public government records; and (4) public reprimand was warranted.

Reprimand ordered.

Attorneys and Law Firms

****551 *663** Melvin Hirshman, Bar Counsel and John C. Broderick, Asst. Bar Counsel for the Attorney Grievance Commission of Maryland, for petitioner.

Carmen M. Shepard, Washington, DC, for respondent.

****552** Argued before BELL, C.J., and ELDRIDGE, WILNER, CATHELL, HARRELL, BATTAGLIA, and ROBERT L. KARWACKI (Retired, specially assigned), JJ.

Opinion

BATTAGLIA, Judge.

Respondent Douglas F. Gansler was admitted to the Bar of this Court on December 18, 1989. On November 7, 2002, the Attorney Grievance Commission of Maryland, by Bar Counsel, acting pursuant to Maryland Rule 16–751(a),[1] filed a petition for disciplinary action, alleging that Gansler violated the following Maryland Rules of Professional Conduct (hereinafter "MRPC"): MRPC 3.1MRPC 3.1 (Meritorious Claims and Contentions),[2] ***664** MRPC 3.6MRPC 3.6 (Trial Publicity),[3] MRPC 3.8MRPC 3.8 (Special Responsibilities ***665 **553** of a Prosecutor),[4] MRPC 8.2(a)MRPC 8.2(a) (Judicial and Legal Officials),[5] and MRPC 8.4(a) & (d)MRPC 8.4(a) & (d) (Misconduct).[6]

1 Maryland Rule 16–751(a) provides:

> (a) **Commencement of disciplinary or remedial action.** Upon approval of the [Attorney Grievance] Commission, Bar Counsel shall file a Petition for Disciplinary or Remedial Action in the Court of Appeals.

2 MRPC 3.1MRPC 3.1 states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.

3 MRPC 3.6MRPC 3.6 states:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

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(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
(c) Notwithstanding paragraph (a) and (b)(1–5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
(1) the general nature of the claim or defense;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case:
(i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

4 MRPC 3.8MRPC 3.8 states:
The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
(e) exercise reasonable care to prevent an employee or other person under the control of the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6Rule 3.6.

5 MRPC 8.2(a)MRPC 8.2(a) states:
(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

6 MRPC 8.4MRPC 8.4 states in relevant part:
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
* * *

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(d) engage in conduct that is prejudicial to the administration of justice....

***666** The charges arose from numerous extrajudicial statements made by Gansler, who has served as the State's Attorney for Montgomery County since January of 1999. By order dated November 13, 2002 and pursuant to Maryland Rules 16–752(a) and 16–757(c), [7] we referred the petition to Judge Julie R. Stevenson of the Circuit Court for Frederick County for an evidentiary hearing and to make findings of fact and conclusions of law. During that hearing, which took place on March 10, 2003, Bar Counsel offered into evidence three videotapes of Gansler's extrajudicial statements and the report of his expert in the case, Professor Abraham Dash. Professor Dash and Professor Lisa Lerman, Gansler's expert, testified at the hearing. Gansler also offered his own testimony as well as that of two Deputy State's Attorneys for Montgomery County.

[7] Maryland Rule 16–752(a) states:

(a) **Order.** Upon the filing of a Petition for Disciplinary or Remedial Action, the Court of Appeals may enter an order designating a judge of any circuit court to hear the action and the clerk responsible for maintaining the record. The order of designation shall require the judge, after consultation with Bar Counsel and the attorney, to enter a scheduling order defining the extent of discovery and setting dates for the completion of discovery, filing of motions, and hearing.

Maryland Rule 16–757(c) states in pertinent part:

(c) **Findings and conclusions.** The judge shall prepare and file or dictate into the record a statement of the judge's findings of fact, including findings as to any evidence regarding remedial action, and conclusions of law....

Judge Stevenson filed a Report and Recommendations on April 29, 2003, in ****554** which she presented findings of fact and conclusions of law. Judge Stevenson concluded that Bar Counsel had presented clear and convincing evidence that Gansler, in one instance, had violated MRPC 3.6(a)MRPC 3.6(a); however, in Judge Stevenson's judgment, the evidence insufficiently supported Bar Counsel's charges that Gansler had violated MRPC 3.6(a)MRPC 3.6(a) in other instances and had violated other MRPC provisions. Both Bar Counsel and Gansler filed exceptions to Judge Stevenson's findings and conclusions. We overrule Gansler's exception and conclude, further, that he violated ***667** MRPC 3.6(a)MRPC 3.6(a) on more than a single occasion. Accordingly, as to Gansler's extrajudicial statements in which he discussed Cook's confession and his opinion of Cook's and Lucas's guilt, we sustain Bar Counsel's exceptions.

I. Facts

The undisputed facts in this case have been proven by clear and convincing evidence as required by Maryland Rule 16–757(b). Those facts demonstrate that, between 2000 and 2001, Gansler made several extrajudicial statements in connection with his office's prosecution of various well-publicized crimes. A discussion of the circumstances of each of the extrajudicial statements follows. [8]

[8] The facts we present in this section are based on the findings of fact and evidentiary items relied upon by the hearing judge in her Report and Recommendations.

A. The Cook Case

In late January of 2001, Sue Wen Stottsmeister was found beaten and unconscious. She had been accosted while jogging along a recreational path located in the Aspen Hill area of Montgomery County. Ms. Stottsmeister ultimately died from the injuries she suffered during that attack.

Nearly six-months later, on June 4, 2001, Albert W. Cook, Jr. allegedly attacked a woman near his home. Witnesses of that attack chased and kept visual contact with Cook until police arrived and arrested him for that incident. While the police were investigating the June 4, 2001 attack, they began to focus their attention on Cook as a suspect in the murder of Stottsmeister. In the afternoon of June 5, 2001, police officials convened the media for a press conference. Before the press conference began, a Washington D.C. television station broadcasted a report that large sneaker footprints had been found at the scene of the murder and that Cook had large feet that might fit sneakers of that size. The press conference then commenced, and the police announced that Cook would be charged with the Stottsmeister murder.

***668** Gansler attended that press conference and made several statements to the media regarding the anticipated prosecution of Cook. He described Cook's confession and the circumstances surrounding his custodial statements to police:

> The police were able to obtain a confession completely consistent with [Cook's] constitutional rights, he confessed within just a few hours with incredible details that only the murderer would have known. He was then provided the opportunity to rest and ... he slept, and where he had said was one of the best nights of sleep he had gotten in a long time.
>
> This morning at dawn, he was taken up to the crime scene, video taped by police, and went over in detail by detail every step of what he did to Ms. Stottsmeister this past January.

Gansler further stated that investigators had "boot print matches and that type of thing, or actually in this case the sneaker matches, but we're very confident, obviously ****555** more than confident that we have apprehended the right person...."

After the press conference, police charged Cook with the murder of Stottsmeister.[9] The statement of charges, which was filed in the District Court of Maryland, Montgomery County, stated: "Cook provided a full and detailed account of the assault and murder of Stottsmeister.... Cook provided details about the murder that would only be known by the perpetrator of the crime."

[9] Judge Stevenson noted, specifically, that the statement of charges in Cook's case had not been filed at the time of the June 5, 2001 press conference.

B. The Lucas Case

While asleep during the middle of the night, Monsignor Thomas Martin Wells, a revered member of the Montgomery County community, was beaten and killed in the rectory at his parish. On June 17, 2000, the Montgomery County police arrested Robert P. Lucas and charged him with the murder of ***669** Monsignor Wells. The statement of charges stated that the police had observed Lucas "wearing shoes having a shoe print consistent with the ones found on the crime scene" and that after Lucas was arrested, he "admitted breaking into the church rectory and responsibility for Well's murder."

The police held a press conference on June 18, 2000 to announce the arrest of Lucas and the charges against him. Gansler spoke at the press conference:

> The Montgomery County Police ... were able to determine definitively that indeed it was Mr. Lucas who had committed the crime. They were able to do so by following him. They conducted surveillance for over 24 hours. And then when they actually found him, he was wearing a very unique shoe, a very unique boot, and the print of that boot matched the print that was found at the scene of the crime, and then further questioning revealed, in fact, he was the person that had done it.

He offered several remarks about the evidence against Lucas, which he described as "a confession from the perpetrator as well as scientific and forensic evidence to corroborate that confession...." Gansler then expressed his opinion that "we have found the person who committed the crime at this point" and that the case against Lucas "will be a strong case."

Additionally, Gansler commented at the press conference that "it was a violent murder" and that Lucas "has a criminal record which includes residential burglaries and that will be obviously something that will come out later on as well." In fact, Lucas's criminal record came out again later, when Deputy State's Attorney Katherine Winfree discussed it at Lucas's bond hearing on the Monday after the press conference.

C. The Perry Case

James Edward Perry was convicted in the Circuit Court for Montgomery County of first-degree murder and sentenced to death for his role in the 1993 killings of an 8 year-old quadriplegic boy, the boy's mother, and a nurse. Although ***670** upheld on direct appeal, in post-conviction proceedings, Perry's conviction was reversed by this Court on December 10, 1999.

On January 4, 2000, the *Washington Post* ran an article describing Gansler's discussions with family members of the victims of the 1993 murders. The article explained that Gansler had asked the family members whether Perry

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should be retried or offered a plea agreement. Quoted in the article was Perry's attorney, William Jordan Temple, who commented that he "certainly would look forward" to a plea ****556** offer because "anyone faced with the possibility of a death penalty considers an offer of life."

While preparing for Perry's retrial, Gansler made extrajudicial statements that the *Gazette Community News* published on April 5, 2000. According to the *Gazette's* report, Gansler had announced that "he has decided to offer [Perry] a plea bargain" and that, "when the offer is formally presented, Perry would have six weeks to make a decision." The article also recounted the events of a hearing in the Perry case, held the day before, at which the court appointed new defense counsel. At that hearing, according to the *Gazette,* the prosecutor "did not mention the plea bargain offer" and Perry's lawyers "declined to discuss a plea offer or any details about the case."

On or about July 6, 2000, Gansler again appeared in front of television cameras. Responding to questions from the media, Gansler remarked that "the Court of Appeals' decision to reverse the original conviction of Mr. Perry was a completely result oriented opinion." Gansler expressed his view that the "four to three" opinion "was clearly an effort to overturn the death penalty in the Perry case."

D. The Bomb Threat Case

On February 8, 2000, the *Montgomery County Journal* published an article reporting the dismissal of charges against two Montgomery County teenagers who had been accused of calling bomb threats to Wheaton High School. At the juveniles' ***671** trial, the State presented evidence of two telephone calls that purportedly were the bomb threats. One of the calls, the article stated, could not be linked to either juvenile, and the other had been made three days prior to the alleged bomb threat. The article quoted the presiding judge, who in dismissing the charges, said, "I have no idea who did this" and "I have no evidence." The *Journal* account relayed Gansler's comments that "his office will continue to prosecute youths suspected of making bomb threats, even if the case is not strong enough to warrant a conviction." Gansler was quoted as saying, "We try hard cases.... Juveniles who phone in bomb threats will be prosecuted. It's more important to prosecute someone and have them acquitted [sic] than let them commit crimes with impunity." [10]

10 In the proceedings before the hearing judge, Bar Counsel presented evidence of numerous other extrajudicial statements by Gansler that Bar Counsel considered objectionable. The hearing judge's Report and Recommendations do not refer to those other statements, and Bar Counsel has not raised any exceptions based on those statements. Because Bar Counsel failed to take exceptions to the hearing judge's factual findings, we consider only those statements discussed by Judge Stevenson to be at issue. *See* Maryland Rule 16–759(2)(B) ("The [Court of Appeals] may confine its review to the findings of fact challenged by [a party's] exceptions.").

II. The Hearing Judge's Conclusions of Law

The hearing judge concluded that Gansler committed a single violation of MRPC 3.6MRPC 3.6 by making extrajudicial statements about his decision to offer a plea agreement in the Perry case. The judge determined that those statements clearly violated the general proscriptions of MRPC 3.6(a)MRPC 3.6(a) as well as the specific provisions of MRPC 3.6(b)(2)MRPC 3.6(b)(2) limiting extrajudicial references to plea agreements. Furthermore, in the hearing judge's estimation, Gansler's plea agreement remarks found no safe harbor under MRPC 3.6(c)MRPC 3.6(c), which provides that certain types of statements *are permissible* even though, under MRPC 3.6(a)MRPC 3.6(a), those statements might have a "substantial ****557** likelihood of materially prejudicing an adjudicative proceeding."

***672** The hearing judge found no violations with respect to Gansler's other extrajudicial statements. The judge concluded that Gansler's references to the physical evidence against Cook and Lucas fell under the safe harbor provision of MRPC 3.6(c)(2)MRPC 3.6(c)(2), which allows a lawyer to state, "without elaboration," "information contained in a public record" notwithstanding the strictures of MRPC 3.6(a)MRPC 3.6(a) or MRPC 3.6(b)MRPC 3.6(b). In the hearing judge's view, the "public record" safe harbor suffered from First Amendment vagueness concerns because it was susceptible of multiple and widely varying interpretations. Lacking a precise definition, the judge indicated that the terms "without elaboration" and "public record" fail to provide lawyers with adequate guidelines for determining when "remarks pass from protected to prohibited."

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The hearing judge, however, conveyed concern over Gansler's comments regarding the Cook and Lucas confessions, which, she stated, "clearly do no fall under [the safe harbor provision of MRPC] (c)(2)," violated "the spirit of [MRPC] 3.6MRPC] 3.6" and "could create a substantial likelihood of materially prejudicing an adjudicative proceeding." Nevertheless, the judge found no violations of MRPC 3.6MRPC 3.6 in these comments because she determined that, due to their timing, no material prejudice actually flowed from them. [11]

11 The hearing judge stated that she reached this conclusion "with reluctance" and that she was "troubled by such statements made by an elected State's Attorney prior to trial."

The judge examined Gansler's extrajudicial criticism of this Court's reversal of Perry's conviction in light of MRPC 8.2MRPC 8.2. The judge agreed with Bar Counsel's expert, who considered Gansler's comments "a lawful and appropriate expression of opinion protected under the First Amendment of the United States Constitution." Consequently, the hearing judge determined that Gansler had not violated MRPC 8.2MRPC 8.2.

Finally, the hearing judge concluded that Bar Counsel had not demonstrated that Gansler violated MRPC 3.1MRPC 3.1 or MRPC 3.8(a)MRPC 3.8(a) by making comments regarding his intended prosecution of youths suspected of making bomb threats. The judge ***673** was persuaded by Gansler's hearing testimony that "his intent was not to prosecute in bad faith" but, rather, to stress that "the State often must try cases difficult to prove." Specifically finding Gansler's testimony credible, the hearing judge concluded that Bar Counsel had not presented clear and convincing evidence that Gansler intended to prosecute without probable cause in violation of MRPC 3.1MRPC 3.1 and MRPC 3.8(a)MRPC 3.8(a).

As we noted earlier, both parties filed exceptions to the hearing judge's conclusions. Bar Counsel maintained that the hearing judge's finding of a single violation was in error and that the evidence clearly and convincingly supported a conclusion that Gansler violated MRPC 3.6MRPC 3.6 on numerous occasions. In addition, Bar Counsel argued that Gansler intended to prosecute without probable cause, in violation of MRPC 3.1MRPC 3.1, MRPC 3.8MRPC 3.8, and MRPC 8.4(d)MRPC 8.4(d). Bar Counsel, however, took no exception from the hearing judge's conclusion that Gansler did not violate MRPC 8.2MRPC 8.2. Gansler found no fault with most of the hearing judge's findings and conclusions, except, however, for her determination that his comments regarding the plea offer to Perry had violated MRPC 3.6MRPC 3.6.

III. Standard of Review

Our recent opinion in *Attorney Grievance Comm'n v. Zdravkovich,* 375 Md. 110, 126, 825 A.2d 418, 427 (2003), ****558** iterated our well established and frequently recognized standard of review in attorney disciplinary matters:

> This Court exercises " 'original and complete jurisdiction for attorney disciplinary proceedings in Maryland,' and conducts 'an independent review of the record.' " *Attorney Grievance Comm'n v. Blum,* 373 Md. 275, 293, 818 A.2d 219, 230 (2003) (quoting *Attorney Grievance Comm'n v. McLaughlin,* 372 Md. 467, 492, 813 A.2d 1145, 1160 (2002) (citations omitted)). "In conducting that review, we accept the hearing judge's findings of fact as *prima facie* correct unless shown to be 'clearly erroneous,' and we give due regard to the hearing judge's opportunity to assess the credibility of witnesses." *Attorney Grievance Comm'n v. Wallace,* 368 Md. 277, 288, 793 A.2d 535, 542 (2002) (citation ***674** omitted). "As to the hearing judge's conclusions of law," however, " 'our consideration is essentially *de novo.*' " *Attorney Grievance Comm'n v. Dunietz,* 368 Md. 419, 428, 795 A.2d 706, 711 (2002) (quoting *Attorney Grievance Comm'n v. Thompson,* 367 Md. 315, 322, 786 A.2d 763, 768 (2001) (quoting *Attorney Grievance Comm'n v. Briscoe,* 357 Md. 554, 562, 745 A.2d 1037, 1041 (2000))).

IV. Discussion

A. MRPC 3.6MRPC 3.6

This case serves as this Court's first opportunity to consider the application of MRPC 3.6MRPC 3.6, the rule of professional responsibility governing trial publicity. More significant than the case's novelty, however, are the balance and interplay of the numerous interests, rights, and responsibilities involved. To provide the proper context for understanding the important issues presented, we begin with a historical discussion of the regulation of trial publicity. We

then proceed to dissect Maryland's present rule and apply it to the extrajudicial statements in controversy.

1. Origins of the MRPC 3.6MRPC 3.6

Criminal justice must be carried out in the courtroom. [12] As Justice Holmes declared in *Patterson v. Colorado,* 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879, 881 (1907), "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." The constitutional underpinnings for this concept reside in the Sixth Amendment's right to a fair trial, made applicable to our State through the Fourteenth Amendment. [13] ***675** *Ristaino v. Ross,* 424 U.S. 589, 595 n. 6, 96 S.Ct. 1017, 1020 n. 6, 47 L.Ed.2d 258, 263 n. 6 (1976) ("A criminal defendant in a state court is guaranteed an "impartial jury" by the Sixth Amendment as applicable to the States through the Fourteenth Amendment.") (citing *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)); *see* ****559** *Estes v. Texas,* 381 U.S. 532, 540, 85 S.Ct. 1628, 1632, 14 L.Ed.2d 543, 549 (1965) (describing the right to a fair trial as "the most fundamental of all freedoms"). Article 21 of the Maryland Declaration of Rights also guarantees the right to a fair trial in all criminal prosecutions. [14]

12 For extended discussions of the origin and historical development of the modern rules governing trial publicity, see Charles W. Wolfram, MODERN LEGAL ETHICS at 633–34 (1986); Alberto Bernabe–Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech,* 33 LOY. U. CHI. L.J. 323 (2002).

13 U.S. CONST. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

14 Article 21 of the Maryland Declaration of Rights provides:

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

The text of the Sixth Amendment makes clear that a fair trial consists of numerous components, including, but certainly not limited to, the rights of an accused to a public trial and impartial jury. These components alone, of course, do not necessarily ensure a fair trial, as Chief Justice Warren explained:

> It has been held ... that the fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment.... But it also has been agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though "every ***676** form [be] preserved," the forms may amount to no " more than an empty shell" when considered in the context or setting in which they were actually applied.

Id. at 560, 85 S.Ct. at 1641, 14 L.Ed.2d at 560 (Warren C.J., concurring). Thus, even where a court has observed all of the Sixth Amendment formalities, it is possible for a defendant to be deprived of a fair trial if circumstances occurring outside the courtroom taint the proceedings. *See* *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) (holding that a defendant's fundamental due process rights had been violated because a local television

station had broadcasted his confession, and he was denied a change of venue).

One outside circumstance that may affect a defendant's right to a fair trial and, specifically, his right to an impartial jury, occurs when an attorney makes a publicized, out-of-court statement about the defendant's case. This is particularly true because attorneys occupy a special role as participants in the criminal justice system, and, as a result, the public may view their speech as authoritative and reliable. Attorneys involved in a particular case have greater access to information through discovery, the ability to converse privately with knowledgeable witnesses, and an enhanced understanding of the circumstances and issues. Their unique role and extensive access to information lends a degree of credibility to their speech that an ordinary citizen's speech may not usually possess. Comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public. When such seemingly credible information reaches the ears or eyes of the public, the jury pool may become contaminated, greatly diminishing the court's ability to assemble an impartial jury. The defendant's right to a fair trial, thus, may be compromised. *See* Joan C. Bohl, *Extrajudicial Attorney Speech and Pending Criminal Prosecutions: The Investigatory Commission Meets A.B.A. Model Rule 3.6,* 44 KAN. L.REV. 951, 973–74 (1996) (discussing how attorney speech differs from the speech of other individuals).

****560** ***677** Limiting extrajudicial attorney speech to preserve a fair trial, however, can be accomplished only in a way that is consistent with the fundamental right to free expression under the First Amendment. In general, the First Amendment applies equally to an ordinary citizen and an attorney, as long as the attorney "plays no lawyerly role in the matter under comment." *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS at 632 (1986). On the other hand, when the attorney has some professional relationship to a matter, the attorney's freedom to speak about it is not as broad. For instance, inside the courtroom, the rules of evidence and principles of relevance place rigid restrictions upon what an attorney may say, and when and how he or she may speak. Even outside the courtroom, the speech of a lawyer may be curtailed to an extent greater than an ordinary citizen's. In the arena of attorney advertising, the Supreme Court has upheld a state's thirty-day waiting period for solicitation letters by plaintiffs' personal injury lawyers, *see* *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), and a state's ban on in-person attorney solicitations, *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

In 1908, the American Bar Association first attempted to control the ill effects of attorney-generated trial publicity through the development of professional standards entitled "Canons of Professional Ethics" (hereinafter the "ABA Canons"). Many states adopted the ABA Canons, including Canon 20, which "[g]enerally ... condemned" newspaper publications "by a lawyer" regarding a pending case because such publications "may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice." [15] *See* ***678** *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1066, 111 S.Ct. 2720, 2740, 115 L.Ed.2d 888, 918 (1991); Alberto Bernabe–Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech,* 33 LOY. U. CHI. L.J. 323, 331 (2002) (hereinafter Bernabe–Riefkohl). The Maryland State Bar Association formally adopted the ABA Cannons in 1922. *Canons of Ethics, Adopted by the Maryland State Bar Association, Annual Session 1922* at 1.

15 The full text of Canon 20 stated:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation form the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

Despite the widespread adoption of the ABA Canons, trial publicity continued to affect defendants' Sixth Amendment rights and, consequently, gained the attention of the Supreme Court during the 1950s and 1960s. The Court dealt with the detriments of excessive media involvement in cases by reversing a number of criminal convictions on the ground that excessive trial publicity deprived the defendants of due process. *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (holding that a defendant had been denied due process because a pre-trial hearing had been televised live and then rebroadcast, and because the court proceedings had been disrupted by the presence of the media); *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct.

1417, 10 L.Ed.2d 663 (1963) (reversing a conviction after the defendant had been denied a change of venue even though a local television station had broadcast his recorded confession three times, ****561** and 106,000 of the estimated 150,000–person community viewed the broadcast); *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) (reversing a conviction where pre-trial publicity distributed in the vicinity of the trial included, *inter alia,* media accounts of the defendant's juvenile record, the confessions to several murders, and previous court-martial proceedings); *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959) (reversing a conviction because seven of twelve jurors had been exposed to news accounts of evidence that was not admitted at trial).

***679** The leading case during this era, which identified the need for trial publicity reform and shaped the American Bar Association's (hereinafter "ABA") remedial measures, was *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). There, the Court, on due process grounds, reversed the murder conviction of Sam Sheppard, whose high-profile trial had been preceded and pervaded by a media frenzy. *Id.* at 363, 86 S.Ct. at 1522–23, 16 L.Ed.2d at 621. Newspapers had documented Sheppard's alleged refusal to cooperate with investigating officials and had published articles discussing incriminating evidence that was never admitted at trial. *Id.* at 338–41, 86 S.Ct. at 1509–11, 16 L.Ed.2d at 606–08. During trial, members of the media frequently moved in and out of the courtroom, causing so much noise and confusion that it became difficult to hear lawyers and witnesses. *Id.* at 344, 86 S.Ct. at 1513, 16 L.Ed.2d at 610. Furthermore, reporters had crowded the defense table at trial, making it very difficult for Sheppard to have private discussions with his counsel. *Id.* Despite the chaotic conditions, the trial judge refused to allow a change of venue and failed to take steps to control the adverse effects of the publicity. *Id.* at 354 n. 9, 358–59, 86 S.Ct. at 1518 n. 9, 1520, 16 L.Ed.2d at 615 n. 9, 618.

The Supreme Court admonished the trial court in *Sheppard* for its failure to control the extrajudicial publicity:

> The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity....

Id. at 361, 86 S.Ct. at 1521, 16 L.Ed.2d at 619. The Court suggested how the trial judge could have minimized the prejudicial publicity, including proscribing extrajudicial statements by lawyers and other trial participants, requesting local officials to implement regulations with respect to the dissemination of trial information, and warning news media about the impropriety of publicizing material not introduced at the proceeding. ***680** *Id.* at 361–62, 86 S.Ct. at 1521–22, 16 L.Ed.2d at 619–20. Emphasizing the prejudicial effect of news media on fair trials, the Court iterated:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.... [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue until the threat abates, or transfer it to another county not so permeated with publicity.

Id. at 362–63, 86 S.Ct. at 1522, 16 L.Ed.2d at 620. Moreover, the Court recognized that repeatedly reversing convictions ****562** would not suffice as a long-term remedy for the harm of trial publicity. The Court recommended an alternative solution:

> But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but it is highly censurable and worthy of disciplinary measures.

Id. at 363, 86 S.Ct. at 1522, 16 L.Ed.2d at 620.

In response to *Sheppard* and as a culmination of four years of meetings by a committee appointed by the ABA to develop standards to regulate the criminal justice system, the ABA in 1968 introduced Standards Relating to Fair Trial and Fair Press (hereinafter the "ABA Standards"). ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS ix (3rd ed.1991). ABA Standard 1–1, which merely set aspirational ***681** goals for lawyers, stated that it was a "duty" of a lawyer to prevent the "release" of information for "dissemination" that is reasonably likely to interfere with a fair trial. [16] In addition, the ABA included a disciplinary rule related to trial publicity in its newly proposed Model Code of Professional Responsibility of 1969 (hereinafter "ABA Model Code of 1969"). Bernabe–Riefkohl at 337. Disciplinary Rule 7–107 of the ABA Model Code of 1969 established a detailed set of mandatory guidelines to be used by lawyers considering the propriety of extrajudicial statements. *Id.* The guidance of Rule 7–107 differed depending on the stage of the case and the nature of the proceeding, but it generally banned all extrajudicial statements that had a "reasonable likelihood" of interfering with a trial or prejudicing the administration of justice. In 1970, Maryland adopted the ABA Model Code of 1969 verbatim and in its entirety.

