In re Joel Alan Brodsky
Attorney-Respondent

Commission No. 2018PR00064

Synopsis of Hearing Board Report and Recommendation
(June 2020)

The Administrator filed a three-count Complaint against Respondent. Count I charged that in a consumer fraud case, he filed frivolous pleadings, used means with no substantial purpose other than to embarrass, delay or burden a third person, and engaged in conduct prejudicial to the administration of justice. Count II charged that in a patent enforcement case he failed to abide by a client's directives, failed to withdraw from the case after being discharged, disclosed confidential information, and failed to return his client's property after being terminated. Count III, which involved a divorce matter, charged that Respondent communicated with a person represented by counsel, used means having no substantial purpose other than to embarrass, delay or burden the opposition, and committed a criminal act by disclosing confidential information in violation of a state statute.

The Hearing Board found the Administrator proved the charges of Counts I and II, as well as the charge in Count III that Respondent used means that have no substantial purpose other than to embarrass, delay or burden a third person. The other charges in Count III were not proved.

After considering the mitigating and aggravating circumstances, the Hearing Board recommended Respondent be suspended for two years until further order of the Court, retroactive to the date of his interim suspension.

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of: **JOEL ALAN BRODSKY,** Attorney-Respondent, No. 6182556.	Commission No. 2018PR00064

REPORT AND RECOMMENDATION OF THE HEARING BOARD

SUMMARY OF THE REPORT

The Administrator's three-count Complaint alleged that Respondent engaged in misconduct in three litigation matters. Count I charged that he filed frivolous pleadings, used means with no substantial purpose other than to embarrass, delay or burden a third person, and engaged in conduct prejudicial to the administration of justice. Count II charged that he failed to abide by his client's directives, failed to withdraw after being discharged, disclosed confidential information, and failed to return his client's property after he was terminated. Count III charged that he communicated with a person represented by counsel, used means that had no substantial purpose other than to embarrass, delay or burden a third person, and committed a criminal act.

The Hearing Board found the charges of Counts I and II were proved, as well as the charge in Count III of using means that have no substantial purpose other than to embarrass, delay or burden a third person. The Board recommended Respondent be suspended for two years until further order of the Court, retroactive to the date of his interim suspension.

FILED

June 23, 2020

ARDC CLERK

INTRODUCTION

The hearing in this matter was held on October 9, 10, 11 and 25, and November 13, 2019 at the offices of the Attorney Registration and Disciplinary Commission ("ARDC") before a panel consisting of Carl (Carlo) E. Poli, Chair, Giel Stein and Gerald M. Crimmins. Lea S. Gutierrez and Melissa Smart represented the Administrator. Respondent Joel Alan Brodsky ("Respondent") appeared and was represented by Samuel Manella.

PLEADINGS

On August 21, 2018, the Administrator filed a three-count complaint against Respondent. On September 21, 2018, Respondent filed an answer in which he admitted some allegations, denied others, and denied all charges of professional misconduct.

MISCONDUCT ALLEGED

Respondent is charged with violating the following Illinois Rules of Professional Conduct: 1) failing to abide by a client's decisions concerning the objectives of representation (Rule 1.2); 2) revealing information relating to the representation without the client's informed consent (Rule 1.6); 3) failing to withdraw from representation after being discharged (Rule 1.16(a)(3)); 4) failing to surrender papers or property to which the client is entitled upon termination of representation (Rule 1.16(d)); 5) bringing or defending a proceeding or asserting or controverting an issue with no basis in law and fact for doing so that is not frivolous (Rule 3.1); 6) communicating with a person known to be represented by counsel about the subject of representation (Rule 4.2); 7) using means that have no substantial purpose other than to embarrass, delay or burden a third person (Rule 4.4); 8) engaging in a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer (8.4(b)); and 9) engaging in conduct prejudicial to the administration of justice (Rule 8.4(d)).

EVIDENCE

The Administrator called six witnesses, including one rebuttal witness, and presented stipulations as to two other rebuttal witnesses. Respondent testified on his own behalf and called eight witnesses. Administrator's exhibits 1-64, 65 (pp. 1-4 and 6), 66-67, 69, 71-75 and Respondent's exhibits 1-10, 12-17, 19, 22-26, 28, 30-43 were admitted into evidence. Certain exhibits that contained confidential information were placed under seal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In attorney disciplinary proceedings the Administrator has the burden of proving the charges of misconduct by clear and convincing evidence. In re Winthrop, 219 Ill. 2d 526 (2006). Clear and convincing evidence constitutes a high level of certainty, which is greater than a preponderance of the evidence but less than proof beyond a reasonable doubt. People v. Williams, 143 Ill. 2d 477 (1991).

Background

For the past ten to twelve years Respondent has maintained a solo practice concentrating on criminal defense work, with some commercial and civil rights litigation. He also occasionally handled domestic relations matters. (Tr. 1006-1007).

Count I

I. Respondent is charged with filing pleadings and other court documents that were frivolous; making accusations in emails and motions that embarrassed, burdened or delayed opposing counsel or an expert witness; and engaging in conduct that affected the judicial process, in violation of Rules 3.1, 4.4 and 8.4(d)).

A. Summary

In connection with defending a client in federal litigation, Respondent filed frivolous pleadings, made accusations that embarrassed, burdened and delayed the opposing party's counsel and expert witness, and delayed the administration of justice.

B. Admitted Facts and Evidence

In April 2016, attorney Peter Lubin filed a lawsuit in the Northern District of Illinois on behalf of Donaldson Twyman against S & M Auto Brokers alleging claims in connection with Twyman's purchase of a used auto. On May 4, 2016, Respondent filed his appearance on behalf of the defendants. (Tr. 396-99, 1027; Adm. Exs. 1, 2).

In August 2016, Lubin filed a request to admit and a motion to compel. Vacationing in Italy at the time, Respondent moved to stay discovery until after his return. After further filings, on August 25, 2016, Judge Kendall denied Respondent's motion to stay and admonished both parties to act professionally and reasonably. (Tr. 412-21, 431-36, 1074-77; Adm. Ex. 72).

Respondent's Conduct toward Lubin

Between September 2016 and March 2017, Respondent accused Lubin in several pleadings of having failed to properly investigate the case before he filed suit; bringing suit to generate fees for himself; disregarding the truth; filing false and misleading pleadings; using the statutory fee-shifting provisions as a tool of extortion; and fabricating evidence. Respondent compared Lubin's actions to those of personal injury attorneys who staged auto accidents in the 1980s and then filed personal injury suits. During the same time period, Respondent repeated his accusations in emails to Lubin, adding that he made up a bogus and disgraceful case, he embarrassed the profession, and his motion for protective order contained a "pack of lies." (Tr. 438-40, 449-52, 456-58, 467-68, 484-96, 1332-34, 1346-48; Adm. Exs. 5-9, 12, 13).

Lubin denied Respondent's accusations. He testified he files cases to help consumers, only accepts a few auto cases, and develops strong evidence to settle them within a few months. He explained that he spoke to Twyman before filing suit; he read reports from a dealership, a body shop, and a consulting expert that assessed Twyman's vehicle; and he reviewed a repair estimate. The consensus opinion was that the car had been in a serious accident which

significantly diminished its value. Lubin recalled he either attached the reports to the complaint or to pleadings early in the case. With respect to his motion for a protective order asking that Respondent be instructed to act properly during depositions, Lubin testified that during a March 2017 deposition, Respondent pounded his hands, used profanity, instructed the witness not to answer, and accused Lubin of being part of a criminal enterprise, all of which interfered with the process, turned the deposition into a farce, and caused the court reporter to leave. As for his fees, Lubin testified if bills mounted, it was because Respondent kept filing accusatory pleadings. (Tr. 396, 400-408, 441-43, 450-60, 473, 494-521, 588-89, 593-95; Adm. Exs. 13, 19, 43).

Lubin felt offended and humiliated by Respondent's statements, especially since the pleadings appeared in a public record and the emails were copied to other persons in his firm. He described Respondent as the most uncivil attorney he has dealt with in 36 years. (Tr. 437, 459, 473, 486-88, 495-96).

