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JUDICIAL ETHICS COMMITTEE
ADVISORY OPINION NO. 12-01

October 23, 2012

The Judicial Ethics Committee has been asked to provide an ethics opinion as to whether judges may utilize social media such as Facebook, Twitter, LinkedIn, and MySpace and, if so, the extent to which they may participate. As we will explain, while the Code of Judicial Conduct allows judges to do so, it must be done cautiously. For the purposes of this opinion, we shall utilize Facebook to refer to social media, for it is one of the most widely-used sites and appears to operate in a fashion similar to others.

Maryland Judicial Ethics Committee Opinion No. 2012-07 explains the services offered by Facebook:

> Facebook is used by millions of people worldwide. After joining this networking site, participants create personal profile pages containing various types of information about themselves, and then send "friend requests" to others, through a process known as "friending." Typically, "Facebook friends" are people who knew one another before joining the site, have mutual acquaintances and/or common interests. By becoming "friends," they are able to see photos, videos and other information posted by or about one [an]other on their respective Facebook pages. Many people post their thoughts, views and opinions on almost any subject, as well as details of their daily lives. Moreover, unless specific privacy settings are used to limit those with whom information is shared, others in the network can view that information. Thus, information posted by a judge on a social networking site can be quickly and widely disseminated, and possibly beyond its intended audience.

Several provisions of the Code of Judicial Conduct are relevant to this question.

Tennessee Supreme Court Rule 10, Canon 1, Rule 1.2 requires that "judge[s] shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Comments to this rule provide, in pertinent part, Comment [1], that it applies to "both the professional and personal conduct of a judge"; Comment [2], that "[a] judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens"; Comment [3], "[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary"; and Comment [5], that a judge must avoid "conduct [that] would create in reasonable minds a perception that the judge violated [the Code of Judicial Conduct] or engaged in other conduct that reflects adversely on the judge's honesty,

impartiality, temperament, or fitness to serve as a judge."

Rule 1.3 provides that "[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

Canon 2, Rule 2.4(B) and (C) provides, in part, that "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment"; and that "[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."

Rule 2.9(A) provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter[.]"

Rule 2.11 sets out the procedures for disqualification in situations where the judge has a conflict or there is an appearance that this is the case. Of particular relevance to a judge's use of social media are subsections (A)(1) and (A)(5), providing that the impartiality of a judge might be reasonably questioned if it appears the judge "has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding"; or, the judge "has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." Additionally, a judge's use of social media may require that the judge "disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." Rule 2.11, Comment [5].

Canon 3, Rule 3.1 sets out the extent to which judges may participate in non-judicial activities:

> A judge may engage in personal or extrajudicial activities, except as prohibited by law or this Code. However, when engaging in such activities, a judge shall not:
>
> (A) participate in activities that will interfere with the proper and timely performance of the judge's judicial duties;
>
> (B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality[.]

Judicial ethics committees of several states have addressed this question, with the majority concluding that judges may utilize social networking sites, but must do so with caution. See Maryland Judicial Ethics Committee Opinion No. 2012-07 ("While they must be circumspect in all of their activities, and sensitive to the impressions such activities may create, judges may and do continue to socialize with attorneys and others.); Florida Judicial Ethics Advisory Opinion 2009-20 (while judges may participate in social media, they may not "friend" lawyers who may appear before them); Oklahoma Judicial Ethics Advisory Opinion 2011-3 (judges may participate in social media, "friending" those who do not "regularly appear or [are] unlikely to appear in the Judge's court"); Massachusetts Judicial Ethics Committee Opinion 2011-6 (judges may participate in social media but "may only 'friend' attorneys as to whom they would recuse themselves when those attorneys appeared before them").

California Judicial Ethics Committee Opinion 66 sets out several matters a judge should consider before participating in a particular social media site:

(1) the nature of the site, the more personal sites creating a greater likelihood that "friending" an attorney would create an appearance of favoritism;

(2) the number of persons "friended" by the judge, with the greater the number of friends resulting in less likelihood of an appearance that any one "friend" would be in a position to influence the judge;

(3) the judge's procedure for deciding whom to friend, such as allowing only some attorneys to become "friends," while excluding others; and

(4) how regularly an attorney who is a friend appears in the judge's court, the more frequent the appearance, the greater the likelihood of the appearance of favoritism.

Maryland Judicial Ethics Committee Opinion No. 2012-07 concludes that "the mere fact of a social connection" does not create a conflict, but, quoting California, "'[i]t is the *nature* of the [social] interaction that should govern the analysis, not the *medium* in which it takes place.'"

Accordingly, we conclude that, while judges may participate in social media, they must do so with caution and with the expectation that their use of the media likely will be

scrutinized various reasons by others. Because of constant changes in social media, this committee cannot be specific as to allowable or prohibited activity, but our review, as set out in this opinion, of the various approaches taken by other states to this area makes clear that judges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made. In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.

FOR THE COMMITTEE:

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ALAN E. GLENN, JUDGE

CONCUR:

CHANCELLOR THOMAS R. FRIERSON, II
JUDGE CHERYL A. BLACKBURN
JUDGE JAMES F. RUSSELL
JUDGE BETTY THOMAS MOORE
JUDGE PAUL B. PLANT
JUDGE SUZANNE BAILEY

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AMERICAN BAR ASSOCIATION

Formal Opinion 462 **February 21, 2013**
Judge's Use of Electronic Social Networking Media

A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.[1]

In this opinion, the Committee discusses a judge's participation in electronic social networking. The Committee will use the term "electronic social media" ("ESM") to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons. [2]

Judges and Electronic Social Media

In recent years, new and relatively easy-to-use technology and software have been introduced that allow users to share information about themselves and to post information on others' social networking sites. Such technology, which has become an everyday part of worldwide culture, is frequently updated, and different forms undoubtedly will emerge.

Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch. This opinion examines to what extent a judge's participation in ESM raises concerns under the Model Code of Judicial Conduct.

Upon assuming the bench, judges accept a duty to "respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."[3] Although judges are full-fledged members of their communities, nevertheless, they "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens…."[4] All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner "that promotes public confidence in the independence, integrity, and impartiality of the judiciary," and must "avoid impropriety and the appearance of impropriety."[5] This requires that the judge be sensitive to the appearance of relationships with others.

The Model Code requires judges to "maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives."[6] Thus judges must be very thoughtful in their interactions with others, particularly when using ESM. Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to

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[1] This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2012. The laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] This opinion does not address other activities such as blogging, participation on discussion boards or listserves, and interactive gaming.

[3] Model Code, Preamble [1].

[4] Model Code Rule 1.2 cmt. 2.

[5] Model Code Rule 1.2. *But see* Dahlia Lithwick and Graham Vyse, "Tweet Justice," SLATE (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to "de-friend" her from their ESM page when they're trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), *article available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.

[6] Model Code, Preamble [2].

compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.[7]

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.[8]

A judge who participates in ESM should be mindful of relevant provisions of the Model Code. For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed. The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.

There also may be disclosure or disqualification concerns regarding judges participating on ESM sites used by lawyers and others who may appear before the judge.[9] These concerns have been addressed in judicial ethics advisory opinions in a number of states. The drafting committees have expressed a wide range of views as to whether a judge may "friend" lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.[10] A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.[11] In this regard, context is significant.[12] Simple

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[7] *See* Model Code Rule 1.2 cmt. 3. *Cf.* New York Jud. Eth. Adv. Op. 08-176 (2009) (judge who uses ESM should exercise appropriate degree of discretion in how to use the social network and should stay abreast of features and new developments that may impact judicial duties). Regarding new ESM website developments, it should be noted that if judges do not log onto their ESM sites on a somewhat regular basis, they are at risk of not knowing the latest update in privacy settings or terms of service that affect how their personal information is shared. They can eliminate this risk by deactivating their accounts.

[8] Jeffrey Rosen, "The Web Means the End of Forgetting", N.Y. TIMES MAGAZINE (July 21, 2010) *accessible at* http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all.

[9] *See, e.g.,* California Judges Ass'n Judicial Ethics Comm. Op. 66 (2010) (judges may not include in social network lawyers who have case pending before judge); Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (2009) (judge may not include lawyers who may appear before judge in social network or permit such lawyers to add judge to their social network circle); Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (judges should be mindful of "whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship'" that should be disclosed and/or require recusal); Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline Op. 2010-7 (2010) (judge may have ESM relationship with lawyer who appears as counsel in case before judge as long as relationship comports with ethics rules); South Carolina Jud. Dep't Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2009 (magistrate judge may have ESM relationship with lawyers as long as they do not discuss anything related to judge's judicial position). *See also* John Schwartz, "For Judges on Facebook, Friendship Has Limits," N.Y. TIMES, Dec. 11, 2009, at A25. *Cf.* Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-04 (2010) (judge's judicial assistant may add lawyers who may appear before judge to social networking site as long as the activity is conducted entirely independent of judge and without reference to judge or judge's office).

[10] *See* discussion in Geyh, Alfini, Lubet and Shaman, JUDICIAL CONDUCT AND ETHICS (5th Edition, forthcoming), Section 10.05E.

[11] California Judges Assn. Judicial Ethics Comm. Op. 66 (need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent). *See also* New York Jud. Eth. Adv. Op. 08-176 (judge must consider whether any online connections, alone or in combination with other facts, rise to level of close social relationship requiring disclosure and/or recusal); Ohio Opinion 2010-7 (same).

[12] Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-06 (2010) (judge who is member of voluntary bar association not required to drop lawyers who are also members of that organization from organization's ESM site; members use the site to communicate among themselves about organization and other non-legal matters). *See also* Raymond McKoski,

designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person. [13]

Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.[14] The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally. [15] A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification.[16] For example, a judge may decide to disclose that the judge and a party, a party's lawyer or a witness have an ESM connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge's ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.

Judges' Use of Electronic Social Media in Election Campaigns

Canon 4 of the Model Code permits a judge or judicial candidate to, with certain enumerated exceptions, engage in political or campaign activity. Comment [1] to Rule 4.1 states that, although the Rule imposes "narrowly tailored restrictions" on judges' political activities, "to the greatest extent possible," judges and judicial candidates must "be free and appear to be free from political influence and political pressure."

Rule 4.1(A)(8) prohibits a judge from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4. The Code does not address or restrict a judge's or campaign committee's method of communication. In jurisdictions where judges are elected, ESM has become a campaign tool to raise campaign funds and to provide information about the candidate.[17] Websites and ESM promoting the candidacy of a judge or judicial candidate may be

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"Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from 'Big Judge Davis'," 99 KY. L.J. 259, 291 (2010-11) (nineteenth century judge universally recognized as impartial despite off-bench alliances, especially with Abraham Lincoln); Schwartz, *supra* note 9 ("Judges do not drop out of society when they become judges…. The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.") (quoting New York University Prof. Stephen Gillers).

[13] *See* Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (designation as an ESM follower does not, in and of itself, indicate the degree or intensity of judge's relationship with the person).

[14] *See, e.g.*, New York Judicial Ethics Advisory Opinion 08-176, *supra* n. 8. *See also* Ashby Jones, "Why You Shouldn't Take It Hard If a Judge Rejects Your Friend Request," WALL ST. J. LAW BLOG (Dec. 9, 2009) ("'friending' may be more than say an exchange of business cards but it is well short of any true friendship"); Jennifer Ellis, "Should Judges Recuse Themselves Because of a Facebook Friendship?" (Nov. 2011) (state attorney general requested that judge reverse decision to suppress evidence and recuse himself because he and defendant were ESM, but not actual, friends), *available at* http://www.jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/.

[15] *See* Jeremy M. Miller, "Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)," 33 PEPPERDINE L. REV. 575, 578 (2012) ("Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge").

[16] Rule 2.11 cmt. 5.

[17] In a recent survey, for judges who stood for political election, 60.3% used social media sites. 2012 CCPIO New Media and Courts Survey: A Report of the New Media Committee of the Conference of Court Public Information Officers (July 31, 2012), *available at* http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/.

established and maintained by campaign committees to obtain public statements of support for the judge's campaign so long as these sites are not started or maintained by the judge or judicial candidate personally.[18]

Sitting judges and judicial candidates are expressly prohibited from "publicly endorsing or opposing a candidate for any public office."[19] Some ESM sites allow users to indicate approval by applying "like" labels to shared messages, photos, and other content. Judges should be aware that clicking such buttons on others' political campaign ESM sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office.[20] On the other hand, it is unlikely to raise an ethics issue for a judge if someone "likes" or becomes a "fan" of the judge through the judge's ESM political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.

Judges may privately express their views on judicial or other candidates for political office, but must take appropriate steps to ensure that their views do not become public.[21] This may require managing privacy settings on ESM sites by restricting the circle of those having access to the judge's ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

Conclusion

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.

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[18] Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-28 (July 23, 2010).
[19] Model Code Rule 4.1(A)(3).
[20] *See* "Kansas judge causes stir with Facebook `like'," The Associated Press, July 29, 2012, *available at* http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook__like_.html.
[21] *See* Nevada Comm'n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) ("In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.").

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The Florida Bar Standing Committee on Advertising
Guidelines for Networking Sites

(Revised April 16, 2013)

Networking sites accessed over the Internet have proliferated in the last several years. There are numerous networking sites of various types. Some networking sites were designed for social purposes, such as Facebook, MySpace, and Twitter. Notwithstanding their origins as social media, many use these social networking sites for commercial purposes. Other networking sites are specifically intended for commercial purposes, such as LinkedIn. In a networking site, a person has the capability of building a profile that includes information about that person. That profile is commonly referred to as the individual's "page." The individual chooses how much of the information on his or her page, if any, is available to all viewers of the site. Some individuals provide access to no information about themselves except to those other individuals that are invited to view the information. Others provide full access to all information about themselves to anyone on the networking site. Others provide access to some information for everyone, but limit access to other information only to those invited to view the information. Additionally, some individuals set their pages to permit posting of information by third parties. Networking sites provide methods by which users of the site may interact with one another, including e-mail and instant messaging. Twitter is a networking site in which brief posts of no more than 140 characters are sent to followers, or persons who have specifically requested to receive the postings of particular persons on Twitter. Twitter postings are generally public, but a person who posts via Twitter can choose to have Twitter postings sent only to that person's followers and not generally accessible to the public.

The SCA has reviewed the networking media, and issues the following guidelines for lawyers using them.

Pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules.

Pages appearing on networking sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules. These pages must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21. Regulations include prohibitions against any misleading information, which includes references to past results that are not objectively verifiable, predictions or guaranties of results, and testimonials that fail to comply with the requirements listed in Rule 4-7.13(b)(8). Regulations also include prohibitions against statements characterizing skills, experience, reputation or record unless they are objectively verifiable. Lawyers and law firms should review the lawyer advertising rules in their entirety to comply with their requirements. Additional information is available in the *Handbook on Lawyer Advertising and Solicitation* on the Florida Bar website.

Invitations sent directly from a social media site via instant messaging to a third party to view or link to the lawyer's page on an unsolicited basis for the purpose of obtaining, or attempting to

obtain, legal business are solicitations in violation of Rule 4-7.18(a), unless the recipient is the lawyer's current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer. Any invitations to view the page sent via e-mail must comply with the direct e-mail rules if they are sent to persons who are not current clients, former clients, relatives, other lawyers, persons who have requested information from the lawyer, or persons with whom the lawyer has a prior professional relationship. Direct e-mail must comply with the general advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as well as additional requirements set forth in Rule 4-7.18(b). Information on complying with the direct e-mail rules is available in the *Handbook on Lawyer Advertising and Solicitation* and in the Direct E-Mail Quick Reference Checklist on the Florida Bar website.

Although lawyers are responsible for all content that the lawyers post on their own pages, a lawyer is not responsible for information posted on the lawyer's page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules. If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page. If the lawyer becomes aware that a third party has posted information about the lawyer's services on a page not controlled by the lawyer that does not comply with the lawyer advertising rules, the lawyer should ask the third party to remove the non-complying information. In such a situation, however, the lawyer is not responsible if the third party does not comply with the lawyer's request.

Lawyers who post information to Twitter whose postings are generally accessible are subject to the lawyer advertising regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21 as above. A lawyer may post information via Twitter and may restrict access to the posts to the lawyer's followers, who are persons who have specifically signed up to receive posts from that lawyer. If access to a lawyer's Twitter postings is restricted to the followers of the particular lawyer, the information posted there is information at the request of a prospective client and is subject to the lawyer advertising rules, but is exempt from the filing requirement under Rule 4-7.20(e~~).~~ Any communications that a lawyer makes on an unsolicited basis to prospective clients to obtain "followers" is subject to the lawyer advertising rules, as with any other social media as noted above. Because of Twitter's 140 character limitation, lawyers may use commonly recognized abbreviations for the required geographic disclosure of a bona fide office location by city, town or county as required by Rule 4-7.12(a).

Finally, the SCA is of the opinion that a page on a networking site is sufficiently similar to a website of a lawyer or law firm that pages on networking sites are not required to be filed with The Florida Bar for review.

In contrast with a lawyer's page on a networking site, a banner advertisement posted by a lawyer on a social networking site is subject not only to the requirements of Rules 4-7.11 through 4-7.18 and 4-7.21, but also must be filed for review unless the content of the advertisement is limited to the safe harbor information listed in Rule 4-7.16. See Rules 4-7.19 and 4-7.20(a).

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PRESENT: All the Justices

HORACE FRAZIER HUNTER

v. Record No. 121472

OPINION BY
JUSTICE CLEO E. POWELL
February 28, 2013

VIRGINIA STATE BAR,
EX REL. THIRD DISTRICT COMMITTEE

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Kenneth R. Melvin, Alfred D. Swersky,
and Von L. Piersall, Jr., Judges Designate

In this appeal of right by an attorney from a Virginia State Bar ("VSB") disciplinary proceeding before a three judge panel appointed pursuant to Code § 54.1-3935, we consider whether an attorney's blog posts are commercial speech, whether an attorney may discuss public information related to a client without the client's consent, and whether the panel ordered the attorney to post a disclaimer that is insufficient under Rule 7.2(a)(3) of the Virginia Rules of Professional Conduct.

I. FACTS AND PROCEEDINGS

Horace Frazier Hunter, an attorney with the law firm of Hunter & Lipton, PC, authors a trademarked blog[1] titled "This Week in Richmond Criminal Defense," which is accessible from his law firm's website, www.hunterlipton.com. This blog, which is

[1] A "blog" is a shortened, colloquial reference for the term "weblog," and is defined as " 'a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer; also: the contents of such a site.' " White v. Baker, 696 F.Supp.2d 1289, 1310 (N.D. Ga. 2010) (quoting Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/blog (last visited January 31, 2013)).

not interactive, contains posts discussing a myriad of legal issues and cases, although the overwhelming majority are posts about cases in which Hunter obtained favorable results for his clients. Nowhere in these posts or on his website did Hunter include disclaimers.

As a result of Hunter's blog posts on his website, the VSB launched an investigation. During discussions with the VSB about whether his blog constituted legal advertising, Hunter wrote a letter to the VSB offering to post a disclaimer on one page of his website:

> "This Week in Richmond Criminal Defense is not an advertisement[;] it is a blog. The views and opinions expressed on this blog are solely those of attorney Horace F. Hunter. The purpose of these articles is to inform the public regarding various issues involving the criminal justice system and should not be construed to suggest a similar outcome in any other case."

However, the negotiations stalled and no disclaimers were posted at that time.

On March 24, 2011, the VSB charged Hunter with violating Rules 7.1, 7.2, 7.5,[2] and 1.6 by his posts on this blog. Specifically, the VSB argued that he violated rules 7.1 and 7.2 because his blog posts discussing his criminal cases were

[2] The District Committee ultimately did not find by clear and convincing evidence that Hunter violated Rule 7.5 and dismissed that charge.

inherently misleading as they lacked disclaimers.[3] The VSB also asserted that Hunter violated Rule 1.6 by revealing information that could embarrass or likely be detrimental to his former clients by discussing their cases on his blog without their consent.

In a hearing on October 18, 2011, the VSB presented evidence of Hunter's alleged violations. The VSB presented a former client who testified that he did not consent to information about his cases being posted on Hunter's blog and believed that the information posted was embarrassing or detrimental to him, despite the fact that all such information had previously been revealed in court. The VSB investigator testified that other former clients felt similarly. The VSB also entered all of the blog posts Hunter had posted on his blog to date. At that time, none of the posts entered contained disclaimers. Of these thirty unique posts, only five discussed legal, policy issues. The remaining twenty-five discussed cases. Hunter represented the defendant in twenty-two of these cases and identified that fact in the posts. In nineteen of these twenty-two posts, Hunter also specifically named his law firm. One of these posts described a case where a family hired

[3] Although some of Hunter's blog posts now contain disclaimers, not all do and the disclaimers that are present were not added until after the VSB brought disciplinary charges against Hunter.

Hunter to represent them in a wrongful death suit and the remaining twenty-one of these posts described criminal cases. In every criminal case described, Hunter's clients were either found not guilty, plea bargained to an agreed upon disposition, or had their charges reduced or dismissed.

At the hearing, Hunter testified that he has many reasons for writing his blog - including marketing, creation of a community presence for his firm, combatting any public perception that defendants charged with crimes are guilty until proven innocent, and showing commitment to criminal law. Hunter stated that he had offered to post a disclaimer on his blog, but the offered disclaimer was not satisfactory to the VSB. Hunter admitted that he only blogged about his cases that he won. He also told the VSB that he believed that using the client's name is important to give an accurate description of what happened. Hunter told the VSB that he did not obtain consent from his clients to discuss their cases on his blog because all the information that he posted was public information.

Following the hearing, the VSB held that Hunter violated Rule 1.6 by "disseminating client confidences" obtained in the course of representation without consent to post. Specifically, the VSB found that the information in Hunter's blog posts "would be embarrassing or be likely to be detrimental" to clients and he did not receive consent from his clients to post such

information. The VSB further held that Hunter violated Rule 7.1. The VSB's conclusion that Hunter's website contained legal advertising was based on its factual finding that "[t]he postings of [Hunter's] case wins on his webpage advertise[d] cumulative case results." Moreover, the VSB found that at least one purpose of the website was commercial. The VSB further held that he violated Rule 7.2 by "disseminating case results in advertising without the required disclaimer" because the one that he proposed to the VSB was insufficient. The VSB imposed a public admonition with terms including a requirement that he remove case specific content for which he has not received consent and post a disclaimer that complies with Rule 7.2(a)(3) on all case-related posts.

Hunter appealed to a three judge panel of the circuit court and the court heard argument. The court disagreed with Hunter that de novo was the proper standard of review and instead applied the following standard: "whether the decision is contrary to the law or whether there is substantial evidence in the record upon which the district committee could reasonably have found as it did." The court further ruled that the VSB's interpretation of Rule 1.6 violated the First Amendment and dismissed that charge. The court held VSB's interpretation of Rules 7.1 and 7.2 do not violate the First Amendment and that the record contained substantial evidence to support the VSB's

determination that Hunter had violated those rules. The court imposed a public admonition and required Hunter to post the following disclaimer: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case." This appeal followed.

II. ANALYSIS

A. Whether "[t]he Ruling of the Circuit Court finding a violation of Rules 7.1(a)(4) and 7.2(a)(3) conflicts with the First Amendment to the Constitution of the United States."

Rule 7.1(a)(4), which is the specific portion of the Rule that the VSB argued that Hunter violated, states:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> . . . .
>
> (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

The VSB also argues that Hunter violated the following subsection of Rule 7.2(a)(3):

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through

> written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> . . . .
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

In response to these allegations, Hunter contends that speech concerning the judicial system is "quintessentially 'political speech'" which is within the marketplace of ideas. Hunter asserts that the Supreme Court of the United States has twice declined to answer whether political speech is transformed into commercial speech simply because one of multiple motives is commercial. Specifically, he argues that his blog posts are not commercial because

> (1) the [Supreme Court of the United States'] formal commercial speech definitions focus

> heavily on whether the speech does *no more* than propose a commercial transaction; (2) the [Supreme Court of the United States'] commercial speech decisions, to the extent that they discuss motivation at all, have focused on whether the speech is *solely* driven by commercial interest; (3) the [Supreme Court of the United States] has repeatedly insisted that the existence of a commercial motivation does not disqualify speech from the heightened scrutiny protection it would otherwise deserve; (4) the [Supreme Court of the United States] has warned that when commercial and political elements of speech are inextricably intertwined, the heightened protection applicable to the political speech should be applied, lest the political speech be chilled; and (5) the constitutional policy arguments that undergird the reduction of protection for commercial speech have no persuasive force when the content of the speech is political.

The VSB responds that Hunter's blog posts are inherently misleading commercial speech.

"Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which . . . this Court . . . exercise[s] de novo review." Peel v. Atty. Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990). An appellate Court must independently examine the entire record in First Amendment cases to ensure that " 'a forbidden intrusion on the field of free expression' " has not occurred. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)).

Turning to Hunter's argument that his blog posts are

political, rather than commercial, speech, we note that "[t]he existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.' " Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (quoting Ginsburg v. United States, 383 U.S. 463, 474 (1966)). However, when speech that is both commercial and political is combined, the resulting speech is not automatically entitled to the level of protections afforded political speech. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474 (1989).

While it is settled that attorney advertising is commercial speech, Bates v. State Bar of Arizona, 433 U.S. 350, 363-64 (1977), Bates and its progeny were decided in the era of traditional media. In recent years, however, advertising has taken to new forms such as websites, blogs, and other social media forums, like Facebook and Twitter. See generally Spirit Airlines, Inc. v. United States Dep't of Transp., 687 F.3d 403 (D.C. Cir. 2012); QVC Inc. v. Your Vitamins Inc., 439 Fed. Appx. 165 (3d Cir. 2011); Athleta, Inc. v. Pitbull Clothing Co., 2013 U.S. Dist. LEXIS 6867 (C.D. Cal. Jan. 7, 2013).

Thus, we must examine Hunter's speech to determine whether it is commercial speech, specifically, lawyer advertising.

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. To the extent that

> commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

Bigelow, 421 U.S. at 826 (internal citations omitted). Simply because the speech is an advertisement, references a specific product, or is economically motivated does not necessarily mean that it is commercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67 (1983). "The combination of all these characteristics, however, provides strong support for the . . . conclusion that [some blog posts] are properly characterized as commercial speech" even though they also discuss issues important to the public. Id. at 67-68 (emphasis in original).

Certainly, not all advertising is necessarily commercial, e.g., public service announcements. See id. at 66 (holding "[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech"). However, all commercial speech is necessarily advertising. See Webster's Third New International Dictionary 31 (1993) (defining "advertisement" as "a calling attention to or making known[;]an informing or notifying[;] a calling to public attention[;] a statement calling attention to something[;] a public notice; esp[ecially] a paid notice or

announcement published in some public print (as a newspaper, periodical, poster, or handbill) or broadcast over radio or television"). Indeed, the Supreme Court of the United States has said that "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." Bigelow, 421 U.S. at 826.