16 ABA Standard 1–1 provided:

> It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

ABA Advisory Comm. of Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press, Standard 1–1 (1969).

In 1983, the ABA again proposed a new model code in an effort to address concerns that the "reasonable likelihood" standard of ABA Standard 1–1 and Disciplinary Rule 7–107 might not meet the requirements of the First Amendment. *See Chi. Council of Lawyers v. Bauer,* 522 F.2d 242 (7th Cir.1975), *cert. denied sub nom., Cunningham v. Chi. Council of Lawyers,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976) (holding that a local criminal rule nearly identical to ABA Standard 1–1 and similar to Disciplinary Rule 7–107 violated the First Amendment as a vague and overbroad restriction on speech). Rule 3.6Rule 3.6 of the Model Rules of Professional Conduct (hereinafter the "ABA Model Rules") attempted to regulate trial publicity in a way that constitutionally balanced the lawyers' right to free expression and an accused's ***682** right to a fair ****563** trial. [17] MRPC 3.6MRPC 3.6, which first appeared in the Maryland Rules in 1986 and presently governs trial publicity in Maryland, is identical to this initial version of ABA Model Rule 3.6Rule 3.6.

17 The first paragraph of the Comment to ABA Rule 3.6Rule 3.6 describes that delicate balancing act:

> It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by

> the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

2. The Structure and Operation of MRPC 3.6MRPC 3.6

MRPC 3.6MRPC 3.6 has three subsections, which all operate together to give the rule its full meaning. Subsection (a) announces a general prohibition against lawyers making extrajudicial statements that "the lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding." This prohibition applies, however, only to those statements that a reasonable person "would expect to be disseminated by means of public communication."

Subsection (b) provides examples of the types of extrajudicial statements that would have "a substantial likelihood of materially prejudicing an adjudicative proceeding." Under subsection (b), statements are prohibited that "ordinarily [are] likely" to include references to criminal matters that relate to, among other things, the criminal record of a party, the possibility of a plea of guilty, the existence or contents of any confession, admission, or statement by a defendant, or any opinion as to the guilt or innocence of a defendant.

***683** Subsection (c) states, however, that circumstances exist where an attorney, without risking discipline, may make extrajudicial statements that fall under subsections (a) and (b). The provisions under subsection (c) are known as "safe harbors." *See* *Gentile,* 501 U.S. at 1033, 111 S.Ct. at 2723, 115 L.Ed.2d at 897 (describing the provisions of Nevada Supreme Court Rule 177(3), which are substantively identical to MRPC 3.6(c)MRPC 3.6(c), as "safe harbors"). For example, an attorney may disclose, through extrajudicial statements and "without elaboration," "the scheduling or result of any step in litigation," even if that information, in some way, would have a "substantial likelihood of materially prejudicing an adjudicative proceeding." MRPC 3.6(c) (4)MRPC 3.6(c) (4). Another such "safe harbor" permits attorneys to comment outside the courtroom and without elaboration on "information contained in a public record." MRPC 3.6(c)(2)MRPC 3.6(c)(2).

3. Gansler's Extrajudicial Statements Applied to MRPC 3.6MRPC 3.6

In the case before us, Bar Counsel argues that Gansler violated MRPC 3.6MRPC 3.6 by making extrajudicial statements related to the Cook, Lucas, and Perry cases. Gansler asserts, however, that his statements in these cases fall under the "public record" exception under the safe harbor provisions of MRPC 3.6(c)MRPC 3.6(c). In addition, Gansler claims that the safe harbor provisions ****564** do not provide sufficient guidance as to what information is contained in the "public record," so he was incapable of determining which statements actually would constitute violations.

The issues in this case are similar to those discussed by the Supreme Court in *Gentile.* In a fractured opinion, the Court held that Nevada Supreme Court Rule 177, a rule substantively identical to MRPC 3.6MRPC 3.6, had been unconstitutionally applied to discipline a defense lawyer for making extrajudicial statements that professed his client's innocence in a criminal case. *Id.* at 1033, 111 S.Ct. at 2723, 115 L.Ed.2d at 897. Chief Justice Rehnquist authored the portion of the majority opinion analyzing the "substantial likelihood of material prejudice" ***684** standard of Rule 177Rule 177, and Justice Kennedy represented the majority of the Court in striking down Nevada's application of Rule 177Rule 177 as unconstitutionally vague.

Nevada's rule, like Maryland's, prohibited an attorney from making extrajudicial statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Gentile, the Nevada attorney challenging the rule, argued that this standard infringed upon an attorney's right to free speech as guaranteed by the First Amendment to the United States Constitution. The State Bar of Nevada, arguing in favor of the standard, emphasized the State's interest in maintaining fair trials that are decided in the courtroom and not through the use of "the meeting-hall, the radio, and the newspaper." *Id.* at 1070, 111 S.Ct. at 2742, 115 L.Ed.2d at 920 (quoting *Bridges v. California,* 314 U.S. 252, 271, 62 S.Ct. 190, 197, 86 L.Ed. 192, 208 (1941)).

In analyzing the parties' arguments, the Court acknowledged that the First Amendment permitted States to regulate attorney speech more stringently than the speech of an ordinary citizen. *Id.* at 1071, 111 S.Ct. at 2743, 115 L.Ed.2d at 921. The Chief Justice explained the State's particular interest in restricting speech of a lawyer involved in a pending case:

> Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in *Nebraska Press,* which was joined by Justices Stewart and Marshall, "as officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.

***685** *Id.* at 1074, 111 S.Ct. at 2744–45, 115 L.Ed.2d at 923 (citation omitted). The Court concluded that the "substantial likelihood of material prejudice standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Id.* at 1075, 111 S.Ct. at 2745, 115 L.Ed.2d at 923 (internal quotations omitted).

The Court also subjected the "substantial likelihood" standard under Rule 177Rule 177 to traditional First Amendment scrutiny, requiring that content-based speech regulation be necessary to achieve a legitimate state interest. *Id.* The Court stated:

> The "substantial likelihood" test embodied in Rule 177Rule 177 is constitutional under this analysis, for it is designed to protect ****565** the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. Even if a fair trial can ultimately be ensured through *voir dire,* change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by [Gentile]. The State has a substantial interest in preventing officers of the court, such as lawyers, form imposing such costs on the judicial system and on the litigants.

Id. at 1075, 111 S.Ct. at 2745, 115 L.Ed.2d at 923–24 (citations omitted). The Court concluded that the "substantial likelihood" standard was narrowly tailored to protect these State interests. *Id.* at 1076, 111 S.Ct. at 2745, 115 L.Ed.2d at 924. This was so because the restraint on attorney speech was ***686** limited—"it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after trial." *Id.*

In addition to upholding the "substantial likelihood" standard on its face, the *Gentile* Court also considered the constitutionality of Nevada's application of Rule 177Rule 177. The Nevada Supreme Court had imposed a sanction against Gentile for making extrajudicial statements labeling the alleged victims in the criminal case as "drug dealers" and "money launderers," blaming the alleged crime on the police, calling into question the police's motives for levying the criminal charges against his client, and proclaiming the

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innocence of his client. *Id.* at 1078–79, 111 S.Ct. at 2747, 115 L.Ed.2d at 925–26. Gentile had testified at his disciplinary hearing that he believed his statements were protected by Rule 177(3)(a)Rule 177(3)(a), one of Rule 177Rule 177's "safe harbors," which allowed an attorney to comment outside of the courtroom and "without elaboration" on the "general nature of the ... defense," even if the lawyer "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 1048–49, 111 S.Ct. at 2731, 115 L.Ed.2d at 907.

A majority of the Justices, led by Justice Kennedy, decided that, "[a]s interpreted by the Nevada Supreme Court, [Rule 177] is void for vagueness ... for its safe harbor provision, Rule 177(3)Rule 177(3), misled [Gentile] into thinking that he could give his press conference without fear of discipline." The Court described its reasoning:

> Given [the Rule's] grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "fair notice to those to whom [it] is directed." *Grayned v. City of Rockford,* 408 U.S. 104, 112, 92 S.Ct. 2294, 2301, 33 L.Ed.2d 222, 230 (1972). A lawyer seeking to avail himself of Rule 177(3)Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance ***687** because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms ****566** have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general into the forbidden sea of the elaborated.

Id. at 1048–49, 111 S.Ct. at 2731, 115 L.Ed.2d at 906–07. The Court further declared that, without providing sufficiently precise guidance, Rule 177Rule 177 "creates a trap" even for the lawyers who study the rule and make a conscious effort to comply with it. *Id.* at 1051, 111 S.Ct. at 2732, 115 L.Ed.2d at 908. Finally, Rule 177(3)(a)Rule 177(3)(a) was "so imprecise" that, in the Court's view, it created an "impermissible risk of discriminatory enforcement."

The case before us involves the application of a different safe harbor, MRPC 3.6(c)(2)MRPC 3.6(c)(2), which refers to "information contained in a public record." This provision suffers from constitutional infirmities similar to those of Nevada's Rule 177(3)(a)Rule 177(3)(a). [18] The text of MRPC 3.6(c)(2)MRPC 3.6(c)(2) provides that an attorney may make extrajudicial statements "without elaboration" concerning "information contained in a public record." These protections lack a clarifying interpretation by this Court, and the term "elaboration," a classic term of degree, has no settled usage or tradition of interpretation in law.

[18] Following the Supreme Court's decision in *Gentile,* the American Bar Association amended ABA Rule 3.6Rule 3.6. The amendments deleted "without elaboration" and "general" from the text of the Rule to address the Court's concern over those terms. *See A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–1998,* at 196 (1999); *Annotated Model Rules of Professional Conduct,* at 357 (1999). MRPC 3.6MRPC 3.6, however, has not changed since its first promulgation in 1986.

The phrase "information contained in a public record" also does not provide sufficient guidance for determining which statements were protected under MRPC 3.6(c)(2)MRPC 3.6(c)(2). As evidenced by the widely disparate meanings for "public record" that the parties' experts in this case have advanced, the term, standing alone, can be subject to multiple interpretations even ***688** by lawyers well educated on this specific principle of professional responsibility. Gansler and Professor Lerman define "information in a public record" broadly as " anything that has been filed in court ... and anything that has been otherwise made public." Bar Counsel and Professor Dash offer a narrower interpretation, suggesting that "the public record exception applies to that formal information in the public domain that exists *prior to, or separate from,* the investigation and prosecution of the subject criminal matter." (emphasis added). Bar Counsel, however, has provided no authority to support its interpretation and, in fact, concedes that the term "does not appear to have been the subject of judicial scrutiny and little guidance is afforded...."

"Public record" has been defined in other contexts, as the hearing judge recognized in her report, but those definitions also fail to provide uniform guidance. Maryland Code, § 10–611(g)(1)Maryland Code, § 10–611(g)(1) of the State Government Article (1984, 1999 Repl.Vol.), sets forth one definition for purposes of the Public Information Act:

> (g) *Public Record.*—(1) "Public record" means the original or any copy of any documentary material that:

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(i) is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and

(ii) is in any form, including:

1. a card;

2. a computerized record;

3. correspondence;

****567** 4. a drawing;

5. film or microfilm;

6. a form;

7. a map;

8. a photograph or photostat;

9. a recording; or

10. a tape.

***689** The Maryland Code provides a different definition of "public record" in Section 8–606(a)(3) of the Criminal Law Article. That section states:

(3) "Public Record" includes an official book, paper, or record, kept on a manual or automated basis, that is created, received, or used by a unit of:

(i) the State;

(ii) a political subdivision of the State; or

(iii) a multicounty agency.

The Maryland Rules describe "public record" in still a different way. Maryland Rule 5–803(b)(8)(A) defines "public records and reports" for purposes of the "public records" exception to the hearsay rule, as including:

> a memorandum, report, record, statement, or data compilation made by a public agency setting forth (i) the activities of the agency; (ii) masters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or (iii) in civil actions and when offered against the State in criminal actions, factual finding resulting from an investigation made pursuant to authority granted by law.

Another source, Black's Law Dictionary, defines "public record" as "[a] record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse." BLACK'S LAW DICTIONARY 1279 (7th ed.1999). These characterizations of "public record" contemplate only information that has been created or distributed by a government entity.

Not all sources, however, consider "public record" to be a reference to materials produced by any government entity. Although Canon 20 of the 1908 ABA Canons of Ethics did not use the phrase "information contained in a public record," its terms do furnish some instruction as to the meaning of the phrase. Canon 20 prohibited "*ex parte* reference" to the facts of a case "beyond quotation from the *records and papers on file in the court.*" (emphasis added). Similarly, Local Rule 204 of the United States District Court for the District of Maryland prohibits an attorney from making certain extrajudicial statements after the arrest of an accused, except that the ***690** lawyer may quote from or refer to without comment to "public Court records" in the case. Thus, according to some sources, "public records" are limited to the exact information contained in documents on file with the court.

Because there is no settled definition of "information contained in a public record" we agree with Gansler that MRPC 3.6(c)(2)MRPC 3.6(c)(2) does not provide adequate guidance for determining which extrajudicial statements would qualify under the safe harbor. For this reason, we construe the phrase in its broadest form as applied to Gansler in this case and to any other extrajudicial statements made prior to the filing of this Opinion. In this case, we consider "information in a public record" to include anything in the public domain, including public court documents, media reports, and comments made by police officers.

Under this broad interpretation, it is clear that a number of Gansler's extrajudicial statements do not warrant discipline, as the hearing judge determined. Gansler did not violate MRPC 3.6MRPC 3.6 by commenting on the sneaker print matches in Cook's case because, shortly before Gansler's

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extrajudicial ****568** comments, a television reporter had broadcast an account of that evidence nearly mirroring Gansler's version. Additionally, in the Lucas case, Gansler made statements to the media about a shoe print at the crime scene that matched shoes Lucas had been observed wearing. This information was already public as recorded in the statement of charges filed by the police the day before. Also contained in the statement of charges was an account of Lucas's admission to police that he broke into the church rectory and murdered Monsignor Wells. Therefore, the next day, when Gansler relayed information about the admission to the media, he revealed "information contained in a public record." We overrule Bar Counsel exceptions as they relate to Gansler's extrajudicial statements about physical evidence in the Cook and Lucas cases as well as the confession in the Lucas case.

Gansler argues that the "public record" safe harbor also should protect his reference to Lucas's history of convictions. ***691** MRPC 3.6(b)(1)MRPC 3.6(b)(1) informs lawyers that extrajudicial statements relating to the "criminal record of a party" are ordinarily likely to be intolerably prejudicial. Nevertheless, during the June 18, 2003 press conference announcing the arrest of Lucas, Gansler mentioned that Lucas "has a criminal record which includes residential burglaries." To support his assertion that this statement should be protected by the "public record" safe harbor, Gansler points to Deputy State's Attorney Winfree's testimony, characterizing Lucas's prior arrest and conviction record as "part of the public record."

Based on this testimony, we hold that Gansler's reference to Lucas's criminal record falls under our broad definition of "information in a public record." We reach this result because we have inferred from Deputy State's Attorney Winfree's testimony that she was referring to publicly accessible court records in Maryland, either case files or docket sheets, which indicate that an individual has been convicted of a crime. Maryland law does not bar an ordinary citizen from combing these court documents to learn information about someone's criminal history. For this reason, Lucas's history of convictions could have existed in the public domain before Gansler spoke of it. Under the circumstances of this case, the extrajudicial reference to Lucas's convictions qualifies for the protection of the "public record" safe harbor, as we have broadly defined it for this Opinion. Because of the strong prejudicial impact of the public disclosure of criminal record information, future respondents will have the burden of establishing that such information was contained in a bona fide public court record accessible to the general public. [19]

19 Not all criminal record information would qualify as "information in a public record," even if the term is defined broadly. Some information relating to an individual's criminal history, such as that collected by the Criminal Justice Information System (hereinafter "CJIS"), may not appear in a case file or docket sheet or otherwise have reached the public domain. The CJIS Central Repository compiles and maintains data of an individual's history of arrests, convictions, and other adverse criminal actions, but CJIS strictly limits access to its data. *See* Maryland Code, § 10–213Maryland Code, § 10–213 of the Criminal Procedure Article (2001); COMAR 12.15.01.08—12.15.01.13 (2003). An ordinary citizen may not obtain criminal history information from CJIS without demonstrating convincingly that the purpose of requesting the data meets one of CJIS's narrow exceptions (e.g., an employer who is seeking background information on a prospective employee whose job could "jeopardize the life and safety of individuals"). COMAR 12.15.01.13. As a result, the CJIS report is not public.
This non-public criminal history information collected by CJIS, of course, may overlap with information contained in publicly accessible case files and docket entries. If that should occur, the overlapping criminal record information would be considered part of the public government records, and statements referring to that particular information would receive protection under the "public record" safe harbor. The converse is also true; if an extrajudicial statement refers to criminal history information obtainable only from a non-public source like CJIS, the "public record" safe harbor would not apply.

****569** ***692** Additionally, lawyers who make extrajudicial statements in the future will not find shelter in the broad definition of MRPC (c)(2) that we apply here. Public policy mandates a more limited definition of "information in a public record." We believe that, to best " protect[ ] the right to a fair trial and safeguard[ ] the right of free expression," the phrase "information in a public record" should refer only to public government records—the records and papers on file with a

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government entity to which an ordinary citizen would have lawful access.

To receive the protection of the "public record" safe harbor, the lawyer must not provide information beyond quotations from or references to public government records. The definition we establish in this case prevents attorneys from side-stepping the rule by directing or encouraging individuals not bound by the MRPC to publicize information so that attorneys can speak freely about it. Furthermore, by strictly limiting what is considered a public record, this definition enables all of the components of MRPC 3.6MRPC 3.6 to filter objectionable publicity, preventing the "public record" exception from swallowing the general rule of restricting prejudicial speech.

In any event, no matter whether one defines "information in a public record" broadly to include everything in the public domain or narrowly, Gansler violated the MRPC 3.6MRPC 3.6 by making several extrajudicial statements at issue in this case. Initially, we must point out that Gansler has not challenged ***693** that his comments qualify, under MRPC 3.6(a)MRPC 3.6(a), as statements that "a reasonable person would expect to be disseminated by means of public communication." The only contested issues in this case concern whether Gansler knew or should have known that his statements would have a substantial likelihood of materially prejudicing an adjudicative proceeding and whether the statements are protected under the safe harbor provisions of MRPC 3.6(c)MRPC 3.6(c). As we discuss in detail below, Gansler did violate MRPC 3.6MRPC 3.6 by commenting on Cook's confession, by discussing the plea offer to Perry, and by providing his opinion as to the guilt of Cook and Lucas.

First, Gansler violated MRPC 3.6MRPC 3.6 by discussing Cook's confession to the Stottsmeister murder. MRPC 3.6(b)(2)MRPC 3.6(b)(2) provides that a statement relating to the "existence or contents of any confession, admission, or statement given by a defendant" is "ordinarily likely" to have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Notwithstanding the cautionary language of the rule and prior to the filing of murder charges, Gansler publicly stated that police were able to obtain a confession from Cook. Apparently seeking shelter again under the "public record" safe harbor, Gansler points out that his reference to "incredible details" mirrored the information and even the language of the charging document. This observation fails to acknowledge that officials did not file the statement of charges against Cook until *after* the press conference. The "public record" safe harbor, whether construed narrowly or broadly, could not apply possibly to any statement that introduced information ****570** to the public for the first time. Gansler should have known that these statements, by themselves, would prejudice Cook in the public's eye.

Not only did Gansler announce the existence of Cook's confession, but he also furnished specific information of the surrounding circumstances, including that Cook provided "incredible details that only the murderer would have known." Gansler magnified the prejudicial effect of his statements by bolstering the believability of the confession. He stated that, ***694** before Cook traveled to the crime scene and "went over in detail by detail every step of" the murder, the police had provided him with a restful night's sleep. If we found no fault with such public disclosures, we would be allowing attorneys, in effect, to evade the operation of the exclusionary rule by taking advantage of the probative value of the confession without regard to its constitutionality or admissibility as evidence. That is, Gansler made Cook's confession public even though its contents might never reach the jury as a result of a constitutional challenge. His actions, in this regard, run afoul of our principles of criminal justice, as Chief Justice Rehnquist illustrated:

> The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

Gentile, 501 U.S. at 1070, 111 S.Ct. at 2742, 115 L.Ed.2d at 920. Accordingly, with respect to Gansler's remarks on the Cook confession, we sustain Bar Counsel's exception because Gansler knew or should have known that his announcement would have a substantial likelihood of causing material prejudice. [20]

20 We observe that, prior to Gansler's comments at the Cook press conference, a television reporter noted that Cook had confessed and Captain Bernie Forsythe mentioned in his comments to the press that investigators had obtained a confession from Cook. The reporter and Captain Forsythe limited their comments to the existence of the confession and offered no additional information about it. Gansler's statements, however, as we noted above, provided a great deal of specific information that had not been disclosed.

Gansler also committed a violation of MRPC 3.6MRPC 3.6, as Judge Stevenson concluded, by commenting extrajudicially on the matter of Perry's plea bargain. MRPC 3.6(b)(2)MRPC 3.6(b)(2) states that a statement is "ordinarily likely" to have a substantial likelihood of materially prejudicing an adjudicative proceeding ***695** if the statement relates to "the possibility of a plea of guilty to the offense." Gansler's reported statement in April of 2000 disclosed, for the first time, his decision "to offer [Perry] a plea bargain."

Gansler argues, though, that his comments to the *Gazette* about the plea offer should be covered by the "public record" safe harbor because the public already knew of his conversations with the victims' family members, in which they were consulted about whether to retry Perry or plea bargain. The public's general knowledge about plea bargains and how they normally play a part in every prosecution does not equate, however, to the public having actual knowledge that a plea bargain would be offered in this particular case. The decision to offer a plea bargain does not qualify as "information contained in a public record," even under the broadest meaning of that phrase.

****571** Besides announcing the plea offer, Gansler also discussed the impending deadline for Perry to accept that offer, all during a very public and controversial prosecution of a multiple murder suspect. Public comments such as these place greater pressure on the defendant to accept the plea offer. More importantly, the comments likely influenced potential jurors in Perry's case by communicating that the lead prosecutor believed the defendant was guilty. *See* JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 12.16 (2nd ed. 1996) ("Any ... statement [regarding the possibility of a plea of guilty] is, of course, a direct reference to an opinion of the speaker as to guilt of the accused or as to the belief of the accused as to his own guilt. It is tantamount to publication of an opinion as to guilt."). We, therefore, overrule Gansler's exception to Judge Stevenson's conclusion that the comments related to Perry's plea offer violated MRPC 3.6MRPC 3.6.

MRPC 3.6(b)(4)MRPC 3.6(b)(4) specifically addresses attorney comments discussing "any opinion as to the guilt or innocence of a defendant." Although several of Gansler's extrajudicial statements fall under this category of restricted speech and were ***696** not covered by any safe harbor, the hearing judge determined that the evidence did not show that any "material prejudicial effect" stemmed from them. Gansler's statements, indicating that "they" had apprehended the person who committed the crimes in the Cook and Lucas cases, came soon after the defendants had been arrested and well before the eve of trial. This, coupled with the fact that neither Lucas's nor Cook's attorneys claimed that Gansler's statements caused prejudice, persuaded the hearing judge to conclude that Bar Counsel had not shown a substantial likelihood of material prejudice.

We disagree with the hearing judge's conclusion that the evidence failed to show that Gansler knew or should have known that his statements of opinion would have a substantial likelihood of material prejudice. In considering the propriety of a statement under MRPC 3.6MRPC 3.6, we determine the likelihood that a particular statement will cause prejudice at the time the statement was made, not whether that statement, in hindsight, actually worked to the detriment of a defendant. Whether Cook or Lucas claimed at their trials to be prejudiced by Gansler's statements, therefore, does not weigh in our analysis. Rather, we concentrate on the point in time when Gansler offered his public comments to determine the probability of prejudice.

According to the hearing judge, the point in time when Gansler made the extrajudicial statements minimized whatever prejudicial effect flowed from his remarks. As support for this conclusion, the hearing judge cited Part II of Justice Kennedy's minority opinion in *Gentile.* Justice Kennedy suggested that statements made well before a defendant's trial have less prejudicial impact than statements made closer to the empaneling of a jury. *Gentile,* 501 U.S. at 1044, 111 S.Ct. at 2729, 115 L.Ed.2d at 904 (Kennedy, J., dissenting). Gentile had made his controversial statements six months prior to voir dire, enough time, according to Justice Kennedy, for the content of the message to fade from the public's memory. *Id.* The timing of Gentile's statement, however, was not the only factor that Justice Kennedy considered in determining that no ***697** prejudice

had occurred in that case. He also analyzed the contents of Gentile's message, which, Justice Kennedy stated, " lack any of the more obvious bases for a finding of prejudice." *Id.* at 1046, 111 S.Ct. at 2730, 115 L.Ed.2d at 905.

**572 We agree with Gansler's theory that the timing of an extrajudicial statement may affect its prejudicial effect, but we do not believe that the timing element in this case neutralizes the obvious prejudicial content of Gansler's statements of opinion. Like in *Gentile,* the timing of Gansler's statements came well before the beginnings of Cook's and Lucas's trials; however, Gansler's proclamation that "they" had apprehended the persons who committed the crimes in the Cook and Lucas cases directly contravened the provisions of MRPC 3.6(b)(4)MRPC 3.6(b)(4) (opinion on guilt of innocence). The comments blatantly expressed Gansler's opinion of the guilt of the defendants. In contrast to the lawyer in *Gentile,* who refused to comment on confessions and evidence from searches, *see* *Gentile,* 501 U.S. at 1046, 111 S.Ct. at 2730, 115 L.Ed.2d at 905 (Kennedy J., dissenting), Gansler supported his opinions of guilt by pointing to specific circumstances, such as confessions and physical evidence, to make his views more reliable.