Respondent acknowledged that accusing Lubin of being an extortionist, having no interest in the truth, and being an embarrassment to the profession was vitriolic, uncivil, inappropriate and unprofessional. He realized that he could have used softer words or better phrasing, and he does not believe Lubin is a criminal. (Tr. 1335-36, 1341-43, 1349-50, 1417).

Respondent believed he had a reasonable basis for his statements that Lubin made up a bogus case, was part of a scheme, and intentionally ran up hours. Specifically, upon investigating the allegations against his clients, Respondent found Twyman drove the car in question more than 10,000 miles without complaint. He also reviewed an auction ticket which indicated the car was insured for material defect, and therefore could have been brought back for a refund. After he discovered a connection between Lubin and another attorney who previously sued S & M Auto, Respondent feared that his clients were being targeted by lawyers who shared

information. The other attorney was sanctioned in an unrelated matter after he filed a frivolous lawsuit to claim fees. Respondent thought Lubin might be following the same pattern. (Tr. 1034-43, 1047-52, 1073, 1342-44, 1351; Resp. Exs. 10, 17).

Respondent also spoke to attorney James Borcia, Lubin's opposing counsel in an unrelated federal case. Borcia had filed a motion for sanctions against Lubin accusing him of improperly filing a suit to extract a settlement and trying to use unqualified experts. That motion was denied in December 2016. Respondent also communicated with another attorney who spoke ill of Lubin and the experts he used, including Lubin's chosen expert in the Twyman matter. Given what he learned about Lubin, Respondent believed his allegations of fee-churning were factually based, but acknowledged that he should have expressed his extortion theory differently. (Tr. 1053-72, 1512-14, 1522; Adm. Ex. 69; Resp. Exs. 15, 16).

With respect to using profanity during a deposition, Respondent testified he did so under his breath, but Lubin made a point of noting the comments for the record. Respondent said he instructed the witness not to answer questions that assumed facts not in evidence, or that were asked and answered. (Tr. 1081-84, 1364-65; Adm. Ex. 19).

Respondent's Conduct toward Expert Witness Szczesniak

Donald Szczesniak has a degree in mechanical engineering. Since 2010 he has consulted with attorneys on engineering and automotive matters. Szczesniak testified he has been qualified as an expert in cases regarding the valuation of cars. (Tr. 639-40).

Szczesniak evaluated Twyman's car based on a test drive, an inspection, and a dealership report, and concluded that it had a diminished value when it was sold to Twyman. A body shop repair estimate corroborated that conclusion. After Twyman filed suit, Szczesniak reviewed a Manheim Market Report that rated the vehicle's condition as 1.9 on a 5-point scale at the time of

purchase by S & M Auto. In October 2016, Szczesniak signed a sworn declaration stating that Twyman's damages totaled $27,809.21. (Tr. 641-54; Adm. Ex. 43).

In January 2017, Respondent stated in a pleading that Szczesniak fabricated his report, has a history of fabrications, is a "scam artist and unscrupulous," works with attorneys to take advantage of fee shifting statutes, and uses courts for extortion. Szczesniak denied Respondent's accusations, which he felt were embarrassing and time consuming. Lubin testified Szczesniak's report was consistent with other third-party assessments and denied asking Szczesniak to fabricate anything. (Tr. 453-55, 657, 664-65, 673-75; Adm. Ex. 8).

Respondent testified he conducted extensive research on Szczesniak. That research revealed improper record-keeping in Szczesniak's used car business; affidavits by individuals denying sworn statements made by Szczesniak in a case he initiated; small claims cases where Szczesniak was the plaintiff or expert witness for plaintiffs; multiple judgments against Szczesniak; and allegations that Szczesniak fabricated an expert report in a similar consumer fraud case. Respondent acknowledged his research included information that he received in late April and May 2017, and electronic searches he conducted in October 2018. (Tr. 1087-95, 1419-28, 1469-73; Adm. Exs. 5, 10, 13, 16; Resp. Ex 17).

Respondent believed he had a reasonable factual basis for challenging Szczesniak's qualifications and credibility. He acknowledged he did not uncover any court finding that Szczesniak fabricated an expert report, committed extortion, or tampered with witnesses; he did not follow the standard method for challenging an expert's qualifications; and he used language that was wrong. (Tr. 1096-97, 1478-80, 1485-91, 1504-1507, 1510-11).

On February 13, 2017, Respondent moved to hold Szczesniak in indirect criminal contempt. The motion accused Szczesniak of attempting to intimidate a potential witness for S

& M Auto by going to her home on the evening of February 1, 2017, and damaging her fence. The motion also stated that Szczesniak had sent Respondent an anonymous fax on October 13, 2016, to intimidate him. Szczesniak denied the allegations. (Tr. 462-64, 667-71; Adm. Ex. 10).

Regarding the fence damage, Respondent testified he relied on the potential witness's statements and report to the police, but had no evidence that Szczesniak was charged with damaging the fence. As to the anonymous fax, Respondent testified the day after he disclosed in a pleading that he ran a background check on Szczesniak, he received a fax and article about persons conducting illegal background checks. Szczesniak's name was not on the fax and no evidence connected Szczesniak to the fax, but Respondent believed he drew a reasonable inference. (Tr. 1092-95, 1492-1503; Resp. Ex. 17).

On February 14, 2017, Judge Kendall denied Respondent's motion as being improperly brought, but stated he could file a motion for sanctions. On February 21, 2017, Judge Kendall directed the parties to cooperate and eliminate vitriolic filings. (Tr. 469; Adm. Exs. 11, 20).

On February 27, 2017, Respondent moved to sanction Szczesniak citing the same conduct he asserted in the motion for criminal contempt. Szczesniak engaged counsel and signed a sworn declaration on March 9, 2017, stating that he was home ill during the alleged fence incident and was driving his mother to a doctor's appointment when he supposedly sent the anonymous fax. He attached supporting affidavits from his mother, wife, and son Luke, and a letter from a doctor's office. (Tr. 465, 475, 479, 669-85; Adm. Exs. 14, 15).

In a March 13, 2017 filing, Respondent questioned whether Luke existed because he could not confirm as much on LexisNexis. Szczesniak testified his son Luke was 17 years old in March 2017. (Tr. 686-87, 1104-1106, 1481-82; Adm. Exs. 16, 45, Resp. Ex. 17).

Sanction Proceedings and Appeal

During an April 12, 2017 status hearing, Judge Kendall expressed concerns about Respondent's aggressive and acrimonious behavior. She continued the matter for a sanctions hearing regarding Respondent's accusations against Szczesniak. (Tr. 527-28, Adm. Ex. 21).

Following Judge Kendall's expressions of displeasure, Respondent consulted with ethics counsel and eventually moved to withdraw the pleadings with accusations against Szczesniak. On May 27, he also sought to withdraw as counsel. According to Lubin, once new defense counsel entered the case the parties settled for slightly less than Szczesniak's diminished value number. (Tr. 562-66, 575, 1107, 1348, 1425, 1507-1508; Adm. Ex. 23).

On July 7, 2017, Lubin and Szczesniak testified at the sanctions hearing. Respondent did not testify, but told the court: "I very sincerely apologize to this Court for anything that I did that caused this Court concern or stress, and I certainly apologize to Mr. Lubin for going too far in this case and causing him any stress." (Tr. 532, 691, 1014, 1019; Adm. Exs. 5, 22, 71).

On March 28, 2018, Judge Kendall issued a 15-page opinion noting Respondent's false accusations and vitriolic behavior toward Lubin, his inappropriate deposition behavior, his baseless motions and, most particularly, his "wildly inappropriate" motion and "unhinged attack" against Szczesniak. Judge Kendall concluded that Respondent failed to heed her prior warnings; acted in bad faith; failed to take responsibility or explain his actions; and offered an apology "in name only." She fined Respondent $50,000, ordered him to attend ethics and anger management courses, and referred the matter to the Executive Committee of the Northern District of Illinois. On Respondent's appeal, the Seventh Circuit affirmed Judge Kendall's order, referring to Respondent's behavior as "extreme and repeated," "beyond the pale," and deserving of the sanction imposed against him. (Tr. 536-38, 556, 591, 1020-23; Adm. Exs. 4, 34; Resp. Ex. 4).