Here, Hunter's blog posts, while containing some political commentary, are commercial speech. Hunter has admitted that his motivation for the blog is at least in part economic. The posts are an advertisement in that they predominately describe cases where he has received a favorable result for his client. He unquestionably references a specific product, i.e., his lawyering skills as twenty-two of his twenty-five case related posts describe cases that he has successfully handled. Indeed, in nineteen of these posts, he specifically named his law firm in addition to naming himself as counsel.

Moreover, the blog is on his law firm's commercial website rather than an independent site dedicated to the blog. See Howard J. Bashman, How Appealing Blog (Feb. 11, 2013, 9:40 AM), http://howappealing.law.com (an independent blog by a Pennsylvania appellate attorney that is accessible through Law.com at http://legalblogwatch.typepad.com/). The website

uses the same frame[4] for the pages openly soliciting clients as it does for the blog, including the firm name, a photograph of Hunter and his law partner, and a "contact us" form. The homepage of the website on which Hunter posted his blog states only:

> **Do you need Richmond attorneys?**
>
> Hunter & Lipton, CP [sic] is a law practice in Richmond, Virginia specializing in litigation matters from administrative agency hearings to serious criminal cases. As experienced Richmond attorneys, we bring a genuine desire to help those who find themselves in difficult situations. Our partnership was founded on the idea that everyone, no matter what the circumstance, deserves a zealous advocate to fight on his or her behalf.
>
> People make mistakes, and may even find themselves in situations not of their own making. And for these people, the system can be extraordinarily unforgiving and unjust—but you do not have to face this system alone.
>
> **If you find yourself in a difficult legal situation, the Richmond attorneys of Hunter & Lipton, LLP would consider it a privilege to represent you. Please contact our office with any questions or to schedule a consultation.**

This non-interactive blog does not allow for discourse about the cases, as non-commercial commentary often would by allowing readers to post comments. See, e.g., Law.com Legal Blog Watch,

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[4] See Joan M. Reitz, Online Dictionary for Library and Information Science, http://www.abc-clio.com/ODLIS/odlis_F.aspx?#frame (last visited February 25, 2013) (defining frame as "[a] separately scrollable area in the window of a computer application or in a Web page that has been divided into more than one scrollable area").

http://legalblogwatch.typepad.com/; Above the Law, http://abovethelaw.com/. See also June Lester & Wallace C. Koehler, Jr., Fundamentals of Information Studies 102 (2d ed. 2007) (observing that "[i]n contrast to the interaction possible in some other forms of web-published information, blog readers are most frequently permitted to leave comments and create threads of discussion"). Instead, in furtherance of his commercial pursuit, Hunter invites the reader to "contact us" the same way one seeking legal representation would contact the firm through the website.

Thus, the inclusion of five generalized, legal posts and three discussions about cases that he did not handle on his non-interactive blog, no more transform Hunter's otherwise self-promotional blog posts into political speech, "than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." Fox, 492 U.S. at 474-75. Indeed, unlike situations and topics where the subject matter is inherently, inextricably intertwined, Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog. "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." Bolger, 463 U.S. at 68. When considered as a

whole, the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product.

Having determined that Hunter's blog posts discussing his cases are commercial speech,

> we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980); Adams Outdoor Advertising v. City of Newport News, 236 Va. 370, 383, 373 S.E.2d 917, 923 (1988).

The VSB does not contend, nor does the record indicate, that Hunter's posts do not concern lawful activity; rather, the VSB argues that the posts are inherently misleading. While we do not hold that the blog posts are inherently misleading, we do conclude that they have the potential to be misleading. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates, 433 U.S. at 383. Of the thirty posts that were on his blog at the time of the VSB

hearing, twenty-two posts named himself as counsel and discussed cases that he handled. With one exception, in all of these posts, he described the successful results that he obtained for his clients.[5] While the States may place an absolute prohibition on inherently misleading advertising, "the States may not place an absolute prohibition on certain types of potentially misleading information, . . . if the information also may be presented in a way that is not deceptive." In re R.M.J., 455 U.S. 191, 203 (1982). Here, the VSB's own remedy of requiring Hunter to post disclaimers on his blog posts demonstrates that the information could be presented in a way that is not misleading or deceptive.

Thus, we must examine whether the VSB has a substantial governmental interest in regulating these blog posts. Central Hudson, 447 U.S. at 566. The Supreme Court of the United States has recognized that " '[i]f the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.' " Peel, 496 U.S. at 110 (quoting Bates, 433 U.S. at 375). Indeed, the Supreme Court of the United States expressed concern that

[5] In the one case that he does not describe favorable results he has received, he discusses how he has been retained by a family in a wrongful death lawsuit against a police department.

the public may lack the sophistication to discern misstatements as to the quality of a lawyer's services. Bates, 433 U.S. at 383. Therefore, the VSB has a substantial governmental interest in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter.

Because the VSB's governmental interest is substantial, we must now determine "whether the regulation directly advances the governmental interest asserted." Central Hudson, 447 U.S. at 566. The VSB's regulations permit blog posts that discuss specific or cumulative case results but require a disclaimer to explain to the public that no results are guaranteed. Rules 7.1 and 7.2. This requirement directly advances the VSB's governmental interest.

Finally, we must determine whether the VSB's regulations are no more restrictive than necessary. Central Hudson, 447 U.S. at 566. The Supreme Court of the United States has approved the use of disclaimers or explanations. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985); In re R.M.J., 455 U.S. at 203; Bates, 433 U.S. at 384. The disclaimers mandated by the VSB

> shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and

> uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Rule 7.2(a)(3). This requirement ensures that the disclaimer is noticeable and would be connected to each post so that any member of the public who may use the website addresses to directly access Hunter's posts would be in a position to see the disclaimer. Therefore, we hold that the disclaimers required by the VSB are "not more extensive than is necessary to serve that interest." Central Hudson, 447 U.S. at 566.

Hunter's blog posts discuss lawful activity and are not inherently misleading, but the VSB has asserted a substantial governmental interest to protect the public from potentially misleading lawyer advertising. See Central Hudson, 447 U.S. at 566. These regulations directly advance this interest and are not more restrictive than necessary, unlike outright bans on advertising. Id. We thus conclude that the VSB's Rules 7.1 and 7.2 do not violate the First Amendment. As applied to Hunter's blog posts, they are constitutional and the panel did not err.

B. Whether the circuit court erred in holding that the VSB's application of Rule 1.6 to Hunter's blog violated his First Amendment rights.

Rule 1.6(a) states, that with limited exceptions,

> [a] lawyer shall not reveal information protected by the attorney-client privilege under applicable

> law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . .

The VSB argues that the circuit court erred in holding that its interpretation of Rule 1.6 violates the First Amendment and that Hunter violated that rule by disclosing potentially embarrassing information about his clients on his blog "in order to advance his personal economic interests." VSB argues that lawyers, as officers of the Court, are prohibited from engaging in speech that might otherwise be constitutionally protected. Thus, the VSB's interpretation of Rule 1.6 involves two types of information: 1) that which is protected by the attorney-client privilege, and 2) that which is public information but is embarrassing or likely to be detrimental to the client. Hunter is charged with disseminating the later type of information. In response to these allegations, Hunter argues that the VSB's interpretation of Rule 1.6 is unconstitutional because the matters discussed in his blogs had previously been revealed in public judicial proceedings and, therefore, as concluded matters, were protected by the First Amendment. Thus, we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that

is not protected by attorney-client privilege without express consent from that client. We agree with Hunter that it may not.

The cases cited by VSB in support of its position differ from this case in a substantial way; the cases relied upon by VSB involve pending proceedings. It is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a pending case. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1076 (1991).

"[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980). Moreover,

> [a] trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig v. Harney, 331 U.S. 367, 374 (1947). All of Hunter's blog posts involved cases that had been concluded. Moreover, the VSB concedes that all of the information that was contained within

Hunter's blog was public information and would have been protected speech had the news media or others disseminated it. In deciding whether the circuit court erred, we are required to make our "own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978). "At the very least, [the] cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." Gentile, 501 U.S. at 1054. The VSB's interpretation of Rule 1.6 fails these standards even when we

> balance "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved,' "

Id. (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984)). State action that punishes the publication of truthful information can rarely survive constitutional scrutiny. Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979).

The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment.

C. Whether the circuit court erred in requiring Hunter to post a disclaimer on his website that does not comply with the requirements of Rule 7.2(3) and therefore does not eliminate the misleading nature of his blog posts.

The VSB argues that the single disclaimer that the circuit court ordered Hunter to post on his blog was insufficient to comport with Rule 7.2(a)(3) because it did not eliminate the misleading nature of the posts.

As we have already concluded, Hunter's blogs are commercial speech and, thus, constitute lawyer advertising. When advertising cumulative or specific case results, Rule 7.2 requires that a disclaimer

> shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Rule 7.2(a)(3).

Here, the VSB required Hunter to post a disclaimer that complies with Rule 7.2(a)(3) on all case-related posts. This means that Hunter's disclaimers "shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results." Rule 7.2(a)(3). The circuit court, however, imposed the following disclaimer to be posted once: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case."

While the substantive meaning of the imposed disclaimer may conform to the requirements stated in Rule 7.2(a)(3)(i) through (iii), it nevertheless is less than what the rule requires. In contrast to the committee's determination, there is no provision in the circuit court's order requiring that the disclaimer be formatted and presented in the manner required by Rule 7.2(a)(3), and the text of the disclaimer prescribed by the

circuit court is not itself formatted and presented in that manner. Even so, Hunter does not argue that the disclaimer required by the circuit court is an appropriate, less restrictive means of regulating his speech and, therefore, we decline to so hold. Based on the arguments presented to it, the circuit court erred by imposing a disclaimer that conflicted with the rule. See, e.g., Rosillo v. Winters, 235 Va. 268, 272, 367 S.E.2d 717, 719 (1988) (concluding that a circuit court abuses its discretion by "enter[ing an] order . . . dispens[ing] with the requirements of [a] Rule"); Zaug v. Virginia State Bar, 285 Va. ___, ___, ___ S.E.2d ___, ___ (2013) (this day decided) ("The Virginia Rules of Professional Conduct are Rules of this Court.").

III. CONCLUSION

For the foregoing reasons, we hold that Hunter's blog posts are potentially misleading commercial speech that the VSB may regulate. We further hold that circuit court did not err in determining that the VSB's interpretation of Rule 1.6 violated the First Amendment. Finally, we hold that because the circuit court erred in imposing one disclaimer did not fully comply with Rule 7.2(a)(3), we reverse and remand for imposition of disclaimers that fully comply with that Rule.

Affirmed in part,
reversed in part,
and remanded.

JUSTICE LEMONS, with whom JUSTICE McCLANAHAN joins, dissenting in part.

I agree with the majority's resolution of the Rule 1.6 issue. However, I dissent from the majority's determination that Hunter is guilty of violating Rules 7.1(a)(4) and 7.2(a)(3) and that Hunter must post a disclaimer that complies with Rule 7.2(a)(3).

Rule 7.1 governs communications concerning a lawyer's services. Rule 7.1(a)(4) states:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
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> . . . .
>
> (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2 is only applicable to advertisements. Rule 7.2(a)(3) states:

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its

> entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
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> . . . .
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.

The First Amendment

I believe that the articles on Hunter's blog are political speech that is protected by the First Amendment. The Bar concedes that if Hunter's blog is political speech, the First

Amendment protects him and the Bar cannot force Hunter to post an advertising disclaimer on his blog.

Speech concerning the criminal justice system has always been viewed as political speech. "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). As political speech, Hunter uses his blog to give detailed descriptions of how criminal trials in Virginia are conducted. He notes how the acquittal of some of his clients has exposed flaws in the criminal justice system.

The majority asserts that because Hunter only discusses his victories, his blog is commercial. The majority does not give sufficient credit to the fact that Hunter uses the outcome of his cases to illustrate his views of the system. Hunter testified that one of the reasons he maintained the blog was to combat "the public perception that is clearly on the side that people are guilty until they're proven innocent." For example, when discussing one of the cases where his client was found not guilty, he concludes the post by explaining that this case is an "example of how innocent people are often accused of committing some of the most serious crimes. That is why it is important not to judge the guilt of an individual until all the evidence has been presented both for and against him."

The majority compares Hunter's detailed discussion of criminal trials and how these outcomes illustrate the need to hold government to its burden of proof, with "opening [a] sales presentation[] with a prayer or a Pledge of Allegiance." The majority proposes that his blog is not transformed into political speech simply because he included eight posts about legal issues and cases he was not involved in. However, the twenty-two posts discussing criminal trials in Virginia are political speech in their own right, and are not dependent upon the content of the other eight posts.

The majority also focuses on the location of Hunter's blog, and asserts that because the blog is accessed through the law firm's website and is not interactive, that demonstrates the blog is commercial in nature. While going through the law firm's website is one way to access the blog, it is also possible to go directly to the blog without navigating through the firm's website. Further, the fact that the blog is not interactive in no way commercializes the speech.

Many businesses have websites. It is not uncommon for websites to include links to related news articles or editorials. Merely because an article may be accessed through a commercial portal does not change the content of the article. It is the content of speech and the motivation of the speaker

that determines the level of protection to which speech is entitled.

Hunter conceded that one of the purposes of the blog was marketing. Although the United States Supreme Court has never clearly decided whether political speech is transformed into commercial speech because one of the multiple motivations of the speaker is marketing and self-promotion, its jurisprudence leads to the conclusion that Hunter's speech is not commercial.

The traditional test for determining whether speech is commercial is if the speech "[does] no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 385 (1973)(emphasis added); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473-74 (1989). Hunter's articles clearly do more than propose a commercial transaction. They contain detailed discussions of criminal trials in this Commonwealth, and Hunter's commentary and critique of the criminal justice system.

The United States Supreme Court has held that commercial speech is "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of N.Y., 447 U.S. 557, 561 (1980) (emphasis added). Marketing is not Hunter's sole

motivation for maintaining this blog. As discussed above, one of Hunter's motivations in maintaining the blog is to disseminate information about "the criminal justice system, the criminal trials and the manner in which the government prosecutes its citizens."

Even if marketing was Hunter's sole motivation, economic motivation cannot be the basis for determining whether otherwise political speech is protected. The United States Supreme Court recognized in Pittsburgh Press Co. that merely having some economic motivation does not create a basis for regulation. "If a newspaper's profit motive were determinative, all aspects of its operations – from the selection of news stories to the choice of editorial position – would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment." 413 U.S. at 385.

The mere existence of some commercial motivation does not change otherwise political speech into commercial speech. "[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." Virginia Pharmacy, 425 U.S. at 761. In discussing the economic motivations at issue in Sorrell v. IMS Health, Inc., 564 U.S. __, 131 S.Ct. 2653 (2011), the United

States Supreme Court recognized that "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression." Id. at 2665.

Even if there is some commercial content to Hunter's speech, any commercial content is intertwined with political speech. When commercial and political elements are intertwined in speech, the heightened scrutiny test must apply to all of the speech.

> It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.

Riley v. National Federation of the Blind of N.C., Inc., 487 U.S. 781, 795-96 (1988) (internal citation omitted).

In this case, the policies the Bar advances have no persuasive force when applied to Hunter's blog. The purposes of Rules 7.1 and 7.2 are to protect the public from misleading communications and advertisements concerning a lawyer's services. Hunter's articles contain detailed descriptions of the trials, along with his commentary on the criminal justice system. The Bar produced no evidence that anyone has found

Hunter's articles to be misleading. There appears to be little benefit, if any, to the public by requiring Hunter to post a disclaimer that concedes his articles are advertisements. Hunter disagrees that his articles are advertisements, and claims they are political speech. He objects to cheapening his political speech by denominating it as advertisement material.

Accordingly, I would hold that Hunter's speech is political, is entitled to the heightened scrutiny test, and that he cannot be forced to include the advertising disclaimer under Rule 7.2 that the Bar seeks to force upon his writings.

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 465 **October 21, 2013**

Lawyers' Use of Deal-of-the-Day Marketing Programs

Deal-of-the-day or group-coupon marketing programs offer an alternative way to sell goods and services. Lawyers hoping to market legal services using these programs must comply with various Rules of Professional Conduct, including, but not limited to, rules governing fee sharing, advertising, competence, diligence, and the proper handling of legal fees. It is also incumbent upon the lawyer to determine whether conflicts of interest exist. While the Committee believes that coupon deals can be structured to comply with the Model Rules, it has identified numerous difficult issues associated with prepaid deals and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.

Introduction

Group-coupon or deal-of-the-day marketing programs have emerged as a new model for advertising and selling goods and services. These marketing programs use websites, email, newspapers, and other tools as vehicles for helping local retailers and service providers to promote their goods and services. Businesses gain an influx of new customers, name and brand exposure through the marketing organization's activities, and the opportunity for increased sales from returning customers and word-of-mouth publicity.[1]

One popular model works as follows: a marketing organization uses a website to advertise deals, allowing anyone interested in receiving notifications of such deals to subscribe to the website's frequent emails. Visitors to the website also may view the deals. The marketing organization works with local businesses to create deals for goods or services that are offered to the marketer's subscribers and visitors. After a threshold number of buyers purchase a deal, the marketing organization and the local business share the proceeds in an agreed-upon division. Each successful buyer receives a code, coupon, or voucher to obtain the specified good or service, which typically has an expiration date.[2]

Lawyers may seek to obtain new clients through these marketing organizations' activities. However, a lawyer must exercise great care to ensure that both the offer and any resulting representation comply with all obligations under the Model Rules, including avoiding false or misleading statements and conflicts of interest, providing competent and diligent representation, and appropriately handling all money received.[3]

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Not all deal-of-the-day marketing programs operate alike and the business model is not static. Therefore, variations to the model described in this opinion may impact how a lawyer uses this type of marketing tool. This opinion does not address marketing programs where the recipient has not initiated contact with the marketing organization and requested notification of deals.

[3] State ethics opinions addressing lawyer use of marketing organization websites have reached different conclusions. As one opinion concluded, the situation is "fraught with peril." Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1 (2012).

Structuring the Deal to Avoid Ethical Issues

The dictionary definition of a coupon is a "voucher entitling the holder to a discount for a particular product."[4] For example, a coupon clipped from the newspaper may entitle a person to buy a jar of spaghetti sauce for fifty cents less than the usual price, but the buyer has to hand over to the merchant both the coupon and the cost of the sauce, less fifty cents. In contrast, marketing organizations often collect the entire discounted price for a good or service and then provide a code that entitles the bearer to collect the good or service from the merchant without any additional payment.

For a lawyer, the two options described above might be illustrated as follows. Assume a lawyer charges $200 per hour for legal services. The lawyer could sell a coupon for $25 that would entitle the bearer to buy up to five hours of legal services at a fifty-percent discount; in other words, the $25 would allow the bearer to pay only $100 per hour for up to five hours of legal services, potentially saving up to $500. This first option requires the coupon bearer to make additional payment to the lawyer commensurate with the number of hours actually used. Alternatively, the lawyer could sell a deal for $500 that would entitle the buyer to receive up to five hours of legal service (with a value of up to $1,000), but all of the money would be collected by the marketing organization, with no additional payment collected by the lawyer no matter how many of the five hours of legal services were actually used. For ease of reference, this opinion will refer to option one as a coupon deal and to option two as a prepaid[5] deal.[6]

A lawyer must pay careful attention to how a deal-of-the-day offer is structured. As discussed more fully below, a coupon deal can meet the requirements of the Model Rules. Less clear is whether a prepaid deal can be structured to be consistent with the Model Rules. No doubt other structures may arise in the future, and they will have to be carefully assessed on their particular terms.

The Cost of Advertising Does Not Constitute Sharing of a Legal Fee

Model Rule 5.4 prohibits a lawyer, with certain exceptions, from sharing legal fees with nonlawyers. Several state ethics opinions examining lawyers' use of deal-of-the-day marketing programs have concluded that these arrangements do not constitute fee sharing and do comport with the purpose behind Rule 5.4, the protection of lawyers' independent professional judgment, by limiting the influence of nonlawyers on client-lawyer relationships.[7] The Committee generally agrees with the analysis set forth in such state opinions, with one caveat.

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[4] NEW OXFORD AMERICAN DICTIONARY 397 (3d ed. 2010).

[5] Although this opinion uses the term "prepaid deal" to describe one form of marketing, it should not be confused with a lawyer's participation in for-profit prepaid legal service plans which this Committee found permissible, subject to certain requirements, in ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-355 (1987).

[6] These two options are not meant to be exhaustive; rather, they are used to illustrate the types of issues a lawyer must consider in structuring a deal for a marketing program.

[7] *See, e.g.*, Maryland State Bar Ass'n Comm. on Ethics, Op. 2012-07 (2012) (where website collects fees upfront and retains percentage of purchase price, arrangement is cost of advertising and not legal fee-splitting arrangement); North Carolina State Bar, Formal Op. 10 (2011) (portion of fee retained by website is merely advertising cost because "it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee…"); South Carolina Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011) (website's share of fee paid by purchaser was an "advertising cost" and not sharing of legal fee with nonlawyer). *But see Advertising on Groupon*

It is the opinion of the Committee that marketing organizations that retain a percentage of payments are obtaining nothing more than payment for advertising and processing services rendered to the lawyers who are marketing their legal services. This is particularly true where the lawyer structures the transaction as a coupon deal because, as discussed below, no legal fees are collected by the marketer. The fact that the marketing organizations deduct payment upfront rather than bill the lawyer at a later time for providing the advertising services does not convert the nature of the relationship between the lawyer and the marketing organization from an advertising arrangement into a fee sharing arrangement that violates the Model Rules.

The one caveat is that the percentage retained by the marketing organization must be reasonable. Model Rule 7.2(b)(1) prohibits a lawyer from paying for referrals but allows a lawyer to pay the "reasonable" costs of advertising.[8] If the portion of the price retained by the marketing organization is reasonable given the cost of alternate types of advertising, the fee likely would be deemed to be reasonable. Similarly, if additional services are being provided (e.g., where the marketing organization is being compensated for publishing the lawyer's advertising message to a large group of subscribers that has been developed by the marketing organization, and/or the organization processes payments from the buyers), the fee, even if a significant portion of the purchase price, likely would be considered to be reasonable.

Advertising Must Not Be False or Misleading

Truthful advertising, including that for legal services, is constitutionally protected commercial speech.[9] Rule 7.1, however, provides that lawyers must not make false or misleading statements about their own abilities or services.[10] Lawyers who choose to use deal-of-the-day marketing programs must supervise the statements made to ensure their accuracy and ensure that the substantive content does not include misleading or incomplete offers that run afoul of the restrictions contained in the Model Rules.

Advertising a coupon deal likely presents fewer hurdles than advertising a prepaid deal. As with any advertising, lawyers must exercise care in offering prepaid deals for a specified service. The public, particularly first-time or unsophisticated purchasers of legal services, may not easily discern what legal services they require or what legal services are encompassed in an offer. Therefore, care should be taken to draft the advertisements and communications to clearly

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and Similar Deal of the Day Websites, Alabama State Bar, Formal Op. 2012-01 (2012) (percentage taken by site is not tied in any manner to "reasonable cost" of advertisement, thus use of such sites to sell legal services is violation of Rule 5.4 because legal fees are shared with a nonlawyer); Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1, *supra* note 3 (online providers are being paid to channel buyers of legal work to specific lawyers in violation of advertising and fee sharing rules); Pennsylvania Bar Ass'n, Advisory Op. 2011-27 (2011) (use of deal-of-the-day website is impermissible fee splitting under Rule 5.4); State Bar of Arizona, Formal Op.13-01 (2013) (even if portion retained is reasonable, it constitutes illegal fee sharing because the consumer pays all the money directly to the website versus the lawyer paying fees for advertising out of already earned fees).

[8] ABA MODEL RULES OF PROF'L CONDUCT R. 7.2(b)(1) provides in full: "A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay the reasonable costs of advertisements or communications permitted by this Rule."

[9] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[10] ABA MODEL RULES OF PROF'L CONDUCT R. 7.1 provides in full: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

define the scope of services offered, including whether court costs and/or other expenses are excluded. Whether a coupon deal or prepaid deal is offered, care should be taken to explain under what circumstances the purchase price of a deal may be refunded, to whom, and what amount.

Buyer is Neither a Prospective nor Current Client

Importantly, a lawyer must be careful to communicate the nature of the relationship created, if any, by the purchase of a deal. A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client under Rule 1.18.[11] However, mere purchase of a deal for legal services does not make the buyer either a prospective client or a current client, entitled to the attendant duties owed by the lawyer. Prior to establishing a client-lawyer relationship, it is incumbent upon the lawyer to first determine whether conflicts of interest exist and whether the lawyer can competently handle the particular matter based on the expected scope of representation and the buyer's needs. Therefore, the lawyer's advertisement and communications should explain that until a consultation takes place with the lawyer, no client-lawyer relationship exists and that such a relationship may never be formed if the lawyer determines there is a conflict of interest, the lawyer is unable to provide the required representation, or the lawyer declines representation for some other reason.[12]

Lawyers should recognize that purchased deals generally can be traded or given as gifts. Lawyers must ensure that the coupon or voucher and all materials marketing the lawyer's services contain language cautioning any holder to review all terms of the purchase on the marketing organization's website, including whether the coupon is transferable. There may be some legal services that are not appropriate for transfer or gift giving due to the nature of the services or the marketing program's technical inability to adequately provide necessary information to the lawyer. For example, we noted earlier that it is not clear whether a prepaid deal can be structured to be consistent with the Model Rules. Similarly, it is not clear whether a prepaid deal, if it can be structured to comply with ethical requirements, could be transferable. Thus, another decision that the lawyer must make in evaluating the marketing program provider and in structuring a deal-of-the-day marketing program is whether or not the service offered can or should be transferable.

Competent Representation and Diligence

Competent handling of a matter requires a preliminary inquiry into, and analysis of, the factual and legal elements of a problem.[13] A lawyer who is offering deals should limit the type

[11] Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1, *supra* note 3, states that the court could reasonably find that a person who has deposited money with the lawyer or lawyer's agent to form a client-lawyer relationship qualifies as a prospective client under Rule 1.18. Comment [1] to ABA MODEL RULES OF PROF'L CONDUCT R. 1.18 states: "Prospective clients, like clients, may … place documents or other property in the lawyer's custody …"

[12] While not all jurisdictions require lawyers to use retainer agreements, such use is advised. If the advertising lawyer expects as part of the deal to require one who is accepted as a client to execute a retainer agreement, that information likely should be disclosed on the website as well.

[13] *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

of services and practice area(s) covered in the offer to those in which the lawyer is competent so that individuals can make informed decisions whether to purchase the deal. Then, before establishing a client-lawyer relationship pursuant to a deal purchase, a lawyer must determine whether the services required by the purchaser are within the lawyer's competence. A lawyer offering deals should also specify any limitations on the types of matters the lawyer handles.