Gentile differs from the case before us for yet another reason: Gansler is a prosecutor, not a defense lawyer. Prosecutors play a unique role in our system of criminal justice. We recognized this recently in *Walker v. State,* 373 Md. 360, 394–95, 818 A.2d 1078, 1098 (2003), where Judge Harrell for the Court stated:

> Prosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice. The special duty of the prosecutor to seek justice is said to exist because the State's Attorney has broad discretion in determining whether to initiate criminal proceedings. *Brack v. Wells,* 184 Md. 86, 90, 40 A.2d 319, 321 (1944). The office of prosecutor is therefore "not purely ministerial, but involves the exercise of learning and discretion," and he or she "must exercise a sound discretion to distinguish between the guilty and the *698 innocent." *Id.* The responsibilities of the prosecutor encompass more than advocacy. The prosecutor's duty is not merely to convict, but to seek justice. "His obligation is to protect not only the public interest but the innocent as well and to safeguard the rights guaranteed to all persons, including those who may be guilty." *Sinclair v. State,* 27 Md.App. 207, 222–23, 340 A.2d 359, 369 (1975).

In addition to their special role as ministers of justice, prosecutors have limitations not experienced by criminal defense attorneys in that defense attorneys have the benefit of their client's presumption of innocence. In other words, a criminal defense attorney may announce an opinion that his or her client is innocent with a lesser risk of causing prejudice because the law, itself, presumes the defendant's innocence.

On the other hand, a prosecutor's opinion of guilt is much more likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public's eye. *See* Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech,* 58 FORDHAM L.REV. 865, 886 (1990) ("When the prosecutor speaks publicly about a pending case, he cannot separate his representational role from his speech, and he thereby involves the state in the extrajudicial comment."). As lawyers, prosecutors are so distinct that some commentators have argued that the rules against extrajudicial statements should apply only to them. *See, e.g.,* Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys,* 29 STAN. L. REV. 607 (1977). Although we do not embrace this position, it nonetheless reinforces the notion that **573 prosecutors, in particular, should be even more cautious to avoid making potentially prejudicial extrajudicial statements. [21] Because we hold that *699 Gansler knew or should have known that his public opinions of Cook's and Lucas's guilt would have a substantial likelihood of material prejudice, we sustain Bar Counsel's exception with respect to those statements. [22]

21 We also observe that prosecutors, as public employees, may not speak publicly with the same broad freedom that ordinary citizens enjoy. *See* *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *DiGrazia v. County Exec. for Montgomery County,* 288 Md. 437, 418 A.2d 1191 (1980). This is so because, in the context of an employer and employee relationship, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering,* 391 U.S. at

568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817. Our cases have acknowledged that public employees may be subjected to greater speech limitations by the State as a result of the State's interests as an employer. *Hawkins v. Dep't. of Public Safety & Corr. Servs.,* 325 Md. 621, 602 A.2d 712 (1992); *O'Leary v. Shipley,* 313 Md. 189, 199, 545 A.2d 17, 22 (1988); *De Bleecker v. Montgomery County,* 292 Md. 498, 507, 438 A.2d 1348, 1353 (1982); *DiGrazia,* 288 Md. at 449, 418 A.2d at 1198.

22 The hearing judge did not address the application of MRPC 8.4(a)MRPC 8.4(a), which finds professional misconduct where a lawyer "violates or attempts to violate the Rules of Professional Conduct." We have held that a violations of a MRPC 1.15MRPC 1.15 and MRPC 1.4(a)MRPC 1.4(a) "necessarily" result in a violation of MRPC 8.4(a)MRPC 8.4(a) as well. *Attorney Grievance Comm'n v. Gallagher,* 371 Md. 673, 710–11, 810 A.2d 996, 1018 (2002). Likewise, we conclude in this case that Gansler's violation of MRPC 3.6MRPC 3.6 also constituted a violation of MRPC 8.4(a)MRPC 8.4(a).

B. MRPC 3.1MRPC 3.1, 3.8(a)3.8(a), and 8.4(d)8.4(d)

Bar Counsel excepted to the hearing judge's conclusion that Gansler did not violate MRPC 3.1MRPC 3.1, 3.83.8, and 8.4(d)8.4(d). The charges under these rules arose from two events: (1) Gansler's unsuccessful prosecution in District Court of two juveniles based on charges that they called bomb threats to a Montgomery County High School, and (2) Gansler's statements regarding his intention to prosecute "[j]uveniles who phone in bomb threats" even if "the case is not strong enough to warrant a conviction." Bar Counsel argues that by prosecuting the two juveniles with minimal evidence, Gansler brought a frivolous claim in violation of MRPC 3.1MRPC 3.1 and prosecuted a charge not supported by probable cause in violation of MRPC 3.8(a)MRPC 3.8(a). Furthermore, in Bar Counsel's view, Gansler's violated MRPC 8.4(d)MRPC 8.4(d) because the statements about future bomb-threat prosecutions communicated to the public that "someone acquitted of a crime was guilty nonetheless and warranted to be prosecuted...." Gansler responds that he ***700** prosecuted the juveniles because he believed that they had committed a crime beyond a reasonable doubt. He contends that the judge's decision to acquit the juveniles represented only that she disagreed with his evaluation of the evidence, not that the prosecution lacked probable cause.

MRPC 3.1MRPC 3.1 prohibits attorneys from bringing frivolous suits, and MRPC 3.8(a)MRPC 3.8(a) prohibits prosecutors from knowingly prosecuting a charge that is not supported by probable cause. Expressly addressing only the comments Gansler made, the hearing judge concluded that Bar Counsel had not presented clear and convincing evidence that Gansler "intended to prosecute in violation of [MRPC] 3.1MRPC] 3.1 and [MRPC] 3.8(a)MRPC] 3.8(a)." Although she did not specifically address the issue in her Report and Recommendations, the hearing judge, by finding no violation under MRPC 3.1MRPC 3.1 and MRPC 3.8(a)MRPC 3.8(a), determined implicitly that insufficient evidence supported Bar Counsel's charge concerning the actual ****574** prosecution of the juveniles. Likewise, the hearing judge also implicitly concluded that the evidence did not support a violation of MRPC 8.4(d)MRPC 8.4(d).

We agree with Judge Stevenson that, based on the evidence presented, Gansler did not commit a violation of MRPC 3.1MRPC 3.1, MRPC 3.8(a)MRPC 3.8(a), or MRPC 8.4(d)MRPC 8.4(d), when he commented on future prosecutions of juveniles who phone bomb threats. Gansler testified and responded to Request for Admissions that he never intended to prosecute any charges in bad faith. Rather, according to Gansler's testimony, by making the comments about prosecuting bomb threats, he intended to communicate that his office must try "hard cases." The hearing judge found this testimony credible, a determination that we readily accept.

Gansler's actual prosecution of the youths also did not amount to a violation of MRPC 3.1MRPC 3.1, as Bar Counsel contends. Evidence before the hearing judge related to this charge came solely from a newspaper article covering the juveniles' case. The article reported that the District Court judge acquitted the juveniles, stating, "I have no idea who did this" and "I have no evidence." As further reported by the article, the ***701** State's evidence of telephone calls could not link the juveniles to the bomb threat. Without more, the news article does not demonstrate by clear and convincing evidence that Gansler violated MRPC 3.1MRPC 3.1. Consequently, we overrule Bar Counsel's exceptions to Judge Stevenson's ruling that Gansler's prosecution of the juveniles as well as his reported comments about future prosecutions do not violate MRPC 3.1MRPC 3.1, MRPC 3.8MRPC 3.8, or MRPC 8.4(d)MRPC 8.4(d).

IV. Sanction

We must determine the appropriate sanction for Gansler's violations of MRPC 3.6MRPC 3.6 and MRPC 8.4(a)MRPC 8.4(a). This case marks the first time in Maryland that we have disciplined an attorney for a violation of MRPC 3.6MRPC 3.6. We remain guided, however, by the well established principles determining the sanction for an attorney who failed to meet our State's standards of professionalism. In sanctioning an attorney, we seek "to protect the public, to deter other lawyers from engaging in violations of the Maryland Rules of Professional Conduct, and to maintain the integrity of the legal profession." *Attorney Grievance Comm'n v. Awuah,* 374 Md. 505, 526, 823 A.2d 651, 663 (2003) (quoting *Attorney Grievance Comm'n v. Webster,* 348 Md. 662, 678, 705 A.2d 1135, 1143 (1998)). To protect the public adequately, we impose a sanction that is "commensurate with the nature and gravity of the violations and the intent with which they were committed." *Id.* (quoting *Attorney Grievance Comm'n v. Awuah,* 346 Md. 420, 435, 697 A.2d 446, 454 (1997)). Our sanction, therefore, "depends upon the facts and circumstances of each particular case, including consideration of any mitigating factors." *Id.* (citing *Attorney Grievance Comm'n v. Atkinson,* 357 Md. 646, 656, 745 A.2d 1086, 1092 (2000); *Attorney Grievance Comm'n v. Gavin,* 350 Md. 176, 197–98, 711 A.2d 193, 204 (1998)).

Bar Counsel recommends that we issue a reprimand. On numerous occasions, Gansler spoke outside of court about matters that had a substantial likelihood of depriving several criminal defendants of fair trials. Gansler presented no evidence of mitigating circumstances. The appropriate sanction ***702** in this case is one "which demonstrates to members of this legal profession the type of conduct that will not be tolerated" and which maintains the integrity of the Bar by preventing Gansler's transgressions "from bringing its image into disrepute." *Attorney Grievance* ****575** *Comm'n v. Culver,* 371 Md. 265, 277, 808 A.2d 1251, 1258 (2002) (quoting *Attorney Grievance Comm'n v. Garfield,* 369 Md. 85, 98, 797 A.2d 757, 764 (2002)). A reported reprimand satisfactorily communicates to Gansler and other members of the Bar that improper extrajudicial statements dangerously jeopardize the foundational principles of our system of criminal justice. Accordingly, Gansler is hereby reprimanded.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING THE COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE 16–715(C), FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST DOUGLAS F. GANSLER.

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442 Md. 14
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND
v.
Bruce Michael SMITH.

Misc. Docket AG No. 3, Sept. Term, 2013.
|
Feb. 23, 2015.

Synopsis

Background: Disciplinary proceedings were brought against attorney. After referral, the Circuit Court, Baltimore County, Ruth A. Jakubowski, J., determined that attorney violated rules.

Holdings: The Court of Appeals, McDonald, J., held that:

attorney violated rules, and

indefinite suspension was warranted.

Suspension ordered.

Watts, J., filed a concurring and dissenting opinion, in which Harrell and Battaglia, JJ., joined.

Attorneys and Law Firms

****1186** Dolores O. Ridgell, Senior Asst. Bar Counsel (Glenn M. Grossman, Bar Counsel, Attorney Grievance Commission of Maryland), for petitioner.

Bruce Michael Smith (Bel Air, MD), for respondent.

Argued before BARBERA, C.J., HARRELL, BATTAGLIA, GREENE, ADKINS, McDONALD and WATTS, JJ.

Opinion

McDONALD, J.

***17** State law requires that law enforcement authorities provide certain notices to victims and, in the case of a child victim, to the representative of the victim. Among other things, this requirement allows those specially affected by the criminal justice system to know its workings and perhaps participate in them. In particular, it provides an opportunity for the victim, or the victim's representative, to be heard at critical junctures in the case, such as sentencing, when the victim's perspective may be significant to the court's decision. This is an important ***18** responsibility of a prosecutor who, as the representative of the State, has a duty to ensure that "justice shall be done." [1]

1 *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *see* footnote 14 below.

This attorney disciplinary proceeding arises out of a criminal prosecution involving an alleged incident of child sexual abuse. Respondent Bruce Michael Smith, at the time an Assistant State's Attorney assigned to the Child Advocacy Center in Harford County, was the prosecutor. In that capacity, he was responsible for notifying the 10–year–old victim and her foster mother of their rights under State law, preparing them for the trial, and informing them of critical proceedings in the case. Mr. Smith concedes that he was woefully deficient in carrying out that responsibility with the result that neither the victim nor her foster mother was aware of the prosecution of the alleged assailant, they were not able to participate in sentencing following the defendant's *Alford* plea, and they were not aware of the conditions of the defendant's later release from custody that forbade any contact with the victim. Mr. Smith also concedes that his failure to communicate with the victim's foster mother resulted in his giving incorrect information to the Circuit Court, which caused that court to postpone the original trial date.

We conclude that Mr. Smith failed to act with the reasonable diligence expected of a member of the bar and that his misconduct prejudiced the administration of justice. He is suspended indefinitely from the practice of law, with the right to re-apply no sooner than 60 days from the date that his suspension begins.

I

Background

A. Legal Context—Child Victims and Victim Notification

1. Victim Notification Requirements

The Maryland Constitution confers on victims of crimes the right to be treated ****1187** with "dignity, respect, and sensitivity" by ***19** agents of the State and to be notified and to participate in criminal proceedings, as may be permitted by implementing legislation. Maryland Declaration of Rights, Article 47.[2] The General Assembly has implemented this "strong public policy" by enacting several statutes that create "a class of specific, but narrow, rights for victims." *Hoile v. State,* 404 Md. 591, 605, 948 A.2d 30 (2008). In particular, the Legislature has set forth certain guidelines for the treatment and notification of a victim. Maryland Code, Criminal Procedure Article ("CP"), § 11–1002(b). In addition, it has required prosecuting attorneys, law enforcement officers, and certain judicial officials to notify victims of those guidelines. CP § 11–104. When the victim is a minor or incompetent person, a "victim's representative"—defined as a close relative or guardian of the victim[3] —has similar rights under these statutes.

2 Article 47, which was adopted in 1994, provides as follows:

> (a) A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.
> (b) In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed of the rights established in this Article and, upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented and the terms "crime," "criminal justice proceeding," and "victim" are specified by law.
> (c) Nothing in this Article permits any civil cause of action for monetary damages for violation of any of its provisions or authorizes a victim of crime to take any action to stay a criminal justice proceeding.

3 *See* CP § 11–1001(f).

Under the statutory guidelines, victims are to be provided with certain services, amenities, information and notices, and opportunities to participate in the criminal process.[4] Pertinent to this case, a victim and a victim's representative, on written request, "should be kept reasonably informed by the police or the State's Attorney of the arrest of a suspect and ***20** the closing of the case, and should be told which office to contact for information about the case." CP § 11–1002(b)(8). If the alleged crime is a "crime of violence," such as sexual abuse of a minor in certain circumstances,[5] the victim and victim's representative should be notified in particular of specified stages of the criminal case, including trial and disposition. CP § 11–1002(b)(10). In addition, on request of the State's Attorney and in the discretion of the trial court, the victim and victim's representative may submit a victim impact statement and address the court at sentencing. CP § 11–1002(b)(11). The victim and victim's representative also have certain rights as to notice when the defendant will be released from custody. CP § 11–1002 (b)(14)–(16).

4 For example, the statute provides that, to the extent practicable, victims should be provided crisis intervention help and employer intercession services, and a waiting area in the courthouse separate from the suspect. CP § 11–1002(b)(2), (5), (7).

5 *See* CP § 1–101(e); Maryland Code, Criminal Law Article, § 14–101(a)(16).

To ensure that victims are aware of their rights, a law enforcement officer or District Court commissioner is to provide the victim or victim's representative with a pamphlet describing those rights on first contact. CP § 11–104(b). Once charges have been filed and made public, the prosecutor is to provide the victim or victim's representative promptly with a copy of the pamphlet and a notification request form. CP § 11–104(c). The prosecutor is to certify compliance with that requirement with the clerk of the court. *Id.* If the victim or ****1188** victim's representative completes and files the notification request form, the prosecutor is, to the extent practicable, to give the victim or victim's representative prior notice of each court proceeding, of the terms of any plea agreement, and of the right to submit a victim impact statement in connection with sentencing. CP § 11–104(e). In addition, that victim or victim's representative "has the right to attend any proceeding in which the right to appear has been granted to a defendant." CP § 11–102(a).

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2. Child Advocacy Centers

To address what it found to be a lack of "necessary counseling and follow-up services" for sexual assault victims, the ***21** General Assembly directed the Governor's Office of Crime Control and Prevention ("GOCCP") to establish sexual assault crisis programs in the State, including child advocacy centers. CP § 11–923. The State has designated 21 child advocacy centers throughout the State to provide a "coordinated multi-disciplinary approach to the problem of child abuse." Report of GOCCP on Child Advocacy Centers (January 1, 2015) at 1, available at <www.goccp.maryland.gov/victim/documents/annual-reports/CACS-2014.pdf>. The centers are to provide "safe, child friendly environments for forensic interviews and medical evaluations of the alleged child victim and offer continued support to the child." *Id.* The centers are to foster collaboration and "reduce existing gaps in services." *Id.* Pertinent to this case, the Harford County Child Advocacy Center ("Center") was established in 1993 and includes on its staff forensic interviewers, therapists, a pediatrician, local, county, and State law enforcement officers, and Assistant State's Attorneys. *See* < http://harfordcac.org/>.

B. Procedural Context

On March 15, 2013, the Attorney Grievance Commission ("Commission"), through Bar Counsel, filed with this Court a Petition for Disciplinary or Remedial Action alleging that Bruce Michael Smith violated various provisions of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") in connection with a child sexual abuse case that he prosecuted while employed by the Harford County State's Attorney's Office and assigned to the Center. In particular, the Commission charged Mr. Smith with violating MLRPC 1.3 (diligence), 3.3 (candor toward a tribunal), and 8.4(a), (c), and (d) (misconduct). Pursuant to Maryland Rule 16–752(a), this Court assigned this disciplinary proceeding to Judge Ruth Ann Jakubowski of the Circuit Court for Baltimore County, [6] to conduct ***22** a hearing concerning the alleged violations and to provide findings of fact and recommended conclusions of law.

[6] This Court initially designated Judge William O. Carr of the Circuit Court for Harford County, but upon request of that court re-assigned the case to Judge Jakubowski.

The hearing judge conducted an evidentiary hearing during October 2013, at which three witnesses, including Mr. Smith, testified, and at which the parties submitted a stipulation of facts as well as several documentary exhibits. The hearing judge filed a detailed Statement of Findings of Fact and Conclusions of Law in December 2013. Based on her findings of fact and analysis of the law, the hearing judge concluded that Mr. Smith had violated MLRPC 1.3, but had not violated MLRPC 3.3 or the various subsections of MLRPC 8.4.

The Commission did not except to the hearing judge's findings of fact, but did except to her conclusion that Mr. Smith did not commit all of the alleged violations; it offered alternative recommendations as ****1189** to sanction, depending on how we dispose of those exceptions. Mr. Smith filed no exceptions or recommendation as to sanction.

C. Factual Context

Because the hearing judge's fact findings are uncontested, we treat them as established. Maryland Rule 16–759(b)(2)(A). The hearing judge's findings and the undisputed evidence in the record established the following facts.

Bar Admission and Employment

Mr. Smith was admitted to the Maryland Bar on December 16, 1999, and is also admitted to practice before the United States District Court for the District of Maryland. He is not a member of the bar of any other state or the District of Columbia.

After working for the Public Defender's Office, Mr. Smith was hired in 2007 as an Assistant State's Attorney for Harford County. He prosecuted cases in the District Court. He was also designated as one of the Assistant State's Attorneys assigned to the Center, which handled cases of child sexual assault and abuse, physical abuse and neglect, child pornography, and internet solicitation of children. As indicated earlier, the Center is also staffed by victim/witness advocates, a ***23** forensic interviewer, a family advocate, several detectives, a State trooper, and several child protective service workers.

State v. Head

In 2009, as part of his duties at the Center, Mr. Smith was assigned to prosecute the case of *State v. Nathan Elwood Head,* in which the defendant was charged with sexual abuse of a minor and a fourth degree sexual offense. According to documents in the State's Attorney's file, the 10–year old victim had been brought to the Center in February 2009 by her foster mother. There, a social worker (assisted in some respects by a detective) interviewed the child in some

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detail concerning an alleged assault by Mr. Head, the 19–year old former boyfriend of her foster sister. The interview was recorded and transcribed, and the matters described by the victim formed the basis of the charges against Mr. Head. The social worker also recorded an interview with the foster sister which was also transcribed and placed in the file.

Charges were filed against Mr. Head, who was in custody on an unrelated charge. Mr. Smith was assigned to prosecute the case. Toward the end of April 2009, Mr. Smith received notice from the Circuit Court for Harford County that the trial would begin on September 8, 2009.

On September 8, Mr. Smith appeared in the Circuit Court and requested a postponement because, according to Mr. Smith, a "necessary, critical witness," the foster mother of the 10–year old victim, was not available. According to the transcript of that hearing, Mr. Smith stated that he believed the foster mother was in Connecticut for a medical emergency, but said, "I don't have my note with me." The trial judge heard from defense counsel, who said "it was [her] understanding that [they] weren't going to be reached for trial" that day, and did not object to the postponement. Finding good cause, the trial judge postponed the case until January 4, 2010—well past the October 6, 2009 *Hicks* date. [7]

7 Maryland Rule 4–271 requires that a criminal trial be scheduled within 180 days of the appearance of counsel or the defendant's first appearance before the circuit court, whichever is earlier, unless the trial date is postponed for good cause. The rule's deadline for commencing trial is sometimes referred to colloquially as the "*Hicks* date"—a reference to *State v. Hicks,* 285 Md. 310, 318, 403 A.2d 356 (1979), in which this Court held that the sanction for a violation of the predecessor version of Rule 4–271 was dismissal of the charges. As noted above, if the court finds good cause for the postponement there is no violation of the rule.

****1190** ***24** On the new trial date, Mr. Smith again appeared at that proceeding as the prosecutor. The defendant entered an *Alford* plea [8] to a fourth degree sexual offense and was found guilty. The court then proceeded to sentencing. Mr. Head's attorney and his grandfather addressed the court on his behalf, but neither the victim nor her foster mother was present and the State did not offer a victim impact statement. Mr. Head was sentenced to one year imprisonment, with all but 142 days suspended and with credit for time served, and three years' probation As a special condition of his probation, Mr. Head was not to have any contact with the victim. There is no indication in the record that anyone from the State's Attorney's Office or the Center had contacted the foster mother to advise her of the proceeding prior to the sentencing; nor did anyone subsequently advise her of the conditions of Mr. Head's probation that related to the victim.

8 In an *Alford* plea, a defendant admits that the State has sufficient evidence to obtain a conviction, but does not admit to committing the crime. *See North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Discovery of Non–Compliance with Victim–Related Responsibilities

More than two years later, in March 2012, when Mr. Head was about to be released from custody, the Division of Correction called the State's Attorney's Office to obtain victim contact information and the State's Attorney's office volunteered to notify the victim. When the State's Attorney's Office contacted the foster mother (who had adopted the child in the meantime) to tell her that Mr. Head was being released from custody, it was surprised to learn that she had no idea that the ***25** case had been prosecuted. [9] She had not heard anything from the Center or the State's Attorney's Office since reporting her daughter's allegations of abuse and assault. [10]

9 The record does not indicate who at the State's Attorney's Office made the contact.

10 It remains a bit of a mystery in this record as to why there was apparently no effort by anyone at the Center to follow up with the victim or her foster mother from the time of her interview in February 2009 until three years later. In any event, Mr. Smith was as emphatic in taking responsibility for the State's lack of communication with the victim as he was in denying that he intentionally misled the trial court. He testified that "it is without question that responsibility rested on my shoulders. Whether it was assigned to administrative staff or not, I'm responsible for ensuring that it's getting done and it did not get done."

The State's Attorney himself then reviewed his office's file for *State v. Head* and the transcripts of the hearings in that case. The file contained the transcribed interviews with the victim

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and her sister, counsels' entries of appearance, discovery requests, and the State's responses to discovery—including a list of potential witnesses that included the victim, her foster mother, a detective, and a social worker. However, the note that Mr. Smith had referenced during the September 8, 2009 hearing when he requested a postponement was not in the file.

Several other items were also noticeably absent from the file. The file did not contain a copy of the victim notification request form that the prosecutor is required to provide the victim. Nor was there any indication whether a completed form had been returned by the victim or ****1191** whether Mr. Smith had filed the required certification with the court attesting that the form had been sent to the victim. While the file included summonses for the defendant and the investigating detective, there were no summonses for the victim or her foster mother. [11]

11 According to the Harford County State's Attorney, the clerical staff in his office prints summonses for each trial, and the attorney assigned to the case reviews and signs them before sending them out.

***26** According to the State's Attorney, the prosecutor of a child abuse case is responsible for meeting with the victim to prepare the child for trial, and the office commonly files a notice of intent to use a child victim's recorded statement at trial. Mr. Smith had apparently neither met with the victim nor attempted to introduce her statement. There was no indication in the prosecutor's file in the *Head* case of any communication with the victim or her foster mother between September 8, 2009, the date of the postponement, and the new trial date, January 4, 2010.

Confrontation and Termination of Employment

After being informed that the victim was unaware of the *Head* prosecution and after reviewing the office file and court file in that case, the State's Attorney confronted Mr. Smith about his handling of the case, his lack of communication with the victim, and his representations to the trial court that a key witness was unavailable, despite the fact that Mr. Smith had apparently never spoken with her. Mr. Smith, who was visibly shaken at the meeting, told the State's Attorney that the note he had referenced at the postponement hearing two and a half years earlier should be in the case file, but could not offer any other explanation. The State's Attorney requested, and received, Mr. Smith's immediate resignation. He then reported the incident to the Commission, which ultimately led to this proceeding.

The Hearing in this Proceeding

At the hearing in this proceeding, Bar Counsel presented the testimony of the State's Attorney and the victim's foster mother. The hearing judge found both to be credible witnesses. In addition, Bar Counsel introduced the State's Attorney's file, excerpts from the court file in the *Head* case and Bar Counsel's deposition of Mr. Smith, transcripts from the court hearings, and a stipulation of facts concerning Mr. Smith's career and the *Head* case.

In his testimony, the State's Attorney described the nature of the Center and the prosecutor's general function there, provided some background information concerning Mr. ***27** Smith's employment with his office, and detailed the results of his own investigation into the handling of the *Head* case. Among other things, the State's Attorney testified that a trial attorney is to make some kind of contact with the victim concerning the disposition of a case. If the victim is not present at the disposition, a letter is to be sent detailing the outcome or a victim advocate makes contact with the victim or the victim's representative. [12]

12 The State's Attorney testified regarding the usual practice in the Child Advocacy Center of contacting victims after trial as follows:

> Bar Counsel: All right. Was it Mr. Smith's responsibility to notify the victim of the, of disposition of the charges against Mr. Head?
>
> [State's Attorney]: I mean, generally with these kind of cases, the attorney does make some kind of contact but we also have a system where a letter, if the victim is not present in Court, there is a letter sent to the victim detailing the outcome of the case and often either one of the—because of the contacts with the victim, the victim advocate or family advocate makes contact and let [sic] them know what the outcome is.