Respondent testified he satisfied the requirements of the sanction order and recognizes that his actions delayed the Twyman litigation. (Tr. 1021, 1523).

C. Analysis and Conclusions

1. Rule 3.1 – filing pleadings that are frivolous

The Administrator charged Respondent with making frivolous assertions in pleadings. At issue are Respondent's accusations that Lubin was an extortionist who fabricated cases and churned fees and that Szczesniak fabricated reports, used intimidation tactics, and should be held in indirect criminal contempt.

In asserting a claim or issue, lawyers must inform themselves of the facts and applicable law and determine that they can make good-faith arguments in support of their clients' positions. Rule 3.1, Comment [2]. Pleadings are frivolous where there is no "objectively reasonable basis" in law or in fact to support the claim. In re Carr, 2010PR00046, M.R. 25521 (Nov. 19, 2012) (Review Bd. at 12). We may consider, but are not bound by, a court's determination that pleadings are frivolous and sanctionable. See In re Owens, 144 Ill. 2d 372, 379 (1991).

With respect to Respondent's accusations against Peter Lubin, the evidence showed that following a discovery dispute in the early months of the Twyman litigation, Respondent began attacking Lubin in pleadings filed with the court. His primary accusation, whether he termed it extortion, engaging in a criminal enterprise, churning fees, or fabricating a case, was that Lubin was pursuing a baseless claim on behalf of his client in order to obtain large fees for himself.

For the following reasons, we find that Respondent's baseless attacks against Lubin violated Rule 3.1. First, Lubin credibly testified regarding his preparation and review of materials before he filed Twyman's complaint. His groundwork, which he provided to Respondent early in the litigation, led him to conclude that Twyman had a legitimate claim. Therefore, we saw no basis for Respondent's assertions that Lubin "fabricated" a case to extort

money from the defendants. Second, we view the sources that Respondent consulted for his accusations as questionable at best. He largely relied on information regarding Lubin's involvement in cases unrelated to the Twyman matter, including comments by one of Lubin's former opposing counsel, and acknowledged that no court findings supported his assumptions about Lubin's motivations. In fact, a motion for sanctions against Lubin in one of the unrelated cases failed. Finally, Respondent's allegations against Lubin did nothing to advance his own clients' cause or refute the claim that Twyman had been sold a defective vehicle. Rather than focusing on the merits of Twyman's claim, Respondent created a distracting side show that taxed both sides and the court. Lubin pointed out that his fees mounted not because he was "churning fees," but because he had to keep responding to Respondent's baseless accusations.

We also find no legitimate basis for Respondent's allegations that Szczesniak falsified his expert reports, or had a history of doing so. Szczesniak credibly testified about his automotive expertise, his inspection of the vehicles, and his record of accepted expert opinions. For his part, Respondent claimed he drew reasonable inferences based on his research regarding Szczesniak. That "research," some of which post-dated Respondent's relevant accusations, focused on Szczesniak's private business affairs and cases unrelated to the Twyman litigation. As with Lubin, Respondent did not uncover any judicial finding that Szczesniak had fabricated an expert report. Notably, Respondent's accusations also fell outside the proper approach used in the federal courts to challenge an expert's methodology or qualifications. See generally Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993) (now codified in Fed. R. Evid. 702).

Respondent did not limit himself, however, to baselessly denigrating Szczesniak's work product. He accused Szczesniak of attempting to intimidate a potential witness by damaging her fence and attempting to intimidate Respondent with an anonymous fax. He also called into

question the existence of Szczesniak's son Luke. Respondent first made these allegations when he asked the court to hold Szczesniak in criminal contempt and refer him for prosecution, and then repeated the allegations in a motion for sanctions.

We find that Respondent had no reasonable basis for making the foregoing assertions. As to the fence incident, Respondent relied on statements by the property occupant and a police report, but had no evidence of any arrest or charges filed against Szczesniak. Rather than investigating the matter properly, Respondent leapt to the harshest conclusion and proceeded to request criminal sanctions against Szczesniak. For his part, Szczesniak credibly denied damaging the fence and submitted affidavits that corroborated his denial. Similarly, we find that Respondent's only basis for tying Szczesniak to the anonymous fax was pure conjecture. Finally, Respondent's insinuation that Szczesniak fabricated his own son's existence, and by association his son's affidavit, was bottomed on Respondent's cursory on-line search. In his haste to point a finger, Respondent again failed to thoroughly research his allegations.

We find the Administrator proved a violation of Rule 3.1 by clear and convincing evidence. Moreover, we concur with the district court's view of Respondent's actions as "wildly inappropriate" and the Seventh Circuit's opinion that his conduct was "beyond the pale."

2. Rule 4.4 – using means that have no substantial purpose other than to embarrass, delay or burden a third person

Based on Respondent's conduct discussed in the preceding section, the Administrator also charged Respondent with violating Rule 4.4. Many of our comments in the prior section are applicable here, although Rule 4.4 focuses more on the purpose of making the assertions.

Respondent acknowledged that his first impression of Lubin was not favorable and within a few months the two clashed over a discovery dispute to such a degree the court had to admonish them. Undeterred, Respondent soon leveled more insults and accusations against

Lubin in both pleadings and emails. Further, Respondent copied other members of Lubin's firm on the emails. As summarized in the preceding section, the claims were unfounded. We find the accusations against Lubin were made simply to embarrass, intimidate and burden him before his colleagues and the court. According to Lubin, Respondent hit the mark.

As for Respondent's accusations against Szczesniak, who was neither a party nor counsel in the case, Respondent set out to intimidate and embarrass him by impugning his reputation. Respondent's argument that his statements were all relevant to Szczesniak's credibility and qualifications is not persuasive since his accusations that Szczesniak fabricated a report in another case, damaged a fence, and may have invented a son, had nothing to do with Szczesniak's work in the Twyman litigation. Respondent admitted the language he used to attack Szczesniak was wrong. As with Lubin, we find Respondent's accusations against Szczesniak were made solely to embarrass, intimidate and burden him which, according to Szczesniak, they did. Accordingly, we find the Administrator proved a violation of Rule 4.4 by clear and convincing evidence.

3. Rule 8.4(d) – conduct prejudicial to the administration of justice

The Administrator charged Respondent with violating Rule 8.4(d) by filing pleadings containing baseless accusations of wrongdoing against Lubin and Szczesniak and causing a degradation of process in the Twyman litigation by ignoring warnings of the court and thereby challenging the court's judicial authority. An attorney's misconduct is prejudicial to the administration of justice if it has an impact on the representation of a client or the outcome of a case, undermines the judicial process or jeopardizes a client's interests. In re Storment, 203 Ill. 2d 378, 399 (2002); In re Thomas, 2010 IL113035, ¶¶ 91, 123.

Respondent admitted at hearing that his actions delayed the Twyman proceedings. It is worth noting that had he come to that realization earlier, per Judge Kendall's admonitions, much

time would have been saved. As it stands, Respondent's disregard of Judge Kendall's admonitions to act civilly and his unfounded accusations throughout the proceedings ultimately led to the expenditure of considerable time and resources by the parties and Judge Kendall. We find therefore, by clear and convincing evidence and his own admissions, that Respondent's actions undermined the judicial process in violation of Rule 8.4(a)(5).

Count II

II. Respondent is charged with taking actions in a litigation matter without his client's authorization; failing to withdraw from representation as requested by his client; revealing confidential information without his client's consent; and failing to return files and records to his client after his representation was terminated, in violation of Rules 1.2, 1.6, 1.16(a)(3) and 1.16(d).

A. Summary

In connection with representing a client in patent litigation, Respondent disobeyed his client's instructions, revealed confidential information, and failed to withdraw from litigation and surrender property to which his client was entitled after being discharged.

B. Admitted Facts and Evidence

The Gamon Litigation and Retainer Agreements

Terry Johnson is an inventor and president of Gamon Plus, Inc. and Gamon International, Inc. ("Gamon"). In September 2014, Johnson and Respondent agreed that Respondent and Andrew Tiajoloff would represent Gamon in a lawsuit against Campbell Soup Company and others for patent infringement. Respondent identified Gamon as a family friend and Tiajoloff as a law school classmate. (Ans. at par. 32; Tr. 601-602, 73, 1131-32, 1549-50).