Even with proper disclosures, a legal matter may be more complex and require more work than contemplated by the offered deal. The lawyer should assess the amount of time and effort necessary to complete the matter, and, if the offer limits the number of hours of legal services the lawyer is obligated to provide, should address the possibility that the allotted time may expire before the representation is concluded. Where appropriate to the scope of services to be provided, the lawyer has an obligation to communicate[14] the fact that additional services may or will be required to complete the representation beyond those included in the deal, and to advise whether the client will be obligated to pay additional fees in that event, and if so, in what amount or at what hourly rate.[15]

In addition, the lawyer must be careful in establishing the maximum number of deals to be sold by the marketing organization. Businesses have been harmed by overselling deals and then struggling to meet the ensuing demand. For a lawyer, setting too high a cap on the number of deals sold could lead to a violation of the Model Rules if the result is excessive work that the lawyer cannot handle promptly, competently, and diligently.[16] The duty to provide competent representation and the duty to act with reasonable diligence and promptness require the lawyer to provide the necessary time and effort appropriate to each case accepted.

Properly Managing Advance Legal Fees

As noted above, deal offers are typically made through marketing organizations that collect payments and retain a portion of those payments for their advertising services. The remainder is transferred to the lawyer, generally in a lump sum, reflecting the number of deals sold without identification of individual purchasers. Whether this lump sum constitutes "legal fees … paid in advance" within the meaning of Model Rule 1.15(c) depends on the nature of the deal.

If a lawyer offers a coupon deal, the purchase of a coupon merely establishes the discount applicable to the cost of future legal services. No legal fees are involved unless and until a client-lawyer relationship is formed, time is spent, and the discounted legal fees are collected directly by the lawyer. In other words, the funds that a marketing organization collects and forwards from the sale of coupon deals are not legal fees. Thus, the aggregate amount transmitted by the marketing organization from such sales may be deposited into the lawyer's general account. On

[14] *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

[15] At least one state opinion concludes that it would be unethical to charge the client additional fees to complete the representation. North Carolina Bar, Formal Op. 10, *supra* note 7, states that the lawyer's duty of competent representation under Rule 1.1 requires the lawyer to complete the representation without additional fees if the matter requires more time than originally anticipated to satisfy the advertised service. This Committee does not agree that it is *per se* improper to charge additional fees for supplemental services not covered by the terms of the original offer.

[16] *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

the other hand, if a transaction is structured as a prepaid deal, then the money that a lawyer receives from the marketing organization constitutes advance legal fees, because the marketing organization collects all of the money to which the lawyer will be entitled for legal services that fall within the terms of the deal. Those advance legal fees need to be identified by purchaser's name and deposited into a trust account.[17] The lawyer who chooses to offer a prepaid deal must make appropriate arrangements with the marketing organization to obtain sufficient information about deal buyers in order to appropriately discharge all obligations associated with handling trust funds. Regardless of whether tracking deal buyers and accounting for prepaid fees may prove difficult when a lawyer uses a marketing organization, the lawyer is still responsible for properly handling advanced legal fees.

Additionally, deals may be purchased and then never used. So long as the lawyer has offered a coupon deal, the lawyer may retain the proceeds.[18] While some jurisdictions have concluded that retaining funds from an unredeemed deal constitutes an excessive fee under Rule 1.5, the Committee does not agree with these jurisdictions to the extent the lawyer has offered a coupon deal and explained as part of the offer that the cost of the coupon will not be refunded.[19] The Committee does agree that monies paid as part of a prepaid deal likely need to be refunded in order to avoid the Model Rules prohibition of unreasonable fees.[20]

In one jurisdiction, if a deal purchaser decides before the expiration of the deal that he or she does not want to be represented by the lawyer, the purchaser is entitled to discharge the lawyer and receive a full refund of the funds paid.[21] The Committee disagrees with this opinion to the extent the lawyer offers a coupon deal and properly explains as part of the offer that there is no right to obtain a refund of the purchase price of the coupon; in such circumstances, the coupon purchaser waives the right to compel a refund. On the other hand, if the purchaser of a prepaid deal decides, prior to the deal's expiration, that he or she does not want to proceed, the lawyer likely must refund unearned advanced fees to avoid the collection of unreasonable legal fees.[22]

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[17] To avoid issues of improper handling of trust funds and fee sharing, a lawyer should be sure that any prepaid deal offer explains to the buyer what percentage is not a legal fee and will be retained by the marketing organization. The Committee does not agree that a lawyer always must return the entire amount of the purchase price, including any portion retained by the marketing organization, if legal services are not rendered for any reason whatsoever. *See* State Bar of Arizona, Formal Op. 13-01, *supra* note 7.

[18] *See* New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 897 (2011) (lawyer may retain coupon proceeds if buyer never seeks the discounted services).

[19] *See* North Carolina Bar, Formal Op. 10, *supra* note 7; Maryland State Bar Ass'n Comm. on Ethics, Op. 2012-07, *supra* note 7. Rule 1.5 of the North Carolina Rules of Professional Conduct prohibits the charging of an "excessive" fee while the Model Rules and the Maryland Lawyers' Rules of Professional Conduct both prohibit the charging of an "unreasonable" fee. However, the Model Rules, the Maryland Rules of Professional Conduct, and the North Carolina Rules of Professional Conduct all use the same factors to determine whether a fee is unreasonable or excessive.

[20] A refund might not be required in all circumstances. For example, the Committee can envision a deal that offers a reduced flat rate only for an initial consultation. If the overall cost were modest, and if the offer explained that there would be no refund except for situations of conflict or lawyer unavailability, an unreasonable fee would not arise and no refund would be required.

[21] *See* New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 897, *supra* note 18.

[22] If the prepaid offer were for a simple service at a modest charge, along the lines of the initial consultation discussed at footnote 20, it is possible no refund would be required, provided proper and full disclosure of a no-refund policy had been made.

Finally, in the event the lawyer cannot perform legal services in accordance with a deal, such as when a conflict of interest or other ethical impediment prevents representation, the duty to refrain from receipt of an unreasonable fee compels a full refund to the purchaser. This is true for both coupon and prepaid deals. The lawyer cannot avoid this obligation to make a refund by stating otherwise in the offer.

In those instances in which a lawyer must refund money from the purchase of a deal, e.g., the lawyer has a conflict and cannot render legal services, the lawyer must refund the entire amount paid, regardless of whether the lawyer is entitled to recoup that portion of the amount that was retained as an advertising fee by the marketing organization. The Committee bases this opinion on the fact that it would be unreasonable to withhold any portion of the amount paid by the purchaser if the lawyer is precluded from providing the proffered services through no fault of the purchaser. The lawyer cannot avoid this obligation to make a full refund by providing otherwise in the offer. On the other hand, if a lawyer is not obligated to give a refund but chooses to do so, e.g., a coupon purchaser has failed to use a coupon deal before it has expired, then the lawyer may choose to refund only the portion of the payment the lawyer received, provided this limitation has been clearly disclosed at the time of purchase.

Conclusion

Offering services through deal-of-the-day or group-coupon marketing programs presents a new way for lawyers to market their services and to provide consumers with legal assistance. Lawyers who make use of this form of advertising, however, must observe their ethical and professional obligations. The Committee believes that coupon deals can be structured to comply with the Model Rules. The Committee has identified numerous difficult issues associated with prepaid deals, especially how to properly manage payment of advance legal fees, and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.

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U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

SEP 12 2013

Laurel G. Bellows
Immediate Past President
American Bar Association
321 North Clark Street
Chicago, IL 60654-7598

Dear Immediate Past President Bellows:

I am writing in response to the concerns you raised regarding the limitations imposed by the Fair Labor Standards Act (FLSA) on the ability of law students to secure work experience through unpaid internships with private law firms where the work they perform is limited to pro bono activities.

Generally, the FLSA does not permit individuals to volunteer their services to for-profit businesses such as law firms. In most instances, individuals who are suffered or permitted to perform work by a covered for-profit entity are considered employees under the FLSA and entitled to minimum wage and overtime unless they are covered by a specific exemption or exclusion. The FLSA does, however, permit individuals to participate in unpaid internships or training programs conducted by for-profit entities if certain criteria are met.

Under certain circumstances, law school students who perform unpaid internships with for-profit law firms for the student's own educational benefit may not be considered employees entitled to wages under the FLSA. The determination of whether such an internship meets this exclusion depends upon all of the facts and circumstances of each student's case. Where all of the following criteria are met, an employment relationship does not exist under the FLSA[1]:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

[1] See WHD Fact Sheet 71, enclosed, for further guidance.

While the intern (or trainee) exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of "employ" is very broad, it may be met in some circumstances when law students perform unpaid internships for for-profit law firms. We understand your specific concern with respect to law students involves unpaid internships (whether or not any academic credit is provided) in which the law school places students with for-profit law firms and acts as an intermediary empowered to monitor the progress of the internship, and in which the law firms provide written assurance that the students will receive an educational experience related to the practice of law and that the student will be assigned exclusively to non-fee-generating pro bono matters.

Where the program is designed to provide a law student with professional practice in the furtherance of his or her education and the experience is academically oriented for the benefit of the student, the student may be considered a trainee and not an employee. Accordingly, where a law student works only on pro bono matters that do not involve potential fee-generating activities, and does not participate in a law firm's billable work or free up staff resources for billable work that would otherwise be utilized for pro bono work, the firm will not derive any immediate advantage from the student's activities, although it may derive intangible, long-term benefits such as general reputational benefits associated with pro bono activities. Where law firm internships involve law students participating in or observing substantive legal work, such as drafting or reviewing documents or attending client meetings or hearings, the experience should be consistent with the educational experience the intern would receive in a law school clinical program. Such internships also offer significant benefit to law students because legal representation and licensing requirements necessitate that unlicensed law students receive close and constant supervision from the firm's licensed attorneys. Such supervision both provides an educational benefit to the law student, and reduces the time that firm attorneys may spend on other work, potentially impeding the firm's operations. Thus, where the hiring of unpaid law student interns does not displace regular employees, the law student is not necessarily entitled to a job at the conclusion of the internship, and the law firm and the law student agree that the intern is not entitled to wages, an unpaid internship with a for-profit law firm structured in such a manner as to provide the student with professional experience in furtherance of their education, involving exclusively non-fee generating pro bono matters would not be considered employment subject to the FLSA.[2] In contrast, a law student would be considered an employee subject to the FLSA where he or she works on fee generating matters, performs routine non-substantive work that could be performed by a paralegal, receives minimal supervision and guidance from the firm's licensed attorneys, or displaces regular employees (including support staff).

You also raised concerns that recent law school graduates who have not yet passed any state bar should be able to participate in unpaid internships with law firms working on pro bono matters to the same extent as current law students. But we understand from your communications that the Labor and Employment Law Section leadership has

[2] The Department considers all of the facts in assessing whether all of the criteria are met. A different set of circumstances may, thus, lead to a different conclusion.

reviewed this matter and determined that law graduates may not volunteer for private law firms without pay in the same manner. Likewise, we believe that the analysis would be different for law school graduates than for law students as the former have completed their legal education. Additionally, law schools would not have the same ability to act as intermediaries between graduates and the law firms that they do with current students and would not be able to monitor the internship's compliance with these principles.

I hope that this summary is helpful in clarifying the limitations the FLSA places on unpaid work in various situations.

Sincerely,

M Patricia Smith

M. Patricia Smith
Solicitor of Labor

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OFFICE OF BAR COUNSEL

March 16, 2012

CONFIDENTIAL

Professor Jason E. Huber
Charlotte School of Law
2145 Suttle Avenue
Charlotte, NC 28208

Re: Zatz/Huber
Bar Docket No. 2011-D387

Anderson/Huber
Bar Docket No. 2011-D388

Nathanson/Huber
Bar Docket No. 2011-D389

Welt/Huber
Bar Docket No. 2011-D390

Dear Professor Huber:

This office has completed its investigation of your allegations of misconduct against Clifford Zatz, Esquire; William Anderson, Esquire; Kirsten Nathanson, Esquire; and Monica Welt, Esquire (collectively, the "Crowell & Moring Lawyers"). We have evaluated these matters in light of an attorney's obligations as set forth in the District of Columbia Rules of Professional Conduct (the "Rules"). It is the burden of our office to find clear and convincing evidence of a violation of the Rules in order to sustain a disciplinary proceeding against an attorney. Clear and convincing evidence, as you know, is more than a mere preponderance of the evidence, which would be sufficient in a civil proceeding. We do not find such evidence in our investigation and therefore, we must dismiss your complaint.

We docketed this matter for investigation after receiving your complaint on October 5, 2011. To summarize, you allege that the Crowell & Moring Lawyers violated Rule 7.1 and Rule 8.4(c) in publishing certain material on their firm's website in June of 2011. The material in question was a "Client Alert" which, among other things, outlined certain purported methodological flaws in a recently published epidemiological study of birth defects in Central Appalachian locales ("the Ahern Study"). The Client Alert noted six points of criticism,

including the following: "[t]he study failed to account for consanquinity [sic], one of the most prominent sources of birth defects."

You allege that this statement about consanguinity "was rightfully perceived by many as another attempt by coal industry apologists to degrade the Appalachian People in order to mask the epidemiological, social and environmental consequences of mountaintop removal mining." You further state that the Client Alert "perpetuates and exploits the empirically debunked notion that inbreeding is regularly practiced by the Appalachian People . . ." and constituted an "attempt to mislead the reader into believing that Appalachian incest, not mountaintop removal mining, caused the observed birth defects." You assert that, in publishing the disputed statement, the Crowell & Moring Lawyers violated Rule 7.1(a) (lawyer advertising) and Rule 8.4(c) (dishonesty).

In their response, which this office received on November 28, 2011, the Crowell & Moring Lawyers, through counsel, deny misconduct. They maintain (i) that the statement at issue is not material, false nor misleading; (ii) that it is not a "statement about [a] lawyer or [a] lawyer's services" within the meaning of Rule 7.1(a), and (iii) that the disputed statement is scientific speech protected by the First Amendment. Lastly, counsel asserts an independent defense on behalf of Ms. Welt, stating that she, as a junior lawyer, properly relied on the judgment of the other Crowell & Moring lawyers (who are partners) and thus is afforded the protection of Rule 5.2(b).

In your reply, which this office received on January 3, 2012, you reiterate the allegations of your complaint, and state that you would not object to the dismissal of the complaint against Ms. Welt on the grounds asserted on her behalf. You further propose a compromise resolution to this matter in which you would withdraw your complaint if the Crowell & Moring Lawyers agree to issue an unqualified apology for the offending statement, and a statement explaining that inbreeding rates are not higher in Appalachia than in other parts of the United States, both to be published on the firm's website.

Our investigation of this matter has not revealed clear and convincing evidence of a violation of the Rules by the Crowell & Moring Lawyers. We do not find that the statement in question relates to a lawyer or a lawyer's services, as would be required to find a violation of Rule 7.1(a). Moreover, we could not prove by clear and convincing evidence that the disputed statement was knowingly false when made, or made with reckless disregard for its truth, in violation of Rule 8.4(c). As you have conceded, the Ahern Study does not address consanguinity, in that respect the Client Alert statement is indisputably true. As for the second clause of the statement – which names consanguinity as "one of the most prominent sources of birth defects" – we could not prove that consanguinity is such an irrelevant control factor in the epidemiological study of birth defects that its mere mention in the Client Alert constitutes a knowing or reckless falsehood. Lastly, it is undisputed that the statement does not compare rates of consanguinity in Appalachia against those of other regions. While it could be said that the

Client Alert, in its overall context, implies or alludes to offensive Appalachian stereotypes, we do not find such implications or allusions to be a sufficient basis to sustain disciplinary charges for dishonesty in violation of Rule 8.4(c).

In closing, we in no way condone the promotion of repugnant stereotypes by members of the District of Columbia Bar, and acknowledge that the preamble to the Rules states that the "Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." D.C. Rules of Professional Conduct ("Scope" comment [2]). The Rules do, however, define the boundaries of this Office's statutory authority to pursue disciplinary action against members of the D.C. Bar (*see* D.C. Bar Rule XI § 2(b) (defining misconduct)), and we may not proceed in the absence of clear and convincing evidence of a violation. We trust that this letter adequately advises you of the basis of our decision.

Sincerely,

Mary-Helen Perry
Senior Staff Attorney

cc: Crowell & Moring Lawyers
c/o Barry E. Cohen, Esquire

MHP:itm

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LAWYER DISCIPLINARY BOARD
INVESTIGATIVE PANEL CLOSING

I.D. Nos.: 11-02-507
11-02-508
11-02-509
11-02-510

Date Complaints Opened: October 28, 2011

COMPLAINANT: Office of Disciplinary Counsel
City Center East, Suite 1200 C
4700 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

RESPONDENTS:

Clifford J. Zatz, Esquire — **Bar No.:** N/A
1001 Pennsylvania Avenue, NW #10
Washington, DC 20004-2595

William L. Anderson, Esquire — **Bar No.:** N/A
1001 Pennsylvania Avenue, NW #10
Washington, DC 20004-2595

Kirsten L. Nathanson, Esquire — **Bar No.:** N/A
1001 Pennsylvania Avenue, NW #10
Washington, DC 20004-2595

Monica M. Welt, Esquire — **Bar No.:** N/A
1001 Pennsylvania Avenue, NW #10
Washington, DC 20004-2595

THE INVESTIGATION OF THIS MATTER having been completed and a report having been made to the Investigative Panel of the Lawyer Disciplinary Board, the Panel orders that these complaints be closed for the following reasons:

STATEMENT OF FACTS

Pursuant to Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure, the Office of Disciplinary Counsel opened these complaints against Respondents Clifford J. Zatz, Esquire, William L. Anderson, Esquire, Kirsten L. Nathanson, Esquire, and Monica M. Welt, Esquire, members of the District of Columbia Bar, after it received a copy of advertising material that they had apparently published on the website of their law firm, Crowell & Moring LLP.[1]

The material in question was a 'client alert' published at http://www.crowell.com/NewsEvents/AlertsNewsletters/all/1360048[2] on or about June 28, 2011. The article was titled "Recent Study Purports to Link Mountaintop Mining with Increased Rate of Birth Defects," and it referred to a study released by researchers from West Virginia University and Washington State University that concluded that mountaintop mining is statistically associated with an increased incidence of certain birth defects in some geographic regions of Kentucky, Tennessee, Virginia, and West Virginia. The article went on to assert that the study contained methodological flaws, including that "[t]he study failed to account for consanquinity [sic][3], one of the most prominent sources of birth defects," and

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[1] According to its website, Crowell & Moring LLP has offices in Washington, DC; New York, NY; Los Angeles, CA; San Francisco, CA; Irvine, CA; Anchorage, AK; Cheyenne, WY; London, England; Brussels, Belgium; Cairo, Egypt; and Riyadh, Saudi Arabia.

[2] The article no longer appears on the Crowell & Moring website.

[3] Consanguinity is defined in the Webster's New World Dictionary as "having the same ancestor." Consanguinity is also commonly known as 'inbred' or 'inbreeding.'

advised the reader to contact Respondents "to further discuss this study or your company's environmental litigation defense strategy."

The aforementioned article was subsequently discussed in articles published by the American Bar Association[4] and the Charleston Gazette.[5] In an ethics complaint filed against Respondents with the District of Columbia Office of Bar Counsel[6] and provided to the Office of Disciplinary Counsel, Jason Huber, Esquire, a member of the West Virginia State Bar, asserted, "[The statement regarding consanguinity] was rightfully perceived by many as another attempt by coal industry apologists to degrade the Appalachian People in order to mask the epidemiological, social, and environmental consequences of mountaintop removal mining." Mr. Huber further asserted, "The Advertisement perpetuates and exploits the empirically debunked notion that inbreeding is regularly practiced by the Appalachian People. Despite the firm's frequently flaunted "ample" and "significant" experience in birth defect litigation, [Respondents] failed to recognize the lack of scientific evidence to support their attempt to mislead the reader into believing that Appalachian incest, not mountaintop removal mining, cause the observed birth defects."

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[4] Debra Cassens Weiss, *Did Crowell & Moring Insult Appalachians with Inbreeding Suggestion?*, ABA Journal (July 12, 2011).

[5] Ken Ward, Jr., *Mountaintop removal and birth defects: Just what are the coal industry's lawyers talking about?* Coal Tattoo (blog) (July 11, 2011).

[6] The District of Columbia Office of Bar Counsel docketed complaints against Respondents regarding the same allegations contained in the instant complaints on or about October 5, 2011. The complaints were dismissed without a finding of a violation of the District of Columbia Rules of Professional Conduct on or about March 16, 2012.

As the Supreme Court of Appeals of West Virginia has held that lawyers not admitted to the West Virginia State Bar but who solicit clients in West Virginia are subject to our disciplinary procedures,[7] Respondents were asked to review Rule 7.1(a) and 8.4(c) of the West Virginia Rules of Professional Conduct and provide further explanation as to why the article was not a dishonest, false or misleading communication. In their joint response, Respondents denied misconduct.

Respondents maintained that the statement at issue was not false or misleading advertising, or dishonest, due to the following reasons: (1) the lack of a connection of consanguinity to birth defects being, at this time, a scientific debate and but one of a number of methodological critiques of the study raised in the website posting; (2) the statement that the underlying study did not consider consanguinity in its findings being truthful and not misleading; (3) the website posting not constituting advertising and thus, not falling within the scope of Rule of Professional Conduct 7.1; and (4) the discussion being a matter of scientific discourse and, thus, subject to First Amendment protection.

Respondents presented scientific literature supporting their contention that consanguinity can be a source of birth defects regardless of the location of the study population, and Respondents asserted that studies such as the underlying study are subject to criticism when all major potential confounding factors are not addressed. Respondents contended that the study "took pains" to eliminate a number of potential confounding factors,

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[7] See, Lawyer Disciplinary Board v. Coale, Allen & Van Susteren, 198 W.Va. 18, 479 S.E.2d 317 (1996).

including certain socioeconomic influences and, as Respondent explained on their website article, consanguinity. Thus, Respondents asserted that the statement contained in their 'client alert' was truthful and accurate. Respondents further asserted that based upon the current research, the issue of consanguinity and its role in birth defects is clearly the type of issue prone to be addressed in litigation by parties and experts defending or challenging their conclusions about causation.

Respondents also asserted that they do not practice law in West Virginia or otherwise perform any legal services in the State, or maintain membership in the West Virginia State Bar. Respondents denied that the 'client alert' on their website was intended to directly solicit any West Virginia clients and instead was merely an announcement of a recent development intended for those who have agreed to receive news alerts from Crowell & Moring, along with an invitation to discuss the details of the development further. Respondents further asserted that the posting was promptly removed from its website upon receiving negative feedback, and the firm issued an apology. Respondents asserted that the article was not intended to be demeaning or reflect any negative perceptions about Appalachia, but understood that some deemed it offensive.

REASON CLOSED

The Lawyer Disciplinary Board has long been of the opinion that web sites, news groups and e-mails are potential forms of attorney advertising which are governed by the prevailing ethical standards in each jurisdiction.[8] However, Respondents did not practice in

[8] See, L.E.I. 98-03, *Attorney Advertising on the Internet*" (dated October 26, 1998).

West Virginia and it is not evident that their communication was specifically directed to West Virginia residents or corporations. The statement referenced herein is also not a statement that relates to a lawyer or a lawyer's services, as would be required to find a violation of Rule 7.1(a) of the Rules of Professional Conduct, or dishonest, as the referenced study undisputedly did not address consanguinity. The Panel finds that to find a violation of Rule 8.4(c) of the Rules of Professional Conduct in this matter there would have to be clear and convincing evidence that a statement was knowingly made by Respondents with reckless disregard for its truth or that it was knowingly false, and that burden cannot be met.

The Panel does find, however, that in its overall context, Respondents' statement did allude to offensive Appalachian stereotypes. The Panel reminds Respondents that such implications of gross stereotypes have no place in the legal system and undermine the integrity of the profession. The Panel in no way condones the conduct of Respondents but cannot proceed in the absence of clear and convincing evidence of a violation of the Rules of Professional Conduct. Accordingly, as there is no further action warranted, this matter is closed.

* * *

CLOSING ORDERED this 14th day of December, 2012, and **ENTERED** this 14 day of December, 2012.

Charles J. Kaiser, Jr.
Charles J. Kaiser, Jr.
Chairperson, Investigative Panel

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DLA PIPER LLP (US), Plaintiff, - against - ADAM VICTOR, Defendant.	Index No. 650374/2012 IAS Part 63 Hon. Ellen Coin **SUPPORTING AFFIDAVIT**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LARRY HUTCHER, being duly sworn, deposes and says:

1. I am a member of Davidoff Hutcher & Citron, counsel for the defendant/counterclaim plaintiff Adam Victor ("Victor") herein, and as such, am fully familiar with the facts and circumstances of this matter. I submit this affidavit in support of the instant application seeking leave to file and serve an amended pleading asserting new causes of action against plaintiff/counterclaim defendant DLA Piper LLP (US) ("DLA Piper").

2. As will be more fully set forth hereafter, Victor's application should be granted since, among other reasons, it is based on newly discovered evidence which demonstrates shockingly egregious conduct by DLA Piper warranting the new counterclaims.

"Churn that bill, baby!"

3. It is hard to imagine that sophisticated lawyers associated with a reputable firm would use the cynical and unethical phrase "Churn that bill, baby!" as a rallying cry, but this is the exact mantra that the lawyers at DLA Piper adopted when it came to performing services for Victor and his company, Project Orange Associates, LLC ("POA"). Their conduct

knows no shame or boundaries.

4. While many disheartened and aggrieved clients, as well as a large portion of the general public, have long suspected that attorneys in general churn time, inflate bills, create unneeded work, or expend time performing useless tasks, that claim has always been difficult, if not impossible to prove. That is no longer the case!

5. Until now, there probably has never been a written admission where members of a law firm have flatly acknowledged they have engaged in such reprehensible and damning conduct. As described herein, the written admissions by DLA Piper attorneys concerning churning perhaps reflect the most egregious conduct by a law firm in any fee matter. These admissions provide a window into a culture of avarice and ruthlessness that casts a pall not only on DLA Piper, but on the entire legal profession.

6. It would be one thing for such a preeminent law firm to have acted in this manner, and then voluntarily address it by reducing its fees or apologizing. Not only did that not occur, DLA Piper's wrongful conduct was compounded by their continuing to seek recovery for fees that were the direct result of churning and unnecessary work. This makes DLA Piper's conduct even more reprehensible.

7. Because of this newly discovered evidence, Victor seeks leave to amend his counterclaims in the proposed form annexed as Exhibit 1 hereto.

8. The amended counterclaims contain three new causes of action - for fraud, for violation of New York Judiciary Law § 487, and for violation of New York General Business Law § 349(h), as well as a request for punitive damages in the amount of $22.47 million, which represents 1% of DLA Piper's reported revenue for 2012 based on the written proof of DLA Piper's serious misdeeds.

Statement of Facts

9. DLA Piper instituted this action seeking to recover $678,762.69 in unpaid legal fees by summons and complaint dated February 9, 2012 (the "Complaint" or "Cpl"). Cpl ¶¶ 17-19. A copy of the Complaint is annexed as Exhibit 2 hereto.

10. In his original counterclaims (the "Counterclaims"), Victor set forth what he believed to be a pattern of DLA Piper inflating bills to him and then being coerced into paying them personally on a regular basis. Counterclaims (at Ex. 3), ¶¶ 18-30.