****1192** The victim's foster mother testified as to the events that led her to believe that Mr. Head had sexual contact with her foster daughter and her decision to take the victim to the Center. At the Center she had consented to the audio and video taping of the social worker's interview of the victim. The foster mother said that she did not hear anything further about the case from anyone at the Center or at the State's

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Attorney's office. She said that she did not initiate any further contact herself on the assumption that the matter had been dropped after their visit to the Center. When contacted three years later about the release of Mr. Head, she was surprised to learn of the prosecution. She said she would have cooperated in the prosecution, had she known about it. She said she had not told anyone at the State's Attorney's Office that she would be unable to attend a hearing or trial in the case.

Mr. Smith did not cross-examine either of the Commission's witnesses. He testified on his own behalf and was cross-examined by Bar Counsel. The hearing judge concluded that ***28** he appeared to be "credible, genuine and truthful" in that testimony.

Mr. Smith testified that he had no independent memory of the case but had refreshed his memory by reviewing the file. Concerning his lack of communication with the victim, Mr. Smith said his normal practice was to wait until the eve of trial to prepare a child victim for testifying, in order to minimize the child's trauma and exposure to the criminal process. The substance of the victim's testimony was already detailed in the transcription of her interview with the Center's social worker. According to Mr. Smith, he would have expected the victim to testify on September 9, but that changed when he sought a postponement on September 8, which was why he never held a pre-trial interview with her. By the January trial date, he knew he had reached a plea deal with the defendant, so once again he did not need to bring the victim in to prepare for trial. Like the State's Attorney, Mr. Smith alluded to the fact that victim's advocates at the Center would communicate with victims, but admitted that he bore responsibility for the fact that no one had contacted the foster mother. [13]

13 At the hearing, the following exchange took place:

> Bar Counsel: Based on your review of the file, what was it that you had done to alert [the foster mother] that there was going to be a trial on September the 8th of 2009?
>
> Mr. Smith: I—there's nothing that shows in the file any contacts. I have no idea what did or did not take place with that. I have no idea whether any of the victim advocates had either attempted to contact her or did not contact her.
>
> Bar Counsel: But it was your job to—
>
> Mr. Smith: Ultimately it was my responsibility to ensure that would take place, yes.

With respect to the postponement of the initial trial date, Mr. Smith said that someone gave him a note that the foster mother was unavailable for the original trial date. He admitted that the note was not in the file and that there was no evidence in the file of a subpoena for the victim or her foster mother, a victim notification form, or a certification to the court that he had sent the form. While he did not dispute the foster mother's testimony that she would have been available ***29** for a September 2009 trial, he denied a suggestion by Bar Counsel that he had fabricated the idea of a note in order to postpone the case because he was unprepared for trial. On cross-examination, he stated that he had been carrying a heavy District Court caseload at that time and had asked that it be ****1193** reduced so that he could devote more time to his work at the Center.

Hearing Judge's Conclusions as to Alleged Violations

The hearing judge found that Mr. Smith failed to exercise reasonable diligence in carrying out his responsibilities in the *Head* case but that he did not intentionally deceive the trial judge in seeking a postponement of the initial trial date. The hearing judge concluded that Mr. Smith's admitted lack of diligence was a violation of MLRPC 1.3, but that in the absence of clear and convincing evidence that he intended to deceive the trial court, he had not violated MLRPC 3.3 or 8.4(a), (c), or (d).

II

Discussion

This Court reviews a hearing judge's conclusions of law *de novo—i.e.,* without any special deference. Maryland Rule 16–759(b)(1). In the course of that review, we consider any exceptions filed by the parties. As noted above, Mr. Smith did not file any exceptions. The Commission excepted to the hearing judge's conclusions that Mr. Smith violated only MLRPC 1.3 and not the other rules cited in the charged violations. We discuss each of the alleged violations in turn.

Lack of Diligence—MLRPC 1.3

Under MLRPC 1.3, a lawyer is to "act with reasonable diligence and promptness in representing a client." Unreasonable delay and procrastination in the discharge of one's duties to a client may result in irreversible prejudice. *See* MLRPC 1.3, comment [3]. Although neither the victim nor

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her foster mother was a "client" of Mr. Smith, as the Assistant State's Attorney assigned to the *Head* case, he was "the ***30** representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is ... that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935);[14] *see also Attorney Grievance Comm'n v. McDonald,* 437 Md. 1, 46, 85 A.3d 117 (2014) (a prosecutor is "held to even higher standards of conduct than other attorneys due to [the] unique role as both advocate and minister of justice") (citation and quotation marks omitted). In that capacity, Mr. Smith was responsible for ensuring compliance with the State's victim notification law in order to properly carry out his responsibilities as the prosecutor in the *Head* case.

14 In an oft-quoted passage, the Supreme Court described the role of the prosecutor:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Mr. Smith agrees that he had ultimate responsibility for compliance with the victim notification obligations—provision of the victim notification form to the victim and her foster mother, communication with the victim and her foster mother about key dates in the prosecution, notification of the foster mother of the disposition of the case and the probation condition that barred Mr. Head from contact with the victim. He concedes that he did none of those ****1194** things. In connection with the request to postpone the trial, he also concedes that he did not use "due diligence" in verifying the information in the note that he believes he received—that the victim's foster mother was unavailable on the initial trial date.

***31** We agree with the hearing judge that Mr. Smith failed to "act with reasonable diligence and promptness" in his obligations to communicate with the victim or her foster mother, and in the need to verify information he presented to the court to obtain a postponement. He therefore violated MLRPC 1.3.

Conduct Prejudicial to the Administration of Justice—MLRPC 8.4(d)

Under MLRPC 8.4(d), it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Not every unnecessary delay or failure to carry out duties expeditiously violates this rule. *See Attorney Grievance Comm'n v. Zeiger,* 428 Md. 546, 559, 53 A.3d 332 (2012) (per curiam) (no MLRPC 8.4(d) violation when attorney's delay in acting as estate administrator caused no substantial harm to anyone). On the other hand, a repeated failure to communicate with clients (or others) that impairs the discharge of the attorney's duties in a case can violate the rule. *See Attorney Grievance Comm'n v. Brown,* 353 Md. 271, 286, 289, 725 A.2d 1069 (1999) (attorney's failure to communicate with client and appear at hearing violated MLRPC 8.4(d)). "The prejudice to the administration of justice may also be measured by the practical implications the attorney's conduct has on the day-to-day operation of our court system." *Attorney Grievance Comm'n v. Dore,* 433 Md. 685, 710, 73 A.3d 161 (2013). An attorney may also violate MLRPC 8.4(d) when the attorney's conduct "reflects negatively on the legal profession and sets a bad example for the public at large." *Attorney Grievance Comm'n v. Brady,* 422 Md. 441, 460, 30 A.3d 902 (2011).

In her conclusions of law, the hearing judge found that Mr. Smith's "singular incident of a lack of due diligence" did not violate MLRPC 8.4(d), in large part because he did not act "with the intentionality required" for such a violation—a criterion that the hearing judge derived from our decision in *Attorney Grievance Comm'n v. Rand,* 429 Md. 674, 716, 57 A.3d 976 (2012).

***32** The Commission devotes the major part of its exceptions to its contention that, contrary to the conclusion of the hearing judge, Mr. Smith's conduct violated MLRPC 8.4(d). The Commission argues that Mr. Smith's conduct was

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not a singular incident, but a continuous course of neglect that spanned at least nine months, from the time the case was assigned to him in March 2009 through the January 2010 plea deal, and even afterwards when he failed to advise the victim or her foster mother of the disposition of the case. It points out that this persistent behavior deprived the victim and her foster mother of the opportunity to exercise, at any time in the *Head* prosecution, the rights accorded them under Article 47 of the State Constitution and its implementing legislation.

We agree that Mr. Smith's consistent failure to ensure that the appropriate information and notices were provided to the victim and her foster mother, coupled with his failure to verify the information he says that he received concerning the foster mother's unavailability for trial, was prejudicial to the administration of justice. The trial—or, as it turned out, alternative disposition—in the *Head* case was unnecessarily postponed, the victim and victim's representative were denied their right to observe and perhaps participate in the case, and the sentencing court was denied ****1195** whatever input the victim might have provided in making that important decision. [15] In our view, Mr. Smith's conduct was "prejudicial to the administration of justice."

15 The record in this case does not tell us whether the victim in the *Head* case—or her foster mother—would have had some useful input for the trial judge to consider when she sentenced Mr. Head. But it is the opportunity to provide such input that is important and underlies the statutory obligation to notify victims in certain cases of key proceedings when the victim requests such notice.

In concluding that a violation of MLRPC 8.4(d) was not established, the hearing judge accurately quoted our prior decision in *Rand* as stating that a "mere mistake" by an attorney in that case did not "rise to the level of *intentionality* required for an 8.4 violation." *Rand,* 429 Md. at 716, 57 A.3d 976 (emphasis added). That statement, however, should be ***33** understood in the context of the facts of the *Rand* case. In that case, the issue concerning a possible MLRPC 8.4(d) violation was whether an attorney, who had taken on representation of a group of county correctional officers in a pay dispute, had intentionally misled one officer who had delayed joining the group about that particular officer's individual legal right to obtain financial relief. The attorney treated that officer similarly to the other members of the group in keeping them informed of the progress of the dispute and their collective interests, but failed to provide the late-joining officer with additional information concerning the consequences of the officer's delay on his eligibility for some of the relief. The hearing judge in *Rand* found that the attorney did not have the intent to mislead the late-joining officer and this Court deferred to that finding, with the result that the attorney was held not to have violated MLRPC 8.4(d).

In this case, Mr. Smith's inaction was more than a "mere mistake." Rather, it amounted to gross negligence in the discharge of the prosecutorial function. His conduct deprived the child victim and her foster mother of the rights to: (1) know the alleged assailant was being prosecuted, (2) attend the hearings in the case against him, (3) submit a victim impact statement to the court prior to or at his sentencing, and (4) know the terms of the defendant's probation upon release. Even if he did not affirmatively intend to mislead the court or disadvantage the victim, his conduct threatened the fair and efficient administration of justice.

Accordingly, we sustain Bar Counsel's exception and hold that Mr. Smith violated MLRPC 8.4(d).

False Statements and Misrepresentations—MLRPC 3.3 and 8.4(c)

The alleged violations of MLRPC 3.3 and 8.4(c) both turn on whether Mr. Smith made a *knowing* false statement to the trial court in *State v. Head* at the time he asked for a postponement of the initial trial date. Under MLRPC 3.3, "[a] lawyer shall not knowingly ... make a false statement of fact or law to a tribunal or fail to correct a false statement of ***34** material fact or law previously made to the tribunal by the lawyer." This requirement is referred to as "candor towards the tribunal." It is based on the idea that " [e]very court has the right to rely upon an attorney to assist it in ascertaining the truth of the case before it. Therefore, candor and fairness should characterize the conduct of an attorney at the beginning, during, and at the close of litigation." *Dore,* 433 Md. at 703, 73 A.3d 161 (quoting *In re Discipline of Wilka,* 638 N.W.2d 245, 249 (S.D.2001)) (ellipses omitted). In order to establish a violation of MLRPC 3.3, there must be clear and convincing evidence, not only ****1196** that an attorney provided false information, but also that the attorney knew the information to be false. *Attorney Grievance Comm'n v. Ward,* 394 Md. 1, 32, 904 A.2d 477 (2006).

A violation of MLRPC 3.3 will also often violate MLRPC 8.4(c) as both provisions concern dishonest conduct. *See*

Dore, 433 Md. at 707, 73 A.3d 161. Under MLRPC 8.4(c), a lawyer is not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." An attorney who knowingly tells a client or a court a falsehood on a matter material to the hearer can violate MLRPC 8.4(c), even if the attorney has no intent to defraud anyone. *See, e.g., Attorney Grievance Comm'n v. Siskind,* 401 Md. 41, 70, 930 A.2d 328 (2007) ("words spoken by an attorney who knows they were untrue involves an inherent intent to deceive"); *Attorney Grievance Comm'n v. Reinhardt,* 391 Md. 209, 222, 892 A.2d 533 (2006) (telling a client a lie about the progress of her case out of embarrassment violated MLRPC 8.4(c)). While this Court has sometimes drawn fine distinctions among the four horsemen of the rule—dishonesty, fraud, deceit and misrepresentation—each pertains to a false statement by an attorney only if the attorney makes use of the false statement knowing that it is untrue.

It is undisputed that Mr. Smith gave the hearing judge false information when he requested the postponement in September 2009. The foster mother was not in another state, had no medical emergency, and had not contacted the State's Attorney's Office about her unavailability. Whether Mr. Smith ***35** violated MLRPC 3.3 or 8.4(c) thus depends on whether he knew that information was false when he provided it or had an opportunity to correct it. As noted above, the hearing judge found Mr. Smith's testimony before her to be "genuine" and "credible" and accepted his explanation that he had been relying on a note that he received that he thought pertained to the foster mother, although he did nothing to verify it. Accordingly, the hearing judge found that there was not clear and convincing evidence of a necessary element of the charges under MLRPC 3.3 and 8.4(c).

The Commission has excepted to that conclusion. The Commission argues that Mr. Smith must have intentionally misled the trial court because, in its view, he was likely unprepared for trial and needed a reason to postpone the trial past the *Hicks* date. The Commission reasons that, as Mr. Smith had not communicated directly with the victim or foster mother about the case, it was unlikely that the foster mother would try to contact him about missing a trial date. It also argues that he should have contacted the foster mother at some point before the new trial date to prepare her for trial, and discounts his explanation that he did not do so because of the anticipated *Alford* plea. The Commission infers that Mr. Smith was intentionally dishonest.

The determination as to whether Mr. Smith violated MLRPC 3.3 and 8.4(c) turns on an assessment of his credibility when he testified that he did not purposely mislead the Circuit Court at the hearing on September 8, 2009. As this Court has reiterated on numerous occasions, we defer to the fact findings of the hearing judge "because she is in the best position to assess first hand a witness's credibility." *Attorney Grievance Comm'n v. Sheridan,* 357 Md. 1, 17, 741 A.2d 1143 (1999). This is particularly true when it comes to assessing an attorney's state of mind as to an intent to deceive. "We are constrained to accept that assessment, particularly given the judge's superior ability to evaluate demeanor-based credibility." *Sheridan,* 357 Md. at 29, 741 A.2d 1143; *see also* ****1197** *Attorney Grievance Comm'n v. Tanko,* 427 Md. 15, 49, 45 A.3d 281 (2012) (deferring to trial judge's credibility determinations ***36** regarding the attorney's intent to deceive, or lack thereof, for purposes of assessing alleged MLRPC 8.4(c) violation).

It is evident from the detailed findings of fact that the hearing judge carefully considered the testimony and other evidence presented at the hearing, including Mr. Smith's testimony. From the perspective of a reviewing court, we cannot say that the hearing judge's assessment of Mr. Smith's credibility was clearly erroneous. Accordingly, we overrule the Commission's exceptions to the hearing judge's conclusions regarding the alleged MLRPC 3.3 and 8.4(c) violations and decline to find violations of those provisions.

MLRPC 8.4(a)

Under MLRPC 8.4(a), "[i]t is professional misconduct for a lawyer to ... violate or attempt to violate the [MLRPC], knowingly assist or induce another to do so, or do so through the acts of another." As this Court has frequently stated, when an attorney violates a rule of professional conduct, the attorney also violates MLRPC 8.4(a). [16] As we have found violations of MLRPC 1.3 and 8.4(d), perforce there is also a violation of MLRPC 8.4(a). [17]

16 *See, e.g., Attorney Grievance Comm'n v. Nelson,* 425 Md. 344, 363, 40 A.3d 1039 (2012).

17 The hearing judge did not separately discuss MLRPC 8.4(a) in the recommended conclusions of law, but did subsume it in her conclusion that the Commission had not provided clear and convincing evidence of the requisite intent for violations of

MLRPC 8.4 generally. The Commission did not except separately as to the failure to find a violation of MLRPC 8.4(a). Because there is no special intent requirement for a violation of 8.4(a) and because we conclude that Mr. Smith violated MLRPC 1.3 and MLRPC 8.4(d), we find that there was a violation of MLRPC 8.4(a). We need not belabor the point because, as a simple reflection of the other violations found, it adds nothing to our consideration of the appropriate sanction.

III

Sanction

The underlying purpose of attorney disciplinary proceedings —and any sanction imposed—is protection of the public, not punishment of the attorney. When imposed, a ***37** sanction "should be commensurate with the nature and gravity of the violations and the intent with which they were committed, taking into account the particular circumstances of each case and any aggravating or mitigating factors." *Attorney Grievance Comm'n v. Khandpur,* 421 Md. 1, 18, 25 A.3d 165 (2011) (internal quotations omitted). The Court frequently looks to a list of possible aggravating and mitigating factors identified by the American Bar Association's *Standards for Imposing Lawyer Sanctions,* §§ 9.22, 9.32, reprinted in Compendium of Professional Responsibility Rules and Standards (2012). *See, e.g., Attorney Grievance Comm'n v. Shapiro,* 441 Md. 367, 406–07, 108 A.3d 394 (2015); *Attorney Grievance Comm'n v. Coppock,* 432 Md. 629, 648–49 & nn. 17–18, 69 A.3d 1092 (2013).

The hearing judge found no aggravating factors. As to mitigating factors, the hearing judge found that Mr. Smith accepted responsibility for failing to contact the victim and her foster mother, that he was not dishonest, and that he was cooperative during the proceedings. We add that there is no evidence that Mr. Smith has a prior disciplinary record.

The Commission recommends that, if this Court does not find violations of MLRPC 3.3 and 8.4(c), we suspend Mr. Smith indefinitely with the right to apply ****1198** for reinstatement in 60 days.[18] As noted above, Mr. Smith did not file a recommendation as to the appropriate sanction for what he admits ***38** was a serious dereliction of his duties as a prosecutor. When pressed at oral argument, he suggested a public reprimand, in light of the fact that the incident cost him his job.

[18] In the event we granted the Commission's exceptions and found violations of MLRPC 3.3 and 8.4(c), the Commission initially recommended disbarment. At oral argument, however, in light of our recent decision in *Attorney Grievance Comm'n v. Litman,* 440 Md. 205, 101 A.3d 1050 (2014), Bar Counsel modified its position to recommend an indefinite suspension with the right to reapply in six months if we found that Mr. Smith had violated MLRPC 3.3 and 8.4(c).

In *Litman,* 440 Md. at 218, 101 A.3d 1050, this Court rejected the Commission's recommendation for disbarment when an attorney "misrepresented facts to tribunals in an attempt to further his client's goals." We noted that "we have not ... always found disbarment to be the appropriate sanction when there is misrepresentation involved, especially when misappropriation of money is not involved," and indefinitely suspended the attorney with the right to reapply in six months. *Id.* at 218, 101 A.3d 1050 (quoting *Attorney Grievance Comm'n v. Sperling,* 432 Md. 471, 69 A.3d 478 (2013)) (ellipses added).

We accept the Commission's recommendation. We have concluded that Mr. Smith failed to act with the reasonable diligence expected of a member of the bar and that his inaction was prejudicial to the administration of justice in the prosecution of a child sexual abuse case and in the State's compliance with the rights accorded victims under State law. These are serious violations, but the hearing judge found they were not committed with fraudulent or deceitful intent. This Court has often referenced the lack of fraudulent intent when imposing a suspension—in lieu of disbarment—for serious violations. *See, e.g., Khandpur,* 421 Md. at 20, 25 A.3d 165; *Attorney Grievance Comm'n v. Nichols,* 405 Md. 207, 218, 950 A.2d 778 (2008). An indefinite suspension is appropriate. The recommended period of suspension is consistent with the sanction imposed in prior cases in which the misconduct consisted at least in part of a lack of reasonable diligence. *See, e.g., Attorney Grievance Comm'n v. Mooney,* 359 Md. 56, 97–98, 753 A.2d 17 (2000) (indefinite suspension with the right to re-apply in 90 days when attorney failed to act with reasonable diligence, as well

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as committed numerous other violations with respect to four clients). In light of the mitigating factors found by the hearing judge, Mr. Smith may re-apply no sooner than 60 days after the beginning of his suspension.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING THE COSTS OF ALL TRANSCRIPTS, PURSUANT TO RULE 16–761, FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST BRUCE MICHAEL SMITH.

HARRELL, BATTAGLIA, and WATTS, JJ., concur and dissent.

***39** WATTS, J., concurring and dissenting, in which HARRELL and BATTAGLIA, JJ., join.

Respectfully, I concur and dissent. [1] This attorney discipline proceeding involves a lawyer who displayed an egregious lack of diligence and candor in his capacity as an Assistant State's Attorney representing the State in a prosecution against a defendant charged with committing crimes against a child. Under this attorney discipline proceeding's unique circumstances, ****1199** without hesitation, I would hold that the hearing judge's finding that Bruce Michael Smith ("Smith"), Respondent, was credible is not entitled to deference from this Court and that clear and convincing evidence established that Smith violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 3.3(a)(1) (Candor Toward the Tribunal) and 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation).

1 I concur with the Majority's conclusions that Smith violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.3 (Diligence), 8.4(d) (Conduct that is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

BACKGROUND

Because the decision not to defer to the hearing judge's credibility finding is based, in large part, on the many facts of the case that amply demonstrate Smith was credible neither in the underlying criminal prosecution before the circuit court nor in the hearing before the hearing judge, I summarize the hearing judge's findings of fact.

On December 16, 1999, this Court admitted Smith to the Bar of Maryland. During the time period relevant to this attorney discipline proceeding, Smith was an Assistant State's Attorney for the Office of the State's Attorney for Harford County, Maryland. Joseph I. Cassilly ("Cassilly") had been the State's Attorney for Harford County since 1983; and, in 2007, Cassilly hired Smith as an Assistant State's Attorney.

In August 2007, Smith was assigned to prosecute cases handled by the Harford County Child Advocacy Center ("the ***40** CAC"). The CAC had been established to handle cases involving child sexual assault and abuse, child pornography, and internet solicitation of children. The CAC is staffed by prosecutors, victim/witness advocates, a forensic interviewer, child protective service workers, and sheriff's detectives.

On or about March 31, 2009, Nathan Head ("Head") was indicted for sexual abuse of a minor and fourth-degree sex offense. As part of his duties with the CAC, Smith was assigned to prosecute Head in the Circuit Court for Harford County ("the circuit court"), beginning with grand jury proceedings. As was the practice of the Office of the State's Attorney for Harford County, a file was created and maintained for Head's prosecution.

On April 9, 2009, David Henninger ("Henninger") entered his appearance on behalf of Head. The prosecution file included Henninger's entry of appearance, the State's and Head's discovery requests, and the State's responses to Head's discovery requests. Smith signed the State's responses, which included a list of potential witnesses, identifying the following people as potential witnesses: (1) the child victim ("the victim") by the victim's initials; (2) the victim's adult guardian; (3) Detective Thomas Bradley; and (4) Leanda Daniels, a social worker with the CAC. In the State's discovery responses, contact information was provided for all of the witnesses except for the victim.

On or about April 30, 2009, Smith received notice that Head's trial was scheduled for September 8, 2009. On September 8, 2009, Smith appeared on behalf of the State in the circuit court and requested a postponement, advising the circuit court that the victim's guardian, a necessary witness, was unavailable. Specifically, Smith stated: "I have a witness who is necessary for the case who is not available at this time." When asked by the circuit court to elaborate, Smith

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stated: "[I]t's my understanding [ ] that ... [the victim's guardian], is absent at this time, out of town, and apparently it's some kind of medical emergency, I believe in Connecticut, Your Honor. I don't have my note with me. She is a ***41** necessary, critical witness in this case, therefore, the State is seeking postponement. ****1200** There has been no other dates before this, Your Honor." The circuit court granted the postponement, stating: "For the matter stated by the State, that a critical witness is unavailable here today, this matter will be postponed for that reason. I find the reason constitute[s] good cause."

Trial was rescheduled for January 4, 2010. On that date, Head pled guilty to fourth-degree sex offense. The circuit court sentenced Head to one year of imprisonment, with all but 142 days suspended and credit for time served, followed by three years' probation. Importantly, as a condition of probation, Head was to have no contact, by any means, with the victim. At sentencing, Smith did not offer the circuit court a victim impact statement or any other information from the victim or the victim's family.

In 2012, the Division of Correction contacted the Office of the State's Attorney for Harford County concerning Head's release. The Division of Correction was unable to locate contact information to notify the victim of Head's release, so the Office of the State's Attorney agreed to contact the victim's guardian. As a result, the Office of the State's Attorney discovered, among other things, that the victim's guardian was unaware that Head had pled guilty and been sentenced; she had been unaware of the September 8, 2009 trial date, and had never advised that she was out-of-state; and, for that matter, she was unaware that Head had ever been charged. Upon this discovery, the prosecution file was reviewed; the prosecution file contained a notation that the September 8, 2009, postponement was due to the victim's unavailability. Thereafter, transcripts of the September 8, 2009, hearing and the January 4, 2010, guilty plea hearing were ordered.

On or about March 21, 2012, Cassilly confronted Smith about the request for postponement and the information obtained from the victim's guardian (*i.e.,* that she was not aware that Head had been charged, that she had never contacted ***42** anyone with regard to traveling out-of-state for a medical emergency, and that she had not, in actuality, traveled out-of-state for a medical emergency). Cassilly told Smith he had concerns about his lack of candor in requesting the postponement and requested Smith's resignation. Cassilly could not recall Smith offering an explanation other than that a note should have been in the prosecution file. Cassilly looked for, but did not find, a note in the prosecution file relating to the unavailability of the victim's guardian or the information that Smith provided to the circuit court on September 8, 2009. After his meeting with Cassilly, Smith's employment as an Assistant State's Attorney was terminated.

In addition to the issues related to the September 8, 2009 postponement request, Cassilly discovered nothing in the prosecution file indicating that the victim had been summonsed for either circuit court date; and neither the prosecution file nor the circuit court's file contained a copy of the Victim Notification Request form that Maryland law requires.[2] In addition, neither the prosecution file nor the circuit court's ****1201** file contained a form certifying that the victim had been notified of her rights; filing such a certification form was Smith's responsibility. According to Cassilly, it was Smith's responsibility to meet with the victim prior to trial, introduce himself, establish a relationship with the victim, and know how the victim would handle questions or respond on the stand; but, the prosecution file contained no notes concerning a pretrial interview with the victim by Smith. The prosecution file contained a statement given by the victim to a social worker at the CAC ***43** on February 20, 2009, which was audio and video taped;[3] and, according to Cassilly, it was customary to use such a recording at trial. Although it was Smith's responsibility to file a motion in the circuit court concerning the State's intention to use the recording at trial, Smith failed to do so.