A September 11, 2014 retainer agreement signed by Johnson, Respondent and Tiajoloff provided that the attorneys would receive 40% of any recovery; they would have a lien for their fees; they could retain other attorneys to assist in the case; they would pay the fees of any additional counsel; and the client would pay all costs and expenses at the time of settlement or

judgment. A second January 6, 2015 retainer agreement repeated those provisions. (Ans. at par. 30; Tr. 609, 1132-36, 1182, 1552-53; Resp. Ex. 25).

On January 23, 2015, Gamon, Respondent, and Tiajoloff executed a supplemental retainer agreement with the Niro, McAndrews, Dowell, & Grossman law firm ("Niro McAndrews"), which was brought in for its expertise in patent litigation and to lead the case. Prior to filing suit, Respondent and Tiajoloff received an evaluation of the case that estimated damages in the tens of millions of dollars. The supplemental agreement incorporated the January 6, 2015 agreement and gave contingency fees of 25% to Niro McAndrews and 7.5% to Respondent and Tiajoloff each. Respondent denied that hourly attorney fees were discussed. He understood that Niro McAndrews would look for a third party to fund the substantial litigation costs. (Ans. at par. 31; Tr. 73, 79, 612-15, 1137-45; Adm. Ex. 36; Resp. Ex. 25).

Matthew McAndrews of Niro McAndrews, testified that his firm identified a possible third-party funder ("the funder") for the litigation in early 2015. Thereafter Gamon and the funder entered into a consulting services agreement. The agreement, which McAndrews testified was emailed to Respondent, included a detailed "non-disclosure" clause to protect confidential business information and prevent opposing parties from learning of any financial vulnerability. Under the non-disclosure clause, confidential information included the existence and status of any financing proposal. (Tr. 80-86; Adm. Ex. 38).

On October 8, 2015, Niro McAndrews filed a patent infringement suit against Campbell Soup and others on behalf of Gamon in the Northern District of Illinois. Respondent, along with Raymond Niro, Jr., Kyle Wallenberg, and Matthew McAndrews, all of Niro McAndrews, appeared for Gamon. At that time, negotiations with the funder were still underway. McAndrews testified the various attorneys got along initially but after the complaint was filed,

Respondent began interjecting himself in ways that were not productive. In December 2015 Niro advised Respondent if he did not step back, Niro McAndrews would withdraw as counsel. (Ans. at pars. 31, 33; Tr. 71-72, 87, 90-97; Adm. Exs. 37, 73).

Communications Regarding Litigation Funding and Fees

McAndrews identified two "term sheets" from the funder which set forth general terms and conditions of the transaction. Pursuant to the proposals, the funder would pay documented costs and attorneys' fees up to a specified amount**,** with a portion of the attorneys' fees paid up front to Niro McAndrews. The proposed terms resulted in a hybrid contingent fee arrangement, with an hourly fee component and a component contingent on a recovery. McAndrews testified if the litigation did not result in any recovery for Gamon, his firm would keep the hourly fees paid to them. Gamon would not be harmed because the funder would have no recourse against it. The term sheets were preliminary, non-binding and unsigned by the funder. (Tr. 98-100, 180-200, 243-44, 1152; Adm. Ex. 57).

On February 9, 2016, Terry Johnson notified Respondent and others of his satisfaction with the funding proposal. That same afternoon, Niro McAndrews circulated a draft retainer agreement which redefined the attorneys' roles and proposed the hybrid contingency fee arrangement and payment of expenses discussed with the funder. The draft provided Respondent would promptly withdraw as attorney of record and only work behind the scenes on discrete projects as requested. McAndrews explained the changes would not impact the fees Respondent would receive, and any hourly fee received by Niro McAndrews would be subtracted from the contingency fee to which it was entitled. The new agreement was never executed. (Tr. 107-114, 217, 240-46; Adm. Ex. 36).

Johnson testified that after studying information provided by McAndrews, he understood he would not be out any money because he would not have to repay any amount provided by the funder. He did not believe he was being cheated. (Tr. 617-19).

Respondent testified he received the term sheet from Johnson, was concerned the funder would be financing attorneys' fees in what was intended to be a contingency fee situation, and believed the arrangement would result in a financial cost to Johnson for fees that were unearned. He also saw a conflict for Niro McAndrews, which would receive fees immediately and retain them regardless of the outcome of the litigation. Respondent and Tiajoloff contacted Johnson by phone, pointed out the problems they perceived with the new terms, and advised Johnson to obtain independent legal advice or fire Niro McAndrews. (Tr. 1145-56, 1169-81; Resp. Ex. 19).

Respondent's February 9, 2016 Email to Niro McAndrews

On February 9, 2016, Respondent emailed McAndrews and Niro, with a copy to Johnson, terminating the employment of Niro McAndrews as attorneys for Gamon. He also notified opposing counsel that Niro McAndrews had been terminated. Respondent testified Johnson authorized him to take that action and further, under the terms of the existing retainer agreement, he was authorized to hire Niro McAndrews and therefore could fire the firm. Respondent acknowledged he has no documentation confirming that Johnson wanted to fire Niro McAndrews. For his part, Johnson denied authorizing Respondent to terminate Niro McAndrews. Shortly after Respondent sent the email, Johnson advised all counsel: "[p]lease be advised that I have not fired anyone, and if I do, I will do it myself." (Tr. 116-17, 620-22, 1181-82, 1552-53, 1566; Adm. Exs. 36, 39; Resp. Ex. 25).

McAndrews testified that prior to Respondent's email, Johnson had not expressed any reservations about Niro McAndrews' handling of the litigation, nor had Respondent mentioned

any termination. Further, Respondent had not contacted McAndrews or Niro with any questions or objections about the draft fee agreement. (Tr. 115, 118, 208, 240-41).

Events of February 10, 2016

Early on February 10, 2016, McAndrews emailed Johnson to correct any misperceptions raised by Respondent about the proposed funding of the litigation. At 10:29 a.m., Johnson emailed Respondent, with copies to other members of the Gamon litigation team, stating:

> After continued rumination it has become apparent that you must be removed from Team Gamon. Therefore you are instructed to immediately withdraw as a counsel of record in the litigation. And further let me assure you that you will receive your agreed share of any judgment you previously agreed to.

After terminating Respondent, Johnson did not consider Respondent to be his attorney, and did not authorize him to hold himself out as Gamon's attorney or do anything other than withdraw from the case. (Tr. 121, 218, 621-26, 1189, 1679; Adm. Ex. 39; Resp. Ex. 28).

At 10:41 a.m. Respondent replied by email that he could not withdraw until he received a written agreement that he would receive 7.5% of the proceeds. Niro reiterated that Respondent should "immediately withdraw as counsel in the litigation." (Tr. 134-37, 1192-93, 1571; Adm. Ex. 39; Resp. Ex. 28).

Following his termination, Respondent filed a Notice of Attorney's Lien and served it on various individuals and entities including the funder, which he identified by name on the service list. McAndrews testified that the existence and identity of the funder was confidential information that should not have been divulged. He was also concerned by Respondent's post-termination disclosure of information regarding the financial arrangement between the client and his legal team. (Tr. 138-45, 1214-17, 1574-75, 1593: Adm. Exs. 40-41; Resp. Ex. 24).

Respondent testified that he filed the lien to protect his fees, rather than the interests of his client. He believed he had to give notice to every person or entity that would be paying

attorney fees, including the funder. He was not certain he had a statutory duty to file his lien notice with the court, but wanted it to be of record since various present and potential payors were involved. (Tr. 1216-18, 1252, 1574-75, 1593, 1633-36, 1691-92).

Respondent admitted that when he filed his lien notice, the funder had not disclosed itself; the funder was not a party to the litigation and had no finalized contract with Gamon; the potential relationship between the funder and Gamon was not generally known to the public; and the client had not consented to disclosure. Respondent did not believe he breached a confidence, however, because the funder would be revealed when it perfected its security interest in the litigation proceeds. He did not believe that his disclosure harmed Gamon. (Tr. 1217-21, 1225, 1234, 1575, 1592-93, 1636-39; Resp. Ex. 19).