11. In discovery, DLA Piper has produced no less than 246,019 pages of documents including numerous internal emails among DLA Piper partners. Based on the recently discovered evidence, Victor can now show conclusively that DLA Piper had knowledge of intentional fraudulent overbilling.

* * * *

12. Without any hyperbole, the emails produced by DLA Piper shock the conscience.

13. In an email sent on May 20, 2010 by Erich Eisenegger to Christopher Thomson and Jeremy Johnson (all DLA Piper attorneys working on POA), Eisenegger writes "**I hear we are already 200k over our estimate-that's Team DLA Piper!**" (emphasis added). A copy of this email is annexed as Exhibit 4 hereto.

14. Christopher Thomson replied to this email later that evening on May 20, 2010, writing to Messrs. Eisenegger and Johnson:

> What was our estimate? But Tim [Walsh] brought Vince [Roldan] [two other DLA Piper attorneys working on POA] in to work on the objection for whatever reason, and now Vince has random people working full time on random research projects in **standard "churn that bill, baby!" mode. That bill shall know no limits.**

(emphasis added). Exhibit 5 hereto.

15. Rather than be horrified by this blatant admission of fraudulent overbilling, or even admonish their colleague for his utter disregard of their professional duties, Messrs. Eisenegger, Thomson, and Johnson continued the email thread, with each joking about how many attorneys were over-staffed on the POA file and how little work those attorneys actually accomplished. Exs. 6, 7 & 8.

16. To wit, Mr. Johnson wrote "Didn't you use 3 associates to prepare for a first day hearing where you filed 3 documents?" Ex. 6.

17. Mr. Thomson responded, "And it took all of them 4 days to write those motions while I did cash collateral and talked to the client and learned the facts. Perhaps if we paid more money we'd have more skilled associates." *Id*. Ex. 7.

18. Meanwhile, Mr. Johnson joked that "It's a Thomson project, he goes full time on whatever debtor case he has running. Full time, 2 days a week." *Id*. Ex. 8.[1]

19. I first reviewed the egregious admissions discussed herein on March 5, 2013. As the Rules of Professional Conduct dictate, as soon as I learned of DLA Piper's offending conduct, I notified both Victor and DLA Piper's counsel the very next day.

20. These abominable admissions cast a pall not only on DLA Piper, but the entire legal profession.

21. Given the brazen misconduct by DLA Piper, it is unlikely that the conduct complained of herein is limited to Victor's case, but is instead part and parcel of a larger corrupt culture of ruthlessness and avarice within the firm where this type of conduct is not even

[1] To the best of our knowledge, we are not aware of DLA Piper adjusting any bill as a result of this activity.

addressed, but rather a cause for celebration.

* * * *

22. Separately, as this Court recalls, Victor unsuccessfully moved to dismiss the Complaint, since he never agreed to retain DLA Piper to represent him personally. This Court denied that motion from the bench on June 13, 2012, finding it an issue of fact as to who DLA Piper actually performed services for - POA or Victor. *See* NYSCEF Doc ID ## 3-15.

23. DLA Piper alleges that it represented POA in its bankruptcy pursuant to an engagement letter between DLA Piper and POA dated April 22, 2010. Cpl ¶ 3.

24. The bankruptcy court issued an order dated June 23, 2010 disqualifying DLA Piper from representing POA, since DLA Piper simultaneously represented one of POA's major creditors, General Electric. *In re Project Orange Assocs.*, 431 BR 363, 374 [Bankr SD NY 2010] (denying DLA Piper's employment application as "DLA Piper's representation of GE creates a conflict of interest with the Debtor.")

25. DLA Piper alleges that after being disqualified from representing POA, Victor verbally asked DLA Piper to represent him individually. Cpl. ¶ 5.

26. Victor vehemently rejects the claim that it was his idea to personally retain DLA Piper. However, Victor ultimately personally paid DLA Piper a total of $776,000 for work that DLA Piper primarily performed for POA as "ghost" counsel after DLA Piper was disqualified from representing POA. Victor seeks to recover those payments through the original Counterclaims. Counterclaims (Ex. 3), ¶¶ 31-48.

27. Documentary evidence demonstrates that it was not Victor's request to have DLA Piper represent him personally after DLA Piper was disqualified from representing POA, but it was always part of DLA Piper's scheme which they called "Plan B."

28. To wit, on June 23, 2010, after receiving the Bankruptcy Court order disqualifying DLA Piper from representing POA, Christopher Thomson wrote to Erich Eisenegger, Jed Freedlander, Vince Roldan, Jeremy Johnson and Jason Karaffa - all DLA Piper attorneys at the time - saying "Well, the Judge just fired us from POA. Drinks anyone?" Mr. Eisenegger responded to all, saying "Wow--But [Tim] Walsh [the partner in charge] has 'Plan B' right?" Mr. Roldan then suggested in a reply all, "get retained as special counsel?" Then Mr. Eisenegger responded to all with "Represent Adam Victor personally" (emphasis added). A copy of this email correspondence is annexed as Exhibit 9 hereto.

29. Thus, Victor's contention that DLA Piper coerced him to permit DLA Piper to continue churning and billing for outrageous amounts of work on the POA bankruptcy, despite the Bankruptcy Court's disqualification order, is accurate based on DLA Piper's own admissions.

30. As such, Victor seeks leave to amend his Counterclaims to include claims for fraud, for violation of New York Judiciary Law § 487, for violation of New York General Business Law § 349(h), as well as a claim for punitive damages. A memorandum of law demonstrating the propriety of such amendment is submitted herewith.

31. There has been no previous application made to this or any other Court for the relief requested herein.

WHEREFORE, I respectfully request that the motion be granted in its entirety.

LARRY HUTCHER

Sworn to before me this
20th day of March, 2013

Notary Public

NARCISSUS F. THOMAS
Commissioner of Deeds
City of New York, No. 2-2366
Certificate Filed in Kings County
Commission Expires Nov. 1 2013

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DLA PIPER LLP (US),	:	Index No. 650374/2012
	:	IAS Part 63
Plaintiff,	:	
	:	Hon. Ellen Coin
- against -	:	
ADAM VICTOR,	:	**ANSWER, AFFIRMATIVE DEFENSES, AND** AMENDED **COUNTERCLAIMS**
Defendant.	:	

Defendant Adam Victor ("Victor" or "Defendant") by his attorneys, Davidoff Hutcher & Citron LLP, submit this Answer, Affirmative Defenses and Counterclaims in response to the complaint (the "Complaint") of plaintiff DLA Piper LLP (US) ("DLA Piper" or "Plaintiff") as follows:

Parties

1. Victor admits the allegations contained in paragraphs 1 and 2 of the Complaint.

Statement of Facts Common to All Claims

2. Victor admits the allegations contained in paragraph 3 of the Complaint, and states that the Engagement Letter was between Project Orange Associates, LLC ("POA") and DLA Piper. Victor was not a party to the Engagement Letter.

3. Victor admits the allegations contained in paragraph 4 of the Complaint.

4. Victor denies the allegations contained in paragraph 5 of the Complaint, except admits that there was a conflict between POA and another client of DLA Piper, and the Bankruptcy Court issued an order disqualifying DLA Piper from representing POA in the POA bankruptcy action. Victor states that while DLA Piper formally withdrew as counsel of record

for POA, DLA Piper continued to act as POA's attorneys in the POA bankruptcy behind the scenes.

5. Victor denies the allegations contained in paragraph 6 of the Complaint.

6. With respect to the allegations contained in paragraph 7 of the Complaint, Victor admits that DLA Piper sent certain invoices to Victor in his capacity as president of POA, and denies that DLA Piper sent any invoices to Victor in his individual capacity.

7. Victor denies the allegations contained in paragraph 8 of the Complaint, except admits that on or about June 25, 2010, Victor paid DLA Piper $250,000 from his personal account for monies DLA Piper billed to POA.

8. Victor denies the allegations contained in paragraph 9 of the Complaint, except admits that on or about October 13, 2010, Victor paid DLA Piper $150,000 from his personal account for monies DLA Piper billed to POA.

9. Victor denies the allegations contained in paragraph 10 of the Complaint.

10. Victor denies the allegations contained in paragraph 11 of the Complaint, except admits that Victor signed the affidavit annexed as Exhibit D to the Complaint.

11. Victor denies the allegations contained in paragraph 12 of the Complaint, except admits that on or about December 31, 2012, Gas Orange Development, Inc. paid DLA Piper $150,000 for monies DLA Piper billed to POA.

12. Victor admits the allegations contained in paragraph 13 of the Complaint and states that Victor does not owe any monies on the "Outstanding Victor Invoices," since Victor was never personally liable for any of DLA Piper's invoices.

13. Victor denies the allegations contained in paragraph 14 of the Complaint.

14. Victor admits the allegations contained in paragraph 15 of the Complains, except denies that Invoice # 2369074 was sent to Victor in his individual capacity, and states that such invoice was sent to Victor in his capacity as president of POA.

15. Victor admits the allegations contained in paragraph 16, except denies that DLA Piper is only permitted to reveal confidential attorney-client communications if it is suing POA – its actual client. DLA Piper may not reveal attorney-client confidences when trying to collect a fee from Victor, with whom DLA Piper had no attorney-client relationship with.

16. With respect to the allegations contained in paragraph 17 of the Complaint, Victor admits that DLA Piper claims it is owed $678,762.69, and denies that DLA Piper is entitled to payment from Victor.

17. Victor admits the allegations contained in paragraph 18 of the Complaint, and denies that Victor has any liability for any invoices sent to him by DLA Piper.

18. Victor denies the allegations contained in paragraph 19 of the Complaint, except Victor admits that he has refused to pay DLA Piper money that Victor is not liable for.

19. Victor denies the allegations contained in paragraph 20 to the extent that DLA Piper expected to be paid by Victor personally, as opposed to POA, and Victor otherwise denies knowledge or information sufficient to admit or deny the balance of the allegations contained in paragraph 20 of the Complaint.

20. Victor denies the allegations contained in paragraph 21 of the Complaint, and states that DLA Piper only represented Victor personally with respect to one small collection matter, and as such, could never have billed Victor more than $50,000.

First Cause of Action (Account Stated)

21. In response to the allegation contained in paragraph 22 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

22. Victor denies the allegations contained in paragraphs 23, 24 and 25 of the Complaint.

Second Cause of Action (Breach of Contract)

23. In response to the allegation contained in paragraph 26 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

24. Victor denies the allegations contained in paragraphs 27, 28, 29, and 30 of the Complaint.

Third Cause of Action (Breach of Implied Covenant of Goof Faith)

25. In response to the allegation contained in paragraph 31 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

26. Victor admits the allegations contained in paragraph 32 of the Complaint, and states that the third cause of action is entirely duplicative of the first cause of action in that it fails to articulate any facts distinct from the breach of contract alleged.

27. Victor denies the allegations contained in paragraph 33 of the Complaint.

Fourth Cause of Action (Unjust Enrichment – Quantum Meruit)

28. In response to the allegation contained in paragraph 34 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

29. Victor denies the allegations contained in paragraphs 35, 36, 37, 38, 39 and 40 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

30. The Complaint fails, in whole or in part, to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

31. The Complaint is barred, in whole or in part, by the doctrines of estoppel, waiver, ratification, laches and/or Plaintiffs' unclean hands.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

32. The relief requested in the Complaint is unavailable as a result of Plaintiff's consent or acquiescence to solely hold POA responsible for the outstanding legal invoices.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

33. The Complaint is barred, in whole or in part, by Plaintiff's breach of the Engagement Letter between Plaintiff and POA.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

34. Victor has at all times acted in good faith and with reasonable grounds for believing that his conduct was entirely lawful. Plaintiff is precluded by its own misconduct, acts and omissions from maintaining this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

35. The actions of Defendants were not wrongful.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

36. The losses and damages complained of in the Complaint were caused by Plaintiff's acts of misconduct and omissions.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

37. The Complaint is barred by documentary evidence.

38. The Engagement Letter conclusively establishes that DLA Piper's sole client was POA

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

39. The Complaint is barred in whole or in part by RPC 1.5 and 22 NYCRR 1215.1 which require a written retainer between an attorney and client in order to recover on a claim for breach of contract.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

40. The cause of action for breach of the duty of good faith is barred as being duplicative of the cause of action for breach of contract.

PRESERVATION OF DEFENSES

41. Victor reserves the right to raise additional and other affirmative defenses that may subsequently become or may appear to be applicable to the Complaint.

COUNTERCLAIMS

1. These counterclaims seek the return of $776,000 paid by Victor to DLA Piper for services rendered for POA, in addition to punitive damages in an amount no less than $22.47 million (1% of DLA Piper's revenues in 2012) resulting from what is perhaps the most egregious example of wrongdoing in a fee matter ever. To wit, DLA Piper's internal emails demonstrate a culture where overbilling, or as one DLA Piper attorney wrote "churn that bill, baby!", is encouraged and laughed about. This atmosphere of avarice and ruthlessness contaminates the entire legal profession.

2. As background, Victor was the owner of the equity of the now-defunct POA. When POA filed for bankruptcy protection, it retained its long-time attorneys at DLA Piper to represent it as debtor's counsel in that proceeding. DLA Piper racked up massive legal fees representing POA in the initial phases of its bankruptcy, which DLA Piper's internal emails make light of, stating at one point that "I hear we are already 200k over our estimate-that's team DLA Piper!"

3. As a result of a conflict of interest, the Bankruptcy Court disqualified DLA Piper from representing POA. Despite being disqualified, DLA Piper did not want to lose this lucrative client that it viewed internally as a cash cow to bill at will, stating "That bill shall know no limits."

4. ~~Nevertheless,~~As such, after being disqualified, DLA Piper insisted to Victor that it remain POA's counsel. Since the Court Order disqualified DLA Piper from its representation, DLA Piper insisted that it would remain behind-the-scenes, and act as "ghost" counsel for POA.

~~3.~~5. In fact, in internal emails, DLA Piper attorneys lamented being "fired" by the bankruptcy judge, but openly admitted that their "Plan B" was to "[r]epresent Adam Victor personally" so that DLA Piper could continue its massive overbilling.

~~4.~~ Even though DLA Piper acted as shadow counsel for POA, it knew it could not get paid by POA since the Bankruptcy Court explicitly ruled that DLA Piper could not represent POA. As such, DLA Piper applied unrelenting pressure on Victor to pay for the legal services rendered to POA.

6.

~~5.~~7. Victor succumbed to DLA Piper's demands and paid DLA Piper $776,000 of his own personal funds for services largely rendered to POA.

8. Victor paid those bills without having the benefit of receiving monthly invoices to determine whether the charges to POA were reasonable. Victor only received itemized bills after they were paid. After reviewing the detailed legal invoices, it is readily apparent that DLA Piper engaged in a systematic and sweeping practice of over-billing, by billing for services that were unnecessary, duplicative, or wasteful. DLA Piper's internal emails demonstrate conclusively that DLA Piper was in fact overbilling on a massive scale, and even joking about it - in one instance, writing "Didn't you use 3 associates to prepare for a first day hearing where you filed 3 documents?" In response, another DLA Piper attorney wrote "And it took all of them 4 days to write those motions while I did cash collateral and talked to the client and learned the facts. Perhaps if we paid more money we'd have more skilled associates."

9. Such overbilling and billing for services that were unnecessary, duplicative or wasteful which was shockingly and specifically admitted in horrific emails is beyond the pale.

Without any hyperbole, DLA Piper's practice evidenced in this case tarnishes the entire legal profession.

~~6.~~

10. Through this action, Victor seeks the return of the money he was pressured to pay DLA Piper to continue a representation DLA Piper was barred from undertaking, and punitive damages in an amount no less than $22.47 million given the severity of DLA Piper's intentional wrongdoing.

~~7.~~

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Parties

~~8.~~11. Counterclaim Plaintiff is Victor and Counterclaim Defendant is DLA Piper.

Jurisdiction

~~9.~~12. The court has personal jurisdiction over DLA Piper pursuant to CPLR § 301 since DLA Piper conducts business in the State of New York.

~~10.~~13. Venue is proper in New York County as DLA Piper brought the instant lawsuit in New York County and DLA Piper maintains a place of business in New York County.

Statement of Facts

~~11.~~14. POA owned and operated a stem-electric cogeneration plant in Syracuse, New York that supplied steam to Syracuse University and electricity to initially Niagara Mohawk Power Corporation, and later to the New York State Independent System Operator.

~~12.~~15. Victor was initially a minority owner of POA, and eventually became the 100% owner.

~~13.~~16. DLA Piper had been the long-time attorneys for POA and other entities controlled by Victor. Victor's companies paid DLA Piper millions of dollars over the past 10 years in legal fees on a variety of matters.

~~14.~~17. In 2008, after 16 years of successful operations, POA was forced to shut down the cogeneration plant, which was a result of the economic consequences of the State of New York's de-regulation and restructuring of the electric utility industry.

~~15.~~18. POA ultimately filed for bankruptcy on April 29, 2010. POA retained its long-time attorneys at DLA Piper to serve as its bankruptcy counsel.

~~16.~~19. POA executed an engagement letter (the "Engagement Letter") with DLA Piper one week prior to POA's bankruptcy filing, a copy of which is annexed as Exhibit A to the Complaint.

~~17.~~20. In a decision and order dated June 23, 2010, the Bankruptcy Court held that DLA Piper could not act as counsel for POA as a result of a conflict of interest. The Bankruptcy Court's decision is reported at In re Project Orange Associates, LLC, 431 BR 363 [Bankr SD NY 2010].

21. Project Orange Associates then retained new bankruptcy counsel. Yet because DLA Piper had institutional knowledge, and did not want to lose such a lucrative client, DLA Piper insisted that it should continue to provide legal services behind the scenes to POA.

22. DLA Piper's nefarious scheme is blatantly admitted in an email produced in discovery in this matter. To wit, on June 23, 2010, after receiving the Bankruptcy Court order barring DLA Piper from representing POA, Christopher Thomson wrote to Erich Eisenegger, Jed Freedlander, Vince Roldan, Jeremy Johnson and Jason Karaffa - all DLA Piper attorneys at the time - saying "Well, the Judge just fired us from POA. Drinks anyone?"

23. Mr. Eisenegger responded to all, saying "Wow--But [Tim] Walsh [the partner in charge] has 'Plan B' right?" Mr. Roldan then suggested in a reply all, "get retained as special counsel?" Then Mr. Eisenegger responded to all with "**Represent Adam Victor personally**" (emphasis added).

~~18.~~24. -POA heeded its counsel's advice. While POA hired separate counsel to officially represent its interests in the bankruptcy, DLA Piper acted as "ghost" counsel for POA and performed the bulk of the legal work required.

~~19.~~25. While POA's actual bankruptcy counsel was required to submit its fee applications to the bankruptcy court for review and approval by the court and the US Trustee, DLA Piper was not subject to such scrutiny since it was not official bankruptcy counsel.

~~20.~~26. DLA Piper would regularly bill POA/Victor for several months at a time, in invoices delivered several months after such services were purportedly rendered.

~~21.~~27. POA could not pay DLA Piper since its assets were all subject to the jurisdiction of the Bankruptcy Court. Accordingly, DLA Piper applied unrelenting pressure to Victor to pay for work done for POA from Victor's personal account.

~~22.~~28. Victor, being unaware of the impropriety of DLA Piper's actions, complied with DLA Piper's repeated demands and threats for money. At DLA Piper's demand, Victor regularly paid money to DLA Piper in advance, without the opportunity to see any detailed invoices.

~~23.~~29. To wit, Victor paid DLA Piper from his own personal funds on four occasions. On or about April 26, 2010, Victor wired $200,000 to DLA Piper. On or about June 25, 2010, Victor wired $250,000 to DLA Piper. On or about September 22, 2010, Victor issued check number 115 to DLA Piper in the amount of $176,000. On or about October 13, 2010, Victor issued check number 120 to DLA Piper in the amount of $150,000.

~~24.~~30. All told, Victor paid DLA Piper $776,000.

~~25.~~31. These payments were all made in advance of receiving detailed legal invoices from DLA Piper. To wit, DLA Piper delivered invoice number 2513808 to POA seeking $597,325.25, dated November 22, 2010, for services rendered from April 30, 2010 to August 3, 2010. On the cover page of the invoice, DLA Piper notes that the invoice was already paid in full in advance.

~~26.~~32. DLA Piper delivered invoice number 2526761 to POA seeking $200,000, dated December 31, 2010, for services rendered from May 3, 2010 to October 22, 2010.

~~27.~~33. Finally, DLA Piper delivered invoice number 2639074 to POA seeking $685,681.20 for services rendered from October 22, 2010 to December 8, 2011.

~~28.~~34. All told, DLA Piper billed POA $1,433,006.45, and was paid $776,000 by Victor, leaving a balance of $657,006.45 owed by POA to DLA Piper according to DLA Piper's own belated invoicing.

~~29.~~35. The three invoices detailed above – invoice numbers 2513808, 2526761, and 2639074 all demonstrate massive over-billing, and billing for work that was unnecessary, duplicative or wasteful.

36. DLA Piper never represented Victor individually, except with respect to one minor collection matter. DLA Piper represented Victor in his individual capacity in an action captioned Fix Spindelman Brovitz & Goldman PC v. Victor, Index No. 8041/2010 [Sup Ct Monroe Co]. The plaintiff in that action sued Victor for approximately $77,000 for unpaid legal bills. DLA Piper did some minor work on this matter for Victor, and Victor ended up settling that action a few months after it was commenced for $17,500 in a conversation directly with the plaintiff therein.

37. As discovery progressed in this matter, DLA Piper has produced emails demonstrating its knowledge of the massive fraudulent overbilling that occurred.

38. To wit, in an email sent on May 20, 2010 by Erich Eisenegger to Christopher Thomson and Jeremy Johnson (all DLA Piper attorneys working on POA), Eisenegger writes "I hear we are already 200k over our estimate-that's Team DLA Piper!"

39. Christopher Thomson replied to this email later that evening on May 20, 2010, writing to Messrs. Eisenegger and Johnson:

> What was our estimate? But Tim [Walsh] brought Vince [Roldan] [two other DLA Piper attorneys working on POA] in to work on the objection for whatever reason, and now Vince has random people working full time on random research projects in **standard "churn that bill, baby!" mode. That bill shall know no limits.**
>
> (emphasis added).

40. Rather than be horrified by this blatant admission of fraudulent overbilling, Messrs. Eisenegger, Thomson, and Johnson continued the email thread, with each joking about how many associates were staffed on the case and how little work they actually accomplished.

41. To wit, Mr. Johnson wrote "Didn't you use 3 associates to prepare for a first day hearing where you filed 3 documents?" Mr. Thomson responded, "And it took all of them 4 days to write those motions while I did cash collateral and talked to the client and learned the facts. Perhaps if we paid more money we'd have more skilled associates."

~~30.~~42. Even Nicolai Sarad, the relationship partner, and Tim Walsh, the partner in charge of the POA bankruptcy, knew massive overbilling was occurring. In an email from Mr. Sarad to Mr. Walsh on June 23, 2010, Mr. Sarad writes, with respect to the POA bill, "you will need to look at this to tell me where there is fat (I see one day of 14.5 hrs for Julia for example, and a lot of time for Baum; 45K for Vince, etc."

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AS AND FOR A FIRST COUNTERCLAIM
(BREACH OF FIDUCIARY DUTY)

~~31.~~43. Victor repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth in full herein.

~~32.~~44. As the president and owner of POA, DLA Piper's client, and as the person who DLA Piper billed for legal services and who paid for DLA Piper's legal services from his own personal account, DLA Piper owed fiduciary duties to Victor, including the duty of good faith, loyalty, and candor. As a result, DLA Piper was at all times obligated to act in Victor's best interest and not to overbill Victor or to bill Victor for legal services that were unnecessary, duplicative or wasteful.

~~33.~~45. DLA Piper breached its fiduciary duties to Victor, based on the pressure it bore on Victor to pay for legal services rendered to POA, and for advising Victor that it was permitted to continue to act as "ghost" counsel for POA, even though the Bankruptcy Court ruled that DLA Piper could not act as counsel for POA.

~~34.~~46. DLA Piper further breached its fiduciary duties by billing Victor for legal services that were unnecessary, duplicative, or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.~~.~~

~~35.~~47. DLA Piper took these actions intentionally and with malicious disregard for its fiduciary duties owed to Victor.

~~36.~~48. As a direct and proximate result of DLA Piper's breach of its fiduciary duties, Victor suffered damages in the amount of $776,000, the amount Victor paid to DLA Piper from his personal account.

49. In addition, punitive damages should be imposed on DLA Piper to punish it for its intentional and fraudulent actions, and to ensure that DLA Piper and others likewise situated will

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refrain from the commission of like outrageous public wrongs. DLA Piper's actions were malicious, wanton, willful, morally reprehensible, in reckless disregard of Victor's rights, and therefore warrant an award of punitive damages.

~~37.~~50. According to the American Lawyer magazine, DLA Piper's revenues in 2012 were approximately $2.247 billion. As such, a punitive damage award in an amount not less than $22.47 million, or 1% of DLA Piper's revenue for one year, is appropriate.~~By virtue of the foregoing, Victor is entitled to a judgment in an amount not to exceed $776,000, in addition to interest accrued and accruing.~~

AS AND FOR A SECOND COUNTERCLAIM
(UNJUST ENRICHMENT)

~~38.~~51. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

~~39.~~52. In the alternative to the first counterclaim, DLA Piper was unjustly enriched by and benefited from the $776,000 paid to DLA Piper by Victor personally for services rendered for POA.

~~40.~~53. DLA Piper's actions in pressuring Victor to pay for services rendered to POA and then accepting those payments were wrongful.

~~41.~~54. DLA Piper was also unjustly enriched by and benefited from the $776,000 paid to it by Victor for legal services that were unnecessary, duplicative, or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.~~.~~

~~42.~~55. Circumstances are such that equity and good conscience require DLA Piper to make restitution to Victor in an amount to be determined at trial, but no greater than $776,000.

AS AND FOR A THIRD COUNTERCLAIM
(BREACH OF CONTRACT)

~~43.~~56. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

~~44.~~57. DLA Piper alleges in its complaint that it had an oral agreement with Victor where Victor agreed to be personally liable for services rendered by DLA Piper. Victor denies that he ever agreed to be personally liable to DLA Piper for services rendered. However, to the extent this Court finds that such an oral agreement did exist, then also in the alternative to the first cause of action, Victor asserts a counterclaim for breach of contract.

~~45.~~58. There is no written contract between Victor and DLA Piper.

~~46.~~59. However, to the extent this Court finds that there was an oral contract between Victor and DLA Piper, which Victor denies, such contract would be valid and binding.

~~47.~~60. To the extent an oral contract existed, which Victor denies, DLA Piper breached that contract by failing to provide invoices in a timely fashion, and engaging in a systematic and sustained practice of overbilling by charging Victor for services that were unnecessary, duplicative or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.~~.~~

61. As a direct and proximate result of these breaches of contract, Victor has suffered damages in an amount to be determined at trial, but no more than the $776,000 that Victor paid to DLA Piper, in addition to pre-judgment interest.