2 Md. Code Ann., Crim. Proc. (2008 Repl. Vol.) § 11–104(c)(1) provides:

> Within 10 days after the filing or the unsealing of an indictment or information in circuit court, whichever is later, the prosecuting attorney shall: (i) mail or deliver to the victim or victim's representative the pamphlet described in § 11–914(9)(ii) of this title and the notification request form described in § 11–914(10) of this title; and (ii) certify to the clerk of the court that the prosecuting attorney has complied with this paragraph or is unable to identify the victim or victim's representative.

3 A document signed by the victim's guardian consenting to the audio and videotaping of the victim's statement was in the prosecution file.

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It was also Smith's responsibility to see that subpoenas/summonses were issued to witnesses to appear for trial. The usual practice of the Office of the State's Attorney for Harford County was as follows. Although witnesses were occasionally notified about other types of hearings by telephone or by letter, the assigned Assistant State's Attorney typically sent a summons and followed up by letter. The summonses/subpoenas are computer-generated. The clerical staff at the Office of the State's Attorney for Harford County enter a date into the computer system; the computer searches for all cases that are scheduled for that date; and a batch of the subpoenas/summonses for that date is printed. Thereafter, the clerical staff separate the summonses, attach them to the front of the prosecution file, and give them to the assigned Assistant State's Attorney for signature. The process allows the assigned trial attorney to review the summonses/subpoenas already issued and to make sure that all of the witnesses needed for the trial date were issued a summons/subpoena. If Smith received the prosecution file in Head's case and realized there were no summons/subpoena for a necessary witness, Smith could have had a summons/subpoena issued for that witness prior to trial.

Pursuant to the procedure described above, the prosecution file and the circuit court's file contained copies of subpoenas signed by Smith for the September 8, 2009, trial date. The subpoenas, issued on August 3, 2009, were addressed to Head and Detective Thomas Bradley of the Harford County Sheriff's Department. There were no copies of subpoenas for the victim or her guardian for either trial date. It was Smith's responsibility, as the assigned Assistant State's Attorney, to ***44** keep the victim and her guardian informed of the proceedings, but the prosecution file contained no notes or other records of any communications with the victim or members of her family between the September 8, 2009, trial date and the January 4, 2010, trial date.

After the circuit court proceeding on January 4, 2010, at which Head pled guilty, Smith did not communicate with the victim or her guardian. And, although one of the conditions of Head's probation was that he have no contact, by any means, with the victim, there was no record that Smith or anyone else contacted the victim or her guardian concerning the case's disposition and the condition of probation imposed. At the hearing, Cassilly testified that, generally, the assigned Assistant State's Attorney communicates with the victim concerning the case's disposition. Barring that, the Office of the State's Attorney for Harford County has a system ****1202** under which, if the victim is not present, a letter detailing the case's disposition is sent to the victim and/or the CAC victim's advocate contacts the victim. At the disciplinary hearing, Smith admitted that he was responsible for notifying the victim and/or the victim's guardian concerning the conditions of Head's probation, but that he failed to do so.

The victim's guardian testified that, after the victim gave a recorded statement on February 20, 2009, she heard nothing from the CAC or the Office of the State's Attorney about the allegations against Head. The victim's guardian did not attempt to contact anyone about the allegations against Head because she got caught up in other matters, and assumed that the victim had not been believed and that the matter had been dropped. According to the victim's guardian, in 2012, she was contacted by someone about Head, and, as a result, discovered that Head had been prosecuted. The victim's guardian testified that, had she been contacted in 2009, she would have cooperated in the prosecution. The victim's guardian also testified that she would have liked to have known that Head had been prosecuted. The victim's guardian testified that she did not leave a telephone message for anyone in the Office of the State's Attorney for Harford County advising that she was ***45** unable to attend a hearing or that she was out-of-state for a medical emergency.

The hearing judge expressly found Cassilly and the victim's guardian credible.

At the hearing, Smith testified that he had no independent recollection of the case, and had refreshed his recollection by reviewing the transcript and other documents. Smith admitted responsibility for a lack of due diligence in handling the case. Smith testified, however, that he would not have fabricated an excuse for a postponement and he believed that his communication to the circuit court regarding the victim's guardian's absence was not untrue. Smith did not dispute the validity of the underlying fact—*i.e.,* the victim's guardian had not traveled out-of-state—but testified that he believed that what he stated on the record was not fabricated. During cross-examination, Smith testified that, at the relevant time, he had a heavy case load and had requested that his District Court case load be reduced so he could devote more time to his assigned CAC case load. The hearing judge found that Smith "appeared credible, genuine, and truthful" when testifying at the hearing.

On November 10, 2014, we heard oral argument. In opening argument, Smith urged this Court to adopt the hearing judge's findings of fact and conclusions of law, and submitted. In response to questions posed by Chief Judge Mary Ellen

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Barbera, Smith recommended that we reprimand him. In rebuttal argument, Smith again asked this Court to adopt the hearing judge's findings of fact and conclusions of law. In response to questions from the Court, Smith stated that he made the postponement request in the circuit court based on the information that he had at the time, and that, in any event, the *Head* case was not going to proceed to trial on September 8, 2009. When asked when he knew the case would not proceed to trial, Smith stated that his "guess" was "probably" weeks prior to the September 8, 2009, trial date, although Smith acknowledged that he had not seen the file between ***46** 2009 and 2012, and that he had not testified before the hearing judge concerning the case not proceeding to trial.

Smith also stated that he did not know whether he had testified about when he learned that Head was going to plead guilty, but believed he had not testified about it because he did not know the date. ****1203** Smith again admitted that he did not have any independent recollection of the case. When asked how this Court could reconcile the hearing judge's findings that both Smith and the victim's guardian were credible, Smith responded that he "testified to the truth" and that, "when asked how that note came about," he "explained that, obviously, someone had left it on [his] desk and that's what [he] presented to the [circuit] court." Smith maintained that "the note was the only information [that he] had," and that he "accepted responsibility for not following up" to verify the information contained in the note before presenting it to the circuit court.

And, in contrast to his testimony, in which he acknowledged that contacting the victim after the guilty plea was his responsibility, Smith advised us that it was the responsibility of a victim-witness coordinator to contact the victim's guardian and advise her of the guilty plea and the condition that Head have no contact with the victim. Smith stated that he "accepted responsibility for" not following up to make sure that the victim-witness coordinator contacted the victim. In response to a question as to whether the record contained any information about the victim-witness unit and how it functions, Smith stated: "No, I don't believe so." Smith conceded that he had no basis in this Court's jurisprudence for recommending a reprimand as the appropriate sanction.

DISCUSSION

Maryland Rule 16–759(b)(2)(B) provides, in relevant part: "If exceptions are filed, the Court of Appeals shall determine whether the findings of fact have been proven by the requisite ***47** standard of proof set out in Rule 16–757 (b). [4] ... The Court shall give due regard to the opportunity of the hearing judge to assess the credibility of witnesses." We accept a hearing judge's proposed findings of fact, unless clearly erroneous, and have explained that "[t]his deferential standard of review is in place because the hearing judge is in the best position to assess the credibility of witnesses and parties." *Attorney Grievance Comm'n v. Walker–Turner,* 428 Md. 214, 226, 51 A.3d 553, 560 (2012) (citations omitted); *see also* *Attorney Grievance Comm'n v. London,* 427 Md. 328, 343, 47 A.3d 986, 995 (2012) ("We accept a hearing judge's findings of fact unless we determine that they are clearly erroneous. That deference is appropriate because the hearing judge is in a position to assess the demeanor-based credibility of the witnesses." (Citation omitted)).

4 Maryland Rule 16–757(b) provides, in pertinent part, that the Attorney Grievance Commission "has the burden of proving the averments of the petition [for disciplinary or remedial action] by clear and convincing evidence."

We have stated that "[w]eighing the credibility of witnesses and resolving any conflict in the evidence are tasks proper for the fact finder." *Attorney Grievance Comm'n v. Marcalus,* 414 Md. 501, 512, 996 A.2d 350, 356 (2010) (citation and internal quotation marks omitted) (alteration in original). Accordingly, "in an attorney discipline proceeding, the hearing judge may elect to pick and choose which evidence to rely upon because he or she is in the best position to assess first hand a witness's credibility [.]" *Attorney Grievance Comm'n v. Payer,* 425 Md. 78, 93, 38 A.3d 378, 387 (2012) (citations and internal quotation marks omitted). We have also explained "that 'clear and convincing evidence' means only that the witnesses to a fact must be found to be credible, and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to ****1204** come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Id.* at 93, 38 A.3d at 387 (citation and internal quotation marks omitted).

***48** A careful review of our existing jurisprudence leads to the conclusion that we are not required to accept a hearing judge's credibility finding in lockstep where there is good reason to doubt the finding and the record contains facts that contradict the finding. Although it is accurate that weighing witness credibility is the job of the hearing judge and that

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we generally defer to such findings, our jurisprudence has always allowed for the possibility that there would be a case in which the hearing judge's credibility finding would be clearly erroneous.

In *Attorney Grievance Comm'n v. Sheinbein,* 372 Md. 224, 248, 812 A.2d 981, 995 (2002), this Court determined that a lawyer "had the specific intent to obstruct or hinder [an] investigation and probable arrest of his son by sending [his son] to Israel." In so concluding, we first evaluated the hearing judge's finding concerning the lawyer's credibility to "determine whether those findings [we]re clearly erroneous." *Id.* at 245, 812 A.2d at 993. We observed that the hearing judge had found that the lawyer was not credible when he testified before a Grand Jury that his intent in sending his son to Israel was to save his son from another individual, suicide, or a police shootout. *Id.* at 245, 812 A.2d at 993. Upon independent review, we stated that "[t]he record [wa]s replete with facts" supporting the hearing judge's credibility finding. *Id.* at 245, 812 A.2d at 993.

And, in *London,* 427 Md. at 350–51, 47 A.3d at 999–1000, we concluded that a lawyer violated MLRPC 8.4(c) by making misrepresentations or failing to communicate a material fact about the status of work that he had completed for a client. Before the hearing judge, the client testified that the lawyer had told him that a deed had been filed. *Id.* at 350, 47 A.3d at 999. By contrast, the lawyer testified that the agreement with the client was that the lawyer would prepare the deed, but that the client would file the deed. *Id.* at 350, 47 A.3d at 999. Ultimately, no deed was filed. *Id.* at 349, 47 A.3d at 999. The hearing judge found the client credible, and found the lawyer "not as credible[.]" *Id.* at 335, 47 A.3d at 990. In concluding that the lawyer violated MLRPC 8.4(c), we stated: "With no reason to doubt the hearing judge's finding that [the client] ***49** was a more credible witness than [the lawyer], we conclude that the evidence is plainly sufficient to support a violation of [MLRPC] 8.4(c)." *Id.* at 351, 47 A.3d at 1000 (footnote omitted).

Here, there are myriad good reasons to doubt the hearing judge's credibility finding as to Smith, and the record is overflowing with facts that contradict the hearing judge's finding. Indeed, the hearing judge's own findings of fact compel the conclusion that Smith was not credible, and that he misled the circuit court in representing that a critical witness was unavailable for trial due to traveling out-of-state for a medical emergency.

There were a number of unusual circumstances accompanying Smith's request for a postponement in the circuit court on September 8, 2009. The hearing judge found that, during the circuit court proceeding, Smith stated that a witness, the victim's guardian, was unavailable, "absent ..., out of town, and apparently it's some kind of medical emergency, ... in Connecticut," but that he did not "have [his] note with [him]." Smith did not produce the alleged note in the circuit court, and Smith did not advise the circuit court of how he came into possession of a note regarding the victim's guardian's unavailability when he had neither contacted the ****1205** victim's guardian to advise her of the trial date nor summonsed her to appear as a witness. Nor was the note placed in the prosecution file.

Several years later, when Cassilly received conflicting information concerning the postponement request—*i.e.,* the information that Cassilly had obtained from the victim's guardian (that she was not aware that Head had been charged, that she had never contacted anyone with regard to traveling out-of-state for a medical emergency, and that she had not, in actuality, traveled out-of-state for a medical emergency)—and met with Smith, Smith offered no explanation or details other than that a note should have been in the prosecution file. Cassilly looked for, but, contrary to Smith's assurance, did not find, a note in the prosecution file relating to the victim's guardian's unavailability or a note regarding any information ***50** provided by Smith to the circuit court on September 8, 2009. After Smith's meeting with Cassilly, Cassilly terminated Smith's employment with the Office of the State's Attorney for Harford County. The logical conclusion is that Cassilly did not believe Smith's account of the September 8, 2009, postponement request before the circuit court.

Compounding the irregularities attendant to the September 8, 2009, postponement request, at the hearing, Smith testified that he had no independent recollection of the case, but that "he would not have fabricated such an excuse" to the circuit court and that he believed what he told the circuit court regarding the victim's guardian's absence "was not untrue." In short, before the hearing judge, Smith simply testified that he would not have been untruthful about receiving the note. It is undisputed, however, based on the hearing judge's findings of fact, that Smith never contacted the victim's guardian to

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inform her of the prosecution or of either the September 8, 2009, or January 4, 2010, trial dates. Specifically, the victim's guardian testified that nobody from the Office of the State's Attorney for Harford County had ever been in touch with her, not even to inform her that Head was being prosecuted. At the hearing, Smith acknowledged that it was his responsibility to notify the victim and her guardian about the prosecution and trial dates, but that he failed to do so. Yet, oddly, Smith failed to provide any explanation whatsoever as to why he would have unexpectedly received a note about the unavailability of a critical witness—the victim's guardian—whom, as he knew, he had not contacted to inform of the prosecution or of the particular trial date.

Although Smith has offered the explanation that he would not have fabricated an excuse for a postponement and that he believes his communication with the circuit court regarding the victim's guardian's absence was not untrue, simply put, the evidence admitted at the disciplinary hearing does not support Smith's allegation. Based on the evidence, there are only two logical explanations for Smith's position—either the victim's guardian was not truthful concerning her lack of contact with the Office of the State's Attorney for Harford County, or, in ***51** September 2009, Smith came into possession of a note unrelated to Head's case that he mistook as pertaining to the victim's guardian. As to the first possibility, the hearing judge expressly found the victim's guardian credible, and nothing in the record casts a reasonable doubt on that finding; *i.e.,* the record presents no circumstances contradicting the victim's guardian's account that she was not contacted by the Office of the State's Attorney for Harford County and did not know of Head's prosecution. And ****1206** Smith agrees that he did not contact the victim's guardian. As to the second possibility, no evidence has been produced demonstrating that Smith received in error a note concerning the victim's guardian's absence or that Smith received a note pertaining to another matter or, for that matter, that a note pertaining to the victim's guardian was misplaced in another prosecution file. In short, there is no scenario grounded in the evidence admitted at the hearing under which Smith's version could be accurate.

Although this Court gives due regard to a hearing judge's credibility finding, in the instant case, in the face of all of the countervailing evidence admitted at the hearing and in light of the hearing judge's own findings of fact, this Court is not required to mindlessly accept the hearing judge's unexplained finding that Smith was credible.[5] Under this attorney discipline proceeding's unique circumstances, given the many good reasons to doubt Smith's credibility and that the evidence, in actuality, contradicts a finding that Smith was credible, I would not defer to the hearing judge's illogical finding concerning Smith's credibility. Clear and convincing evidence requires not only that a witness be found to be credible, but ***52** also "that the facts to which [the witness has] testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the [hearing judge] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Payer,* 425 Md. at 93, 38 A.3d at 387 (citation and internal quotation marks omitted). Again, Smith neither testified as to any remembered facts nor provided any detail concerning the particulars of his prosecution of Head; to the contrary, Smith testified that he had no independent recollection of the matter.[6] In other words, nothing in Smith's testimony could have led the hearing judge to come to find by clear and convincing evidence that Smith would not have misled the circuit court about the note.[7]

5 As an aside, although the hearing judge found that Smith "appeared credible, genuine and truthful in testifying before" the hearing judge, the hearing judge did not explain, elaborate, or even mention a fact supporting the finding (*i.e.,* the hearing judge did not state that the credibility determination was based on Smith's demeanor or something else, nor did the hearing judge state that the credibility finding was confirmed by evidence admitted at the hearing). To be sure, hearing judges are permitted to make demeanor-based credibility findings. Here, however, overwhelming evidence contradicts the validity of such a finding concerning Smith's credibility.

6 At oral argument, the Honorable Glenn T. Harrell, Jr. asked Smith whether he remembered the character Sergeant Schultz from the television show "Hogan's Heroes." Smith responded: "Yes." Judge Harrell pointed out that Sergeant Schultz's catchphrase was "I know nothing," which "seems to have been [Smith's] defense before the [hearing] judge." Given Smith's testimony that he has no independent recollection of the case, Judge Harrell's comparison is well-taken.

7 And, disconcertingly, despite admitting at the hearing that it was his responsibility to notify the victim and/or her guardian of Head's guilty plea and conditions of probation, at oral argument, Smith

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> advised that it would have been the responsibility of a victim-witness coordinator to contact the victim and/or her guardian concerning Head's guilty plea. In other words, although, at the hearing Smith acknowledged his responsibility to contact the victim after the guilty plea, Smith changed his tune between the disciplinary hearing and oral argument, and decided that responsibility for contacting the victim after the guilty plea rested with a victim-witness coordinator. The conflicting information provided by Smith as to who was responsible for contacting the victim and/or her guardian following Head's guilty plea undermines the finding that Smith was credible.

****1207** I would reverse the hearing judge's conclusion that Smith did not violate MLRPC 3.3(a)(1) and 8.4(c). MLRPC 3.3(a)(1) provides that "[a] lawyer shall not knowingly: [ ] make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" (Paragraph break omitted). MLRPC 8.4(c) provides: "It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, ***53** deceit[,] or misrepresentation[.]" Given the hearing judge's findings of fact, I would conclude that Smith violated MLRPC 3.3(a)(1) and 8.4(c) by lying to the circuit court when making the postponement request. The hearing judge's findings of fact are more than sufficient to demonstrate that Smith—who admitted that he had a heavy case load and had requested that his case load be reduced, and who failed to even inform the victim or her guardian of Head's prosecution or of the initial trial date—fabricated an excuse for a postponement to cover up his complete lack of diligence in the handling of Head's prosecution. In my view, there is no other reasonable or logical conclusion that can be reached given the hearing judge's findings of fact, notwithstanding the hearing judge's inexplicable credibility finding.

In accordance with the Commission's recommendation at oral argument, I would indefinitely suspend Smith from the practice of law in Maryland with the right to apply for reinstatement no sooner than six months after the effective date of the suspension. *Cf.* *Attorney Grievance Comm'n v. Litman,* 440 Md. 205, 206, 217, 222, 101 A.3d 1050, 1052, 1057, 1058, 1061 (2014) (In a reciprocal discipline case, where, among other things, the lawyer "misrepresented intentionally facts and the law to both judicial and administrative tribunals" and "either made deliberately the misrepresentations at issue or blinded himself willfully to the falsity of his contentions[,]" this Court concluded that the appropriate sanction was an indefinite suspension with the right to apply for reinstatement no sooner than six months after the effective date of the suspension.). For the above reasons, respectfully, I concur and dissent.

Judge HARRELL and Judge BATTAGLIA have authorized me to state that they joined me in this opinion.

All Citations

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Attachment D

Excerpts from the ABA Model Rules of Professional Conduct

Preamble

Rule 1.11

Rule 1.13

Rule 3.6

Rule 3.8

Rule 4.2

Model Rules of Professional Conduct: Preamble & Scope

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PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public

officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

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

zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they

define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

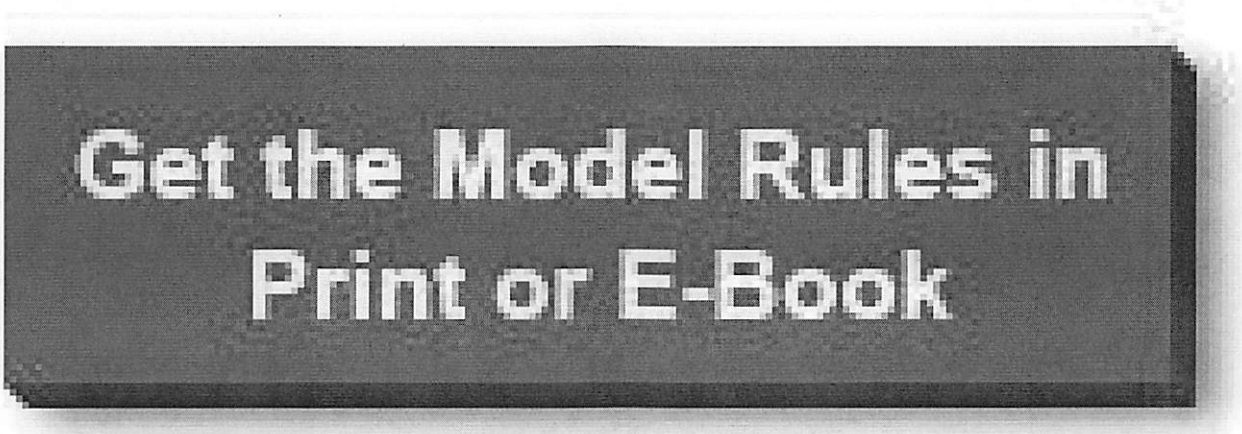
[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will

be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Preface | Chairperson's Introduction | Ethics 2000 Chair's Introduction | Table of Contents



American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope

Rule 1.11: Special Conflicts of Interest for Former & Current Government Officers & Employees

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Client-Lawyer Relationship

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment | Table of Contents | Next Rule

ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_11_special_conflicts_of_interest_for_former_current_government_officers_employees

Rule 1.11 Special Conflicts of Interest For Former And Current Government Officers And Employees - Comment

Share this:

Client-Lawyer Relationship

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Back to Rule | Table of Contents | Next Comment

ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_11_special_conflicts_of_interest_for_former_current_government_officers_employees/comment_on_rule_1_11

Rule 1.13: Organization as Client

Share this:

Client-Lawyer Relationship

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment | Table of Contents | Next Rule

Rule 1.13 Organization As Client - Comment

Share this:

Client-Lawyer Relationship

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a

matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Back to Rule | Table of Contents | Next Comment



ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/comment_on_rule_1_13

Rule 3.6: Trial Publicity

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Advocate

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment | Table of Contents | Next Rule

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/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_6_trial_publicity

Rule 3.6 Trial Publicity - Comment

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Advocate

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is

not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
>
> (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
>
> (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place

limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Back to Rule | Table of Contents | Next Comment

ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_6_trial_publicity/comment_on_rule_3_6

Rule 3.8: Special Responsibilities of a Prosecutor

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Advocate

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making

extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment | Table of Contents | Next Rule

ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor

Rule 3.8 Special Responsibilities Of A Prosecutor - Comment

Share this:

Advocate

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Back to Rule | Table of Contents | Next Comment

ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8

Rule 4.2: Communication with Person Represented by Counsel

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Transactions With Persons Other Than Clients

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment | Table of Contents | Next Rule



Rule 4.2 Communication With Person Represented By Counsel - Comment

Share this:

Transactions With Persons Other Than Clients

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Back to Rule | Table of Contents | Next Comment

ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel/comment_on_rule_4_2

Attachment E

Maryland Attorney General Opinions

- 82 *Opinions of the Attorney General* 15 (1997)

(Who is the Client?)

- 87 *Opinions of the Attorney General* 126 (2002)

(Application of Conflicts Rules)

COUNTIES

ATTORNEYS – EVIDENCE – PUBLIC INFORMATION ACT – "CLIENT" OF ST. MARY'S COUNTY ATTORNEY – APPLICATION OF ATTORNEY-CLIENT AND OTHER PRIVILEGES TO DOCUMENTS PREPARED BY COUNTY ATTORNEY

December 16, 1997

The Honorable Roy Dyson
Maryland Senate

You have requested our opinion concerning the assertion of the attorney-client privilege by the County Attorney for St. Mary's County. Specifically, you ask whether the clients of the county attorney are, as you put it, "the County Commissioners and not the citizens of St. Mary's County." You also ask whether written material prepared by the county attorney for a county agency may be withheld from public disclosure as privileged.

Our opinion is as follows:

1. The corporate entity that is St. Mary's County is the client of the St. Mary's County Attorney. The county commissioners are not individually the clients of the county attorney. However, to the extent that the commissioners and other elected and appointed officials and employees of the county are carrying out the functions of the corporate entity in accordance with law, they are the agents of the client and may be viewed by the county attorney as entitled to speak for the client. Although the county attorney should act with due regard for the public interest, an attorney-client relationship as such does not ordinarily exist between the county attorney and the citizens of the county.

2. A document is not confidential as a matter of law merely because it is prepared by the county attorney. Many documents prepared by the county attorney, however, are privileged because of

their content and therefore are not disclosable under the Maryland Public Information Act.[1]

I

Identity of the County Attorney's "Client"

Article 25, §1 of the Maryland Code begins as follows: "The county commissioners of each county in this State are declared to be a corporation ...." The corporate status of the county commissioners is confirmed by the case law. *See Neuenschwander v. Washington Suburban Sanitary Comm'n,* 187 Md. 67, 48 A.2d 593 (1946); *Jay v. County Commissioners,* 120 Md. 49, 87 A. 521 (1913).[2] Therefore, the attorney for a county represents the corporate entity.[3]

In the course of representing that corporate entity, a county attorney is subject to the Maryland Rules of Professional Conduct. One of these, Rule 1.13, addresses the responsibility of a lawyer to an organizational client. Under Rule 1.13(a), "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." As the comment to the rule points out, "an organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents." In this rule, the term "constituents" does not have the political meaning of those who elect the governing officials. Rather, the term "constituents" refers to those who, in the structure of the organization, are entitled to act for it. When the corporation is a county, these "constituents" include the county commissioners, appointed officials, and employees and agents of the county.

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[1] The status of documents and other records is determined under the Public Information Act, rather than the St. Mary's County Open Meetings Law, Article 24, Title 4, Subtitle 2.

[2] Likewise, counties that have adopted charter home rule are also corporations. *See* Article 25A, §1.

[3] In charter home rule counties, the charter may delineate a more specific role for the county attorney – that is, whether the county attorney represents both the executive and legislative branches of government or only the executive branch. *Compare, e.g.,* §213 of the Montgomery County Charter *with* §403(b) of the Harford County Charter.

The comment to the rule recognizes that "defining precisely the identity of the client and prescribing the resulting obligations of [government] lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the act or failure to act involves the head of a bureau, the department of which the bureau is a part or the government as a whole may be the client for the purposes of this rule." In other words, the county attorney must consider the extent to which, under applicable law, the official or employee is authorized to act on behalf of the county. Within the scope of lawful authority, the official or employee is an agent of the corporate entity and is entitled to speak on behalf of, and exercise the privileges of, the client.