After Respondent filed the attorney's lien notice, Niro McAndrews sent Respondent an urgent email notifying him he had disclosed confidential information and instructing him to immediately withdraw the notice and service list from the public record. Respondent did not comply. McAndrews testified that as a result of Respondent's filing of the lien notice, negotiations with the funder terminated. (Tr. 146-49, 156, 1576; Adm. Ex. 39).

Respondent's Motion to Disqualify Niro McAndrews

On February 11, 2016, when Respondent had yet to withdraw as counsel, Niro McAndrews filed an emergency motion to terminate his representation. On February 14, 2016, Respondent filed a response identifying himself as an attorney for the plaintiffs, and attaching a personal affidavit contending that Niro McAndrews was exploiting Johnson. The same day, he filed a motion to disqualify Niro McAndrews, again identifying himself as an attorney for the plaintiffs and describing the proposed fee agreement as fraudulent. Respondent testified he had an ethical duty to inform the tribunal, as well as the ARDC, of misconduct by Niro McAndrews. He also believed that pursuant to a local federal court rule, he could act on behalf of Gamon until

the court consented to his withdrawal. (Ans. at par. 47; Tr. 202, 1235-45, 1572, 1579-84, 1591, 1596, 1641-46; Adm. Exs. 42, 44, 46; Resp. Ex. 31).

McAndrews was concerned that Respondent's motion to disqualify once again divulged confidential and privileged material including the fee arrangement, counsel's litigation strategy and mental impressions, financing arrangements, the search for a litigation funder, the strength of Gamon's case, and the amount of damages. In a February 14, 2016 email, McAndrews instructed Respondent to withdraw the motion to disqualify because it was not placed under seal. When Respondent did not comply, McAndrews filed an emergency motion to seal. Respondent filed a response, again identifying himself as one of Gamon's attorneys. McAndrews then moved to strike or seal Respondent's Notice of Attorney's Lien, and to seal Respondent's responses to motions. (Tr. 164-71, 179, 1585-89; Adm. Exs. 39, 44, 48-50, 55).

Respondent denied that he disclosed any privileged confidential information. He acknowledged that Johnson did not specifically authorize him to move to disqualify or respond to motions from Niro McAndrews, but he believed he was authorized to do so because he was still an attorney of record for Gamon. (Tr. 1583-96).

On February 19, 2016, Judge Norgle granted Gamon's motion to terminate Respondent's representation and various motions to seal. On that date, Respondent reported Niro McAndrews' actions to the ARDC, which investigated and determined not to take any action. On February 25, 2016, Judge Norgle granted the motion to strike or seal Respondent's Notice of Attorney's Lien. (Tr. 176-79, 223, 1243-44; Adm. Exs. 51, 53, 56).

Requests for Return of Documents

Johnson recalled giving Respondent a "memory stick" with stored documents and a trial notebook which another attorney had prepared at a cost of $5,000. Respondent testified he received a trial notebook and a thumb drive, made multiple copies of each, and distributed them

to other attorneys on the case. On February 11, 2016, Niro McAndrews requested that Respondent “return any and all documents, electronic information, media, and any work product or other information or documents” within 24 hours. Although further requests were made on February 19 and 22, 2016, Respondent did not return any documents. (Ans. at par. 46; Tr. 220-22, 627, 631, 1248; Adm. Exs. 39, 52, 73).

Respondent testified he returned the original trial notebook to Johnson. He kept a copy and had copies of pleadings, but did not have original documentation. The parties stipulated that McAndrews would testify he never received a copy of the trial notebook from Respondent, and Respondent never returned a copy to the firm. Johnson did not recall getting much back from Respondent, and did not receive the trial notebook from him. (Tr. 632, 1248-49, 1540).

C. Analysis and Conclusions

1. Rule 1.2 – failure to abide by a client’s decisions, and Rule 1.16(a)(3) – failure to withdraw after being discharged

The Administrator charged Respondent with violating Rules 1.2 and 1.16(a)(3) when he failed to withdraw as Gamon’s counsel as instructed and then filed pleadings without direction or authority from Gamon. Rule 1.2 requires a lawyer to abide by the client’s decisions concerning the objectives of representation and to consult the client about how to pursue those objectives. Rule 1.16(a)(3) obligates a lawyer to withdraw from representation upon being discharged.

The evidence showed that Respondent took a number of actions without authorization from his client, beginning with his February 9, 2016 email discharging the Niro McAndrews firm. Johnson immediately followed up with an email clarifying the firm was not being fired, and the following day sent an email advising Respondent he was “removed from team Gamon” and “instructed to immediately withdraw as a counsel of record.” Those words leave no room

for interpretation. Johnson testified that following his email, he no longer considered Respondent to be Gamon's attorney or to have any authority to act on Gamon's behalf.

Respondent disregarded the clear message of Johnson's email, failed to withdraw as counsel, and continued to hold himself out as Gamon's attorney. Respondent contends that a local federal court rule authorized him to continue to act on behalf of Gamon until such time as the court consented to his withdrawal. Local Rule 83.17 of the Northern District of Illinois states that an attorney who has filed an appearance is the attorney of record for the party "for all purposes incident to the proceeding" and may not withdraw without leave of court. Although Respondent was still attorney of record when he filed the pleadings in question, his reliance on Rule 83.17 is misplaced. We do not read that rule as taking precedence over the will of the client in discharging an attorney; rather, it prevents any sudden abandonment of a client in the event the attorney terminates representation.

Respondent further argues that his filing of a motion to disqualify Niro McAndrews was warranted under Rule of Professional Conduct 3.3, which provides that a lawyer "who represents a client in an adjudicative proceeding" and who knows that a person intends to or is engaging in fraudulent conduct "related to the proceeding" shall take remedial measures including, if necessary, disclosure to the tribunal. Respondent claims he was protecting Gamon's interests by disclosing Niro McAndrews' alleged fraud relating to the proposed retainer agreement. We note that the focus of Rule 3.3 is on fraud in the presentation of facts or law related to the controversy before the court, rather than on disputes between co-counsel with respect to fee agreements. Further, at the time Respondent filed the motion and responses in question, he had been discharged and was not representing a client in a judicial proceeding.

Most important, we do not accept Respondent's claim that his purpose in continuing to file pleadings after he was discharged was to protect Gamon from fraud. We find he was acting for his own benefit and in retaliation for a proposed agreement which limited his role in the Gamon litigation and allowed Niro McAndrews to collect upfront fees from a third-party funder.

In In re Applebee, 2012PR00049, M.R. 26795 (Sept. 12, 2014), the attorney failed to file a motion to withdraw and pursued an appeal after being discharged, in violation of Rule 1.2(a). The Hearing Board also took note of Rule 1.16, and stated that rule does not allow a discharged attorney to continue representation indefinitely based on the belief that doing so is in the client's best interests. See also In re Ducey, 03 SH 123, M.R. 23053 (May 18, 2009) (Review Bd. at 16).

Respondent's obligation was to follow the directions of his client to withdraw and not take any unauthorized measures. His failure to do so after being discharged and his attempts to continue representing Gamon violated both Rules 1.2 and 1.16(a)(3). Our finding does not impede an attorney's reporting of perceived fraudulent conduct; it merely requires the report to occur in a manner consistent with the interests protected by Rules 1.2(a) and 1.16(a)(3).

2. Rule 1.6 – revealing confidential information

Rule 1.6(a) states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or it is permitted pursuant to paragraph (b), which sets forth specific circumstances for revealing information if the lawyer reasonably believes it is necessary. The Administrator charged Respondent with violating Rule 1.6 by disclosing the relationship between Gamon and a third-party funder. We find this charge was proved.

The evidence showed that in early 2015, Niro McAndrews sent an email to Respondent along with a copy of a consulting agreement entered into between Johnson and a third-party funder which contained a non-disclosure clause regarding confidential information. McAndrews

emphasized that the information regarding the funder was confidential and, if disclosed to the opposing party, could signal Gamon's financial vulnerability.

On February 10, 2016, the day after Johnson discharged Respondent, Respondent filed a Notice of Attorney's Lien which revealed, in the service list, the funder's name and address. Although Respondent argued the information was not confidential because the funder's identity would be disclosed eventually, he agreed the information was not public when he disclosed it. He also acknowledged Johnson had not consented to the disclosure.