AS AND FOR A FOURTH COUNTERCLAIM
(BREACH OF NY JUDICIARY LAW § 487)

62. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

63. DLA Piper engaged in deceitful conduct and its attorneys colluded amongst themselves with intent to deceive Victor.

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64. Such conduct included DLA Piper submitting bills to Victor for legal services that were unnecessary, duplicative or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.

65. DLA Piper also deceived the Bankruptcy Court by continuing to perform services for POA even after it was disqualified as counsel, by billing such services to Victor personally.

66. DLA Piper acted with a chronic extreme pattern of legal delinquency.

67. As a direct and proximate result of DLA Piper's conduct, Victor has suffered damages in an amount to be determined at trial, but no more than the $776,000 that Victor paid to DLA Piper, in addition to pre-judgment interest, which money DLA Piper was not entitled to.

68. Plaintiff is entitled to treble damages pursuant to Judiciary Law § 487.

AS AND FOR A FIFTH COUNTERCLAIM
(FRAUD)

69. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

70. DLA Piper made false representations to Victor, for the purpose of inducing Victor to pay legal bills for services that were unnecessary, duplicative or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.

71. DLA Piper also committed fraud by omission when it submitted legal bills to Victor without disclosing that those bills contained time entries for services that were unnecessary, duplicative or wasteful.

72. DLA Piper deliberately billed Victor for services that were unnecessary, duplicative or wasteful.

73. Based upon the false representations made by DLA Piper, Victor paid DLA Piper $776,000 for legal fees that were unnecessary, duplicative or wasteful.

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74. If Victor knew the truth behind the inflated legal bills submitted to him by DLA Piper, he would not have paid $776,000 to DLA Piper for services that were unnecessary, duplicative or wasteful.

75. By reason of the foregoing, Victor is entitled to compensatory damages in the amount of $776,000, together with expenses and attorneys' fees incurred in the bringing of this action as well as exemplary and punitive damages.

76. In particular, punitive damages should be imposed on DLA Piper to punish it for its intentional and fraudulent actions, and to ensure that DLA Piper and others likewise situated will refrain from the commission of like outrageous public wrongs. DLA Piper's actions were malicious, wanton, willful, morally reprehensible, in reckless disregard of Victor's rights, and therefore warrant an award of punitive damages in an amount not less than $22.47 million, or 1% of DLA Piper's revenue for 2012.

AS AND FOR A SIXTH COUNTERCLAIM
(VIOLATION OF NY GENERAL BUSINESS LAW § 349[h])

77. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

78. DLA Piper is a law firm that promotes its services to high end consumers.

79. The actions described herein, including overbilling and billing for services that were unnecessary, duplicative, or wasteful, and deceiving the Bankruptcy Court and Victor by billing Victor for services rendered on behalf of POA after DLA Piper was disqualified by the Bankruptcy Court from representing POA constitute deceptive or materially misleading acts or practices.

80. By reason of the foregoing, Victor is was damaged in the amount of $776,000, the amount of money Victor paid to DLA Piper from his personal accounts.

81. In addition, pursuant to NY General Business Law § 349[h], this Court is granted the authority to award Victor the reasonable attorneys' fees expended in prosecuting this action.

~~48.~~

WHEREFORE, Victor respectfully requests that a Judgment be entered herein:

(a) Dismissing the complaint with prejudice,

(b) On the first counterclaim, or in the alternative on the second counterclaim, or in the alternative on the third counterclaim, or in the alternative on the fourth counterclaim, or in the alternative on the fifth counterclaim, or in the alternative on the sixth counterclaim, granting Victor a money judgment in an amount to be determined at trial, but no more than $776,000 in addition to pre-judgment interest;

~~(b)~~(c) On the fourth counterclaim, granting treble damages to Victor pursuant to Judiciary Law § 487;

(d) On the first counterclaim, or in the alternative on the fifth counterclaim, for an award of punitive damages in an amount not less than $22,470,000;

(e) On the sixth counterclaim, for a hearing to determine the amount of reasonable attorneys' fees to be awarded to Victor and against DLA Piper;

(f) Granting Victor an award for the costs and disbursements of this action; and

(g) Granting such other and further relief as this Court deems just and proper

~~(c)~~

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~~(d) Granting such other and further relief as this Court deems just and proper.~~

Dated: New York, New York
~~July 3, 2012~~March __, 2013

DAVIDOFF HUTCHER & CITRON LLP

By: ~~/s/ Joshua Krakowsky~~
Larry Hutcher
Joshua Krakowsky
605 Third Avenue
New York, New York 10158
(212) 557-7200

Attorneys for Defendant/Counterclaim Plaintiff Adam Victor

TO: Kevin Arthur, Esq.
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Counsel for Plaintiff/Counterclaim Defendant

and

Jeffrey Schreiber, Esq.
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2 Grand Central Tower
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~~19~~19th Floor
New York, New York 10017
(212) 655-3500
Local Counsel for Plaintiff/Counterclaim Defendant

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Exhibit 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DLA PIPER LLP (US)

Plaintiff,

-against-

ADAM H. VICTOR

Defendant.

Index No. 650374-2012
Date Purchased: 2/9/2012

Plaintiff designates NEW YORK COUNTY as the place of trial.

SUMMONS

To the above-named defendant:

YOU ARE HEREBY SUMMONED and required to serve upon plaintiff's attorneys an answer to the complaint in this action within twenty (20) days after service of this summons, exclusive of the day of service (or within thirty (30) days after service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue designated is plaintiff's place of business at 1251 Avenue of the Americas, New York, NY 10020.

Dated: New York, New York
February 9, 2012

DLA PIPER LLP (US)

By: _____
Christopher P. Hall
Spencer Stiefel

DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, New York 10020-1104
212-335-4500 (telephone)
212-884-8588 (facsimile)

Attorneys for *Plaintiff*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DLA PIPER LLP (US) Plaintiff, -against- ADAM H. VICTOR Defendant.	Index No. 650374/2012 **COMPLAINT**

Plaintiff, DLA Piper LLP (US) ("Plaintiff" or "DLA Piper"), complains and alleges as follows:

Parties

1. DLA Piper is, and, at all relevant times hereinafter mentioned was, a limited liability partnership organized and existing under the laws of the State of Maryland, and is authorized to do business in the State of New York, with an address of 1251 Avenue of the Americas, New York, New York 10020.

2. Upon information and belief, Adam H. Victor ("Defendant" or "Victor") is, and at all relevant times hereinafter mentioned was, an individual who lives in the State of New York, having his residence at 630 First Avenue, Suite 30E, New York, New York 10018.

Statement of Facts Common to All Claims

3. On April 22, 2010, DLA Piper provided to Victor a written letter of engagement ("Engagement Letter") that provided: (1) an explanation of the scope of the legal services to be provided; and (2) an explanation of attorney's fees to be charged, expenses and billing practices. A true and correct copy of the Engagement Letter is attached hereto as Exhibit A. As provided in the Engagement Letter, DLA Piper was to provide legal services related to "the refinancing

and restructuring options (the 'Restructuring') of Project Orange Associates, LLC ('POA')". *See* Engagement Letter at 1.

4. Victor signed the Engagement Letter on behalf of POA and dated it April 22, 2010. Thereafter, DLA Piper entered an appearance as counsel for POA in POA's bankruptcy case in the Bankruptcy Court of the Southern District of New York.

5. Due to a conflict between POA and another client of DLA Piper, DLA Piper had to withdraw as POA's counsel in the bankruptcy case. On or about June 23, 2010, Victor informed DLA Piper that, rather than performing the services for POA, he wanted DLA Piper to represent him in his individual capacity with regard to the Restructuring (the "Representation"), and DLA Piper agreed to do so.

6. In accordance with the agreement between DLA Piper and Victor, DLA Piper provided to Victor the services necessary for the Representation.

7. DLA Piper issued invoices ("Victor Invoices") notifying Victor of the fees and disbursements due and owing to DLA Piper in connection with the Representation.

8. On June 25, 2010, Victor wired to DLA Piper $250,000 from his personal account as payment for legal services to Victor related to the Restructuring.

9. On or about October 6, 2010, Victor sent to DLA Piper a check for $150,000 from his personal account as payment for legal services to Victor related to the Restructuring. A true and correct copy of the October 6, 2010 check is attached hereto as Exhibit B.

10. The Bankruptcy Court of the Southern District of New York was aware that DLA Piper represented Victor, as on November 3, 2010, such information was included in a motion filed in that court. *See In re Project Orange Associates, LLC*, Case No. 10-12307 (MG), Doc.

No. 266 ("Document 266"), a true and correct copy of which is attached hereto as Exhibit C. Document 266 filed in that court provides, in relevant part:

> The DIP Lender under the Credit Agreement is Gas Alternative Systems, Inc. The DIP Lender is an entity owned and controlled by Mr. Adam Victor, the Debtor's President. The DIP Lender has retained separate counsel, DLA Piper LLP (US), which has represented Mr. Victor and the DIP Lender with respect to this Credit Agreement and the DIP financing.

Exhibit C at ¶16.

11. On November 3, 2010, Victor submitted an affidavit in support of Document 266. A true and correct copy of Victor's affidavit is attached hereto as Exhibit D

12. On or about December 31, 2010, through Gas Orange Development, a company of which Victor is the president and sole stockholder, Victor sent to DLA Piper $150,000 as payment for legal services to Victor related to the Restructuring.

13. Despite these payments, two Victor Invoices remain outstanding and unpaid (the "Outstanding Victor Invoices").

14. DLA Piper, in accordance with its agreement with Victor, and in the ordinary course of business, delivered to Victor Invoice # 2526761 in the amount of $200,000 for legal fees and disbursements incurred in the Representation. DLA Piper received partial payment of this invoice, which payment has been credited to the account.

15. On November 30, 2011, DLA Piper submitted Invoice # 2369074 to Victor for $628,762.69. Invoice # 2369074 references the fact that $50,000 of the amount then due was for the prior outstanding balance. Invoice # 2369074 provides, *inter alia*: "INVOICE IS DUE AND PAYABLE UPON RECEIPT". This invoiced amount included a $50,000 "Courtesy Discount". Thus, the amount of services rendered and costs incurred by DLA Piper to Victor was actually $678,762.69.

16. Because invoices from DLA Piper may reveal information protected by the attorney-client privilege and Victor has not yet filed a pleading disputing the fees charged, invoices are not attached hereto. Consistent with Rule 1.6(b)(5)(ii) of the Rules of Professional Conduct, DLA Piper will reveal confidential information, including invoices and correspondence, if necessary to establish or collect a fee.

17. The unpaid fees and disbursements due and owing to DLA Piper under the Outstanding Victor Invoices total $678,762.69.

18. DLA Piper has requested that Victor pay to DLA Piper all outstanding amounts due and owing under the Outstanding Victor Invoices.

19. Despite DLA Piper's good faith attempts to recover the outstanding billed amounts, Victor has failed to honor and comply with his obligations under his agreement with DLA Piper, and has failed to pay the outstanding $678,762.69 due and owing to DLA Piper.

20. DLA Piper reasonably expected to be paid its agreed-upon hourly rates for all time billed, as well as for all disbursements expended on Victor 's behalf in connection with the Representation.

21. This dispute is not covered by 22 NYCRR § 137 because the amount in dispute exceeds $50,000.

First Cause of Action
(Account Stated)

22. DLA Piper repeats and realleges, as if set forth here in full, the allegations contained in paragraphs 1 through 21 herein.

23. DLA Piper, in accordance with its agreement with Victor, and in the ordinary course of business, delivered to Victor Invoice # 2526761 in the amount of $200,000 for legal fees and disbursements incurred in the Representation.

24. Victor received Invoice # 2526761 without objection, and on or about December 31, 2010, through Gas Orange Development, Victor sent to DLA Piper $150,000 as payment for legal services to Victor related to the Restructuring. Thus, leaving a balance of $50,000, which remains unpaid.

25. By reason of the foregoing, DLA Piper has been damaged in the amount of $50,000 with interest thereon to the fullest extent permitted by law.

Second Cause of Action
(Breach Of Contract)

26. DLA Piper repeats and realleges, as if set forth here in full, the allegations contained in paragraphs 1 through 25 herein.

27. Victor entered into a legal services contract with DLA Piper pursuant to which Victor agreed to pay DLA Piper's fees and to reimburse DLA Piper's costs, disbursements and expenses incurred in connection with the Representation.

28. In reliance on Victor's agreement to pay for DLA Piper's legal representation and services, DLA Piper expended time and resources in the Representation.

29. Victor's agreement to pay DLA Piper for legal representation and services in connection with the Representation constituted a valid, binding and enforceable contract. All services for which Victor has failed to pay are of the same general kind as previously rendered to and paid for by the client.

30. Victor's failure to pay DLA Piper for the Representation constituted a breach of contract, entitling DLA Piper to full recovery of the entire outstanding amount for the services rendered and disbursements expended totaling $678,762.69 as well as interest and all costs and fees incurred in its good faith attempt to recover the outstanding amount from Victor.

Third Cause of Action
(Breach Of Implied Covenant Of Good Faith)

31. DLA Piper repeats and realleges, as if set forth here in full, the allegations contained in paragraphs 1 through 30 herein.

32. In New York, all contracts contain an implied covenant of good faith and fair dealing.

33. Victor's failure to pay DLA Piper under the terms of the parties' agreement constituted a breach of the implied covenant of good faith and fair dealing, entitling DLA Piper to full recovery of the agreed upon fees and disbursements of $678,762.69.

Fourth Cause of Action
(Unjust Enrichment – Quantum Meruit)

34. DLA Piper repeats and realleges, as if set forth here in full, the allegations contained in paragraphs 1 through 33 herein.

35. In accepting and relying on DLA Piper's services in the Representation, Victor agreed to pay DLA Piper for DLA Piper's fees and to reimburse DLA Piper's costs, disbursements and expenses, and DLA Piper agreed to undertake the Representation on behalf of Victor.

36. An attorney-client relationship existed between DLA Piper and Victor for the duration of the Representation through its conclusion.

37. DLA Piper performed legal services for Victor in good faith and with the expectation that DLA Piper would receive the agreed-upon compensation.

38. In connection with the Representation, DLA Piper incurred $678,762.69 in fees and disbursements which remain outstanding and unpaid.

39. Having received the benefit of DLA Piper's services in the Representation, Victor owes DLA Piper the reasonable value of the legal services provided and disbursements expended on Victor's behalf.

40. The reasonable value of DLA Piper's services and disbursements which remain outstanding and unpaid is $678,762.69.

WHEREFORE, DLA Piper demands judgment against Victor, on each of the causes of action set forth in this Complaint, in the amount of $678,762.69, together with reasonable attorney's fees, filing fees, pre- and post-judgment interest to the fullest extent permitted by law or equity, and costs of suit and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
February 9, 2012

DLA Piper LLP (US)

By: _____
Christopher P. Hall
Spencer Stiefel

1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500 (telephone)
(212) 335-4501 (facsimile)

Attorneys for Plaintiff

EXHIBIT A

DLA Piper US LLP
1251 Avenue of the Americas, 27th Floor
New York, New York 10020-1104
www.dlapiper.com

Nicolai J. Sarad
nicolai.sarad@dlapiper.com
T 212.335.4642
F 212.884.8542

April 22, 2010

Adam H. Victor
President
Project Orange Associates, LLC
630 First Avenue
Suite 30C
New York, New York 10016

Re: Retention of DLA Piper by Project Orange Associates, LLC

Dear Adam:

We are pleased to have the opportunity to represent you. You have asked us to assist you in assessing the refinancing and restructuring options (the "Restructuring") of Project Orange Associates, LLC ("POA").

Legal services for which you will be billed include time spent on legal research, document review and drafting, correspondence, depositions, court appearances, conferences, telephone calls, travel, negotiations, closing of transactions and other services related to transactions or litigation. Our general practice is to bill clients based on the time expended by the attorneys and legal assistants involved in the matter at each individual's then current hourly billing rate. Our current hourly rates for legal assistants and lawyers range from $225 to $865 per hour, depending primarily on the particular lawyer's or legal assistant's background and experience. A list of our currently effective hourly rates will be furnished to you upon request. These rates are adjusted periodically, usually at the beginning of the calendar year, and any modification of such rates is applicable to legal services performed after the new rates become effective.

We are requesting an initial retainer of $200,000. This amount may need to be adjusted upon a change in circumstances.

The lead partner in connection with the Restructuring will be Tim Walsh, and Tim will also supervise the team involved at the firm. In addition Nick Sarad will be the overall client relationship manager with POA. As team leaders Tim and Nick may assign parts of the work to other lawyers or other personnel in the office under their supervision, and may use other firm lawyers where specialized help is needed. In their supervisory roles, however, Tim and Nick will continue to be responsible to you for the entire assignment and will be available to discuss the use of other personnel with you. It is our practice to assign tasks among lawyers, legal assistants and law clerks, document and docket clerks in such a way as to produce quality work at a reasonable cost to you given the nature of the specific project. Though the extent of our work on a specific assignment is frequently not within our control, the attorney responsible for

your matters is always prepared to discuss with you the scope of our assignment and changes therein.

Our performance of legal services may involve direct and indirect costs that we will incur on your behalf. These disbursements and charges include items incurred and paid by us on your behalf such as long distance telephone charges, postage, special mail or delivery charges, telex or telecopy charges, recording fees, transportation, meals, lodging and other costs necessary for out-of-town travel, photocopying, and use of other service providers such as printers or experts, if needed. In litigated matters, we include payments we must make for filing fees, court costs, process servers, court reporters, witness fees, and similar costs. These charges will be billed at cost. We also make separate charges for the use of computerized legal research systems, including "Lexis" and "Westlaw", that in our experience significantly reduce lawyer research time. We do not charge for secretarial, word processing or similar charges which are a part of our overhead.

We customarily send monthly invoices for services rendered and other charges incurred for your account during the previous month. The monthly invoice details the work performed and the types of charges incurred. Payment will be due thirty (30) days after the date of our invoice.

DLA Piper LLP (US) is a large law firm with offices in various locations throughout the United States. We may currently or in the future represent one or more other clients in matters or transactions or having other contacts with POA and/or its affiliates or subsidiaries. For example, we may represent other clients in corporate matters (including mergers and acquisitions, takeovers, and other change-in-control issues and transactions) and commercial transactions (including preparation and negotiation of agreements, licenses, leases, loans, securities offerings or underwritings), or in other matters and transactions involving POA on behalf of these or other clients where we do not represent POA on the same matter, or on legislative or policy matters, or administrative proceedings that may involve or affect POA and/or its affiliates or subsidiaries. We understand that POA consents to the firm's current and future representation of any such other clients in any of such matters without the need for any further consents from POA. We understand that no such direct conflict would exist where the representation of another client is not substantially and adversely related to the matters the firm is handling for POA, or where the firm's representation of either POA or another client would involve legislative issues, policy issues, or administrative proceedings unrelated to the representation of the other. We do not view this advance consent to permit unauthorized disclosure or use of any client confidences.

If you have questions about any aspect of our arrangements or our invoices from time to time, feel entirely free to raise those questions. It is important that we proceed on a mutually clear and satisfactory basis in our work for you.

The foregoing covers the essential elements necessary for the establishment of the attorney-client relationship between DLA Piper LLP (US) and POA. If you have any questions or comments about the terms of our agreement as herein outlined, please call me to discuss them.

If the scope of the services we are to render to you and terms of the engagement are satisfactorily described above, please indicate your agreement by executing the enclosed copy of this letter and returning it to us. Thereafter, unless we agree in writing to alter these arrangements, we will assume that these terms are acceptable to you for this matter and for all future matters on which you retain DLA Piper LLP (US) to serve you.

We will endeavor to provide prompt and responsive legal services at all times.

Very truly yours,

DLA Piper LLP (US)

Nicolai Sajad
Partner

CC: Timothy Walsh

I have read the above letter and agree and accept the terms and conditions set forth therein.

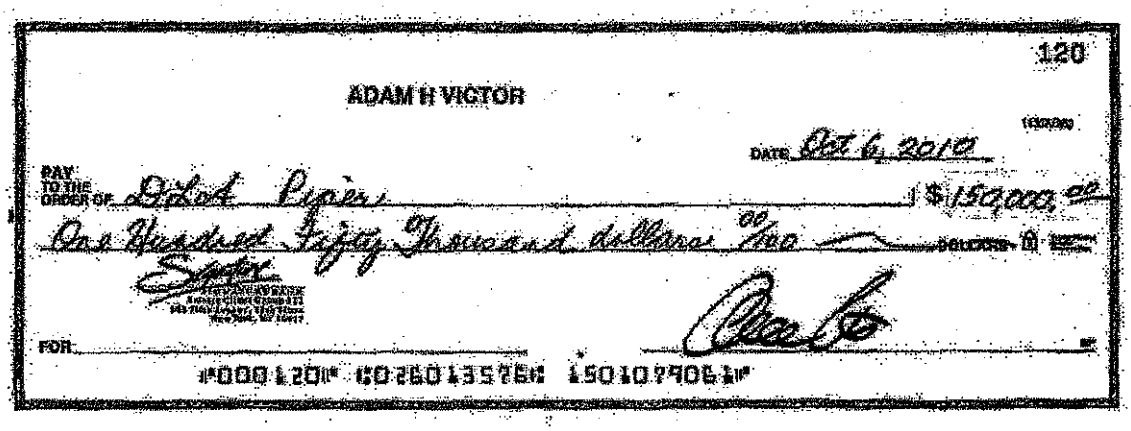
Date: April 22, 2010

PROJECT ORANGE ASSOCIATES, LLC

By: _____
Adam H. Victor
President

EAST\42905498.2

EXHIBIT B



120

ADAM H VICTOR

DATE Oct 6, 2010

PAY TO THE ORDER OF D'Lot Pipes $ 150,000.00

One Hundred Fifty Thousand dollars 00/100 DOLLARS

FOR

⑈000120⑈ ⑆026013576⑆ 150107906⑈

EXHIBIT C

KLESTADT & WINTERS, LLP
292 Madison Avenue, 17th Floor
New York, NY 10017-6314
Telephone: (212) 972-3000
Facsimile: (212) 972-2245
Tracy L. Klestadt
Brendan M. Scott

Attorneys for the Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Chapter 11
PROJECT ORANGE ASSOCIATES, LLC,	:	
	:	Case No. 10-12307 (MG)
Debtor.	:	

AMENDED MOTION PURSUANT TO 11 U.S.C. §§ 105, 363(b) AND 364(C) AND BANKRUPTCY RULES 4001 AND 9014 FOR ORDERS AUTHORIZING DEBTOR TO OBTAIN ADDITIONAL INTERIM AND FINAL FINANCING AND AUTHORIZING THE DEBTOR TO USE PROPERTY OF THE ESTATE, INCLUDING THE PROCEEDS OF THE INTERIM AND FINAL FINANCING TO TO FUND AND IMPLEMENT A CERTAIN SETTLEMENT AGREEMENT BETWEEN THE DEBTOR AND SYRACUSE UNIVERSITY

TO THE HONORABLE MARTIN GLENN:

Project Orange Associates, LLC, as debtor and debtor in possession in the above captioned chapter 11 case (the "Debtor"), by its undersigned attorneys, hereby files its motion, (the "Motion") for orders, pursuant to sections 105, 363(b) and 364(c) of title 11 of the United States Code (the "Bankruptcy Code"), and rules 4001(c) and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the Debtor to obtain additional interim financing of up to $1,600,000 (the "Interim Third DIP Loan") and final financing of $4.1 million (the "Third DIP Loan") pursuant to the Amended and Restated Credit Agreement, dated as of November 1, 2010 (the "Credit Agreement", a copy of which is attached hereto as **Exhibit**

"A"), between the Debtor and Gas Alternative Systems, Inc. (the "DIP Lender"), and entry of interim and final orders. In support of this Motion, the Debtor respectfully represents as follows:

PRELIMINARY STATEMENT

This Debtor seeks approval to borrow up to $4.1 million in additional debtor in possession financing from the DIP Lender. The Third DIP Loan is being provided by the DIP Lender as secured DIP financing. The Debtor will grant to the DIP Lender a lien on its assets up to the value of the Third DIP Loan, which shall be valid lien only after Syracuse University releases its lien on the Debtor's assets. The DIP Lender's lien on the Debtor's assets will be subordinated only to the secured claim of Syracuse University and claims for fees under 28 U.S.C. § 1930(a)(6). The DIP Lender is an entity wholly owned by Adam Victor, the Debtor's equity holder.

The funds from the Third DIP Loan will provide the Debtor with the necessary liquidity to fund and implement a certain settlement agreement between the Debtor and Syracuse University (the "University") dated as of October 16, 2010 (the "Settlement Agreement"), which requires the Debtor to, among other things, (a) post two letters of credit in the total amount of $1,600,000, (b) enter into a contract with and pay a demolition contractor to demolish the Debtor's cogeneration facility in Syracuse, New York, (c) enter into a contract with and pay an independent engineer to monitor progress of the demolition work and (d) pay real estate taxes for the tax years 20110-2011 and 2011-2012.

BACKGROUND

1. On April 29, 2010 (the "Petition Date"), the Debtor filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code.

2. The Debtor remains in possession of its assets and continues to manage its business as debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

3. No trustee, examiner, or creditors' committee has been appointed in this chapter 11 case.

4. Additional information regarding the Debtor's business, capital structure, and the circumstances leading to this chapter 11 filing is contained in the Affidavit of Adam Victor Pursuant to Local Bankruptcy Rule 1007-2 in Support of First Day Motions and Applications and is incorporated herein by reference.

5. Certain of the Debtor's assets are subject to the alleged first-priority liens of the University. However pursuant to the terms of the Settlement Agreement, the University will release all liens on the Debtor's assets upon the Debtor's compliance with the terms of the Settlement Agreement.

6. Pursuant to the Final Order Authorizing the Debtor to Obtain Post-petition Financing from Gas Alternative Systems, Inc. entered on May 13, 2010, the Court authorized the Debtor to obtain financing in the amount of $150,000 in accordance with a Credit Agreement, dated as of May 10, 2010, between the Debtor and the DIP Lender (the "Original DIP Facility"). The Debtor has borrowed and used all available funds under the Original DIP Facility to pay its post-petition expenses and operate its business.

7. Pursuant to the Amended Final Order Authorizing Post-petition Financing entered on July 21, 2010, the Court authorized the Debtor to obtain financing in the additional amount of $390,000 in accordance with a First Amendment to Credit Agreement, dated as of June 4, 2010, between the Debtor and the DIP Lender (the "Additional DIP Facility"). The Debtor has borrowed and used all available funds under the Additional DIP Facility to pay its post-petition expenses and operate its business.

JURISDICTION AND VENUE

8. This Court has jurisdiction of this motion pursuant to 28 U.S.C. sections 157 and 1334. Venue of this case and this Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409. The statutory predicates for the relief sought herein are Bankruptcy Code sections 105, 363(b) and 364(c) and Bankruptcy Rules 4001(c) and 9014.