Certainly, a county attorney, like other public lawyers, has a responsibility to consider the public interest. As the comment to the rule points out, for example, "when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that [a] wrongful official act is prevented or rectified, for public business is involved." Nevertheless, the county attorney generally does not have an attorney-client relationship with members of the public, for they are neither the corporate entity that is the client nor agents of the county authorized by law to act on its behalf.

II

Attorney-Client Privilege – Invocation

A governmental entity is no less entitled to the protection of the attorney-client privilege than any other client. This protection exists both under the common law and by statute.

The attorney-client privilege has ancient origins and was established as a matter of English common law long before the independence of the United States. *See Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981); *United States v. (Under Seal)*, 748 F.2d 871, 873 (4th Cir. 1984). As one court observed, "the privilege is intended to encourage the client in need of legal advice to tell the lawyer the truth. Unless the lawyer knows the truth, he or she cannot be of much assistance to the client." *Samaritan Foundation v. Goodfarb*, 862 P.2d 870, 874 (Ariz. 1993).

In Maryland, the attorney-client privilege has been described as "deeply rooted in the common law." *State v. Pratt*, 284 Md. 516, 519, 398 A.2d 421 (1979). Therefore, the privilege is preserved under Article 5 of the Declaration of Rights, which declares that "the Inhabitants of Maryland are entitled to the Common Law of England ... according to the course of that Law ...." The common law privilege is also given statutory recognition: "A person may not be compelled to testify in violation of the attorney-client privilege." §9-108 of the Courts and Judicial Proceedings Article.

The common law privilege has always been understood to be available to government agencies. *See, e.g., Hearn v. Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975) ("Federal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state."). As the D.C. Circuit recently observed, "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). *See also, e.g., In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997) (recognizing federal government's entitlement to claim attorney-client privilege while rejecting applicability of privilege to notes taken by in-house presidential counsel during meetings with First Lady and her private counsel).

The Maryland Public Information Act ("PIA") likewise recognizes the attorney-client privilege as a basis on which a government agency may withhold documents from public inspection. Under §10-615(1) of the State Government ("SG") Article, Maryland Code, "a custodian shall deny inspection of a public record or any part of a public record if ... by law, the public record is privileged or confidential." In addition, under SG §10-618(b), "a custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit." This somewhat awkward provision, adapted verbatim from the federal Freedom of Information Act, has long been held to incorporate the attorney-client privilege. *See generally* Annotation, *Freedom of Information Act Exemption (5 U.S.C.S. §552(b)(5)) for Inter-Agency and Intra-Agency Memorandums or Letters as Applicable to Communications to or from Attorneys for the Government*, 54 A.L.R. Fed. 280 (1981).

In sum, St. Mary's County, acting through its agents, is entitled to invoke the attorney-client privilege. Unless an official authorized to do so has waived the privilege, the county attorney has a duty to assert it on behalf of the client entity.

III

Attorney-Client Privilege – Scope

"The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services.... The privilege also protects communications from attorneys to their clients if the communications 'rest on confidential information obtained from the client.'" *Tax Analysts v. IRS*, 117 F.3d at 618 (quoting *In re Sealed Case*, 77 F.2d 94, 99 (D.C. Cir. 1984)). *See generally Harrison v. State*, 276 Md. 122, 135, 345 A.2d 830 (1975).[4] Because the client in this situation, the county, is an organization, "the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communications." *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 253 n. 24 (D.C. Cir. 1977). Thus, the attorney-client privilege may be invoked for communications between a county attorney and agents of the county in circumstances where there is "actual confidentiality, limited distribution safeguards, real expectations of confidential status, and the functioning of the attorney as counsel to the agency .... Confidentiality must have been both expected at the time and carefully maintained to avoid disclosure." 1 James T. O'Reilly, *Federal Information Disclosure* §15.14 (2d ed. 1996).[5]

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[4] Under what is called the "joint defense" or "common interest" rule, the privilege can be preserved for communications not only with clients but also among "persons who share a common interest in litigation" and their attorneys. *In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990).

[5] Prudence suggests that documents within the privilege be identified as such. The failure to do so, coupled with unnecessary distribution of the documents, may suggest that confidentiality was not intended. *See Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693,

(continued...)

The privilege, however, "is not absolute; it does not restrict disclosure of every aspect of what occurs between the attorney and the client." *In re Criminal Investigation No. 1/242Q*, 326 Md. 1, 11, 602 A.2d 1220 (1992). For example, facts that the attorney may develop independently from sources other than the client are not privileged, even if those facts are included in the lawyer's communication to the client. *See Allen v. West Point-Pepperell, Inc.*, 848 F. Supp. 423, 427-8 (S.D.N.Y. 1994); *Smith v. Conway Organization, Inc.*, 154 F.R.D. 73, 78 (S.D.N.Y. 1994); *Carte Blanche (Singapore) P.T.E., Ltd. v. Diners Club Int'l*, 130 F.R.D. 28, 33 (S.D.N.Y. 1990). Moreover, a document that is not itself privileged does not gain privileged status merely because it passes through the attorney's hands or is attached to an attorney's communication to the client. *See, e.g., Pacamor Bearings, Inc. v. Minebea Co. Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996).

At times, a government lawyer may be assigned the role of articulating an agency's view of the law. If, for example, an agency lawyer provides "neutral, objective analyses of agency regulations," these documents may fall outside the privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). When the attorney in effect becomes the decision maker for the agency, the documents embodying the decision are not privileged. *Schleffer v. United States*, 702 F.2d 233 (D.C. Cir. 1983).

IV

Other Privileges

The attorney-client privilege is not the only one that might be available to maintain the confidentiality of documents prepared by a county attorney. As a matter of both common law and the PIA, a county attorney may assert the work-product privilege to keep certain material confidential. In general, "documents ... prepared in anticipation of litigation or for trial" are the attorney's work product.

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[5] (...continued)
696 n.6 (E.D. Va. 1987); *Hardy v. New York News, Inc.*. 114 F.R.D. 633, 644 (S.D.N.Y. 1987).

Maryland Rule 2-402(c). This work product is ordinarily not discoverable in civil litigation: "We do not think that discovery in civil cases ... goes to that which is in essence the work product of the attorney accumulated in the preparation of the case." *Wagonheim v. Maryland State Board of Censors*, 255 Md. 297, 309, 258 A.2d 240 (1969), *aff'd*, 401 U.S. 480 (1971). The privilege is intended to keep confidential the "attorney's legal strategy, his intended lines of proof, his evaluation of strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses." *Sporck v. Peil,* 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985).

In addition, the PIA protects from disclosure client confidences covered by Rule 1.6 of the Maryland Rules of Professional Conduct. This rule prohibits a lawyer from revealing "information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation," and except as otherwise authorized in the rule or other law. If disclosure of information would place a county attorney in violation of Rule 1.6, then the information is "privileged and confidential" for purposes of a request under the PIA. *Harris v. Baltimore Sun Co.*, 330 Md. 595, 625 A.2d 941 (1993).

Finally, a writing from the county attorney might also be exempt from disclosure if it falls within the executive or governmental privilege aspect of SG §10-618(b). *See generally Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980); 66 *Opinions of the Attorney General* 98 (1981). This privilege protects materials that are deliberative in character and that were created during the process leading up to a decision. *See* Office of the Attorney General, *Public Information Act Manual* 24-26 (7th ed. 1997).

V

Conclusion

In summary, it is our opinion that St. Mary's County, as a corporate entity, is the client of the St. Mary's County Attorney, and the County Attorney may, under appropriate circumstances, invoke the attorney-client and other privileges to maintain the confidentiality of documents encompassed by those privileges.[6]

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

[6] Subsequent to your request for an opinion, your office provided material from a constituent that, in the constituent's view, evidenced too broad an assertion of privilege by St. Mary's County when certain documents were requested under the PIA. Because the Attorney General's Office has not been granted authority to adjudicate disagreements about the status of records under the PIA, we must limit ourselves to the guidance provided in this opinion and decline to consider whether the County responded correctly to particular requests for documents.

COUNTIES

ATTORNEYS – WHETHER LAWYERS IN COUNTY ATTORNEY'S OFFICE MAY ACT AS ADVISER TO ADMINISTRATIVE TRIBUNAL AND ADVOCATE BEFORE SAME TRIBUNAL

August 27, 2002

John B. Norris, III, Esquire
County Attorney for St. Mary's County

Your predecessor asked whether it would be a "conflict of interest" for one attorney from the Office of the County Attorney to represent a County official or agency in an administrative appeal before the County Board of Appeals while another attorney from that Office advises the Board of Appeals.

Issues of legal ethics, as well as due process concerns, may be raised when two attorneys from the same government office act, respectively, as adviser to an administrative tribunal and as advocate before that tribunal in the same matter. However, in our opinion, those concerns are resolved if the County Attorney's Office employs procedures designed to ensure the fairness of the administrative process.[1]

I

Background

A. Board of Zoning Appeals

The St. Mary's County Board of Appeals is established under the zoning enabling law set forth in the Annotated Code of

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[1] In connection with his request for this opinion, your predecessor also directed us to the St. Mary's County Code of Ethics, Chapter 158 of the St. Mary's County Code, and in particular to §158-6, captioned "Conflicts of Interest." While it does not appear that this section bears on the question considered in this opinion, interpretation of the County Ethics Code is appropriately vested in the St. Mary's County Ethics Commission, §158-4, rather than the Office of the Attorney General.

Maryland, Article 66B, §§4.07, 14.07(d) and the St. Mary's County Comprehensive Zoning Ordinance ("Zoning Ordinance"), §20.3.[2] The Board consists of five members, and one alternate, appointed by the Board of County Commissioners. Zoning Ordinance §20.3.

The jurisdiction of the Board of Appeals is limited to land use matters. It decides applications for special exceptions, conditional uses, and variances as a matter of first impression. *See* Article 66B, §4.07(d)(2), (3); Zoning Ordinance, Figure 20.1.[3] In other proceedings, the Board of Appeals acts as an appellate body, reviewing the administrative and enforcement decisions of County officials and agencies. *See* Article 66B, §4.07(d)(1); Zoning Ordinance, Figure 20.1; §§20.3(4), 23.1.

The Board of Appeals conducts quasi-judicial hearings that are open to the public and at which any person may testify. The Chairman of the Board is authorized to administer oaths and compel attendance of witnesses. Zoning Ordinance §20.3(5). We understand that a typical appeal is conducted as a *de novo* adversarial hearing. The Planning Director presents a planning staff report that outlines the basis for his or her decision. Testimony and other evidence is received from applicants and other interested parties. Witnesses are cross-examined. Closing statements are usually made. In addition, the floor is opened to general public comment.

Following the hearing, the Board of Appeals may affirm, reverse, or modify, in whole or in part, the order or decision under review.[4] In addition, the Board may issue its own order or decision as it has "all the powers of the administrative officer from whom the appeal is taken." Article 66B, §4.07(h); Zoning Ordinance §20.3(6). A decision of the Board is a final administrative decision that may

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[2] The Zoning Ordinance is available on the County's web site at: http://www.co.saint-marys.md.us/planzone/docs/5-8zoningordinance/index.htm.

[3] Certain administrative variances may be obtained directly from the Planning Director in lieu of applying to the Board of Appeals. *See* Zoning Ordinance §22.5. A person aggrieved by the decision of the Planning Director may appeal to the Board of Appeals. *Id.*, §22.5(7).

[4] The Board of Appeals is to render a final written decision within 60 days after the hearing. Zoning Ordinance §§20.3(7), 23.5.

be appealed to the circuit court. *See* Article 66B, §4.08; Zoning Ordinance §§20.3(7), 23.5.

In light of the complexity of land use decisions and the importance of ensuring proper administrative proceedings, the assistance of counsel is valuable and, in some cases, essential for both the County agencies that participate in the proceedings and the Board of Appeals itself.

B. Office of the County Attorney

The County Attorney's Office is small. In recent years it has consisted of two or three full-time attorneys. The Office represents the Board of County Commissioners, the County governing body, as well as the agencies, boards, and commissions that are part of the County government. Included among those entities are agencies involved in land use – the Board of Appeals, the County Planning Commission, and the Department of Planning and Zoning.

When a decision of a County agency such as the Planning Department is appealed to the Board of Appeals, both the agency and the Board generally require the assistance of counsel. We understand that, typically, the senior attorney in the County Attorney's Office advises the Board of Appeals and another attorney from the Office represents the County agency whose decision is the subject of the appeal. On occasion, however, when the budget permits, the Office of the County Attorney has engaged the services of a contract attorney to advise the Board of Appeals in place of a full-time attorney from the County Attorney's Office.

II

Analysis

We are not aware of any Maryland authority addressing the propriety of one member of a county attorney's office advising a county board of appeals while another attorney from the same office appears as an advocate before the board on behalf of a county agency. Potential conflicts involving attorneys are usually resolved by reference to the ethical rules governing attorneys. In addition, a possible conflict affecting an administrative decision-maker may call into question the fairness of the administrative process and raise due process concerns.

A. Rules of Professional Conduct

The ethical rules governing Maryland attorneys are set forth in the Maryland Rules of Professional Conduct, as adopted by the Court of Appeals. Maryland Rule 16-812, Appendix. There is no question that an attorney for a government entity, such as St. Mary's County, is subject to those rules.

1. Conflicts of Interest

Rule 1.7 sets forth the general rule on conflicts of interest:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.
>
> (c) The consultation required by paragraphs (a) and (b) shall include explanation of the implications of the common representation and any limitations resulting from the lawyer's responsibilities to another, or from the lawyer's own interests, as well as the advantages and risks involved.

In some circumstances, even the appearance of a conflict may result in a violation of Rule 1.7. *Attorney Grievance Comm'n v. Hines*, 366 Md. 277, 292, 783 A.2d 656 (2001).

Subject to limited exceptions, when a lawyer is disqualified under Rule 1.7 from representing a client, other lawyers in the same law firm are also disqualified. *See* Rule 1.10.[5] "Firm" or "law firm" is defined for purposes of the Rules as "a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation *or other organization* and lawyers employed in a legal services organization." Maryland Rules of Professional Conduct, *Preamble: Terminology*; Rule 1.10 *comment* (emphasis added). A county attorney's office appears to come within this definition. *See* Maryland State Bar Association, Committee on Ethics, Ethics Docket 89-3 (concluding that county attorney's office is a "firm" for purposes of Rule 1.10 in addressing conflict involving county attorney's part-time private practice).

2. Application of Conflicts Rules to Government Attorneys

The Maryland Rules of Professional Conduct, however, acknowledge that the conflicts rules may not apply to government lawyers in the same way they do to attorneys in private practice. The introductory section of the rules states that "lawyers under the supervision of [government legal officers] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These Rules do not

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[5] Rule 1.10 reads, in pertinent part:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 ...
>
> . . .
>
> (d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

Other portions of the rule concern the imputation of conflicts when an attorney leaves or joins a firm.

abrogate any such authority." Maryland Rules of Professional Conduct, *Preamble: Scope.* Disqualification by imputation is an area where government law offices have traditionally been afforded different treatment.[6] This is due, at least in part, to the nature of the government client.

3. Identifying the Government Attorney's Client

For a government attorney, the "client" may be viewed more broadly than the specific agency or official that the lawyer is representing or advising. Rule 1.13 of the Rules of Professional Conduct concerns organizational clients. It provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13(a). The rule further provides that a lawyer representing an organization may also represent its constituents, subject to the conflict rules in Rule 1.7. Rule 1.13(e). The commentary to Rule 1.13 states that, while the rule generally applies to government organizations, the "duties of lawyers employed by the government ... may be defined by statutes and regulation." Rule 1.13 *comment.* The commentary also acknowledges that "defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole." *Id. See also* 2 *Restatement (Third) of the Law Governing Lawyers* §97 *Comment c* (2000) ("client" of government attorney may vary, depending on circumstances such as terms of attorney's employment, scope and nature of services, particular regulatory arrangements relevant to attorney's work, and history and tradition of the office).

In a prior opinion, this Office discussed the "client" of the St. Mary's County Attorney. 82 *Opinions of the Attorney General* 15

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[6] Although Rule 1.10 does not explicitly except government attorneys, the official comment notes that "government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11." However, the latter rule only addresses successive government and private practice. (In contrast to the Maryland rule, the comment that follows Rule 1.10, as adopted by the District of Columbia Court of Appeals, explicitly states that the definition of "firm" does not extend to a government agency or other government entity.)

(1997). That opinion primarily concerned whether the County Attorney could appropriately invoke the attorney-client privilege to withhold information from public disclosure. Citing Rule 1.13, the opinion concluded that the corporate entity – that is, the County government as a whole – is the County Attorney's client, that various officials and employees of the County are agents of that entity when acting within the scope of their authority, and that, under appropriate circumstances, the County Attorney may be required to assert the attorney-client privilege or other privileges on behalf of the County. However, that opinion did not address whether the County Attorney might have a conflict in representing diverse units of County government, such as the Board of Appeals and a County department whose decision is at issue before the Board.

In general, a unit of county government, such as a planning department, is considered an agent of the county and not a distinct client for purposes of conflict of interest analysis. However, the courts have recognized an exception to this general rule "when the agency lawfully functions independently of the overall entity." *See Civil Service Comm'n of San Diego County v. Superior Court*, 163 Cal.App. 3d 70, 78, 209 Cal.Rptr. 159 (1984) (disqualifying county counsel from representing county in dispute with quasi-independent civil service commission that county counsel had also advised); *cf. Zoning Hearing Bd. of Uniontown v. City Council of Uniontown*, 720 A.2d 166, 168-79 (Pa. Cmwlth. 1998), *appeal dismissed*, 560 Pa. 556, 746 A.2d 1116 (2000) (municipal zoning board, rather than city council, entitled to select separate counsel because, under Pennsylvania law, zoning board is an adjudicatory tribunal independent of city council). *See also* Maryland State Bar Association, Committee on Ethics, Ethics Docket No. 88-35 (declining to decide whether there was conflict of interest in attorney's simultaneous representation of both local planning board and local board of zoning appeals, on ground that relationship between the two boards was a question of law beyond the purview of the committee).

While the St. Mary's County Board of Appeals is a County agency, it is not an agent of the County Commissioners in the same respect as the Planning Department. Although the members of the Board of Appeals are appointed by the County Commissioners, the Board is a quasi-judicial body that exercises independent decision-

making authority.[7] Only a court can reverse a decision of the Board of Appeals.

Thus, a reasonable argument can be made that the Board should be considered a separate client from the Planning Department. If the County Attorney's representation of the Board were "directly adverse to" or "materially limited by" the Office's representation of the Planning Department, there likely would be a conflict within the meaning of Rule 1.7. But that conclusion would not resolve the propriety of dual representation.

Even if two government entities are considered separate clients under the Rules of Professional Conduct, other law creating a government law office or describing its duties may authorize or require dual representation. Moreover, the "conflict" addressed by those rules concerns only the possibly divergent interests of the two government entities – a conflict that can be waived by the government entities themselves. The Rules of Professional Conduct do not address the separate issue of fairness to third parties who are involved in an administrative proceeding involving the two entities.

B. Fairness of Administrative Process

The propriety of the simultaneous representation by a government law office of several agencies does not depend entirely on whether possibly distinct agency clients might have divergent interests that the law recognizes. In particular, the propriety of one lawyer from a county attorney's office advising an administrative tribunal, while another lawyer acts as advocate before that tribunal, may depend on whether the dual representation undermines the integrity of the administrative process.

In a 1974 opinion, Attorney General Burch considered whether it was proper for one Assistant Attorney General to act as legal adviser to the State Board of Public Accountancy while another presented evidence before the Board during an administrative proceeding. After reviewing the constitutional role of the Attorney General and a statutory requirement that agencies obtain legal representation from the Attorney General's Office, he concluded that

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[7] A member of the Board of Appeals may be removed by the County Commissioners only for cause, following written charges and an opportunity for a public hearing. *See* Article 66B, §4.07(a)(5); *see also* Zoning Ordinance §20.3(3).

"[t]he roles of presenter of evidence and legal adviser ... are duties imposed by law and *without impropriety when there is no unfairness in fact.*" 59 *Opinions of the Attorney General* 10, 14 (1974) (emphasis added), *citing Reddick v. State Commissioner of Personnel*, 213 Md. 195, 200, 131 A.2d 464 (1957).[8]

The Court of Special Appeals reached a similar conclusion nine years later in *Comm'n on Medical Discipline v. McDonnell*, 56 Md. App. 391, 407, 467 A.2d 1072 (1983), *rev'd on other grounds*, 301 Md. 426, 483 A.2d 76 (1984). In that case, a physician had been sanctioned by the Commission on Medical Discipline following an administrative proceeding. He sought reversal of the sanction on the ground, among others, that the Attorney General's Office had acted as both administrative prosecutor and adviser to the Commission. The Court noted that the dual role of the Attorney General, as both adviser to the Commission and prosecutor of cases before that body, was mandated by the State Constitution and statutes. The Court also noted that the Attorney General had separated the two roles by assigning certain assistants to serve as advisers and other assistants to act as prosecutors in adjudicatory hearings, and by issuing guidelines to ensure that each group was independent of the other. Citing *Reddick*, the Court held that "[d]epending upon the nature of those guidelines and the extent to which they were followed ..., such separation of functions may have been sufficient to avoid unfairness." 56 Md. App. at 407. *See also Consumer Protection Div. v. Consumer Publishing Co.*, 304 Md. 731, 763, 501 A.2d 48 (1985) (combination of both investigative and adjudicatory functions within the Consumer Protection Division did not violate due process where individuals responsible for adjudicatory function did not participate in investigation stage of proceeding).

A similar conclusion was reached in a California decision, which held that an asserted conflict of interest within a government law office would be resolved if appropriate screening mechanisms were adopted. *Howitt v. Superior Court*, 3 Cal.App.4th 1575, 5 Cal.Rptr.2d 196 (1992). In that case, a deputy sheriff challenged his transfer and suspension before the county employment appeals board, a quasi-independent administrative tribunal charged with adjudicating disputes between the county and county employees. At

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[8] In *Reddick*, the Court of Appeals did not find it necessary to decide the dual representation issue, since the Deputy Attorney General involved was present at the hearing as a potential witness rather than as counsel. 213 Md. at 200.

the hearing, the sheriff's department was represented by the deputy county counsel, while the appeals board was advised by the county counsel. The deputy sheriff sought to have the county counsel disqualified from advising the board.

The California Court of Appeal held that the county counsel's office could represent a county agency in an adversarial hearing while, at the same time, serving as legal adviser for the decision-maker, provided that the representation followed certain guidelines. 3 Cal.App.4th at 1579. The court derived those guidelines, not from the state rules of professional conduct for lawyers, but from due process principles requiring an impartial decision-maker.[9] *Id.* at 1580. The court concluded that one attorney from the county counsel's office could advise the administrative decision-maker while another attorney from the same office acted as advocate before the tribunal, "only if there are assurances that the adviser for the decision-maker is screened from any inappropriate contact with the advocate.... [T]he burden of providing such assurances must rest on the law office performing the dual roles..." 3 Cal.App.4th at 1586-87. The court added that the county need not create "functionally separate offices to advocate and advise. It should be sufficient if the lawyer advising the Board has no potential involvement in or responsibility for the preparation or presentation of the case." 3 Cal.App.4th at 1587 n.4.

C. Summary

In our view, the Rules of Professional Conduct do not preclude one attorney in the County Attorney's Office from representing the County Planning Director or the Planning Department before the Board of Appeals while another attorney from that Office serves as counsel to the Board. Although the County Attorney is not a constitutionally created office, the County Attorney's function within the County government is analogous to the role of the Attorney General in State government. In our view, that function justifies a county law office's dual roles in administrative

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[9] The court reasoned that the ethical rule addressing conflicts of interest was not designed to address the conflict in question. The court noted that a conflict generally may be waived by the informed consent of the parties, but that a waiver by the two agencies involved "does precious little for the remaining party who must face an adversary with unequal access to the tribunal." 3 Cal. App. 4th at 1580.

proceedings at the county level, provided there are procedures to ensure the fairness of the administrative process.

To avoid the appearance of a conflict or actual unfairness, the County Attorney's Office could adopt and follow certain protocols when one attorney in the Office acts as adviser to the Board while another represents a county agency in an appeal before the Board. For example, such protocols could proscribe *ex parte* communications between the two attorneys regarding issues of the law or facts related to a particular matter before the Board, provide for each attorney to maintain separate files on Board matters that would not be accessible to the other attorney, and ensure that support staff protect confidentiality. The protocols should be designed to separate the roles of agency advocate and Board adviser and to preserve the integrity of the administrative process.

III

Conclusion

In our view, an attorney in the County Attorney's Office may represent a County official or agency before the Board of Appeals while another attorney in the same Office serves as counsel to the Board. However, procedures should be employed to separate the two roles and to ensure the fairness of proceedings before the Board.

J. Joseph Curran, Jr.
Attorney General

William R. Varga
Assistant Attorney General

Robert N. McDonald
Chief Counsel
Opinions & Advice

Attachment F

Maryland Attorney Disciplinary Case

Involving

First Amendment Issue

Attorney Grievance v. Frost, 437 Md. 245 (2014)

437 Md. 245
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND
v.
James Albert FROST.

Misc. Docket AG No. 69, Sept. Term, 2012.
|
Feb. 26, 2014.

Synopsis

Background: Attorney Grievance Commission filed petition for disciplinary or remedial action against attorney. In default proceeding, the Circuit Court, Anne Arundel County, Paul F. Harris, J., entered findings of fact and conclusions of law determining that attorney had committed misconduct.

Holdings: The Court of Appeals, Greene, J., held that:

attorney's post-judgment motion to dismiss disciplinary proceedings did not warrant setting aside order of default;

attorney's knowingly false statements alleging corrupt activity by several judges and public legal officers were not entitled to protection under First Amendment; and

attorney's accusations of lawlessness, corruption, and exertion of improper or undue influence, made against judges and other public legal officers warranted disbarment.

Attorney disbarred.

Adkins, J., concurred with opinion.

McDonald, J., concurred in part and dissented in part, with opinion.

Attorneys and Law Firms

****266** Lydia E. Lawless, Assistant Bar Counsel (Glenn M. Grossman, Bar Counsel, Attorney Grievance Commission of Maryland), for Petitioner.

James Albert Frost, for Respondent.

BARBERA, C.J., HARRELL, BATTAGLIA, GREENE, ADKINS, McDONALD and WATTS, JJ.

Opinion

GREENE, J.