Respondent testified he included the potential third-party funder on his service list because he believed he had to notify any entity or person against whom he might have a claim for fees. There is nothing in the Illinois Attorneys Lien Act, 770 ILCS 5/0.01, however, that required him to include the name of the funder. That act provides that attorneys shall serve notice of their lien, in writing, upon the "party" against whom their clients may have such suits, claims or causes of action. In this case, the proposed funder was not a party to the litigation. Moreover, any fees to which Respondent would be entitled were contingent on the recovery of damages in the litigation from the defendants.

Even if Respondent believed he was protecting his interests by giving notice of his lien to the funder, a public court filing was not required. Under the Act, he could have served the funder by registered or certified mail or, if he believed a court filing was essential, he could have requested the court to seal the information with respect to the funder. Respondent took no precautions to protect the confidential information.

We find Respondent's disclosure of information in his Notice of Attorney's Lien violated Rule 1.6(a). To make matters worse, his misconduct continued even after Niro McAndrews notified him that he had revealed confidential information and instructed him to withdraw the

notice. Not only did he fail to comply with that request, he filed a motion to disqualify Niro McAndrews in which he disclosed more confidential information regarding the anticipated funding arrangement, litigation strategy and the strength of Gamon's case.

3. Rule 1.16(d) – failure to promptly surrender papers and property of a client upon termination of representation

The Administrator charged Respondent with violating Rule 1.16(d) by failing to return Gamon's documents and electronic files. That rule requires an attorney, upon termination, to surrender "papers and property to which the client is entitled."

Johnson recalled providing a data storage device with stored documents to Respondent, as well as a trial notebook which had been prepared by another attorney at a substantial cost. Respondent acknowledged he received a thumb drive and trial notebook from Johnson, but stated he made copies of both for co-counsel, returned the original notebook to Johnson, and had no other original documents to return.

McAndrews testified Respondent never distributed a copy of the trial notebook to him, and denied receiving Respondent's notebook, despite several requests for the return of all documents and electronic information. Similarly, Johnson testified Respondent did not return the trial notebook to him. We viewed both McAndrews and Johnson as credible witnesses.

We find Respondent received property from his client relating to the representation which he should have returned upon his termination. The trial notebook prepared by another attorney, in particular, was property over which a client would want to maintain possession and control. We conclude therefore, that Respondent's failure to return client property violated Rule 1.16(d).

Count III

III. Respondent is charged with sending an email to a person he knew was represented by counsel; making accusations in the email that were embarrassing to that person; and committing a crime by disclosing information in violation of the Mental Health Act, in violation of Rules 4.2, 4.4 and 8.4(b).

A. Summary

While representing a client in a divorce proceeding, Respondent made assertions in an email that had no substantial purpose other than to embarrass or burden the opposing party. The panel found the other charges were not proved.

B. Admitted Facts and Evidence

In 2016 Gina Fanady filed a petition for dissolution of her marriage to Steve Fanady. At that time, she was represented by attorney John Kay. In or about November 2016, Respondent agreed to represent Steve Fanady. (Tr. 279-80, 893, 1267).

Meetings with Psychologist

Gina testified she and Steve agreed to attend therapy with Dr. Karla Steingraber, a psychologist, to work on co-parenting issues. Gina noted the therapy was not court-ordered and only she, Steve, and the therapist were to know about it and see reports or results generated by the therapist. Steve testified Dr. Steingraber's purpose was to help craft a parenting agreement by taking notes as a neutral party. He denied she was supposed to provide any mental, marital, or co-parenting therapy. (Tr. 282-87, 357, 898, 917-18, 926-27, 940-41).

On December 12, 2016 attorney Kay emailed Respondent regarding "Therapy-for co-parenting" and advised that Dr. Steingraber was willing to meet with Gina and Steve to assist them with co-parenting; she would be "utilized for counseling purposes;" and she would "not be called as a witness or otherwise used for any litigation purposes." Respondent replied by email directing Kay to set up the first of three counseling sessions and agreeing to Kay's conditions.

Respondent understood Dr. Steingraber would act as a sort of mediator to assist with a co-parenting agreement. He did not consider Kay's use of the words "counseling" and "therapy" to mean treatment for any mental disease. (Tr. 1268, 1614-18, 1625-27; Adm. Ex. 60).

In December 2016, Gina and Steve attended their first appointment with Dr. Steingraber, at which they discussed and entered into a preliminary parenting agreement. On December 21, 2016, Dr. Steingraber emailed Gina and Steve an "Outline" summarizing sixteen points they had discussed and listing four future goals. Gina testified the outline did not resolve issues or reflect any agreement, and was not to be included in court proceedings. Steve testified the outline memorialized their parenting agreement. He forwarded it to Respondent, asked Respondent to file a motion to have it entered as a parenting order, and authorized him to disclose the meeting and attach the outline to the motion. (Ans. at par. 66; Tr. 313-15, 361, 903-905; 923-32).

On January 10, 2017, Respondent filed a motion on behalf of Steve to "Continue and Expand Visitation," and "to Adopt the Parties' Agreement regarding Parenting as the Order of the Court." The motion, with Dr. Steingraber's outline attached, stated that the parties had entered into an agreement as to some terms of the temporary parenting of the minor child. Respondent testified he did not need Gina's or her attorney's permission to attach the outline, nor did he know they did not want it attached. He noted the outline was not a clinical record or information protected by the Illinois Mental Health Act, as it did not contain any diagnosis, treatment plan, or therapy notes. (1274-75, 1619, 1630; Adm. Ex. 62).

Respondent's August 23, 2017 Email

By August 2017, a dispute arose in the Fanady divorce as to where the minor child would attend school. On August 23, 2017, Gina's new attorney, Don Rendler Kaplan, sent Respondent an email, with copies to Gina and various personnel in two school districts, accusing Respondent

of denigrating Gina and making statements to school officials that were false, demeaning and bordering on the absurd. (Tr. 332-37, 1279-80; Adm. Ex. 63, Resp. Ex. 37).

Respondent sent a reply email, copying those individuals who had received Kaplan's email, as well as Steve. The email stated, in part, that Gina is "very mentally sick;" she is "pathologically obsessed" with having things her way; she will "lie, mislead, and fabricate, to achieve that end;" she made an "attempt at stealing $180,000 in corporate money;" and she is "mentally ill and needs serious help." When Gina read the email, she felt disgusted, humiliated, slandered, and bullied. She believed the accusations obscured the reason for her daughter's school placement, affected her ability to act for her daughter, added more complexity to the divorce, and portrayed her family negatively. She denied stealing any corporate money and denied having any mental health condition. (Tr. 338-47, 357, 365-66; Adm. Ex. 63).

At the time Respondent sent his August 23, 2017 email, he knew Gina was represented by counsel. He testified he hit "reply to all" and added Steve to the "cc" list because Steve had asked for a copy of all correspondence. He denied paying much attention to the recipient list, but was aware school officials were included. As for his statements, Respondent acknowledged he did not have a report from any psychologist stating Gina was mentally ill, he used inappropriate words, and he should not have described her as mentally sick. He believed the substance of the email was correct. Steve confirmed he had instructed Respondent to copy him on all emails, and stated the reference to Gina's theft of $180,000 concerned her unauthorized access to a corporate account. (Ans. at par. 74; Tr. 914-15, 1281-83, 1606, 1612, 1623-24).

On December 22, 2017, Dr. Finn, a clinical psychologist, reported to the court that he was unable to corroborate Steve's concerns that Gina was mentally ill. Gina testified that while

Dr. Finn identified some counter-productive behavior on her part, no one but Steve ever opined that she was mentally ill. (Tr. 343-44, 372-75, 1613-14; Adm. Ex. 66).

C. Analysis and Conclusions

1. Rule 4.2 – communicating with a person known to be represented by counsel about the subject of the representation

The Administrator charged Respondent with violating Rule 4.2 by sending an email to Gina Fanady. That rule prohibits an attorney from communicating about the subject of the representation with a person known to be represented by another lawyer, without the other lawyer's consent. Rule 4.2 is designed to protect represented persons against possible overreaching by other lawyers participating in the matter, interference by lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation. Rule 4.2, Comment [1].