RELIEF REQUESTED

9. By this Motion, the Debtor seeks entry of an interim and final order, pursuant to Bankruptcy Code sections 105, 363(b) and 364(c) and Bankruptcy Rules 4001(c) and 9014, authorizing the Debtor to (a) further amend the Credit Agreement with the DIP Lender[1] and permit additional borrowing up to $4.1 million in secured, post-petition financing under the Credit Agreement and (b) use the proceeds of the Third DIP Loan and/or funds currently held in the Debtor In Possession Bank account in accordance with the budget annexed hereto as **Exhibit "B"**, including (i) using up to $1,600,000 of the proceeds of the Third DIP Loan and/or funds currently held in the Debtor In Possession Bank account, to post two letters of credit as required by the Settlement Agreement (a copy of the Settlement Agreement is annexed hereto as **Exhibit "C"**, (ii) using up to $2,500,000 of the proceeds of the Third DIP Loan and/or funds currently held in the Debtor In Possession Bank account, to enter into a contract with and pay a demolition contractor to demolish the Debtor's cogeneration facility in Syracuse, New York as required by the Settlement Agreement[2], (iii) using up to $109,120 of the proceeds of the Third DIP Loan and/or funds currently held in the Debtor In Possession Bank account, to enter into a contract

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1 The DIP Lender is wholly owned and controlled by Adam Victor, the Debtor's President and sole equity holder.

2 The Debtor has not yet executed an agreement with a demolition contractor, but has received a complete bid from one contractor and a partial bid from a second contractor. Additional bids are anticipated in the near future. The bid received by the Debtor estimates the cost of demolition at $2,500,000. At this time, the Debtor continues to consider its options, but requires the ability to use up to $2,500,000 of the proceeds of the Third DIP Loan to enter into a contract with and pay a demolition contractor.

with and pay an independent engineer to monitor progress of the demolition work as required by the Settlement Agreement.[3] This Motion is supported by the Affidavit of Adam Victor, dated November 1, 2010 (the "Victor Affidavit"), a copy of which is attached hereto as **Exhibit "D"**. Mr. Victor is the Debtor's President and has been directly involved in all of the Debtor's post-petition operational and financing efforts.

BASIS FOR RELIEF

Need For Financing

10. Since the Petition Date, the Debtor had been using the University's alleged cash collateral pursuant to consensual interim cash collateral orders and amended budgets approved by this Court. Victor Affidavit, ¶4. The Debtor has generated substantial revenue from operations since the Petition Date, and as a result, the Debtor has over $1,000,000 in cash on hand. Victor Affidavit, ¶4. The Debtor will use cash on hand to partially fund the Debtor's financial obligations under the Settlement Agreement, but the Debtor lacks sufficient liquidity to fully fund its financial obligations under the Settlement Agreement. Victor Affidavit, ¶4

11. Accordingly, the Debtor will require additional DIP financing in order to meet its obligations under the Settlement Agreement, including among other things, the demolition of the Debtor's cogeneration facility in Syracuse New York (the "Cogeneration Facility") and payment of real estate tax obligations for the tax years of 2010-2011 and 2011-2012. Victor Affidavit, ¶5.

12. It is critical to facilitate the Debtor's reorganization that it has access to sufficient post-petition funds in order to implement the Settlement Agreement. The Settlement Agreement resolves all disputes with the University including the proof of claim it filed in the amount of $189,007,735, a portion of which the University asserts as a secured claim in an amount equal to

[3] The Debtor is in the process of finalizing an agreement with the firm of O'Brien & Gere Engineers, Inc., whereby O'Brien & Gere Engineers, Inc. will serve as the independent engineer. The estimated costs of O'Brien & Gere Engineers, Inc.'s services is $109,120.

the value of all of the Debtor's assets (the "Proof of Claim"). As a result of its compliance with the terms of the Settlement Agreement, the University will withdraw the Proof of Claim and will convey to the Debtor title to all equipment currently used in the Cogeneration Facility. The Debtor requires sufficient liquidity to fund its obligations under the Settlement Agreement, including the demolition of the Cogeneration Facility, posting of two letters of credit in the total amount of $1,600,000, and payment of real estate tax obligations for the tax years of 2010-2011 and 2011-2012. Failure to satisfy such obligations will result in immediate harm to the Debtor's efforts to reorganize and therefore its ability to maximize the value of its assets for the benefit of its creditors. Victor Affidavit, ¶7.

13. The Debtor has determined, in the exercise of its business judgment and in consultation with its professionals, that it requires access to up to $4.1 million. Victor Affidavit, ¶8. The Debtor believes that a financing facility at this level will enable it to meet its obligations under the Settlement Agreement and provide the Debtor with an opportunity to reorganize its business and propose confirmable plan. Victor Affidavit, ¶9.

14. To ensure stability and maintain the highest level of care, Mr. Victor is prepared to advance funding on favorable terms to the Debtor. This funding is necessary to continue provide the Debtor with an opportunity to reorganize its operations and to develop a plan of reorganization.

15. Accordingly, the Debtor respectfully requests that the Court enter the order annexed hereto as **Exhibit "E"** (the "Interim Order") approving the Credit Agreement on an interim basis and scheduling a final hearing on the Motion, and (b) enter an order substantially in the form of the annexed **Exhibit "F"** (the "Final Order"), granting final approval of the Credit Agreement.

The DIP Lender

16. The DIP Lender under the Credit Agreement is Gas Alternative Systems, Inc. The DIP Lender is an entity owned and controlled by Mr. Adam Victor, the Debtor's President. The DIP Lender has retained separate counsel, DLA Piper LLP (US), which has represented Mr. Victor and the DIP Lender with respect to this Credit Agreement and the DIP financing.

17. As discussed below, the Credit Agreement provides far superior terms for the Debtor and it is in the best interest of the Debtor, its estate, its creditors and other parties in interest to close on the proposed Credit Agreement. The Third DIP Loan contains no fees, a very low rate of interest, and no unusual defaults. In light of the Debtor's budget and financial projections, it is extremely unlikely that any commercial lenders would provide any credit, much less on the terms proposed by the current DIP Lender.

The Credit Agreement

18. The Debtor has, subject to this Court's approval, agreed to the terms of the Credit Agreement. The following is a summary of certain key provisions of the Credit Agreement[4]:

A. Commitment and Availability. The Credit Agreement provides for post-petition financing of up to $4.1 million.

B. Use of Funding. The funds made available to the Debtor pursuant to the Credit Agreement shall be used solely to fund the Debtor's obligations under the Settlement Agreement.

C. Term. One hundred and eighty (180) days, or as otherwise provided in the credit agreement.

D. Interest Rate. Prime plus three percent (3%) per annum.

E. Default Interest Rate. Three percent (3%).

F. Budget. The Credit Agreement incorporates the budget attached to the Cash Collateral Order (as such budget may be amended, the "Budget").

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[4] Capitalized terms used herein but not otherwise defined herein shall have the meaning ascribed to them in the Credit Agreement.

G. Carve Out for Certain Fees and Expenses. The Credit Agreement provides that the DIP Lender is granted a secured claim for the amount of the Third DIP Loan. The DIP Lender has agreed to subordinate its secured claim to quarterly fees payable to the Office of the United States Trustee pursuant to 28 U.S.C. 1930(a)(6) (the "Carve-Out Expenses") plus any interest owed thereon and the secured claim of Syracuse University.

H. Collateral. The DIP Loan is secured. As security for the Obligations, the Debtor has agreed to grant to the DIP Lender a continuing security interest in and lien upon, and a right of setoff against (and the Debtor has agreed to pledge and assign to the DIP Lender), all of the assets of Borrower as collateral (the "Collateral"). The DIP Lender has acknowledge and agreed that DIP Lender's liens on the Collateral are and shall remain subordinate to the Carve-Out Expenses and the secured claim of Syracuse University, until payment in full of the Carve-Out Expenses and the release by Syracuse University of its secured claims and liens.

I. Fees. The DIP Lender is not requesting any fees with respect to the DIP Loan, nor is the DIP Lender being reimbursed for legal expenses and costs.

J. Conditions to Closing. The standard conditions precedent related to execution of documents and entry of Interim and Final Orders by this Court are the only conditions to closing.

K. Default Provisions. The potential events of default are: (i) failure to pay the DIP Loan as required under the Credit Agreement; (ii) material misrepresentations; (iii) filing of applications to dismiss the Chapter 11 case or appoint a Chapter 11 trustee or examiner, or entry of orders with respect to same; (iv) filing of a plan that does not contemplate repayment of the Third DIP Loan; (v) modification of the Credit Agreement or the Interim or Final Orders; (vi) order of this Court granting relief from the automatic stay for assets valued in excess of $100,000.00; and (vii) material adverse change. The majority of these defaults provide a five (5) business day cure period for the Debtor.

19. The Credit Agreement may be amended or modified prior to the hearing through negotiations with the Debtor, the DIP Lender, the Office of the United States Trustee or the University. If any such amendments or modifications are made to the Credit Agreement, the Debtor will provide the Court with a copy of the Credit Agreement, as amended or modified, in advance of the hearing.

20. The Debtor requires immediate access to $1,600,000 to ensure sufficient liquidity to post two letters of credit totaling $1,600,000 dollars within three (3) business days after the Debtor obtains Court approval of the Settlement Agreement. Thus it requires immediate access to the entire amount of the Interim DIP Loan.

21. The Credit Agreement does not include provisions related to cross collateralization, rollups, waivers or concessions of prepetition debt, 506(c) waivers, liens on avoidance actions, or any carve outs that treat professionals in disparate fashion.

22. The Debtor believes the terms and conditions of the Credit Agreement are reasonable under the circumstances and financing on more favorable terms is not available. See Victor Affidavit, ¶10. As set forth in the Victor Affidavit, the Credit Agreement is a fair and reasonable agreement between the Debtor and the DIP Lender. See Victor Affidavit, ¶10. For all of the foregoing reasons, the Debtor believes that the terms and conditions of the Credit Agreement serve the best interests of the Debtor, its creditors and estate and should be approved.

The Standard for Approval of the Credit Agreement

23. The Debtor believes the terms and conditions of Bankruptcy Code section 364(c) authorize this Court to allow the Debtor to obtain post-petition financing from the DIP Lender in the manner proposed in the Credit Agreement. Section 364(c) provides:

> if the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt:
>
> * * *
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

24. As described above, after appropriate investigation and analysis, the Debtor has concluded that the Credit Agreement is necessary to the preservation of the estate and the

payment of the Debtor's financial obligations under the Settlement Agreement. Further, the Credit Agreement is a far superior alternative when compared with the terms typically proposed by other lenders – there are no fees or costs associated with the proposed Additional DIP Loan.

25. Bankruptcy courts routinely defer to a debtor's business judgment on most business decisions, including the decision to borrow money, unless such decision is arbitrary and capricious. *See In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that an interim loan, receivables facility, and asset based facility were approved because they "reflect[ed] sound and prudent business judgment on the part of TWA. . . . [were] reasonable under the circumstances and in the best interest of TWA and its creditors"); *cf. Group of Institutional Investors v. Chicago Mil. St. P. & Pac. Ry.*, 318 U.S. 523, 550 (1943) (decisions regarding the rejection or assumption of a lease are left to the business judgment of the debtor); *In re Simasko Prod. Co.*, 47 B.R. 444, 449 (D. Colo. 1985) ("Business judgments should be left to the board room and not to this Court."); *In re Lifeguard Indus., Inc.*, 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983) (same); In re Curlew Valley Assocs., 14 B.R. 506, 513-14 (Bankr. D. Utah 1981) (holding that courts generally will not second guess a debtor-in-possession's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code"). In fact, "[m]ore exacting scrutiny would slow the administration of the Debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially[.]" *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

26. In *Crouse*, the court reasoned that the standard of review in approving DIP financing under 364(c) would be similar to that required in approving a settlement pursuant to

Bankruptcy Rule 9019. *Id.* at 550; *In Ellingsen MacLean Oil Co.*, 65 B.R. 358, 364-64 (Bankr. W.D. Mich. 1986). At most, it appears that some courts evaluate the proposed financing under Bankruptcy Code section 364(c) by application of the business judgment rule. *See In re Crouse Group, Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987).

27. Pursuant to Bankruptcy Rule 9019, the bankruptcy court should consider all facts surrounding the issue and determine whether the proposed action serves the interest of the estate. *See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 292 (2d Cir. 1992). A bankruptcy court does not, however, engage in an independent investigation into the reasonableness of the proposed conduct, but instead generally defers to the judgment of the debtor in possession provided there is a legitimate business justification for the settlement. "Where the Debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *Committee of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

28. Indeed, the court should not conduct a "mini-trial" on the merits of the action, but should instead "canvas the issues to see whether the settlement falls below the lowest point in the range of reasonableness." *Aetna Casualty & Surety Co. v. Jasmine, Ltd. (In re Jasmine, Ltd.)*, 258 B.R. 119, 123 (D. N.J. 2000). Accordingly, the Court does not have to engage in an independent investigation of the financing options available to the Debtor. The Court may authorize the Debtor to enter into the Credit Agreement so long as the Credit Agreement does not fall below the lowest point in the range of reasonableness.

29. The Debtor acknowledges that transactions between a debtor in possession and an

insider are subject to greater scrutiny than "arms-length" transactions. *See In re C.E.N., Inc.*, 86 B.R. 303, 306 (Bankr. D. Me. 1988). However, given the extremely favorable terms of the Credit Agreement, the Debtor believes the proposed DIP financing will survive such scrutiny.

The Debtor Should Be Authorized to Enter Into the
Credit Agreement Pursuant to the Business Judgment Rule

30. In the present case, the Debtor has reviewed various financing options, however, the financing proposed by the DIP Lender is the most beneficial to the estate because, inter alia:

- funds will be available immediately;
- there appear to be no other lenders willing to lend to the Debtor;
- the loan will be secured by a lien on the Debtors collateral, but such lien shall be subordinated to the secured claim of Syracuse University;
- the loan is subordinated to certain Carve Out Expenses;
- there are no fees of any kind, avoiding the placement, monitoring, commitment and servicing fees found in most DIP financings;
- the interest rate is reasonable; and
- there are no onerous conditions precedent to closing.

31. Under these circumstances, the Debtor respectfully submits that the Credit Agreement is beneficial and in the best interest of the estate and its creditors.

32. The Debtor has exercised sound business judgment in determining that a post-petition credit facility is appropriate and has satisfied the legal prerequisites to incur debt under the Credit Agreement.

Section 363(b) of the Bankruptcy Code Authorizing the Use of
Estate Property for Transactions other than those in the ordinary Course of Business

33. The Debtor requires the ability to use cash other than in the ordinary course of business to fund its obligations under the Settlement Agreement, including posting two letters of

credit, paying the fees of a contractor to demolish the Cogeneration Facility and paying the fees of an independent engineer as required by the terms of the Settlement Agreement.

34. Section 363(b) of the Bankruptcy Code provides that "the Trustee, after notice and a hearing, may use, sell, or other than in the ordinary course of business, property of the estate.... See 11 U.S.C. § 363(b).

The Proposed Financing Has Been Provided in Good Faith

35. The terms and conditions of the Credit Agreement are fair and reasonable and are the result of actions taken in good faith. The terms are overwhelmingly favorable for the Debtor and the Third DIP Loan will be used to fund a settlement which substantially increases the value of the Debtor's estate.

NOTICE

36. The Debtor has served notice of this Motion on (i) the Office of the United States Trustee for the Southern District of New York; (ii) the University; (iii) those creditors holding the twenty (20) largest unsecured claims against the Debtor's estate; and (iv) all parties that have filed notices of appearances in the Debtor's case. The Debtor submits that no other or further notice need be provided.

NO PRIOR REQUEST

37. No previous request for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests that the Court enter: (a) an interim order, substantially in the form attached as **Exhibit "E"** hereto, approving the Credit Agreement on an interim basis; (b) enter the Final Order approving the Credit Agreement and underlying Third DIP Loan; and (c) grant the Debtor such other and further relief as the Court deems just and proper.

Dated: November 3, 2010
New York, New York

Respectfully Submitted,

KLESTADT & WINTERS, LLP

By: /s/ Tracy L. Klestadt
Tracy L. Klestadt
Brendan M. Scott
292 Madison Avenue, 17th Floor
New York, NY 10017-6314
Telephone: (212) 972-3000
Facsimile: (212) 972-2245

Attorneys for Debtor and
Debtor in Possession

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Chapter 11
PROJECT ORANGE ASSOCIATES, LLC,	:	
	:	Case No. 10-12307 (MG)
Debtor.	:	

AFFIDAVIT OF ADAM VICTOR IN SUPPORT OF DEBTOR'S MOTION PURSUANT TO 11 U.S.C. §§ 105 AND 364(c) AND BANKRUPTCY RULES 4001 AND 9014 FOR ORDERS: (A) AUTHORIZING DEBTOR TO OBTAIN ADDITIONAL INTERIM AND FINAL FINANCING FROM GAS ALTERNATIVE SYSTEMS. INC., (B) SCHEDULING HEARINGS ON SHORTENED NOTICE

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

Adam Victor, being duly sworn, deposes and says:

1. I am the President of the above-captioned debtor and debtor in possession (the "Debtor"). I have personal knowledge of the Debtor's business and the facts herein. With respect to financial information set forth herein, I have relied on information provided by employees of the Debtor, and with respect to pending legal matters, I have relied on the Debtor's attorneys.

2. I submit this affidavit in support of the Debtor's motion, dated November 1, 2010 (the "Motion")[1], for orders, pursuant to sections 105 and 364(c) of title 11 of the United States Code (the "Bankruptcy Code"), and rules 4001(c) and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"): (a) scheduling hearings on the Motion on shortened notice; and (b) authorizing the Debtor to obtain certain interim financing of $1,600,000 and final financing $4,100,000 (the "Third DIP Loan") pursuant to a Amended and Restated Credit

[1] Capitalized terms used, but not defined, herein shall have the meanings provided in the Motion.

Agreement, dated as of October 29, 2010 (the "Credit Agreement"), between the Debtor and Gas Alternative Systems, Inc. (the "DIP Lender").

DEBTOR'S NEED FOR FUNDING

3. The Debtor and the University have reached an agreement which resolves all disputes between the Debtor and the University. The Settlement Agreement requires the Debtor to, among other things, post two (2) letters of credit in the total amount of $1,600,000 within three (3) days after the Settlement Agreement is approved by order of this Court and also requires the Debtor to pay for the demolition of the Debtor's cogeneration facility in Syracuse New York (the "Cogeneration Facility").

4. Since the Petition Date, the Debtor had been using the University's alleged cash collateral pursuant to consensual interim cash collateral orders and amended budgets approved by this Court. The Debtor has generated substantial revenue from operations since the Petition Date, and as a result, the Debtor will have over $1,000,000 in cash on hand after payment of real estate taxes due on October 31, 2010. The Debtor will use cash on hand to partially fund the Debtor's financial obligations under the Settlement Agreement, but the Debtor lacks sufficient liquidity to fully fund its financial obligations under the Settlement Agreement.

5. The Debtor will require additional DIP financing in order to meet its obligations under the Settlement Agreement, including among other things, the demolition of the Cogeneration Facility and payment of real estate tax obligations for the tax years of 2010-2011 and 2011-2012.

6. It is critical to facilitate the Debtor's reorganization that it has access to sufficient post-petition funds in order to implement the Settlement Agreement. The Settlement Agreement resolves all disputes with the University including the proof of claim it filed in the amount of

$189,007,735, a portion of which the University asserts as a secured claim in an amount equal to the value of all of the Debtor's assets (the "Proof of Claim"). As a result of its compliance with the terms of the Settlement Agreement, the University will withdraw the Proof of Claim and will convey to the Debtor title to all equipment currently used in the Cogeneration Facility.

7. The Debtor requires sufficient liquidity to fund its obligations under the Settlement Agreement, including the demolition of the Cogeneration Facility, posting of two letters of credit in the total amount of $1,600,000, and payment of real estate tax obligations for the tax years of 2010-2011 and 2011-2012. Failure to satisfy such obligations will result in immediate harm to the Debtor's efforts to reorganize and therefore its ability to maximize the value of its assets for the benefit of its creditors.

8. The Debtor requires the ability to borrow up to $4.1 million in order to fund its obligations under the Settlement Agreement.

9. I believe that a financing facility at this level will enable the Debtor to meet its obligations under the Settlement Agreement and provide the Debtor with an opportunity to reorganize its business and propose a confirmable plan.

10. Based upon my review of the financing options available to the Debtor, the terms and conditions of the Credit Agreement and the DIP Loan are reasonable under the circumstances and financing on more favorable terms is not available.

11. The DIP Lender has indicated that it would not be willing to extend the Third DIP Loan under the terms set forth in the Credit Agreement unless the Debtor granted a lien on its assets up to the amount of the Third Dip Loan actually advanced to the Debtor.

12. I was solely responsible for negotiating the terms of the Credit Agreement with the DIP Lender.

/s/ Adam Victor
Adam Victor

Sworn to before me this
__ day of November, 2010

_____
NOTARY PUBLIC

Exhibit 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DLA PIPER LLP (US), Plaintiff, - against - ADAM VICTOR, Defendant.	Index No. 650374/2012 IAS Part 63 Hon. Ellen Coin **ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**

Defendant Adam Victor ("Victor" or "Defendant") by his attorneys, Davidoff Hutcher & Citron LLP, submit this Answer, Affirmative Defenses and Counterclaims in response to the complaint (the "Complaint") of plaintiff DLA Piper LLP (US) ("DLA Piper" or "Plaintiff") as follows:

Parties

1. Victor admits the allegations contained in paragraphs 1 and 2 of the Complaint.

Statement of Facts Common to All Claims

2. Victor admits the allegations contained in paragraph 3 of the Complaint, and states that the Engagement Letter was between Project Orange Associates, LLC ("POA") and DLA Piper. Victor was not a party to the Engagement Letter.

3. Victor admits the allegations contained in paragraph 4 of the Complaint.

4. Victor denies the allegations contained in paragraph 5 of the Complaint, except admits that there was a conflict between POA and another client of DLA Piper, and the Bankruptcy Court issued an order disqualifying DLA Piper from representing POA in the POA bankruptcy action. Victor states that while DLA Piper formally withdrew as counsel of record

for POA, DLA Piper continued to act as POA's attorneys in the POA bankruptcy behind the scenes.

5. Victor denies the allegations contained in paragraph 6 of the Complaint.

6. With respect to the allegations contained in paragraph 7 of the Complaint, Victor admits that DLA Piper sent certain invoices to Victor in his capacity as president of POA, and denies that DLA Piper sent any invoices to Victor in his individual capacity.

7. Victor denies the allegations contained in paragraph 8 of the Complaint, except admits that on or about June 25, 2010, Victor paid DLA Piper $250,000 from his personal account for monies DLA Piper billed to POA.

8. Victor denies the allegations contained in paragraph 9 of the Complaint, except admits that on or about October 13, 2010, Victor paid DLA Piper $150,000 from his personal account for monies DLA Piper billed to POA.

9. Victor denies the allegations contained in paragraph 10 of the Complaint.

10. Victor denies the allegations contained in paragraph 11 of the Complaint, except admits that Victor signed the affidavit annexed as Exhibit D to the Complaint.

11. Victor denies the allegations contained in paragraph 12 of the Complaint, except admits that on or about December 31, 2012, Gas Orange Development, Inc. paid DLA Piper $150,000 for monies DLA Piper billed to POA.

12. Victor admits the allegations contained in paragraph 13 of the Complaint and states that Victor does not owe any monies on the "Outstanding Victor Invoices," since Victor was never personally liable for any of DLA Piper's invoices.

13. Victor denies the allegations contained in paragraph 14 of the Complaint.

14. Victor admits the allegations contained in paragraph 15 of the Complains, except denies that Invoice # 2369074 was sent to Victor in his individual capacity, and states that such invoice was sent to Victor in his capacity as president of POA.

15. Victor admits the allegations contained in paragraph 16, except denies that DLA Piper is only permitted to reveal confidential attorney-client communications if it is suing POA – its actual client. DLA Piper may not reveal attorney-client confidences when trying to collect a fee from Victor, with whom DLA Piper had no attorney-client relationship with.

16. With respect to the allegations contained in paragraph 17 of the Complaint, Victor admits that DLA Piper claims it is owed $678,762.69, and denies that DLA Piper is entitled to payment from Victor.

17. Victor admits the allegations contained in paragraph 18 of the Complaint, and denies that Victor has any liability for any invoices sent to him by DLA Piper.

18. Victor denies the allegations contained in paragraph 19 of the Complaint, except Victor admits that he has refused to pay DLA Piper money that Victor is not liable for.

19. Victor denies the allegations contained in paragraph 20 to the extent that DLA Piper expected to be paid by Victor personally, as opposed to POA, and Victor otherwise denies knowledge or information sufficient to admit or deny the balance of the allegations contained in paragraph 20 of the Complaint.

20. Victor denies the allegations contained in paragraph 21 of the Complaint, and states that DLA Piper only represented Victor personally with respect to one small collection matter, and as such, could never have billed Victor more than $50,000.

First Cause of Action (Account Stated)

21. In response to the allegation contained in paragraph 22 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

22. Victor denies the allegations contained in paragraphs 23, 24 and 25 of the Complaint.

Second Cause of Action (Breach of Contract)

23. In response to the allegation contained in paragraph 26 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

24. Victor denies the allegations contained in paragraphs 27, 28, 29, and 30 of the Complaint.

Third Cause of Action (Breach of Implied Covenant of Goof Faith)

25. In response to the allegation contained in paragraph 31 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

26. Victor admits the allegations contained in paragraph 32 of the Complaint, and states that the third cause of action is entirely duplicative of the first cause of action in that it fails to articulate any facts distinct from the breach of contract alleged.

27. Victor denies the allegations contained in paragraph 33 of the Complaint.

Fourth Cause of Action (Unjust Enrichment – Quantum Meruit)

28. In response to the allegation contained in paragraph 34 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

29. Victor denies the allegations contained in paragraphs 35, 36, 37, 38, 39 and 40 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

30. The Complaint fails, in whole or in part, to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

31. The Complaint is barred, in whole or in part, by the doctrines of estoppel, waiver, ratification, laches and/or Plaintiffs' unclean hands.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

32. The relief requested in the Complaint is unavailable as a result of Plaintiff's consent or acquiescence to solely hold POA responsible for the outstanding legal invoices.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

33. The Complaint is barred, in whole or in part, by Plaintiff's breach of the Engagement Letter between Plaintiff and POA.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

34. Victor has at all times acted in good faith and with reasonable grounds for believing that his conduct was entirely lawful. Plaintiff is precluded by its own misconduct, acts and omissions from maintaining this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

35. The actions of Defendants were not wrongful.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

36. The losses and damages complained of in the Complaint were caused by Plaintiff's acts of misconduct and omissions.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

37. The Complaint is barred by documentary evidence.

38. The Engagement Letter conclusively establishes that DLA Piper's sole client was POA

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

39. The Complaint is barred in whole or in part by RPC 1.5 and 22 NYCRR 1215.1 which require a written retainer between an attorney and client in order to recover on a claim for breach of contract.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

40. The cause of action for breach of the duty of good faith is barred as being duplicative of the cause of action for breach of contract.

PRESERVATION OF DEFENSES

41. Victor reserves the right to raise additional and other affirmative defenses that may subsequently become or may appear to be applicable to the Complaint.