***249** The Attorney Grievance Commission of Maryland ("Petitioner" or "Bar Counsel"), acting pursuant to Maryland Rule 16–751(a), filed a " Petition for Disciplinary or Remedial Action" against James Albert Frost ("Respondent" or "Frost"), on December 5, 2012. Petitioner charged Frost with violating various Maryland Lawyers' Rules of Professional Conduct ("MLRPC" or " Rule"), specifically Rule 8.1Rule 8.1 (Bar Admission and Disciplinary Matters),[1] Rule 8.2(a)Rule 8.2(a) (Judicial and Legal Officials);[2] and Rule 8.4(a), (c) and (d)Rule 8.4(a), (c) and (d) (Misconduct).[3]

1 MLRPC 8.1 provides in pertinent part:

> [A] lawyer ... in connection with a disciplinary matter, shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

2 MLRPC 8.2(a) provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

3 MLRPC 8.4 provides in pertinent part:

> It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Maryland Lawyers' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in

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> conduct that is prejudicial to the administration of justice[.]

Pursuant to Maryland Rule 16–752(a) (Order Designating Judge), this Court referred the matter to the Honorable Paul F. Harris of the Circuit Court for Anne Arundel County to conduct an evidentiary hearing and to render findings of fact and recommend conclusions of law pursuant to Maryland Rule 16–757. After Petitioner made reasonable attempts to personally serve Respondent with a copy of the Petition for Disciplinary ***250** or Remedial Action and related papers, including discovery requests and a written request for admission of facts and genuineness of documents,[4] ****267** Petitioner effectuated service on Respondent by serving the Client Protection Fund of the Bar of Maryland pursuant to Maryland Rule 16–753.[5] Respondent filed no response to the Petition for Disciplinary Action and discovery requests, including the Requests for Admissions, prompting the hearing judge's entry of an order of default. *See* Md. Rule 16–754(c) (providing that the failure to file an answer shall be treated as a default).

4 The Affidavit of Robert C. Versis, Investigator for the Attorney Grievance Commission of Maryland, states that Mr. Versis traveled to Respondent's residence on two occasions. On the first occasion, despite hearing movement within Respondent's apartment, Mr. Versis received no response at the door. At that time, Mr. Versis also viewed photocopies of Respondent's birth certificate, driver's license, and Maryland State Bar Association identification card, which were affixed to the exterior of the apartment door. Mr. Versis left his business card with his telephone number at the apartment door, and the following day received a lengthy voicemail message from an individual who identified himself as "Jim Frost, James A. Frost." On the second occasion, Mr. Versis noticed an individual, whose appearance matched the photographs posted on Respondent's apartment door, standing at a nearby bus stop. Upon approaching the individual, Mr. Versis called Respondent's name, to which the individual responded, "Yeah?" After Mr. Versis displayed his identification badge, the individual stated "You can go to hell!" and ran towards and around the apartment building. Mr. Versis approached the building in his vehicle and then, exiting his vehicle, he was able to view the individual inside the building through a glass breezeway. Again, upon entering the building and knocking at Respondent's apartment door, Mr. Versis received no response.

5 Md. Rule 16–753 provides in pertinent part: "If after reasonable efforts the attorney cannot be served personally, service may be made upon the employee designated by the Client Protection Fund of the Bar of Maryland pursuant to Rule 16-811.4 (a)(12), who shall be deemed the attorney's agent for receipt of service."

On May 14, 2013, Judge Harris conducted a hearing on the merits. Respondent failed to appear for or participate in the hearing. During the brief hearing, Petitioner requested that all of Petitioner's Requests for Admissions, which went unanswered by Respondent, be deemed admitted. Judge Harris granted the request and accepted the Requests for Admissions into evidence. Thereafter, the hearing judge issued "Findings ***251** of Fact and Conclusions of Law," in which he found by clear and convincing evidence that Respondent's actions constituted violations of MLRPC 8.1(b), 8.2(a), 8.4(a), (c) and (d). In doing so, Judge Harris made the following findings of facts:

> Respondent was admitted to the Maryland Bar on June 29, 1972. He does not maintain an office for the practice of law. On April 23, 2012, Respondent wrote an email to his ex-wife, stating, *inter alia:*
>
> > With regard to Case # 110082–C, you know or should know that: (1) Ann S. Harrington, a lawless judge, arranged for deputy sheriffs of the Montgomery County, MD, Sheriff's Office to illegally arrest me on May 13, 2008, with no probable cause to do so and there by committed the crime under State of Maryland law of making a false report to an agency of the state with police powers; ... (3) There was no basis in law or in fact for Judge Stephen P. Johnson, a weak man and corrupt judge acting under improper and political influence, to have me locked up in the county jail on a "no bond" order for 87 days and 87 nights but that's what was done; and (4) The crooked State's Attorney for Montgomery County, MD, John J. McCarthy, Esq., a protégé of Douglas F. Gansler, Esq., the corrupt Attorney General of Maryland, and a political ally of Maryland Governor O'Malley, a pretty-boy hack politician, didn't let his assistant prosecutors drop the phon[y] charge against me until August 8, 2008.
> >
> > With regard to Case # 11041–C ... you know or should know that the Maryland State Police deceived District

Court of Maryland Commissioner Kaitlyn Boyle into signing a warrant to arrest me and then deceived Circuit Court Judge Joseph A. Dugan, Jr., into signing a search and seizure warrant by and through perjury on the warrant applications signed on August 13, 2008, by Maryland State Trooper Michael Brennan, who was ordered to do that by Maryland State Police Captain Clifford T. Hughes, his supervisor, **268 and Maryland State Police Superintendent Terence B. Sheridan, who were acting under improper and political influence exerted (through an intermediary) *252 by Governor O'Malley and his wife, Judge of the District Court of Maryland for Baltimore City Catherine Curran O'Malley.

Respondent made the April 23, 2012 statements regarding the Honorable Ann S. Harrington, specifically calling her a "lawless judge" and accusing her of "arrang[ing] for deputy sheriffs of the Montgomery County, MD Sheriff's Office to illegally arrest [him]" knowing the statements to be false and with reckless disregard as to their truth or falsity. Respondent has no facts to support the statements made regarding Judge Harrington.

Respondent made the April 23, 2012 statements regarding the Honorable Stephen P. Johnson, Retired Judge for the District Court of Maryland for Montgomery County, specifically calling him "a weak man and corrupt judge acting under improper and political influence ..." knowing the statements to be false and with reckless disregard as to their truth or falsity. Respondent has no facts to support the statement regarding Judge Johnson.

Respondent made the April 23, 2012 statement regarding John J. McCarthy, State's Attorney for Montgomery County, specifically calling Mr. McCarthy a "crooked" State's Attorney, knowing the statement to be false and with reckless disregard as to its truth or falsity. Respondent has no facts to support the statement regarding Mr. McCarthy.

Respondent made the April 23, 2012 statement regarding Douglas F. Gansler, Attorney General of Maryland, specifically calling Mr. Gansler "corrupt," knowing the statement to be false and with reckless disregard as to its truth or falsity. Respondent has no facts to support the statement regarding Mr. Gansler.

Respondent made the April 23, 2012 statement regarding Governor O'Malley, specifically that he exerted "improper" influence over members of the Montgomery County Police Department, knowing the statement to be false and with reckless disregard as to its truth or falsity. Respondent has no facts to support the statement regarding Governor O'Malley.

*253 Respondent made the April 23, 2012 statement regarding the Honorable Catherine Curran O'Malley, Judge [for the] District Court of Baltimore City, specifically that she exerted "improper" influence over members of the Montgomery County Police Department, knowing the statement to be false and with reckless disregard as to its truth or falsity. Respondent has no facts to support the statement regarding Judge Curran O'Malley.

On or about May 2, 2012, Respondent mailed a copy of the April 23, 2012 email to George Meng, Esquire. Prior to May 2, 2012, Respondent had no relationship or communication with Mr. Meng. On or about May 2, 2012, Respondent forwarded a copy of the April 23, 2012 email to Paul Carlin, Esquire. On or about May 2, 2012, Respondent forwarded a copy of the April 23, 2012 email to Katherine Kelly Howard, Esquire.

On May 4, 2012, Mr. Meng emailed Respondent asking why the April 23, 2012 email was sent to him, directing him to Rule 8.2Rule 8.2, 8.38.3 and 8.48.4 of the Maryland Lawyers' Rules of Professional Conduct and requesting a response as how the April 23, 2012 email did not violate Rules 8.2Rules 8.2 and 8.48.4 and did not require reporting to Petitioner pursuant to Rule **269 8.3 **269 Rule 8.3. On May 10, 2012, no response having been received to his May 4 email, Mr. Meng again emailed Respondent requesting a response to the questions posed on May 4, 2012. On May 18, 2012, Respondent emailed Mr. Meng stating, "You should have something from me in your mail Monday." On May 18, 2012, Respondent mailed Mr. Meng a letter directed to Chief of Police J. Thomas Manger, Montgomery County, Maryland. The May 18, 2012 letter did not, in any way, respond to the questions posed by Mr. Meng in his emails of May 4 and May 10. Mr. Meng received the May 18, 2012 letter on May 21, 2012. On May 21, 2012, Mr. Meng emailed Respondent again requesting a response to his May 4 and May 10 emails.

On May 23, 2012, no further communication having been received from Respondent, Mr. Meng filed a complaint with the Petitioner and enclosed: (1) Respondent's April 23, 2012 *254 email, (2) Mr. Meng's May 4, 2012 email to Respondent, (3) Mr. Meng's May 10, 2012 email to Respondent, (4) Mr. Meng's May 18, 2012 email to Respondent, (5) Respondent's letter of May 1, 2012 to

Chief of Police J. Thomas Manger, and (6) Mr. Meng's May 21, 2012 email to Respondent.

By letter dated July 11, 2012, Bar Counsel forwarded a copy of the May 23, 2012 complaint and enclosures to Respondent and requested a response thereto be provided, in writing, no later than July 27, 2012. Respondent received Bar Counsel's July 11, 2012 letter and enclosures. On or about July 26, 2012, Respondent sent a letter to Bar Counsel stating: "The statements of mine concerning which objections have been presented to your office are protected from state action by the free speech clause of the First Amendment to the United States Constitution." On or about July 27, 2012, Respondent sent a letter to Bar Counsel stating, *inter alia:*

> How did it happen, I wonder, that ten days after my e-mail message of April 24 long-time A.G.C. of Maryland Commissioner George Meng (to whom I had forwarded that email on the subject *perjury*) sends me an e-mail message (for the first time in his life) with the absurd allegation that I'm in violation of Rule 8 of the Rules of Professional Responsibility? No reasonably prudent individual would believe that you and he and, most likely, some other people had not conferred with one another about me and my truth-telling before on May 4th George undertook his fruitless efforts to have me assume the role of attorney respondent who offers an explanation/states some defense to a "complaint." How did you as the Maryland Bar Counsel dare to get involved in this sort of activity, Glenn? You should be ashamed of yourself.

By letter dated July 31, 2012, Bar Counsel directed Respondent's attention to Rule 8.2(a)Rule 8.2(a) and specifically requested evidence to substantiate his April 24, 2012 statements regarding The Honorable Ann S. Harrington, The Honorable Stephen P. Johnson, State's Attorney John J. McCarthy, and Attorney General Douglas F. Gansler. A written response was required no later than August 13, 2012. Respondent ***255** received Bar Counsel's letter dated July 31, 2012. On or about August 4, 2012, Respondent sent a letter to Bar Counsel stating "The statements of mine concerning which objections have been presented to the Office of Maryland Bar Counsel are protected from state action by the free speech clause of the First Amendment to the ****270** United States Constitution." On or about August 6, 2012, Respondent sent a copy of the August 4, 2012 letter to Bar Counsel with the handwritten notation: "Ms. Lawless, Your letter to me dated July 11th constitutes state action."

Respondent never provided a substantive response to Bar Counsel's requests for information dated July 11, 2012 and July 31, 2012. Bar Counsel's requests for information were lawful. On or about August 15, 2012, Respondent sent a letter to Bar Counsel demanding to know how many complaints Bar Counsel had initiated. On or about September 13, 2012, Respondent sent a copy of a letter addressed to "The Members of the Attorney Grievance Commission of Maryland" to Bar Counsel. The September 13, 2012 letter requested the commission "order Mr. Grossman to answer truthfully in writing the question posed to him in [the] August 15th letter *post haste.*" In addition to sending the September 13 letter to Bar Counsel, Respondent sent copies to the members of the Attorney Grievance Commission. On or about September 19, 2012, Respondent sent a copy of his August 15, 2012 letter to Bar Counsel.

Judge Harris further entered the following conclusions of law, determining that Respondent violated MLRPC 8.1(b), 8.2(a), 8.4(a), (c) and (d):

> *Rule 8.1Rule 8.1. Bar Admission and Disciplinary Matters*
>
> * * *
>
> Respondent violated Rule 8.1(b)Rule 8.1(b) when he failed to provide any substantive response to Bar Counsel's letters dated July 11, 2012 and July 31, 2012 containing lawful demands for information.
>
> ***256** *Rule 8.2Rule 8.2. Judicial and Legal Officers*
>
> * * *
>
> Respondent violated Rule 8.2(a)Rule 8.2(a) when, on April 23, 2012, he stated that the Honorable Ann S. Harrington was [a] "lawless judge" and accusing her of "arrang [ing] for deputy sheriffs of the Montgomery County, MD Sheriff's Office to illegally arrest [him]."
>
> Respondent violated Rule 8.2(a)Rule 8.2(a) when, on April 23, 2012, he stated that the Honorable Stephen P. Johnson, Retired Judge for the District Court of Maryland for Montgomery County, was "a weak man and corrupt judge acting under improper and political influence ..."

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Respondent violated Rule 8.2(a)Rule 8.2(a) when, on April 23, 2012, he stated that the Honorable Catherine Curran O'Malley, Judge [for the] District Court of Maryland for Baltimore City, exerted "improper" influence over members of the Montgomery County Police Department.

Respondent violated Rule 8.2(a)Rule 8.2(a) when, on April 23, 2012, he stated that John J. McCarthy, State's Attorney for Montgomery County, was a "crooked" [State's Attorney].

Respondent violated Rule 8.2(a)Rule 8.2(a) when, on April 23, 2012, he stated that Douglas F. Gansler, Attorney General of Maryland, was "corrupt."

Respondent violated Rule 8.2(a)Rule 8.2(a) when, on April 23, 2012, he stated that Governor O'Malley, exerted "improper" influence over members of the Montgomery County Police Department.

Rule 8.4Rule 8.4. Misconduct

* * *

The [c]ourt, as discussed herein, having concluded that Respondent violated Rules 8.1(b)Rules 8.1(b), 8.2(a)8.2(a), 8.4(c) and (d)8.4(c) and (d) concludes that Respondent has also committed **271 misconduct in violation of Rule 8.4(a)Rule 8.4(a).

*257 Respondent violated Rule 8.4(c)Rule 8.4(c) when he made the statements regarding Judges Harrington, Johnson and Curran O'Malley, State's Attorney McCarthy, Attorney General Gansler and Governor O'Malley knowing the statements to be false.

Respondent's conduct, taken as a whole, violates Rule 8.4(d)Rule 8.4(d). (Citations omitted.)

Although Respondent did not at any time participate in the proceedings in the Circuit Court for Anne Arundel County, on May 23, 2013, he filed with this Court a motion to vacate any findings of fact and conclusions of law made by Judge Harris, and to dismiss the action for lack of proper service of process, which we denied on May 30, 2013. [6]

6 This "Motion to Vacate and to Dismiss" was filed nine days after the May 14, 2013 disciplinary hearing, and approximately two weeks before the June 13, 2013 filing of Judge Harris's written findings of facts and conclusions of law.

Neither Respondent nor Petitioner filed exceptions to the findings of fact and conclusions of law of the hearing judge. [7] On July 5, 2013, Petitioner filed its Recommendation for Sanction, recommending disbarment. On July 17, 2013, Respondent filed a new motion to dismiss with this Court, alleging principally that there was insufficient service of process upon him, that he had committed no violation of any Rule of Professional Responsibility, and that the statements underlying the instant action against him were protected by the Free Speech Clause of the First Amendment to the United States Constitution. He further requested that this Court "dismiss this unjustified, unjustifiable, and downright ridiculous attorney disciplinary case." Subsequently, on July 30, 2013, Respondent filed a "Statement" requesting this Court to consider Respondent's July 13, 2013 "Motion to Dismiss" as *258 timely filed exceptions in this case. Respondent's "Motion to Dismiss" was not, by its title or date, filed properly or timely under Rule 16–758(b), [8] and we decline to consider it to be timely filed exceptions.

7 Although Petitioner did not file any exceptions to the hearing judge's findings and conclusions, *see* Rule 16–758(b), at oral argument before this Court, Petitioner conceded that the hearing judge erred in concluding that Respondent's statement about Governor O'Malley violated Rule 8.2(a)Rule 8.2(a), because, as discussed *infra,* the governor is not a "public legal officer" within the meaning of Rule 8.2(a)Rule 8.2(a).

8 Rule 16–758(b) provides in relevant part: "Within 15 days after service of the notice required by section (a) of this Rule, each party may file (1) exceptions to the findings and conclusions of the hearing judge...." As Respondent stated in his "Statement," the deadline to file exceptions to Judge Harris's findings of fact and conclusions of law was July 8, 2013.

Discussion

In attorney discipline proceedings, "this Court has original and complete jurisdiction and conducts an independent review of the record.... [T]he hearing judge's findings of fact generally will be accepted unless they are clearly erroneous."

Attorney Grievance Comm'n v. Cherry–Mahoi, 388 Md. 124, 152, 879 A.2d 58, 76 (2005) (citations omitted). Maryland Rule 16–759(b)(2)(A) provides, "[i]f no exceptions are filed, the Court may treat the findings of fact as established for the purpose of determining appropriate sanctions, if any." In other words, we deem the hearing judge's findings of fact "correct if (1) they are not clearly erroneous, or (2), at th[is] Court's option, if neither party filed exceptions to them." *Attorney Grievance Comm'n v. Kremer,* 432 Md. 325, 334, 68 A.3d 862, 868 (2013) (citations ****272** omitted). After a review of the record, and because neither Petitioner nor Respondent filed exceptions to the hearing judge's findings of fact, we conclude that the facts are established as determined by Judge Harris.

The hearing judge's proposed conclusions of law are reviewed for legal correctness. *Attorney Grievance Comm'n v. West,* 378 Md. 395, 410, 836 A.2d 588, 596 (2003). "In other words, the ultimate determination as to an attorney's alleged misconduct is reserved for this Court." *Attorney Grievance Comm'n v. De La Paz,* 418 Md. 534, 552, 16 A.3d 181, 192 (2011) (citation omitted). Based on our review of the record, we agree with the hearing judge that Respondent violated Rules 8.1(b)Rules 8.1(b), 8.2(a)8.2(a), 8.4(a), (c) and (d)8.4(a), (c) and (d). We will, however, ***259** address Respondent's "Motion to Dismiss," in which he alleged that he was not properly served, and that his conduct, as it relates to the violation of Rule 8.2(a)Rule 8.2(a), is entitled to First Amendment protection. We conclude that his motion is without merit.

As noted previously, an order of default was entered against Respondent due to his failure to file an answer or participate in the disciplinary proceedings. Moreover, Respondent failed to bring his claims regarding improper service to the attention of the hearing judge. Rather, his "motions to dismiss" were filed with this Court after the disciplinary hearing had concluded, thus the hearing judge was never given an opportunity to rule on them. Where Respondent failed to participate in or appear for the disciplinary hearing despite being properly served with process, and where the circumstances surrounding Petitioner's attempts to personally serve Respondent indicate his awareness of the instant proceedings, Respondent's failure to comply with the rules for disciplinary procedures is inexcusable. *See Attorney Grievance Comm'n v. Steinberg,* 395 Md. 337, 361, 910 A.2d 429, 443 (2006) (holding that where an attorney received service of process and provided no valid reason for his failure to participate in the proceedings, the attorney's "failure to appear at the hearing [was] inexcusable" and that the order of default was proper); *Attorney Grievance Comm'n v. Faber,* 373 Md. 173, 178–79, 817 A.2d 205, 208–09 (2003) (rejecting the respondent's exception that he did not receive proper service and that he was denied due process, where bar counsel demonstrated repeated attempts to serve the respondent personally and on the Client Protection Fund of the Bar of Maryland). Therefore, we will not set aside the default entered against Respondent. We next address Respondent's First Amendment argument as it relates to the hearing judge's conclusion that Respondent violated Rule 8.2(a)Rule 8.2(a).

MLRPC Rule 8.2(a)Rule 8.2(a) provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the ***260** qualifications or integrity of a judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office." The facts establish that Respondent made the following statements in his email dated April 23, 2012, later disseminated to members of the Bar:

> 1. That the Honorable Ann S. Harrington was a "lawless judge" and accusing her of "arrang[ing] for deputy sheriffs of the Montgomery County, MD Sheriff's Office to illegally arrest [him];"
>
> 2. That the Honorable Stephen P. Johnson, Retired Judge for the District Court of Maryland for Montgomery County, was "a weak man and corrupt judge acting under improper and political influence;"
>
> ****273** 3. That the Honorable Catherine Curran O'Malley, Judge for the District Court of Maryland for Baltimore City, exerted "improper" influence over members of the Montgomery County Police Department;
>
> 4. That John J. McCarthy, State's Attorney for Montgomery County, was a "crooked" State's Attorney;
>
> 5. That Douglas F. Gansler, Attorney General of Maryland, was "corrupt;" and
>
> 6. That Governor O'Malley exerted "improper" influence over members of the Montgomery County Police Department.

Along with its Petition for Disciplinary or Remedial Action, Petitioner served Requests for Admissions asking Respondent to admit that at the time he made each of the

above statements, he knew them to be false or made them with reckless disregard for their truth or falsity, and that he had no facts to support any of the statements. Because Respondent failed to answer the requests, they were deemed admitted and, therefore, Respondent is charged with knowledge of the falsity of each statement, or reckless disregard as to the truth or falsity of each statement. *See* Md. Rule 16–756 (providing that discovery in attorney grievance cases is governed by Title 2, Chapter 400 of the Maryland Rules); Md. Rule 2–424(b) ***261** ("Each matter of which an admission is requested shall be deemed admitted unless ... the party to whom the request is directed serves a response...."); *De La Paz,* 418 Md. at 542, 16 A.3d at 186 (noting that because the attorney "failed to file an answer to Bar Counsel's Petitions or respond to its Requests for Admissions of Facts and Genuineness of Documents; thus, the factual averments in those Petitions were deemed admitted, in accordance with Md. Rules 2–323(e), 2–613, and 16–754(c)"); *Attorney Grievance Comm'n v. Guida,* 391 Md. 33, 39 n. 11, 891 A.2d 1085, 1088 n. 11 (2006) (noting that unanswered requests were deemed admitted under Rule 16–756Rule 16–756 and 2–424(b)); *Murnan v. Hock, Inc.,* 274 Md. 528, 534, 335 A.2d 104 (1975) (holding that, unless other relief was sought, unanswered admissions were "conclusively binding").

We agree with the hearing judge's conclusion that each of Respondent's statements relate to the integrity and/or qualifications of the named individuals, and that Respondent made the statements knowing they were false or with reckless disregard as to their truth or falsity. At the outset, we reject the hearing judge's conclusion that Respondent's statement as to Governor O'Malley violates Rule 8.2(a)Rule 8.2(a), because Governor O'Malley, the chief executive of the State of Maryland, is not a "public legal officer" for the purposes of the Rule.[9] The five remaining statements, however, involve judges or public legal officers, which fall under the purview of Rule 8.2(a)Rule 8.2(a). We shall hold that by making those five statements, with the knowledge that they were false or with reckless disregard for their truth ***262** or falsity, Respondent violated Rule 8.2(a)Rule 8.2(a), and further that Respondent's statements are not entitled to protection under the First Amendment.

9 *See* Comment [1] to MLRPC 8.2(a), providing that "[a]ssessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender...." The attorney general, prosecuting attorneys, and public defender play important roles in our judicial system. Accordingly, false statements by lawyers impugning the integrity and qualifications of those offices would weaken public confidence in our judicial system. By contrast, the governor, the chief executive officer of the State, does not function as a legal officer within the judiciary. Therefore, the governor is not a "public legal officer" under the purview of Rule 8.2(a)Rule 8.2(a).

****274** Moreover, these statements are, generally, the kind of statements that Rule 8.2(a)Rule 8.2(a) is intended to prevent. Allegations of corruption tend to discredit the public's trust and confidence in the judiciary and judicial system. Our analysis of this case rests on Respondent's statements taken together as a whole. For the sake of clarity, we note that certain phrases, alone, may not necessarily rise to the level of an attack on a judicial officer or public legal officer sufficient to warrant action pursuant to Rule 8.2(a)Rule 8.2(a). For example, Respondent's use of the words "lawless" and "weak man," without further allegations or criticisms, in another circumstance might not constitute a violation of Rule 8.2(a)Rule 8.2(a). Here, nevertheless, where those phrases were used in conjunction with false factual allegations of corrupt activity, to include collusion with law enforcement and "arrang[ing] for deputy sheriffs ... to illegally arrest [him]," Respondent is clearly in violation of Rule 8.2(a)Rule 8.2(a).

The Preamble to the Maryland Lawyers' Rules of Professional Conduct provides that "[6] ... a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." In other words, "[m]embers of the legal profession have a responsibility to refrain from engaging in conduct prejudicial to the administration of justice." *Attorney Grievance Comm'n v. DeMaio,* 379 Md. 571, 581, 842 A.2d 802, 808 (2004). Rule 8.2(a)Rule 8.2(a) furthers this principle by requiring lawyers to refrain from impugning the qualifications or fitness of judicial and public legal officers. As Comment [1] to MLRPC 8.2(a) clarifies, "[e]xpressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence ***263** in

the administration of justice."[10] *See also* *In re Simon*, 913 So.2d 816, 824 (La. 2005) ("While a lawyer as a citizen has a right to criticize [judges, judicial officers or public legal officers] publicly, he [or she] should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."). In other words, the purpose of Rule 8.2(a)Rule 8.2(a) is not to protect judges, judicial officers, or public legal officials from unkind or undeserved criticisms. Rather, Rule 8.2(a)Rule 8.2(a) protects the integrity of the judicial system, and the public's confidence therein, and it does so in a limited way. Statements in violation of Rule 8.2(a)Rule 8.2(a) must (1) be false, (2) impugn the integrity or qualifications of judges, judicial officers or public legal officers, and (3) be made by the attorney knowing them to be false or with reckless disregard for their truth or falsity.

10 For additional commentary on Rule 8.2(a)Rule 8.2(a), *see* Melvin Hirshman, *Did I Mean to Say That?*, 42 Md. B.J. 69–70 (Sept./Oct. 2009) (discussing cases in Maryland and elsewhere involving violations of Rule 8.2(a)Rule 8.2(a), and concluding that "[t]hese cases demonstrate the need for an attorney to undergo a cooling off period and consultation with others before 'lashing out' at the judiciary. There is a limit to verbalizing one's inner thoughts. I'm sure many an attorney has been upset during a trial, a ruling, an opinion, etc. So, look before your leap!").