On August 23, 2017 Gina's attorney sent Respondent an email, with copies to Gina and others, regarding statements made by Respondent to school officials. Respondent responded by email to Gina's attorney, with copies to the same list of recipients used by Gina's attorney, plus Steve Fanady. Respondent explained that he chose the "reply all" option without paying much attention to the recipients, except for adding his client to the list.

We find the Administrator did not prove a violation of Rule 4.2. Infractions of that rule typically involve attorneys who communicate with a represented person outside the presence of that person's counsel, thereby risking that the represented person, without the benefit of counsel, could be influenced or intimidated by the confronting attorney or divulge confidential information. Respondent's email did not present that risk. His statements were in response to, and directed to, Gina's attorney. Gina was merely a bystander, much as if she had been present in person when Respondent was conferring with her attorney. As such, Gina's relationship with

her attorney was not interfered with or threatened; nothing was directed to Gina privately of which her attorney was not aware; and Gina was not invited to respond personally. Notably, Gina's own attorney brought her into the discussion by copying her on his initial email, and therefore we liken the situation to one in which an attorney brings a client to the table and has discussions with the opposing counsel in the client's presence. While we do not condone Respondent's action in including the opposing party in his correspondence, these specific circumstances do not give rise to a Rule 4.2 violation.

2. Rule 4.4 – using means that have no substantial purpose other than to embarrass, delay or burden a third person

The Administrator charged Respondent with violating Rule 4.4 by sending an email to school district officials containing derogatory accusations against Gina Fanady, including that she was "very mentally sick," in need of "serious help," and she would lie to achieve her goals. Violations of Rule 4.4(a) have been found where attorneys use inappropriate, derogatory or offensive language toward other people while representing clients. See In re Craddock, 2017PR00115, M.R 030266 (March 13, 2020) (Hearing Bd. at 8).

Respondent's use of disparaging words to describe Gina's mental health and character clearly violated Rule 4.4(a). We need look no further than the insulting language in the email and Gina's own testimony that she did, indeed, feel humiliated and bullied by Respondent's words, which were copied to officials of her child's school. Even worse, the damaging impact of Respondent's broadcast to school officials could have damaging effects that trickled down to the minor child. We find Respondent's email to be an overly aggressive response to an admonishment from opposing counsel.

3. Rule 8.4(b) – engaging in a criminal act

The Administrator charged Respondent with engaging in a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b). The alleged criminal act was his disclosure of the outline Dr. Steingraber sent to Gina and Steve summarizing their discussion regarding parenting. Respondent attached that outline to a motion requesting expanded visitation for Steve.

Section 110/3(a) of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/3, provides:

> All records and communications shall be confidential and shall not be disclosed except as provided in this Act. Unless otherwise expressly provided for in this Act, records and communications made or created in the course of providing mental health or developmental disabilities services shall be protected from disclosure regardless of whether the records and communications are made or created in the course of a therapeutic relationship.

Section 110/2 of the Act defines "Confidential Communication" or "communication" as:

> Any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient.

Section 110/16 of the Act states that any person who knowingly and willfully violates any provision of the Act is guilty of a Class A misdemeanor. The latter provision provided a basis for the Administrator to assert a violation of professional Rule 8.4(b).

We received much conflicting evidence as to whether Dr. Steingraber provided mental health services to Gina and Steve so as to bring their communications, particularly Dr. Steingraber's outline of their discussions, within the purview of section 3 of the Mental Health Act. We do not reach that question, however, or the issue of whether Respondent knowingly and willfully violated the Act, because we find the Act is not applicable in this situation.

The question of who can be held liable for disclosing confidential information under the Mental Health Act was addressed in Quigg v. Walgreens, 388 Ill. App. 3d 696 (2nd Dist. 2009). In that case, the plaintiff brought an action under the Mental Health Act against a pharmacy for disclosing, to the plaintiff's husband, her record of medications prescribed by a psychiatrist. The appellate court found that the pharmacy did not bear legal responsibility for its disclosure because the Act only subjects a therapist or agency that has a therapeutic relationship with a recipient of mental health services to liability. The court noted that subjecting *anyone* to liability under the Act would be an overbroad application of the Act.

Respondent had no therapeutic relationship with Gina or Steve, and therefore we conclude, in accord with the Quigg case, that the Administrator did not establish the applicability of the Mental Health Act to an attorney who disclosed information provided to him by his client. We believe the Administrator reached too far in asking us to find, in a disciplinary proceeding, that Respondent engaged in a criminal act in violation of a statutory scheme that regulates mental health professionals. Accordingly, we do not find a Rule 8.4(b) violation.

Evidence in Mitigation and Aggravation

Respondent testified that he became a lawyer to help people. He has assisted with immigration cases by fielding telephone calls or handling occasional matters on a pro bono basis. He also has handled at least six major criminal matters in the past few years without charge, including a murder case, an improper interrogation case, and a wrongful conviction. He has received many letters from prisoners, tried to respond to each one with legal advice, and aided a soon-to-be released prisoner with estate and housing issues. (Tr. 1289-91, 1296-1301).

Respondent testified that he cooperated with the ARDC, understands his obligation to maintain the integrity of the profession, accepts responsibility for his wrongful acts, and realizes he let himself, his family, and the profession down. He knows he should not have called

Szczesniak a scam artist, is sick about his language, and has apologized to Szczesniak's lawyer, the appellate court, and the ARDC. With respect to the Gamon matter, he was trying to protect his client and felt he had an obligation to inform the court of Niro McAndrews' actions. He does not feel his filing of the attorney lien harmed his client or the case. As to the Fanady case, he does not believe he committed any ethical violations. (Tr. 1026-27, 1287-88, 1304-10, 1647).

Respondent testified he was bullied as a child, and felt an element of bullying behavior in the Twyman and Gamon cases. If he is confronted with contentious situations now, he brings in another lawyer to respond or consults other lawyers for advice. He knows his comments can become public, and would not insult anyone in an email. (Tr. 1012-14, 1284-86, 1531, 1668-69).

The Illinois Supreme Court suspended Respondent on an interim basis on June 19, 2019. Respondent described the suspension as personally and financially devastating, and he has suffered stress and embarrassment at not being able to help his clients. (Tr. 1301-1303, 1532).

Seven character witnesses (including five attorneys, a former FBI agent and a translator), most of whom have known Respondent for a considerable length of time, testified that based on their personal experience Respondent is an honest individual. Other positive traits mentioned by various witnesses were Respondent's willingness to mentor young attorneys, his professionalism, his passion in representing clients and his remorse for his conduct. Several of the witnesses had knowledge of Respondent's good reputation in the broader community, including one witness who testified Respondent is well-known and highly respected in the Arab community and provides services to immigrants without charge. Most of the witnesses testified their opinion of Respondent is unchanged by the allegations brought by the Administrator. (Tr. 740-890).

Several witnesses involved in the Twyman, Gamon and Fanady matters testified about the effect of Respondent's actions. Peter Lubin testified Respondent's actions caused 200 docket

entries, enormous attorney fees, psychological stress on both himself and his client, harm to his reputation, and a delay in resolving the case. Donald Szczesniak stated Respondent's accusations impacted his family and finances, but did not cause him to have a negative view of attorneys. Matthew McAndrews testified he spent tens of hours protecting highly confidential information in the Gamon matter and then spent more time and money defending himself, his firm, and his client against baseless charges and further disclosure of confidential information in a state court action brought by Respondent. (Tr. 225-34, 567, 666, 675, 692).

Gina Fanady believed Respondent's misstatements and lies in her divorce matter undermined the legitimacy of the profession and she now looks less favorably on lawyers. Her attorney, John Kay, testified some of Respondent's behavior was unprofessional, and his reputation in the legal community is not favorable. (Tr. 352-53, 1720).

In April 2013, Respondent and his opposing counsel were disqualified from appearing in a state court matter due to their uncivil and outrageous behavior. In a memorandum opinion, the judge described the unsuccessful steps he took to curb counsels' behavior, including admonishing them repeatedly, increasing the visibility of courtroom security and holding depositions in the courtroom. (Tr. 1402-1408, 1661; Adm. Ex. 5).