COUNTERCLAIMS

1. These counterclaims seek the return of $776,000 paid by Victor to DLA Piper for services rendered for POA.

2. Victor was the owner of the equity of the now-defunct POA. When POA filed for bankruptcy protection, it retained its long-time attorneys at DLA Piper to represent it as debtor's counsel in that proceeding.

3. As a result of a conflict of interest, the Bankruptcy Court disqualified DLA Piper from representing POA. Nevertheless, after being disqualified, DLA Piper insisted to Victor that it remain POA's counsel. Since the Court Order disqualified DLA Piper from its representation, DLA Piper insisted that it would remain behind-the-scenes, and act as "ghost" counsel for POA.

4. Even though DLA Piper acted as shadow counsel for POA, it knew it could not get paid by POA since the Bankruptcy Court explicitly ruled that DLA Piper could not represent POA. As such, DLA Piper applied unrelenting pressure on Victor to pay for the legal services rendered to POA.

5. Victor succumbed to DLA Piper's demands and paid DLA Piper $776,000 of his own personal funds for services largely rendered to POA.

6. Victor paid those bills without having the benefit of receiving monthly invoices to determine whether the charges to POA were reasonable. Victor only received itemized bills after they were paid. After reviewing the detailed legal invoices, it is readily apparent that DLA Piper engaged in a systematic and sweeping practice of over-billing, by billing for services that were unnecessary, duplicative, or wasteful.

7. Through this action, Victor seeks the return of the money he was pressured to pay DLA Piper to continue a representation DLA Piper was barred from undertaking.

Parties

8. Counterclaim Plaintiff is Victor and Counterclaim Defendant is DLA Piper.

Jurisdiction

9. The court has personal jurisdiction over DLA Piper pursuant to CPLR § 301 since DLA Piper conducts business in the State of New York.

10. Venue is proper in New York County as DLA Piper brought the instant lawsuit in New York County and DLA Piper maintains a place of business in New York County.

Statement of Facts

11. POA owned and operated a stem-electric cogeneration plant in Syracuse, New York that supplied steam to Syracuse University and electricity to initially Niagara Mohawk Power Corporation, and later to the New York State Independent System Operator.

12. Victor was initially a minority owner of POA, and eventually became the 100% owner.

13. DLA Piper had been the long-time attorneys for POA and other entities controlled by Victor. Victor's companies paid DLA Piper millions of dollars over the past 10 years in legal fees on a variety of matters.

14. In 2008, after 16 years of successful operations, POA was forced to shut down the cogeneration plant, which was a result of the economic consequences of the State of New York's de-regulation and restructuring of the electric utility industry.

15. POA ultimately filed for bankruptcy on April 29, 2010. POA retained its long-time attorneys at DLA Piper to serve as its bankruptcy counsel.

16. POA executed an engagement letter (the "Engagement Letter") with DLA Piper one week prior to POA's bankruptcy filing, a copy of which is annexed as Exhibit A to the Complaint.

17. In a decision and order dated June 23, 2010, the Bankruptcy Court held that DLA Piper could not act as counsel for POA as a result of a conflict of interest. The Bankruptcy Court's decision is reported at In re Project Orange Associates, LLC, 431 BR 363 [Bankr SD NY 2010].

18. Project Orange Associates then retained new bankruptcy counsel. Yet because DLA Piper had institutional knowledge, and did not want to lose such a lucrative client, DLA Piper insisted that it should continue to provide legal services behind the scenes to POA. POA heeded its counsel's advice. While POA hired separate counsel to officially represent its interests in the bankruptcy, DLA Piper acted as "ghost" counsel for POA and performed the bulk of the legal work required.

19. While POA's actual bankruptcy counsel was required to submit its fee applications to the bankruptcy court for review and approval by the court and the US Trustee, DLA Piper was not subject to such scrutiny since it was not official bankruptcy counsel.

20. DLA Piper would regularly bill POA/Victor for several months at a time, in invoices delivered several months after such services were purportedly rendered.

21. POA could not pay DLA Piper since its assets were all subject to the jurisdiction of the Bankruptcy Court. Accordingly, DLA Piper applied unrelenting pressure to Victor to pay for work done for POA from Victor's personal account.

22. Victor, being unaware of the impropriety of DLA Piper's actions, complied with DLA Piper's repeated demands and threats for money. At DLA Piper's demand, Victor regularly paid money to DLA Piper in advance, without the opportunity to see any detailed invoices.

23. To wit, Victor paid DLA Piper from his own personal funds on four occasions. On or about April 26, 2010, Victor wired $200,000 to DLA Piper. On or about June 25, 2010, Victor wired $250,000 to DLA Piper. On or about September 22, 2010, Victor issued check number 115 to DLA Piper in the amount of $176,000. On or about October 13, 2010, Victor issued check number 120 to DLA Piper in the amount of $150,000.

24. All told, Victor paid DLA Piper $776,000.

25. These payments were all made in advance of receiving detailed legal invoices from DLA Piper. To wit, DLA Piper delivered invoice number 2513808 to POA seeking $597,325.25, dated November 22, 2010, for services rendered from April 30, 2010 to August 3, 2010. On the cover page of the invoice, DLA Piper notes that the invoice was already paid in full in advance.

26. DLA Piper delivered invoice number 2526761 to POA seeking $200,000, dated December 31, 2010, for services rendered from May 3, 2010 to October 22, 2010.

27. Finally, DLA Piper delivered invoice number 2639074 to POA seeking $685,681.20 for services rendered from October 22, 2010 to December 8, 2011.

28. All told, DLA Piper billed POA $1,433,006.45, and was paid $776,000 by Victor, leaving a balance of $657,006.45 owed by POA to DLA Piper according to DLA Piper's own belated invoicing.

29. The three invoices detailed above – invoice numbers 2513808, 2526761, and 2639074 all demonstrate massive over-billing, and billing for work that was unnecessary, duplicative or wasteful.

30. DLA Piper never represented Victor individually, except with respect to one minor collection matter. DLA Piper represented Victor in his individual capacity in an action captioned Fix Spindelman Brovitz & Goldman PC v. Victor, Index No. 8041/2010 [Sup Ct Monroe Co]. The plaintiff in that action sued Victor for approximately $77,000 for unpaid legal bills. DLA Piper did some minor work on this matter for Victor, and Victor ended up settling that action a few months after it was commenced for $17,500 in a conversation directly with the plaintiff therein.

AS AND FOR A FIRST COUNTERCLAIM
(BREACH OF FIDUCIARY DUTY)

31. Victor repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth in full herein.

32. As the president and owner of POA, DLA Piper's client, DLA Piper owed fiduciary duties to Victor, including the duty of good faith, loyalty, and candor.

33. DLA Piper breached its fiduciary duties to Victor, based on the pressure it bore on Victor to pay for legal services rendered to POA, and for advising Victor that it was permitted to continue to act as "ghost" counsel for POA, even though the Bankruptcy Court ruled that DLA Piper could not act as counsel for POA.

34. DLA Piper further breached its fiduciary duties by billing Victor for legal services that were unnecessary, duplicative, or wasteful.

35. DLA Piper took these actions intentionally and with malicious disregard for its fiduciary duties owed to Victor.

36. As a direct and proximate result of DLA Piper's breach of its fiduciary duties, Victor suffered damages in the amount of $776,000, the amount Victor paid to DLA Piper from his personal account.

37. By virtue of the foregoing, Victor is entitled to a judgment in an amount not to exceed $776,000, in addition to interest accrued and accruing.

AS AND FOR A SECOND COUNTERCLAIM
(UNJUST ENRICHMENT)

38. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

39. In the alternative to the first counterclaim, DLA Piper was unjustly enriched by and benefited from the $776,000 paid to DLA Piper by Victor personally for services rendered for POA.

40. DLA Piper's actions in pressuring Victor to pay for services rendered to POA and then accepting those payments were wrongful.

41. DLA Piper was also unjustly enriched by and benefited from the $776,000 paid to it by Victor for legal services that were unnecessary, duplicative, or wasteful.

42. Circumstances are such that equity and good conscience require DLA Piper to make restitution to Victor in an amount to be determined at trial, but no greater than $776,000.

AS AND FOR A THIRD COUNTERCLAIM
(BREACH OF CONTRACT)

43. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

44. DLA Piper alleges in its complaint that it had an oral agreement with Victor where Victor agreed to be personally liable for services rendered by DLA Piper. Victor denies

that he ever agreed to be personally liable to DLA Piper for services rendered. However, to the extent this Court finds that such an oral agreement did exist, then also in the alternative to the first cause of action, Victor asserts a counterclaim for breach of contract.

45. There is no written contract between Victor and DLA Piper.

46. However, to the extent this Court finds that there was an oral contract between Victor and DLA Piper, which Victor denies, such contract would be valid and binding.

47. To the extent an oral contract existed, which Victor denies, DLA Piper breached that contract by failing to provide invoices in a timely fashion, and engaging in a systematic and sustained practice of overbilling by charging Victor for services that were unnecessary, duplicative or wasteful.

48. As a direct and proximate result of these breaches of contract, Victor has suffered damages in an amount to be determined at trial, but no more than the $776,000 that Victor paid to DLA Piper, in addition to pre-judgment interest.

WHEREFORE, Victor respectfully requests that a Judgment be entered herein:

(a) Dismissing the complaint with prejudice,

(b) On the first counterclaim, or in the alternative on the second counterclaim, or in the alternative on the third counterclaim, granting Victor a money judgment in an amount to be determined at trial, but no more than $776,000 in addition to pre-judgment interest;

(c) Granting Victor an award for the costs and disbursements of this action; and

(d) Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 3, 2012

DAVIDOFF HUTCHER & CITRON LLP

By: /s/ Joshua Krakowsky
Larry Hutcher
Joshua Krakowsky
605 Third Avenue
New York, New York 10158
(212) 557-7200

Attorneys for Defendant/Counterclaim Plaintiff Adam Victor

TO: Jeffrey Schreiber, Esq.
Meister Seelig & Fein LLP
2 Grand Central Tower
140 East 45th Street
19th Floor
New York, New York 10017
(212) 655-3500
Counsel for Plaintiff/Counterclaim Defendant

Exhibit 4

To: Thomson, Christopher[Christopher.Thomson@dlapiper.com]; Johnson, Jeremy R.[Jeremy.Johnson@dlapiper.com]
From: Eisenegger, Erich P.
Sent: Thur 5/20/2010 10:41:02 PM
Subject: Re: Project Orange

I hear we are already 200k over our estimate-that's Team DLA Piper!

From: Thomson, Christopher
To: Johnson, Jeremy R.; Eisenegger, Erich P.
Sent: Thu May 20 18:36:52 2010
Subject: FW: Project Orange

Yeah Team Tim!

From: Thomas Puccio [mailto:tpuccio@lotpp.com]
Sent: Thursday, May 20, 2010 6:29 PM
To: Walsh, Timothy W.
Cc: Adam Victor; Jonathan Flaxer; Gabriel Del Virginia; Sarad, Nicolai J.; Thomson, Christopher; Roldan, Vincent J.; Zborovsky, Gabriella
Subject: Re: Project Orange

Tim,

The papers read well. I checked them carefully for accuracy and I did not find anything that I recognized as incorrect or that should be substantively changed. As you might expect there are a number of nuances in the fact pattern and legal arguments that we need to confer about before June 3rd; however, you and your team have very ably mastered the essence of the disputes with SU in a remarkably short period of time. Great work!

Tom

On May 19, 2010, at 3:09 PM, Walsh, Timothy W. wrote:

> Attached is our draft objection to Syracuse's motion. Please review and provide us with your comments as soon as possible. Thanks.
>
> Tim

Timothy W. Walsh
DLA Piper LLP (us)
1251 Avenue of the Americas
New York, New York 10020-1104
212.335.4616 T
212.884.8516F
Timothy.Walsh@dlapiper.com

<POA_ Objection to Syracuse Stay Relief Motion.DOC>

Exhibit 5

To: Eisenegger, Erich P.[Erich.Eisenegger@dlapiper.com]; Johnson, Jeremy R.[Jeremy.Johnson@dlapiper.com]
From: Thomson, Christopher
Sent: Thur 5/20/2010 10:42:27 PM
Subject: RE: Project Orange

What was our estimate? But Tim brought Vince in to work on the objection for whatever reason, and now Vince has random people working full time on random research projects in standard Vince "churn that bill, baby!" mode. That bill shall know no limits.

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Exhibit 6

To: Thomson, Christopher[Christopher.Thomson@dlapiper.com]; Eisenegger, Erich P.[Erich.Eisenegger@dlapiper.com]
From: Johnson, Jeremy R.
Sent: Thur 5/20/2010 10:48:58 PM
Subject: RE: Project Orange

Didn't you use 3 associates to prepare for a first day hearing where you filed 3 documents?

From: Thomson, Christopher
Sent: Thursday, May 20, 2010 6:45 PM
To: Eisenegger, Erich P.; Johnson, Jeremy R.
Subject: RE: Project Orange

Eh, that's not totally true - Nick took like 150K to pay off outstanding bills for his work. So the BK is really only around 450K... That said, DLA seems to love to low ball the bills and with the number of bodies being thrown at this thing it's going to stay stupidly high and with the absurd litigation POA has been in for years it does have lots of wrinkles.

From: Eisenegger, Erich P.
Sent: Thursday, May 20, 2010 6:43 PM
To: Thomson, Christopher; Johnson, Jeremy R.
Subject: Re: Project Orange

400k. We are at 600k

From: Thomson, Christopher
To: Eisenegger, Erich P.; Johnson, Jeremy R.
Sent: Thu May 20 18:42:26 2010
Subject: RE: Project Orange

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Exhibit 7

To: Johnson, Jeremy R.[Jeremy.Johnson@dlapiper.com]; Eisenegger, Erich P.[Erich.Eisenegger@dlapiper.com]
From: Thomson, Christopher
Sent: Thur 5/20/2010 10:50:01 PM
Subject: RE: Project Orange

And it took all of them 4 days to write those motions while I did cash collateral and talked to the client and learned the facts. Perhaps if we paid more money we'd have more skilled associates.

From: Johnson, Jeremy R.
Sent: Thursday, May 20, 2010 6:49 PM
To: Thomson, Christopher; Eisenegger, Erich P.
Subject: RE: Project Orange

Didn't you use 3 associates to prepare for a first day hearing where you filed 3 documents?

From: Thomson, Christopher
Sent: Thursday, May 20, 2010 6:45 PM
To: Eisenegger, Erich P.; Johnson, Jeremy R.
Subject: RE: Project Orange

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Sent: Thu May 20 18:42:26 2010

Subject: RE: Project Orange

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Tom

On May 19, 2010, at 3:09 PM, Walsh, Timothy W. wrote:

Attached is our draft objection to Syracuse's motion. Please review and provide us with your comments as soon as possible. Thanks.

Tim

Timothy W. Walsh
DLA Piper LLP (us)
1251 Avenue of the Americas
New York, New York 10020-1104
212.335.4616 T
212.884.8516F
Timothy.Walsh@dlapiper.com

<POA_ Objection to Syracuse Stay Relief Motion.DOC>

Exhibit 8

To: Eisenegger, Erich P.[Erich.Eisenegger@dlapiper.com]; Thomson, Christopher[Christopher.Thomson@dlapiper.com]
From: Johnson, Jeremy R.
Sent: Thur 5/20/2010 10:48:27 PM
Subject: RE: Project Orange

It's a Thomson project, he goes full time on whatever debtor case he has running. Full time, 2 days a week.

From: Eisenegger, Erich P.
Sent: Thursday, May 20, 2010 6:41 PM
To: Thomson, Christopher; Johnson, Jeremy R.
Subject: Re: Project Orange

I hear we are already 200k over our estimate-that's Team DLA Piper!

From: Thomson, Christopher
To: Johnson, Jeremy R.; Eisenegger, Erich P.
Sent: Thu May 20 18:36:52 2010
Subject: FW: Project Orange

Yeah Team Tim!

From: Thomas Puccio [mailto:tpuccio@lotpp.com]
Sent: Thursday, May 20, 2010 6:29 PM
To: Walsh, Timothy W.
Cc: Adam Victor; Jonathan Flaxer; Gabriel Del Virginia; Sarad, Nicolai J.; Thomson, Christopher; Roldan, Vincent J.; Zborovsky, Gabriella
Subject: Re: Project Orange

Tim,

The papers read well. I checked them carefully for accuracy and I did not find anything that I recognized as incorrect or that should be substantively changed. As you might expect there are a number of nuances in the fact pattern and legal arguments that we need to confer about before June 3rd; however, you and your team have very ably mastered the essence of the disputes with SU in a remarkably short period of time. Great work!

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<POA_ Objection to Syracuse Stay Relief Motion.DOC>

Exhibit 9

To: Roldan, Vincent J.[Vincent.Roldan@dlapiper.com]; Thomson, Christopher[Christopher.Thomson@dlapiper.com]; Freedlander, Jed[jed.freedlander@dlapiper.com]; Johnson, Jeremy R.[Jeremy.Johnson@dlapiper.com]; Karaffa, Jason[Jason.Karaffa@dlapiper.com]
From: Eisenegger, Erich P.
Sent: Wed 6/23/2010 7:32:33 PM
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Represent Adam Victor personally

From: Roldan, Vincent J.
Sent: Wednesday, June 23, 2010 3:31 PM
To: Eisenegger, Erich P.; Thomson, Christopher; Freedlander, Jed; Johnson, Jeremy R.; Karaffa, Jason
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

get retained as special counsel?

From: Eisenegger, Erich P.
Sent: Wednesday, June 23, 2010 3:30 PM
To: Thomson, Christopher; Freedlander, Jed; Roldan, Vincent J.; Johnson, Jeremy R.; Karaffa, Jason
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Wow--But Walsh has "Plan B" right?

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 3:30 PM
To: Eisenegger, Erich P.; Freedlander, Jed; Roldan, Vincent J.; Johnson, Jeremy R.; Karaffa, Jason
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Well, the Judge just fired us from POA. Drinks anyone?

From: Eisenegger, Erich P.
Sent: Wednesday, June 23, 2010 3:29 PM
To: Thomson, Christopher; Freedlander, Jed; Roldan, Vincent J.; Johnson, Jeremy R.;

Karaffa, Jason
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Jesus, that Wimbledon match is 54-53 in the fifth set.

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 2:59 PM
To: Freedlander, Jed; Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

For those of you not familiar with those local landmark and institution:

http://www.bohemianhall.com/en/index.html

From: Freedlander, Jed
Sent: Wednesday, June 23, 2010 2:23 PM
To: Thomson, Christopher; Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason
Subject: Re: Saturday June 26, USA Soccer History 2:30 PM

Guys, I'm away this wknd but, if I were you, I'd make a reservation at city winery or possibly that nolita "stadium". Big screens

---

From: Thomson, Christopher
To: Thomson, Christopher; Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Sent: Wed Jun 23 13:25:28 2010
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Any opinions from Jed or JJ (assuming Erich is watching with 4 kids in his lap on Long Island)? Firefly wouldn't be my first pick, especially since the beers are stupidly overpriced, but it's serviceable.

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 1:16 PM

To: Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

A) My fat ass likes to sit
B) My fat ass likes a waitress
C) With a broken foot, my fat ass really likes to sit

From: Roldan, Vincent J.
Sent: Wednesday, June 23, 2010 1:15 PM
To: Thomson, Christopher; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

even without a table, there's plenty of bar space

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 1:14 PM
To: Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

That bar was a pain in the ass to get a table, but only because I was the only one that got there at 12 and they wouldn't seat us until everyone was there. If everyone gets there on time, we'd be fine...

From: Roldan, Vincent J.
Sent: Wednesday, June 23, 2010 1:12 PM
To: Thomson, Christopher; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

hopefully not the germans

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 1:09 PM
To: Eisenegger, Erich P.; Roldan, Vincent J.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Don't know until the 2:30 games - likely the Black Stars of Ghana.

From: Eisenegger, Erich P.
Sent: Wednesday, June 23, 2010 1:09 PM
To: Roldan, Vincent J.; Thomson, Christopher; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Who are we playing?

From: Roldan, Vincent J.
Sent: Wednesday, June 23, 2010 1:09 PM
To: Thomson, Christopher; Johnson, Jeremy R.; Eisenegger, Erich P.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

that bar u picked for the England match was good. i'd go there again

---

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 1:06 PM
To: Johnson, Jeremy R.; Roldan, Vincent J.; Eisenegger, Erich P.; Karaffa, Jason; Freedlander, Jed
Subject: Saturday June 26, USA Soccer History 2:30 PM

Gents -

It has been brought to my attention that Team USA's next match will be this Saturday at 2:30 PM. While some of you may have 9 kids and live in suburbia, louts like myself would like to organize as large a group as possible for this history drinking and watching opportunity. As I do unfortunately live in this general area, I'm fine watching up here, but could also go downtown to watch. Due to the history nature of this clash, I'd suggest arriving by 12 to secure a table one we decide on a locale and determine who is interested. Obviously non-DLA people are welcome, as I plan to invite my friends as well and expect the size of the group will get quite large.

Chris

Christopher R. Thomson
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, New York 10020-1104
212.335.4722 **T**
917.778.8722 **F**
christopher.thomson@dlapiper.com
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Slide 16

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF MATTHEW B. MURRAY

VSB DOCKET NOS. 11-070-088405 and 11-070-088422

AGREED DISPOSITION MEMORANDUM ORDER

On July 17, 2013, these matters were heard by the Virginia State Bar Disciplinary Board upon the joint request of the parties for the Board to accept the Agreed Disposition signed by the parties and offered to the Board as provided by the Rules of the Supreme Court of Virginia. The panel consisted of Robert W. Carter, lay member, John A. C. Keith, Jeffrey L. Marks, Melissa W. Robinson, and Pleasant S. Brodnax, III, Chair, presiding. The Virginia State Bar was represented by Alfred L. Carr, Assistant Bar Counsel. Matthew B. Murray, Respondent was present and was represented by his counsel, Thomas W. Williamson, Jr. The Chair polled the members of the Board as to whether any of them were aware of any personal or financial interest or bias which would preclude any of them from fairly hearing the matters to which each member responded in the negative. Lisa A. Wright, Court Reporter, Chandler and Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222, after being duly sworn, reported the hearing and transcribed the proceedings.

WHEREFORE, upon consideration of the Agreed Disposition, the Certification, and Respondent's Disciplinary Record,

It is **ORDERED** that:

✓ The Board accepts the Agreed Disposition and the Respondent shall receive a Five-Year Suspension, as set forth in the Agreed Disposition, which is attached to this Memorandum Order.

It is further **ORDERED** that:

The sanction is effective:

✓ July 17, 2013

It is further **ORDERED** that:

The Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the Five-Year Suspension of his license to practice law in the Commonwealth of Virginia, to all clients for whom his is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the Five-Year Suspension, and make such arrangements as are required herein within 45 days of the effective date of the Five-Year Suspension. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the Five-Year Suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the Five-Year Suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for a hearing before a three-judge court.

The Clerk of the Disciplinary System shall assess costs pursuant to ¶ 13-9 E. of the Rules.

A copy teste of this Order shall be mailed by Certified Mail to Matthew B. Murray, at his last address of record 1852 Wayside Place, Charlottesville, VA 22903 with the Virginia State Bar, and by first-class mail to his counsel, Thomas W. Williamson, Jr., Esquire, Williamson Law LC, 3415 Floyd Avenue, Richmond, VA 23221 and to Alfred L. Carr, Assistant Bar Counsel, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED THIS 17th DAY OF July, 2013

VIRGINIA STATE BAR DISCIPLINARY BOARD

PSB

Pleasant S. Brodnax, III, Chair

VIRGINIA:

BEFORE THE DISCIPLINARY BOARD
OF THE VIRGINIA STATE BAR

JUL 9 2013

IN THE MATTER OF
MATTHEW B. MURRAY

VSB Docket Nos. 11-070-088405 and 11-070-088422

AGREED DISPOSITION
(FIVE YEAR SUSPENSION)

Pursuant to the Rules of the Virginia Supreme Court Rules of Court Part 6, Section IV, Paragraph 13-6.H., the Virginia State Bar, by Alfred L. Carr, Assistant Bar Counsel and Matthew B. Murray, Respondent, and Thomas W. Williamson, Jr., Respondent's counsel, hereby enter into the following Agreed Disposition arising out of the referenced matter.

I. STIPULATIONS OF FACT

1. At all relevant times hereto, Respondent Matthew B. Murray (hereinafter "Respondent") was a duly licensed attorney in the Commonwealth of Virginia.

2. On March 26, 2009, Respondent and his legal assistant reviewed Respondent's client, Mr. Isaiah Lester's (hereinafter "Plaintiff"), Facebook page in response to Defendant's Request for Production of documents dated March 25, 2009.

3. On March 26, 2009, Respondent sent his client, Plaintiff, an email that suggested that Plaintiff deactivate his Facebook page on April 14, 2009. Respondent's legal assistant sent Plaintiff an email of March 26, 2009, stating: "The pic Zunka has is on your facebook. You have something (maybe plastic) on your head and are holding a bud with your I Love Hot Moms shirt on. There are 2 couples in the background ....both girls have long blond hair. Do you know the pic? There are some other pics that should be deleted."

4. Respondent's response to Defendant's March 25, 2009 Request No. 10 for documents stated that Plaintiff did "not have a Facebook page on the date this is signed, April 15, 2009."

5. During a hearing on March 3, 2010, on Defendant's Second Motion for Continuance, Plaintiff's counsel, Respondent, maintained that Defense counsel, David Tafuri, Esq., had "hacked" into Plaintiff's Facebook account, or had otherwise accessed the account without permission. Respondent stated that he intended to use the word "hack" to be synonymous with "no-permission access." Respondent offered this evidence to the Court in support of his argument that the Defendants' Second Motion for Continuance should be denied.

6. In response to the Court's question with regard to the basis for his claim, Respondent stated that the evidence for his claim constituted the photograph attached to the Defendant's Request for Production of March 25, 2009.

7. During the hearing, Respondent told the Court that he did not know how Defense counsel had accessed the account, but that he "assumed" the account had been "hacked." Respondent stated further that he and his client "assumed" that opposing counsel "had" the Facebook page and that "the only purpose of the request for production was to legitimize that which they had acquired without permission."

8. During the March 3, 2010, hearing, Respondent repeatedly acknowledged that he had no familiarity with Facebook prior to the proceedings of this case.

9. On November 13, 2009, Defense counsel, Mr. Tafuri, informed Respondent that the Plaintiff had sent Mr. Tafuri a Facebook message on January 9, 2009.

10. Mr. Tafuri's facsimile correspondence with Respondent on November 13, 2009, confirmed a telephone conversation between Mr. Tafuri and Respondent during which Respondent had asked whether Plaintiff had sent a Facebook message to Defense counsel, since the Plaintiff remembered sending such a message.

11. On December 14, 2009, Mr. Tafuri sent Respondent a copy of the Facebook "message" of January 9, 2009, via facsimile and certified mail.