In *Attorney Grievance Comm'n v. Hermina*, 379 Md. 503, 842 A.2d 762 (2004), we found a violation of Rule 8.2(a)Rule 8.2(a) where the attorney made an accusation of an *ex parte* conference between opposing counsel and the trial judge with reckless disregard for its truth or falsity. We held that this conduct was "wholly improper" and that "[i]f there was a question in his mind about ****275** the conversation between [the trial judge] and [opposing counsel] ... [the attorney] should have brought his client's concern to [the judge's] attention and made appropriate inquiry of her, not write a letter to counsel accusing him and the judge of having an inappropriate *ex parte* communication [.]" *Hermina*, 379 Md. at 520–21, 842 A.2d at 772. *See also* *Attorney Grievance Comm'n v. McClain*, 406 Md. 1, 16, 956 A.2d 135, 143 (2008) (finding a violation of Rule 8.2(a)Rule 8.2(a) where respondent used "misleading statements to support the ***264** assertion that [the trial judge] was motivated by personal bias [which] improperly called the judge's integrity into question.").

In *Attorney Grievance Comm'n v. DeMaio*, we found a violation of 8.2(a) where the attorney made several "false, spurious and inflammatory representations and allegations" in briefs and other court filings regarding the Chief Judge and Clerk of the Court of Special Appeals. 379 Md. at 585, 842 A.2d at 810. In particular, the respondent made claims that the Chief Judge and Clerk of the Court of Special Appeals had "collu[ded] ... to remove briefs from the legal process" and that the judge was "engaged in a scheme of unjust enrichment." *DeMaio*, 379 Md. at 576, 842 A.2d at 805. In that case, much like in the instant case, the respondent refused to participate in the disciplinary process and the hearing judge entered an order of default against him. *DeMaio*, 379 Md. at 573–74, 842 A.2d at 803. After bar counsel filed its recommendation for sanction, the respondent filed a "response" to the recommendation for sanction, in which he criticized bar counsel's investigation and action against him. *DeMaio*, 379 Md. at 578, 842 A.2d at 806. Moreover, the respondent maintained his allegations against the Chief Judge and Clerk of the Court of Special Appeals and made no apparent attempts to investigate or substantiate his claims. We held that these statements were cause for disbarment, and "certainly is conduct that prejudices the administration of justice seriously and most directly." *DeMaio*, 379 Md. at 585, 842 A.2d at 810.

Although DeMaio did not contend that his statements were entitled to First Amendment protection, in that case we nevertheless discussed *In re Evans*, 801 F.2d 703 (4th Cir.1986), in which the Fourth Circuit specifically rejected such a First Amendment argument. In that case, the United States District Court for the District of Maryland disbarred Evans from practicing law in that court for a violation of Rule 8.2(a)Rule 8.2(a) where Evans wrote a letter accusing a magistrate judge of incompetence and/or religious and racial bias. In rejecting Evans's argument that his speech was protected under the First Amendment, the Fourth Circuit, quoting a New York state appellate court, stated:

> ***265** Judicial officers, as we have said, are not immune from suit or criticism; but, like every one else, they are protected against scandalous charges. To make a public, false and malicious attack on a judicial officer

> is more than an offense against him individually; it is an offense against the dignity and integrity of the courts and of our judicial system. It may bring discredit upon the administration of justice amongst citizens who have no way of determining the truth of the charges. It tends to impair the respect and authority of the court. In this and in other jurisdictions, the rule is well settled that an attorney who engages in making false, scandalous or other improper attacks upon a judicial officer is subject to discipline.

In re Evans, 801 F.2d at 707 (quoting *In the Matter of Greenfield,* 24 A.D.2d 651, 652, 262 N.Y.S.2d 349, 350–51 (N.Y.App.Div.1965)). The Fourth Circuit also cited several other jurisdictions that have ****276** reached a similar conclusion as to the limitations of First Amendment protection for speech by lawyers that is in contravention of rules of professional conduct and prejudicial to the administration of justice. *In re Evans,* 801 F.2d at 707–08 (citing *The People ex rel. The Chicago Bar Assn., Relator, v. Metzen,* 291 Ill. 55, 125 N.E. 734 (1919); *Kentucky Bar Assn. v. Williams,* 682 S.W.2d 784 (Ky.1984); *In re Rogers,* 28 N.M. 375, 212 P. 1034 (1923); *In re Manheim,* 113 A.D. 136, 99 N.Y.S. 87 (N.Y.App.Div.1906)).

In recent years, additional state and federal courts have chimed in on these limitations. For example, the Supreme Court of Indiana, discussing whether the *New York Times* [11] ***266** subjective test or an objective test would apply to Rule 8.2(a)Rule 8.2(a) [12] violations, recently stated:

> [11] *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (holding that to satisfy the protections of the First Amendment, a public official must prove that a defamatory statement was made with "actual malice" in order to recover damages). In defamation cases, we apply the *New York Times* subjective test to evaluate whether the defendant made the defamatory statements with "actual malice," which requires proof that the defendant made the statement knowing it to be false or with reckless disregard to its truth or falsity. *See Batson v. Shiflett,* 325 Md. 684, 728, 602 A.2d 1191, 1213–14 (1992). An attorney discipline case involving defamatory statements, however, is not the same as a defamation case. *See Standing Comm. v. Yagman,* 55 F.3d 1430, 1437 (9th Cir.1995) ("[T]here are significant differences between the interests served by defamation law and those served by rules of professional ethics."). There appears to be disagreement among the states as to whether the general defamation standard announced in *New York Times, i.e.* the subjective test, should apply equally to attorney discipline cases. Most courts, however, have chosen to apply an objective standard to attorney conduct in Rule 8.2(a)Rule 8.2(a) violation cases. *See e.g. United States Dist. Ct. v. Sandlin,* 12 F.3d 861, 867 (9th Cir.1993) (recognizing that "[w]hile the language of [Rule] 8.2(a)Rule] 8.2(a) is consistent with the constitutional limitations placed on defamation actions by *New York Times,* because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate. Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.") (citation and quotation omitted); *Yagman,* 55 F.3d at 1438 (following *Sandlin* and stating that "an objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken."). Here, because Respondent, by default, is deemed to have admitted that the statements were false and that he had actual knowledge of their falsity, we need not and do not address the issue of whether a subjective or objective standard is appropriate in this context.

> [12] Indiana Professional Conduct Rule 8.2(a) uses the same language as MLRPC 8.2(a), which both follow Rule 8.2(a) of the ABA Model Rules of Professional Conduct.

> First, the limits on professional speech by attorneys are not coextensive with the limits of the First Amendment.... Second, attorneys are expected to exercise reasonable objectivity in their statements about judicial officers. We expect those who have been granted the special privilege of admission to the bar to bring reasonable objectivity to their statements about judicial officers; to rise above the raw emotions and accusations that impede rather than enhance the judicial process.
>
> *In re Dixon,* 994 N.E.2d 1129, 1136 (Ind.2013). *See also* *United States Dist. Ct. v. Sandlin,* 12 F.3d 861, 866 (9th Cir.1993) ("[O]nce a lawyer is admitted to the bar, although he ***267** does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct."); *Disciplinary* ****277** *Counsel v. Gardner,* 99 Ohio St.3d 416, 793 N.E.2d 425, 429 (2003) ("The First Amendment does not shield an attorney from discipline for falsely suggesting 'unseemly complicity' by the judiciary in unlawful or unethical practices. Such false statements, whether by attorneys or others, enjoy no constitutional protection when they are made with knowledge of their falsity or reckless disregard for their truth.") (citations omitted); *Matter of Westfall,* 808 S.W.2d 829, 836 (Mo.1991) ("As officers of the court, lawyers do not stand in the shoes of ordinary citizens. Lawyers must execute their professional responsibilities ethically and pursuant to rules, carefully considered, in order to ensure the confidence of both litigants and the public.") (citations omitted).

In a different context, we discussed limitations on lawyers' extrajudicial speech in *Attorney Grievance Comm'n v. Gansler,* 377 Md. 656, 835 A.2d 548 (2003). In that case, then State's Attorney for Montgomery County Douglas Gansler was charged with violating Rule 3.6, which prohibits lawyers from making certain extrajudicial statements that the lawyer knows or should know have a substantial likelihood of causing material prejudice to an adjudicative proceeding. We discussed the origins and purpose of Rule 3.6, which generally is to protect defendants' Sixth Amendment right to a fair trial. *Gansler,* 377 Md. at 674–77, 835 A.2d at 558–59. In addressing the applicability of the First Amendment to speech by attorneys in the context of Rule 3.6, we stated that "[i]n general, the First Amendment applies equally to an ordinary citizen and an attorney," but, when acting as an attorney, "[e]ven outside the courtroom, the speech of a lawyer may be curtailed to an extent greater than an ordinary citizen's." 377 Md. at 677, 835 A.2d at 560 (citation and quotation omitted).[13] ***268** Noting that "attorneys occupy a special role as participants in the criminal justice system, and, as a result, the public may view their speech as authoritative and reliable[,]" we held that Gansler violated Rule 3.6 by making several statements to the press about certain defendants' confessions, plea bargains, and his opinion of their guilt, related to pending cases. *Gansler,* 377 Md. at 676, 835 A.2d at 569. Our analysis in *Gansler* is consistent with *DeMaio* and our analysis of Rule 8.2(a) today. Although Rule 8.2(a) limits attorney speech, it does so in a narrow context. The purpose of the Rule is to prevent damage to the integrity of the judicial system. False statements impugning the integrity of "judges, judicial officers, and public legal officials" undermines the integrity of the judiciary, and "prejudices the administration of justice seriously and most directly." *DeMaio,* 379 Md. at 585, 842 A.2d at 810. Accordingly, where Respondent made knowingly false statements alleging corrupt activity by several judges and public legal officers in relation to earlier criminal proceedings against him, such expression is not entitled to protection under the First Amendment and is plainly in violation of MLRPC ****278** Rule 8.2(a).[14]

13 "This Court has long held lawyers to a higher standard of conduct than the average citizen." *Attorney Grievance Comm'n v. Sheinbein,* 372 Md. 224, 253, 812 A.2d 981, 998 (2002). *See also* *Bradley v. Fisher,* 80 U.S. 335, 355, 13 Wall. 335, 20 L.Ed. 646 (1871) ("[T]he obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts.").

14 We note that there are qualified and absolute privileges that will apply to certain speech as a defense to defamation claims, and these privileges generally apply equally to statements made by lawyers. For example, in defamation cases, an attorney has an absolute privilege to make defamatory statements that are rationally related to

a judicial proceeding. *See* *Norman v. Borison*, 418 Md. 630, 650, 17 A.3d 697, 709 (2011). We agree with several of our sister states, however, that there is no absolute privilege that would protect an attorney from disciplinary action. *See Loigman v. Twp. Comm. of Twp. of Middletown*, 185 N.J. 566, 889 A.2d 426, 438 (2006); *Krouse v. Bower*, 20 P.3d 895, 901 n. 1 (Utah 2001); *Kirschstein v. Haynes*, 788 P.2d 941, 950 (Okla.1990); *Selby v. Burgess*, 289 Ark. 491, 712 S.W.2d 898, 900 (1986). Absolute privilege is a broad defense to tort claims, including tort claims related to statements made in connection to pending AGC actions, *see Mixter v. Farmer*, 215 Md.App. 536, 81 A.3d 631 (2013); however, we confirm that it is not a defense to claims of unprofessional conduct.

***269 Sanction**

Our goal when imposing sanctions is to protect the public and the public's confidence in the legal profession, not to punish the erring attorney. *See* *Attorney Grievance Comm'n v. Tanko*, 408 Md. 404, 424–25, 969 A.2d 1010, 1023 (2009); *Attorney Grievance Comm'n v. Goff*, 399 Md. 1, 30, 922 A.2d 554, 571 (2007); *Attorney Grievance Comm'n v. Rees*, 396 Md. 248, 254, 913 A.2d 68, 72 (2006). Sanctions protect the public when they deter future offending conduct and remove "those unfit to continue in the practice of law from the rolls of those authorized to practice in this State." *Attorney Grievance Comm'n v. Gore*, 380 Md. 455, 471–72, 845 A.2d 1204, 1213 (2004). When sanctions are imposed, they should be "commensurate with the nature and gravity of the violations and the intent with which they were committed." *Attorney Grievance Comm'n v. Stein*, 373 Md. 531, 537, 819 A.2d 372, 375 (2003).

In *DeMaio*, a case substantially similar to the case at bar, we held that disbarment was the appropriate sanction, stating that:

> Making accusations in petitions to this Court seeking their removal, impugning the integrity of the Chief Judge of the Court of Special Appeals and the Clerk of that court, without justification or even an attempt at justification beyond conjecture and speculation, and repeating those accusations during the disciplinary hearing, again without attempt at justification, are themselves, as they would be with respect to any judge or clerk, cause for disbarment.

DeMaio, 379 Md. at 585, 842 A.2d at 810. Additionally, DeMaio failed to demonstrate any investigation or factual basis for his allegations, and maintained his allegations throughout the disciplinary proceedings against him. Quoting *In re Evans*, we stated that:

> ***270** [A]ppellant's failure to investigate, coupled with his unrelenting reassertion of the charges ... convincingly demonstrates his lack of integrity and fitness to practice law. A person guilty of such practices is ... dangerous in any walk of life and is especially so when he occupies the responsible position of an attorney upon whose good faith, truthfulness, sense of propriety and ethical standards both courts and litigants are entitled to rely.

DeMaio, 379 Md. at 584, 842 A.2d at 809–10 (quoting *In re Evans*, 801 F.2d at 706). We also noted that, in addition to making false statements about the integrity and qualifications of judicial officers, the attorney's response to the disciplinary proceedings "raise[d] other questions with respect to the respondent's fitness to continue in ****279** the practice of law." *DeMaio*, 379 Md. at 585, 842 A.2d at 810.

In the present matter, we have concluded that Respondent violated Rules 8.1(b), 8.2(a), 8.4(a), (c) and (d). In addition, Respondent has repeatedly refused to offer any justification for his conduct, which, like in *DeMaio*, raises a question as to his fitness to continue in the practice of law. Respondent made numerous unsubstantiated allegations against judges and public legal officers, which he then disseminated without

explanation to members of the Bar. Despite repeated requests to explain these allegations, as well as requests to explain why he disseminated them to various members of the Bar, Respondent has at all times ignored these requests or refused to offer any rational reason for his criticisms or the dissemination of those criticisms. Respondent has also presented no evidence that he has made any investigation into the truthfulness of his claims. In addition to his outright failure to respond or participate meaningfully in the instant proceedings, Respondent's inflammatory letter to Bar Counsel, stating, for example, "you should be ashamed of yourself," and insinuating that Bar Counsel would not respond "truthfully" to his communications, as well as his "motion to dismiss" referring to the instant action as an "unjustified, unjustifiable, and downright ridiculous attorney disciplinary case," all reflect Respondent's lack of fitness to continue in the *271 practice of law. Considering all of the foregoing, we agree with Petitioner that the appropriate sanction is disbarment.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING THE COSTS OF ALL TRANSCRIPTS, PURSUANT TO RULE 16–761, FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST JAMES ALBERT FROST.

ADKINS, J., concurs.

McDONALD, J., concurs and dissents.

ADKINS, J., Concurring.

The Majority opinion is well-researched and well-stated. Respectfully, I write this concurring opinion to articulate a constraint on our disciplinary authority that the Majority does not express. In my view, there are boundaries on our authority to discipline an attorney for false statements or reckless statements under Maryland Lawyers' Rules of Professional Conduct 8.2(a) that are dependent on the context of the false or reckless statement that is made. Judge McDonald ventures that "few lawyers—or judges—have not, at some time, uttered an unkind and undeserved criticism of a judge, an Attorney General, a State's Attorney, or a Public Defender." McDonald, J., Concurring and Dissenting Op. at 275, 85 A.3d at 281. I agree, and add that, in frustration, disappointment, or anger at an adverse ruling, it is altogether human to do so—even if the statement is false, or made with reckless disregard for its truth. Such statements should not be the subject of professional discipline, provided they are made to family members, within the confines of one's own law firm, or to other close associates whom the speaker knows to be like-minded. Were we to discipline lawyers for such statements, we and the Attorney Grievance Commission would be treading on the constitutional protection for freedom of speech so cherished by our citizens.

*272 As Judge McDonald points out, the First Amendment is not confined to, or even primarily directed at, discussions among like-minded people. I limit my comment to this context only to give reassurance **280 to practicing lawyers that I, at least, would not agree to our being "word police" of their day-to-day conversations about judges.

But, here, the statements made by Respondent were not so confined. As the Majority says, the statements in question were intentionally mailed by Respondent to lawyers who were not part of a judicial or other disciplinary body, and with whom he had absolutely no relationship and no reason to correspond, except to make the admittedly false and defamatory statements. I do not share Judge McDonald's view that we should restrain from imposing discipline based upon a respondent's deemed admissions. In this context, I agree that the discipline imposed by the Majority opinion is fully justified.

McDONALD, J., Concurring and Dissenting.

Although the Majority opinion is well thought out and carefully written, I cannot join it. Our primary purpose in attorney discipline is to protect the public from inept or errant lawyers, not to protect public officials from criticism, even if unjustified. I would suspend Mr. Frost for his failure to respond adequately to Bar Counsel's inquiry, but am not comfortable disbarring on this limited record for what appears to be largely an expression of opinion, misguided though that opinion may be.

Under the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 8.1(b), an attorney should respond to a lawful inquiry from Bar Counsel, even if, in the attorney's view, the underlying complaint is frivolous or any resulting disciplinary action would ultimately prove untenable. Mr. Frost's failure to respond substantively to Bar Counsel's inquiry thus violated MLRPC 8.1(b). [1] An appropriate sanction *273 would be an indefinite suspension with a special condition of readmission that he cooperate with Bar Counsel's inquiry. In addition,

the record of this matter documents erratic behavior by Mr. Frost that raises reasonable questions about his judgment and competence (in the broadest sense). Given our responsibility to the public with respect to those we license to serve it as attorneys, I would also condition Mr. Frost's readmission on the results of an appropriate medical evaluation. *See* Maryland Rule 16–760(h)(1).

1 These facts would also support a determination that Mr. Frost violated MLRPC 8.4(a) (violation of the MLRPC) and 8.4(d) (conduct prejudicial to the administration of justice).

MLRPC 8.2(a) incorporates in the disciplinary rules a restriction on attorney speech outside the courtroom or a legal proceeding. The alleged violation of MLRPC 8.2(a) in this case is based on the content of an e-mail that Mr. Frost sent to his ex-wife and then inexplicably shared with three other lawyers. MLRPC 8.2(a) prohibits a lawyer from making a statement concerning the qualifications or integrity of a judge (or other legal officer) only if the lawyer makes the statement with knowledge that it is false or with "reckless disregard" as to its truth. The Restatement of the Law Governing Lawyers reiterates that standard and elaborates its rationale:

> Lawyers are specially situated to assess the official performance of judges and other judicial and legal officers. Accordingly, both constitutional law and sound social policy require that lawyers have broad latitude in criticizing such officers.
>
> Under the rule of *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny, judges and other public legal officers are "public officials," so that an action by a judge or public legal officer ****281** against a lawyer for damages for defamation would require a showing of actual malice. Similar considerations should also lead to application of the standard in *New York Times v. Sullivan* in lawyer-discipline cases.

Restatement (Third) of the Law Governing Lawyers § 114, comment b (2000 & 2013 Supp.).

The Majority opinion finds that the "knowing or reckless" element is satisfied in this case as a result of Mr. Frost's failure to participate in the proceedings below and to respond ***274** to requests for admissions. In other words, he is deemed to have admitted the intent element of the violation, which, in the view of the Majority opinion, relieves us of the need to consider the actual content and circumstances of his e-mail, or the standard by which the statements in question should be judged. Majority op. at pp. 261, 265-66 n. 11, 85 A.3d at 273, 276 n. 11.

Requests for admissions are typically used to obtain agreement as to the genuineness of documents, the establishment of other foundational facts necessary for the admission of evidence, or the truth of uncontested facts, thereby streamlining the adjudication of a matter. *See, e.g.,* P. Niemeyer & L. Schuett, Maryland Rules Commentary 336 (3d ed. 2004) ("Requests for admissions of fact serve a limited but useful function.... The purpose of the rule is ... to eliminate from trial those matters over which the parties truly have no dispute"). While I do not fault Bar Counsel, or any other litigant, for seeking to have an opposing party concede the entire case through this discovery device, requests for admission that concern the ultimate issue in a case are generally not that useful and thus are not enforced.[2] *Id.* And when a request on an ultimate issue is "deemed" admitted, it may be more accurately characterized as a default than a finding or holding on the particular issue. Thus, the deemed violation of MLRPC 8.2(a) is largely an echo of the violation of MLRPC 8.1(b)—the failure to respond adequately to Bar Counsel's inquiry or to participate in the proceedings below. Perhaps the peculiar facts of this case—or the unusual way in which ***275** the ultimate issue has been determined—limit the significance of the Court's holding. On the other hand, it may establish an unfortunate precedent.

2 In the instant case, the Request for Admission of Facts and Genuineness of Documents largely concerned the genuineness of numerous items of correspondence involving Mr. Frost, as well as basic facts concerning his legal career and the content of statements he made. However, it also asked him to admit that he made various statements "knowing that the statement was false" and, with respect to the same statements, "with reckless

disregard as to its truth or falsity." Among the other facts deemed admitted was that Mr. Frost is "unable to render adequate legal service by reason of mental or physical illness or infirmity, or addiction to or dependence upon an intoxicant or drug." This last deemed admission concerning mental capacity conceivably raises a question about the two deemed admissions concerning the intent element.

I suspect that few lawyers—or judges—have not, at some time, uttered an unkind and undeserved criticism of a judge, an Attorney General, a State's Attorney, or a Public Defender. No doubt there have been occasions where an attorney, in the aftermath of an adverse ruling, has commented on the parentage of the judge in a way that, even without the benefit of a "deemed admission," is obviously and literally false, but is essentially a statement of opinion rather than fact. Perhaps such remarks are usually made to those who share the sentiment and, unlike the instant case, do not generate a complaint. But whether there is a violation of MLRPC 8.2(a) should not depend on the sympathies **282 or sensitivities of the listener.[3] In the end, the rule is aimed at intentional factual misstatements, not rude opinions.[4]

3 In her concurring opinion, Judge Adkins sensibly attempts to limit the reach of the Majority opinion, suggesting a sort of "friends and family" exception to its holding based on the First Amendment. The Restatement of the Law Governing Lawyers adopts a similar approach in limiting the restriction on attorney speech about judges to statements made "publicly"—a qualification not included in MLRPC 8.2(a). *See* Restatement § 114. In any event, the authors of the Restatement—as well as the drafters of the model for MLRPC 8.2(a)—intended that the *New York Times* standard be satisfied. And the First Amendment is not confined to discussions among like-minded people, but rather designed to encourage and protect public discourse. *See, e.g.,* *Whitney v. California,* 274 U.S. 357, 376, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring); *Snyder v. Phelps,* —— U.S. ——, 131 S.Ct. 1207, 1215–17, 179 L.Ed.2d 172 (2011).

4 This was certainly the intent of the drafters of the model rule that became MLRPC 8.2(a). *See* American Bar Association, Model Rules of Professional Conduct, Proposed Final Draft (May 30, 1981) at 207 ("Rule 8.2 applies to a statement of fact.").

The summary of case law in the Majority opinion is certainly accurate. I add four observations.

First, as the authors of the Restatement noted, civil liability for criticism of a public official is limited to false statements made with actual malice—*i.e.,* knowledge of falsity or reckless *276 disregard of falsity. *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). In the context of critical remarks about judges, the Supreme Court has stated that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (reversing conviction of district attorney who stated that "vacation-minded" judges sympathetic to racketeering interests were responsible for court backlog and impeding vice investigations).

Second, the drafters of MLRPC 8.2(a) intended to incorporate the standards articulated in *Garrison* and *New York Times* in that rule. *See* American Bar Association, Model Rules of Professional Conduct, Proposed Final Draft (May 30, 1981) at 206 ("Rule 8.2 is consistent with that limitation [in *New York Times* and *Garrison*]"); M. Tarkington, *The Truth be Damned: The First Amendment, Attorney Speech, and Judicial Reputation,* 97 Geo. L.J. 1567, 1587 & n.123 (2009). (As the Majority opinion recounts, some courts have instead chosen not to apply the *New York Times* standard in favor of a less demanding, "objective" standard. Majority op. at p. 266 n. 11, 85 A.3d at 276 n. 11).

Third, the decisions of this Court under MLRPC 8.2(a) that are relied upon by the Majority opinion all involved statements alleging specific acts of misconduct rather than a general negative characterization of the officials. *See* *Attorney Grievance Comm'n v. McClain,* 406 Md. 1, 956 A.2d 135 (2008) (in appeal to circuit court, attorney alleged that District Court judge had admitted personal bias against him and purported to "document" that allegation with false statements about the content of the record); *Attorney Grievance Comm'n v. DeMaio,* 379 Md. 571, 842 A.2d 802 (2004) (attorney alleged, without factual basis, that judge had *ex parte* contact with opposing party, had possibly received a "monetary benefit" from that party, and had colluded to

remove briefs from public record); *Attorney Grievance Comm'n v. Hermina,* 379 Md. 503, 842 A.2d 762 (2004) (attorney accused judge of holding *ex* *277 *parte* jury instruction conference with opposing **283 counsel in violation of the Code of Judicial Conduct). In this case, only the statements concerning Judge Harrington—*i.e.,* that she allegedly arranged for deputy sheriffs to "illegally" arrest Mr. Frost—appear to go beyond derogatory adjectives.

Finally, discipline imposed by the judiciary that may appear designed to shield judges from general statements of adverse opinions can itself undermine confidence in the judiciary. *See* J. Dodd, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware,* 15 N. Ky. L.Rev. 129, 144 (1988).

At this intersection of statements of fact and statements of opinion, of protected speech and public officials, it is best to proceed with caution. I would not impose discipline on the basis of a "deemed admission" of the critical intent element. Rather, we should hold the charges under MLRPC 8.2(a) and 8.4(c) in abeyance. If Mr. Frost were suspended on the basis of the other charged violations, and were later to satisfy the conditions for readmission and cooperate with Bar Counsel's inquiry, I would remand the matter to the hearing judge for further consideration of the remaining charges. *See* Maryland Rule 16–759(c)(6). But I would not disbar under MLRPC 8.2(a) and 8.4(c) at this time on this record.

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