In March 2015, Respondent sent an email to an attorney in a matter unrelated to the current proceeding, accusing him of intentionally lying and being learning disabled. Respondent claimed he was just kidding with a friend. In another unrelated matter, between May and August 2016, Respondent sent emails to an attorney accusing him of "churning up a huge bill" and being obese, and referring to another attorney as an "obnoxious, fat slob." Respondent acknowledged he lost his temper in that case, but noted the litigation was hard-fought and lengthy, and the opposing counsel was a bully. (Tr. 1381, 1393-1400, 1539-40, 1663-67; Adm. Exs. 65, 67).

Prior Discipline

On January 20, 2004 the Illinois Supreme Court suspended Respondent for three months for misconduct that occurred in 2000. In re Brodsky, 01 CH 42, M.R. 19007 (Jan. 20, 2004). In that matter Respondent failed to maintain approximately $23,000 of client estate funds in a separate identifiable trust account and converted those funds by keeping the money in a safe in his office. No deceitful motive was ascribed to his conduct or to his signing of another person's name in order to withdraw the funds from a bank, as the Hearing Board accepted his explanation that he was trying to protect the funds from forfeiture to the state. (Hearing Bd. at 14-16).

RECOMMENDATION

Having concluded that Respondent engaged in misconduct, we must determine the appropriate discipline. In so doing, we note the purpose of these proceedings is not to punish, but rather to safeguard the public, maintain the integrity of the profession and protect the administration of justice from reproach. In re Timpone, 157 Ill. 2d 178 (1993).

In arriving at the appropriate discipline, we consider those circumstances which may mitigate and/or aggravate the misconduct. In re Witt, 145 Ill. 2d 380, 398 (1991). In mitigation, Respondent cooperated in these proceedings, presented seven character witnesses, and testified to his pro bono legal work, particularly in the areas of immigration and criminal defense. See In re Clayter, 78 Ill. 2d 276 (1980). Respondent also acknowledged some inappropriate conduct and apologized for those actions. His remorse struck us as being more obligatory than heartfelt, however, and his acknowledgements are offset by his failure to recognize other wrongdoing, particularly in the Gamon matter.

In aggravation, we consider any harm or risk of harm that was caused by Respondent's conduct. See In re Saladino, 71 Ill. 2d 263 (1978) (discipline should be "closely linked to the harm caused or the unreasonable risk created by the [attorney's] lack of care"). In Counts I and

III, Respondent's written attacks on Lubin, Szczesniak and Fanady, which were publicized in filings or emails, placed those individuals' reputations at risk and caused them undue stress. Szczesniak also suffered financially, as he had to hire a lawyer to represent him against Respondent's spurious allegations. As to Count II, Respondent's disclosure of confidential information jeopardized the ability of his client to obtain funding for expensive litigation. Finally, Respondent's conduct caused significant outlays of time and expense by courts that dealt with his frivolous filings and heard motions to protect confidential information that he disclosed.

Another factor in aggravation is Respondent's pattern of behavior. Respondent's misconduct was not an isolated instance; rather his actions reflect repeated misdeeds involving three client matters spanning a period of about eighteen months. See In re Lewis, 38 Ill. 2d 310 (1990). The pattern was further confirmed by evidence that he engaged in uncivil behavior in a litigation matter as early as 2013, which led a judge to remove him from the case. Rather than checking himself after that occurrence, he engaged in the bullying tactics seen in this proceeding as well as in other unrelated cases. Likewise, his pattern of revealing confidential information extended beyond the federal litigation in the Gamon case, as he continued to disclose the same protected information in an action he initiated in state court.

We also consider, in aggravation, Respondent's prior discipline. We are mindful that the nature of the prior misconduct and the time between it and the current misconduct are elements that affect this factor's weight. See In re Shelton, 2013 PR 00039, M.R. 27712 (Jan. 21, 2016) (Hearing Bd. at 74-75). In 2004 Respondent was suspended for three months for mishandling $23,000 of client funds, with no dishonesty involved. As his actions in that matter were dissimilar to his present misconduct and a significant amount of time has since passed, we give little weight to his prior discipline. We note, however, that the earlier case confirms our opinion

that Respondent will not hesitate to use improper means to achieve a result which he misguidedly believes is justified.

The Administrator urged us to recommend Respondent be suspended for two years until further order of the Court. Respondent, while disputing most charges of misconduct, acknowledged his actions regarding Szczesniak warrant some discipline. He disagreed that a harsh sanction was required or that any suspension should continue until further order of Court.

We recognize that the transgressions in this case, if considered separately and not aggravated by other circumstances, might warrant a modest sanction. Discipline is being imposed in this case for a combination of misconduct that includes filing frivolous pleadings, degrading others, failing to withdraw and continuing to represent a client after being discharged, failing to return documents to a client, disclosing confidential information, and prejudicing the administration of justice.

We look to the following cases for guidance. In In re Greanias, 01 SH 117, M.R. 19079 (Jan. 20, 2004) the attorney filed lawsuits against Commissioners of the Industrial Commission as well as lawyers and laypersons, accusing them of fraud, conspiracy and racketeering. The lawsuits were groundless, intended to embarrass, delay and burden others, filed with reckless disregard for the truth, and prejudicial to the administration of justice. The Hearing Board was concerned the attorney did not understand her misconduct and would not change her ways, and thus determined she should not be allowed to practice until she proved she will not engage in similar misconduct. The attorney was suspended for two years until further order of the Court.

In In re Cudzik, 99 RC 1511, M.R. 16152 (Nov. 19, 1999), a reciprocal discipline case, the attorney was suspended for three years for using confidential information of a former client to her disadvantage; representing a former client's ex-husband for the purpose of harassing the

former client; filing an action without a good basis for doing so; engaging in a conflict of interest with respect to a former client; and attempting to settle litigation after being discharged. The attorney, who had been previously reprimanded and admonished, was acting from revenge.

Finally, in In re Ditkowsky, 2012PR00014, M.R. 26516 (March 14, 2014), the attorney was suspended for four years until further order of Court for sending hundreds of emails falsely alleging corruption and criminal conduct by guardians ad litem, judges, and others; making misrepresentations to a physician; and threatening criminal charges to gain an advantage in a civil case. His actions were not motivated by personal gain; rather, his baseless accusations caused him to lose perspective. In aggravation, he lacked understanding of his actions, failed to express remorse, and filed frivolous pleadings in his disciplinary case. His previous discipline, which was dissimilar and occurred twenty years earlier, was given little weight.

After considering the foregoing cases, Respondent's rule violations in three separate matters, and the mitigating and aggravating factors, we conclude that a suspension of two years is warranted. We further believe the suspension should continue until further order of the Court. The evidence was replete with examples of Respondent's aggressive tactics and relentless vindictiveness. That mindset, combined with his demonstrated pattern of behavior, his failure to recognize the wrongfulness of much of his misconduct and his lack of sincere remorse, leaves us skeptical that he will change his tactics. See In re Houdek, 113 Ill. 2d 323 (1986) (suspension until further order warranted by lack of evidence that attorney is willing or able to meet professional standards of conduct in the future). In fact, he was not at all deterred by the sanctions hearing in the Twyman case, as shortly thereafter he sent the offensive email in the Fanady matter. The fear that Respondent will engage in future misconduct and thereby place the public at risk is reason for the suspension to continue until further order. The steps Respondent

has taken to curb his behavior are not enough to convince us otherwise, and therefore we conclude he should prove his rehabilitation in a reinstatement proceeding.

Accordingly, we recommend that Respondent Joel Alan Brodsky be suspended for two years until further order of the Court, retroactive to the date of his interim suspension.

Respectfully submitted,

Carl (Carlo) E. Poli
Giel Stein
Gerald M. Crimmins

CERTIFICATION

I, Kenneth G. Jablonski, Clerk of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and keeper of the records, hereby certifies that the foregoing is a true copy of the Report and Recommendation of the Hearing Board, approved by each Panel member, entered in the above entitled cause of record filed in my office on June 23, 2020.

/s/ Kenneth G. Jablonski

Kenneth G. Jablonski, Clerk of the
Attorney Registration and Disciplinary
Commission of the Supreme Court of Illinois

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