12. On February 23, 2010, John Zunka, Esq., counsel for Defendant, sent Respondent a letter referring Respondent to copies of the correspondence on November 13, 2009, and December 14, 2009, reiterating the basis for Mr. Tafuri's access to the photograph in question, and referencing the relevant Facebook privacy rule in effect on January 9, 2009.

13. In an email dated February 24, 2010, Respondent declined to comply with Defense counsel's requests to strike Mr. Tafuri from the Plaintiff's witness list and to retract the "hacking" comment.

14. On February 25, 2010, Mr. Tafuri sent an email to Respondent notifying him that Defense counsel would file a Motion for Sanctions if Respondent did not comply with the requests contained in Mr. Zunka's February 23, 2010, letter based on Defense counsel's explanations therein.

15. At the hearing on March 3, 2010, Respondent said that he first learned of his client's Facebook "message" during the hearing on February 8, 2010.

16. In the Plaintiff's Responses to the Defendant William D. Sprouse's Fifth Request for Production of Documents (Defendant Allied Concrete's Sixth Request), dated May

10, 2010, signed by Respondent, the Plaintiff twice asserted that Mr. Tafuri had made "unauthorized access" to the Plaintiff's Facebook account.

17. In the Plaintiff's Responses to Defendant William D. Sprouse's Second Request for Production of Documents (Allied Concrete's Third Request), dated May 10, 2010, signed by Respondent, the Plaintiff referred to "unauthorized access" of his Facebook account.

18. Aside from the photograph in question and the Plaintiff's bare assertion that he believed his account had been accessed without permission, Respondent presented no evidence to the Court as the basis for the claim of unauthorized access.

19. During the hearing on May 27, 2010, with regard to sanctions, Plaintiff's counsel did not address Facebook's default privacy settings or counsel's inquiry into any such matters.

20. Respondent argued that "hacking" is not a crime, that he did not intend the word "hacking" to be used to accuse Defense counsel of a crime, and that therefore "no harm to any reputation has been done and none can be claimed."

21. If Respondent and Mr. Tafuri, in fact, discussed Mr. Lester's Facebook "message" to Mr. Tafuri on or around November 13, 2009, Respondent would have had approximately three and a half months before the hearing on March 3, 2010, during which he could have investigated his "unauthorized access" or "hacking" claims.

22. Even if Respondent did not, as he said during the hearing, learn of his client's Facebook "message" until February 8, 2010, he would have had approximately one month before the hearing on March 3, 2010, during which he could have investigated his "unauthorized access" or "hacking" claims.

23. On November 17, 2010, the Court ordered Respondent to produce a privilege log, to include emails to and from Respondent and Plaintiff related to the Facebook spoliation issue, to be reviewed by the Court *in camera*. On November 18, 2010, Respondent filed the privilege log; however, the Court ruled Respondent's Privilege Log as inadequate and ordered Respondent to file an Amended Privilege Log by November 29, 2010. On November 29, 2010, Respondent filed the Amended Privilege Log.

24. Respondent by letter dated December 14, 2010, notified the court that his legal assistant had ". . . apparently overlooked [the March 26, 2009 9:54 a.m.] email" from the Privilege Logs that was enclosed with the letter to the Court. (See paragraph 3)

25. Respondent, however, had directed his legal secretary to remove the March 26, 2009 9:54 a.m. email in question from both privilege logs that he filed with the Court. On February 28, 2011, Respondent stated under oath in his deposition that he intentionally violated the Court's November 17, 2010 order when he caused the deletion of the March 26, 2009 9:54 a.m. emails from the privilege logs he filed with the Court.

26. Respondent stated under oath that he expects to be held accountable for his Misconduct in willfully concealing the March 26, 2009 email and falsely casting the blame upon another.

27. By Order entered October 21, 2011, the Court sanctioned and *personally* obligated Respondent to remit to Defendant, the sum of $542,000. The Court ordered Plaintiff to remit $180,000 to Defendant for his Misconduct during the trial.

28. On or about May 30, 2013, Respondent remitted $594,209.72 to Defendant. On June 7, 2013, Defendants executed an Acknowledgment of Payment In Full and released all claims for the sanction against Respondent and Plaintiff.

II. NATURE OF MISCONDUCT

Such conduct by the Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

> (c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;

III. PROPOSED DISPOSITION

Accordingly, Assistant Bar Counsel and the Respondent tender to the Disciplinary Board for its approval the agreed disposition of Five Year Suspension of Respondent's license as representing an appropriate sanction if this matter were to be heard through an evidentiary hearing by a panel of the Disciplinary Board.

If the Agreed Disposition is approved, the Clerk of the Disciplinary System shall assess an administrative fee.

THE VIRGINIA STATE BAR

By: _____
Alfred L. Carr, Assistant Bar Counsel

_____
Matthew B. Murray, Respondent

_____
Thomas W. Williamson, Jr.,
Respondent's Counsel

Matter of Rios
2013 NY Slip Op 03439
Decided on May 14, 2013
Appellate Division, First Department
Per Curiam
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on May 14, 2013

SUPREME COURT, APPELLATE DIVISION

First Judicial Department
Luis A. Gonzalez,Presiding Justice,
David B. Saxe
Sallie Manzanet-Daniels
Nelson S. Román
Darcel D. Clark,Justices.

3253 -3844

[*1]In the Matter of Shane O. Rios (admitted as Shane Omar Rios), and Daniel H. Levy (admitted as Daniel Hudson Levy), attorneys and counselors-at-law: Departmental Disciplinary Committee for the First Judicial Department, Petitioner, Shane O. Rios, Daniel H. Levy, Respondents.

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondents, Shane O. Rios and Daniel H. Levy, were admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the Second Judicial Department on June 15, 2005 and February 16, 2005, respectively.

Jorge Dopico, Chief Counsel, Departmental
Disciplinary Committee, New York
(Norma I. Melendez, of counsel), for petitioner.
Susan Brotman, for respondents. [*2]
M-3253 (September 10, 2012)
IN THE MATTER OF SHANE O. RIOS AND DANIEL
H.LEVY, ATTORNEYS

PER CURIAM

Respondents Shane Omar Rios and Daniel Hudson Levy were admitted to the practice of law in the State of New York by the Second Judicial Department on June 15, 2005 and February 16, 2005, respectively. At all times relevant to this proceeding, respondents maintained an office for the practice of law within the First Judicial Department.

On May 18, 2011, the Departmental Disciplinary Committee (Committee) served respondents with a notice and statement of charges containing three charges alleging professional misconduct stemming from respondents' representation of a client in a personal injury matter.

Charge one of the Committee's statement of charges alleged that respondents violated rule 8.4(c) of the Rules of Professional Conduct (22 NYCRR 1200.0), which prohibits an attorney from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation." Specifically, the Committee alleged that respondents intentionally concealed investigative information regarding their client's case from an attorney whom they retained to try the client's personal injury lawsuit.

Charge two alleged that respondents violated rule 8.4(h) of the Rules of Professional Conduct (22 NYCRR 1200.0), which prohibits an attorney from engaging in any conduct

that adversely reflects on his or her fitness as an attorney, by informing their client about the law governing liability for her accident prior to asking her to identify the precise situs of her accident.

Charge three alleged that respondents violated rule 1.1(b)[FN1] of the Rules of Professional Conduct (22 NYCRR 1200.0), which prohibits a lawyer from handling a legal matter that he or she "knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." The Committee alleged that respondents violated this rule by failing to ascertain the precise location of their client's accident in a nonsuggestive manner and by failing to inquire about their client's criminal history after she acknowledged that she had a Driving Under the Influence of Alcohol (DUI) conviction.

On June 16, 2011, respondents submitted an answer to the statement of charges wherein they admitted each and every factual allegation therein. Respondents also admitted that they violated the rules alleged in charges two and three, thus admitting liability as to those charges. However, they denied liability as to charge one.

Thereafter, on August 16, 2011, the parties appeared for a hearing before a Referee. All parties executed a pre-hearing stipulation, wherein respondents once again admitted the facts alleged in the Committee's statement of charges. Whereas respondents had initially denied liability as to charge one and admitted liability as to charges two and three, in the stipulation respondents admitted liability as to charges one and two and only admitted partial liability as to charge three. Specifically, while respondents admitted that they violated rule 1.1(b) of the Rules of Professional Conduct (22 NYCRR 1200.0) by failing to ascertain the precise location of their [*3]client's accident in a nonsuggestive manner, they opposed the portion of charge three which alleged that they failed to ask about their client's criminal history in violation rule 1.1(b).

Respondents' testimony at the hearing, the testimony of five character witnesses, and documents stipulated and/or admitted in evidence - including the aforementioned pre-

hearing stipulation - established the following:

In January 2008, respondents, who met while they both attended Fordham Law School, opened Rios & Levy LLP., their own firm focusing on personal injury matters. Even though neither respondent had ever handled a personal injury matter from start to finish, respondents, both of whom had worked for other personal injury law firms since their graduation from law school in 2004, believed they could amass the requisite experience during the pendency of the cases for which they were retained. On March 20, 2008, respondents were contacted by a former client who sought to have respondents meet with her mother regarding an injury sustained by the client's mother in a fall. Respondents met with this prospective client at her home and she told them that she fell on a badly cracked sidewalk while exiting a church on Lockwood Avenue, in the Bronx. While the prospective client could neither remember the name of the church nor its exact location, she knew that the church and the sidewalk on which she fell were located on a street which intersected with Lockwood Avenue.

Respondents took this client's case and the very next day filed the requisite retainer agreement. Thereafter, via an Internet search, they discovered that the only church on Lockwood Avenue was Bryn Mawr Presbyterian Church, which was not located in the Bronx but was instead located in Yonkers. Respondents immediately notified the church about their client's accident and a few days thereafter the church's claims administrator confirmed that the claim had been received. Becoming aware that liability for sidewalk claims in Yonkers required prior written notice to the municipality, respondents sent Freedom of Information Law (FOIL) requests to the City of Yonkers seeking information regarding sidewalk defects on the sidewalk abutting the church. Upon their client's refusal to accompany them to the situs of the accident, respondents then went to the church to investigate the claim and take photographs. Once there, respondents found no sidewalk defects on the only sidewalk abutting the church. However, respondents did notice that the sidewalk/driveway abutting a house across the street from the church was badly cracked. Respondents photographed both the sidewalk abutting the church and the badly cracked sidewalk abutting the house across the street. Upon receiving a response to their FOIL

request, which indicated the absence of prior written notice for any defects on the sidewalk abutting the church, respondents realized that their client had no viable claim against the church and her only chance of recovery was an action against the homeowner whose property abutted the badly cracked sidewalk/driveway across the street.

In May 2008, respondents met with their client. In order to ensure that she had a viable case, they decided to influence her by first explaining the law, emphasizing that if she fell on the sidewalk abutting the church, she would have no viable claim for her injuries. However, they indicated that if she fell across the street on the driveway, she had a viable case against the owner of the abutting property. They then showed their client pictures of both the undamaged sidewalk abutting the church and of the badly cracked sidewalk/driveway across the street. Upon asking her where she fell, the client indicated that she had fallen on the sidewalk across the street from the church. Shortly thereafter, respondents notified both the owner of the home abutting the sidewalk/driveway across the street from the church and her insurance company of their client's [*4]accident. In June 2008, respondents commenced an action against the homeowner and pursued discovery. In February 2009, after plaintiff had been deposed and denied having a criminal history, she asked respondents whether a DUI constituted a criminal conviction. Making no further inquiry about their client's criminal history, respondents researched the question posed by their client, answering the same in the negative.

In September 2009, when the court scheduled her action for trial, respondents realized that they were incapable of trying the case. Thus, respondents retained experienced trial counsel. Respondents then briefed trial counsel on the procedural history of the case. However, in order to conceal that they had improperly influenced their client to misrepresent the location of her accident, respondents did not tell trial counsel that the client had initially indicated that she fell on the sidewalk abutting the church. Moreover, when respondents gave trial counsel the case file, they removed the claim letter they initially sent to the church, the acknowledgment from the church's claims administrator, photographs of the sidewalk abutting the church, the FOIL requests made to the City of Yonkers, and the responses thereto. At trial, respondents' client's case was dismissed because, inter alia, she

was confronted with her prior criminal convictions and was impeached by her deposition testimony denting it.

With the exception of the portion of charge three which respondents did not admit, respondents acknowledged that their actions in handling their client's case was dishonest and shameful. Testifying about the undue influence exerted on their client, Levy testified that "the way she came to allege that she fell where she fell was influenced by the way I explained the law to here." Respondents expressed considerable remorse for their actions, attributing their behavior in part to youth and inexperience. In order to ensure that they never engage in this kind of misconduct in the future, respondents made changes to their practices, procuring experienced attorneys to serve as mentors and altering their intake process to ensure they gather all facts from clients prior to explaining the law. Respondents also chronicled their public service and community service, such as traveling to Florida during the previous presidential election to ensure that the rights of voters were protected.

The Referee heard from several character witness, including an associate at Simpson Thatcher & Bartlett who testified that respondent Levy was a genuine and honest person, was embarrassed about his behavior, and that Levy indicated he would not engage in this behavior in the future. With respect to respondent Rios, the Referee heard from a case manager at Kings County Surrogate's Court who testified that Rios is part of the Big Brother Program and is her son's Big Brother, that Rios is a positive role model, and that his misconduct did not change the way she felt about him.

With respect to charges one, two, and the portion of three alleging that respondents failed to ascertain the location of their client's accident in a non-suggestive manner, the Referee found, consistent with the allegations in the Committee's statement of charges, that respondents through their misconduct violated all of the sections of the Code of Professional Responsibility charged by the Committee. With regard to the portion of charge three alleging that respondents violated rule 1.1(b) of the Rules of Professional Conduct (22 NYCRR 1200.0) by failing to ask about their client's criminal history, the Referee found that respondents' failure to inquire about their client's criminal history did not violate this

rule where, as here, the client's inquiry as to whether a DUI constituted a criminal conviction did not put respondents on notice that she had other convictions about which they should have inquired. Finding that even though respondents [*5]presented substantial mitigating evidence, their behavior - insofar as it was serious, unprofessional, dishonest, long-standing, motivated by financial gain, caused injury to a third party, and wasted valuable court resources - warranted a six-month suspension from the practice of law rather than a private reprimand.

A Hearing Panel (Panel) heard arguments in support and in opposition to confirmation of the Referee's report and recommendation. For the very reasons articulated by the Referee, the Panel confirmed the Referee's Report. However, noting that respondents engaged in a scheme motivated by financial gain whereby they deliberately influenced and encouraged their client to lie and thereafter perpetuated the lie for more than a year, the Panel concluded that a nine-month suspension, rather than the six months recommended by the Referee, was warranted.

The Committee now petitions this Court for an order pursuant to 22 NYCRR 603.4(d) and 605.15(e)(2), and Judiciary Law § 90(2), confirming the Panel's determination as to both liability and sanction, thereby suspending respondents for a period of nine months. Respondents cross-move seeking confirmation of the Panel's determination on liability, disaffirming the Panel's determination as to sanction, and seeking a sanction of no more than three months suspension. We hereby grant the Committee's application, grant respondents' cross petition, in part, and confirm the Panel's determination in its entirety.

To the extent that respondents admitted all the factual allegations in the Committee's statement of charges in their answer and admitted liability to charges one, two, and part of three in the pre-hearing stipulation, the Panel's determination on liability is fully supported by the record and is therefore confirmed. Given the record before us, we also find that a nine-month suspension, rather than a suspension of three months or less, is the appropriate sanction.

Since cases where we are called upon to determine the appropriate sanction for attorney misconduct are inherently fact specific, no one fact is dispositive on the issue of sanction (*Matter of Hankin*, 296 AD2d 238, 240 [1st Dept 2002]). "Instead, it is more appropriate, and certainly more prudent, to conclude that the circumstances surrounding the proven unethical or unlawful behavior, the professional situation and history of a respondent, and any other relevant aggravating and mitigating factors will all be considered equally in any disciplinary decision" (*id.*). However, a review of this Department's precedent evinces that in cases where the misconduct alleged involves the misrepresentation of facts to a court, tribunal, or government agency, suspension is warranted even in the face of substantial mitigating circumstances (*see Matter of Brenner*, 44 AD3d 160 [1st Dept 2007] [despite the existence of several mitigating factors, suspending attorney for six months for submitting an affidavit to a federal court misrepresenting whether he had ever been disciplined by any court before which he had been admitted]; *Matter of Pu*, 37 AD3d 56 [1st Dept 2006] [despite substantial mitigating factors, suspending attorney for one year for lying in pleadings submitted to the court during the course of a lawsuit and making misrepresentations in open court], *appeal dismissed in part, denied in part* 8 NY3d 877 [2007]; *Matter of Becker*, 24 AD3d 32, 33-35 [1st Dept 2005] [despite compelling mitigating factors, suspending attorney for three months when, in order to settle a client's case, he altered settlement documents and documents filed with the Office of Court Administration in order to conceal that his client had died before settlement]; *Matter of Vasquez*, 1 AD3d 16 [1st Dept 2003] [despite substantial and compelling mitigating factors, suspending attorney for six months for verbally misrepresenting to commissioners of a city agency that a deputy mayor had authorized a raise in his pay and thereafter falsifying a memorandum to [*6]support his false claim]

Here, based on the record, it is clear that respondents intentionally influenced their client to misrepresent the situs of her accident in order to pursue an action which they knew was fraudulent from its inception. Thereafter, respondents, with full knowledge that they were perpetrating a fraud, commenced an action against an innocent third party, filing papers, such as pleadings, containing misrepresentations with the court. Then, for a over a

year, respondents continued to conduct discovery and attend court conferences with full knowledge that the action they were pursuing was based on a misrepresentation which they themselves influenced. When forced to retain trial counsel, respondents not only failed to apprise counsel that their client's accident did not occur where she alleged, but in order to conceal their prior misconduct, they sanitized the case file, removing any evidence as to the accident's actual situs. While respondents never expressly admitted that their behavior was motivated by financial gain, in a case where their legal fee would be determined by the amount they were able to recover for their client, it is clear that respondents engaged in the misconduct alleged and to which they admitted for financial gain and with venal intent.

Like in *Matter of Pu*, respondents here, to the extent they filed pleadings falsely listing the situs of their client's accident, also misrepresented facts to a court (*Matter of Pu* at 58). However unlike the respondent in that case, respondents here did not make any false statements in open court. Accordingly, something less than the one-year suspension we imposed in *Matter of Pu* is warranted. We agree with the Committee that insofar as respondents perpetrated this fraud for a protracted period, spanning more than a year, a more severe sanction than the six-month suspension that we imposed in *Matter of Vasquez* is warranted since in that case, the attorney's misconduct consisted of two acts, both which were committed at or about the same time (*Matter of Vasquez* at 18). Furthermore, since respondents' misconduct harmed the party against whom, through their influence, their client wrongfully sued, the appropriate sanction is certainly more than the three-month suspension we imposed in *Matter of Becker*, where the attorney's misrepresentation did not harm anyone (*Matter of Becker* at 33-35).

Based on the foregoing, despite the evidence presented by respondents in mitigation, we agree with the Panel that a nine-month suspension is warranted.

Accordingly, the Committee's motion for an order confirming the Hearing Panel's findings and conclusions should be granted and respondents should be suspended from the practice of law for a period of nine months, and respondents' cross motion should be granted to the extent it seeks to confirm the Hearing Panel's finding on liability, and otherwise

denied to the extent it seeks to disaffirm the Hearing Panel's recommended sanction.

All concur.

Order filed. (May 14, 2013)

Gonzalez,P.J., Saxe, Manzanet-Daniels, Román and Clark, JJ., concur.

Respondents suspended from the practice of law in the State of New York for nine months, effective June 13, 2013 and until further order of this Court.

Footnotes

Footnote 1: Initially, the Committee charged respondents with violating rule 1.1(a) of the Rules of Professional Conduct (22 NYCRR 1200.0). However, the parties subsequently agreed that a violation of rule 1.1(b) was the more appropriate charge.

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This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 170
In the Matter of Peter J. Galasso, &c., An Attorney and Counselor-at-Law.

Grievance Committee for the Ninth Judicial District,
Respondent;
Peter J. Galasso,
Appellant.

Jeffrey L. Catterson, for appellant.
Matthew Lee-Renert, for respondent.
Nassau County Bar Association; Thomas F. Liotti, amici curiae.

PER CURIAM:

Petitioner instituted a disciplinary proceeding against respondent attorney Peter J. Galasso alleging ten charges of professional misconduct. The essence of the petition is that respondent failed to properly supervise the firm's bookkeeper resulting in the misappropriation of client funds and that he

breached his fiduciary duty by failing to safeguard those funds. Although we find the bulk of the charges were properly sustained, we modify to dismiss the charge alleging respondent's failure to timely comply with the lawful demands of the Grievance Committee.

At all times relevant to this appeal, respondent has been a partner of the law firm known as Galasso & Langione, LLP (the Galasso Langione firm).[1] Anthony Galasso, respondent's brother, was also employed by the firm and had, over the course of several years, worked his way up from an entry-level position as a file clerk and messenger to become the firm's bookkeeper and office manager.

In June 2004, respondent represented Steven Baron in a matrimonial action commenced by Wendy Baron. The parties and their attorneys entered into an escrow agreement through which respondent was the designated escrow agent for the proceeds from a sale of commercial property owned by Steven Baron. Respondent agreed to hold the sum of $4,840,862.34 in an interest-bearing escrow account, pending further order of Supreme Court in the matrimonial action. Anthony Galasso, in his capacity as office manager, deposited the funds into an escrow account at Signature Bank (the Baron escrow account). Respondent and fellow partner James Langione were the only authorized signators on the account

[1] The firm was subsequently known as Galasso, Langione & Botter, LLP and is currently known as Galasso, Langione, Catterson & LoFrumento, LLP.

application. However, Anthony Galasso apparently altered the application to permit electronic fund transfers and to include himself -- a nonlawyer -- as a signator.

Between June 23, 2004 and January 17, 2007, Anthony Galasso transferred approximately $4,501,571 from the Baron escrow account into six other firm accounts maintained at Signature Bank through the use of roughly 90 internet transfers. It seems that the Baron funds were used to replace money that Anthony Galasso had already removed from the firm accounts. Transferred funds from the Baron escrow account were then disbursed to respondent, firm employees and other entities in the course of business, all without the knowledge of the firm's principals or the consent of the Barons. In particular, approximately $360,000 in funds transferred from the Baron escrow account were used to finance the purchase of the firm's office condominium. To escape detection, Anthony Galasso had the genuine Baron escrow account statements, generated by the bank, diverted to a post office box and fabricated false statements for review by the firm. Although the Barons demanded payment of the funds held in escrow, more than $4.3 million remains due and owing to them.

In June 2006, the Galasso Langione firm received $800,000 on behalf of the Estate of George Carroll in settlement of a medical malpractice/wrongful death action and Anthony Galasso deposited the funds into the firm's IOLA (Interest on

Lawyer Account) at M&T Bank. The following month, the firm received $175,000 on behalf of Adele Fabrizio in connection with a personal injury action. Anthony Galasso also deposited these funds into the firm's M&T IOLA. Anthony Galasso misappropriated the bulk of these funds by forging the partners' signatures on IOLA checks. With respect to the IOLA, respondent's practice had been to review monthly financial reports generated by Anthony Galasso, rather than the account statements themselves. To date, despite the clients' demands for the return of their funds, the firm has returned only $85,791.36 to the Estate of Carroll; no funds have been returned to Fabrizio.

Anthony Galasso confessed to the theft of the above funds on January 18, 2007 and ultimately pleaded guilty to two counts of grand larceny in the first degree, ten counts of falsifying business records in the first degree and ten counts of criminal possession of a forged instrument in the second degree. He was sentenced to 2½ to 7½ years imprisonment, as well as $2,000,000 in restitution. Respondent cooperated fully with the criminal investigation. Indeed, the Nassau County District Attorney's Office submitted a letter to the Grievance Committee providing its conclusions that no one else in the firm had had knowledge of the theft and that nothing in the documents presented to the firm by Anthony Galasso would have raised any suspicion regarding the accounts. Respondent has also commenced civil suits against the banks involved, in an attempt to recover

the client funds.

As noted above, the Grievance Committee commenced a disciplinary proceeding against respondent alleging ten charges of professional misconduct.[2] The matter was referred to a Special Referee who sustained all ten charges. The Appellate Division granted the Committee's motion to confirm the Referee's

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[2] Charges one, two, seven and nine allege that respondent breached his fiduciary duty to pay or deliver escrow funds, by failing to safeguard client funds and by failing to promptly pay or deliver those funds to the person entitled to them (Code of Professional Responsibility DR 9-102 [a], [c][4]; DR 1-102 [a][7] [22 NYCRR 1200.46 (a), (c)(4); 1200.3 (a)(7)] and Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.15 [a], [c][4]; 8.4 [h]).

Charges six, eight and ten allege that respondent failed to supervise a nonlawyer employee resulting in the misappropriation of client funds (Code of Professional Responsibility DR 1-104 [d][2] [22 NYCRR 1200.5 (d)(2)] and Rules of Professional Conduct [22 NYCRR 1200.0] rule 5.3 [b][2][i], [ii]).

Charge three alleges that respondent was unjustly enriched by use of the Baron funds for his personal benefit (Code of Professional Responsibility DR 9-102 [a]; 1-102 [a][5], [a][7] [22 NYCRR 1200.46 (a); 1200.3 (a)(5), (a)(7)] and Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.15 [a]; 8.4 [d], [h].

Charge four alleges that respondent failed to provide appropriate accounts to the Barons with respect to their escrow funds (Code of Professional Responsibility DR 9-102 [c][3]; 1-102 [a][7] [22 NYCRR 1200.46 (c)(3); 1200.3 (a)(7)] and Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.15 [a]; 8.4 [h]).

Charge five alleges that respondent failed to timely comply with the lawful demands of the Committee (Code of Professional Responsibility DR 1-102 [a][5], [a][7] [22 NYCRR 1200.3 (a)(5), (a)(7)] and Rules of Professional Conduct (22 NYCRR 1200.0) rules 8.4 [d], [h]).

report and denied respondent's cross motion to disaffirm the report (94 AD3d 30 [2d Dept 2012]). The Court also suspended respondent from the practice of law for a period of two years. This Court granted respondent leave to appeal, and we now modify.

Few, if any, of an attorney's professional obligations are as crystal clear as the duty to safeguard client funds. Rather than establishing a new or heightened degree of liability for attorneys, we find that the Appellate Division's determination is completely consistent with existing standards pertaining to the safeguarding and oversight of client funds. In other words, "a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed" (Matter of Holtzman, 78 NY2d 184, 191 [1991]).

Respondent is not bound to his clients solely by the contractual language of the escrow agreement, but also by a fiduciary relationship. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior" (Meinhard v Salmon, 249 NY 458, 464 [1928]; see Matter of Wallens, 9 NY3d 117, 122 [2007]). Respondent owed his clients a high degree of vigilance to ensure that the funds they had entrusted to him in his fiduciary capacity were returned to them upon request. To that end, implementation of any of the basic measures respondent has since adopted -- personal review of the bank statements, personal contact with the bank and improved

oversight of the firm's books and records -- likely would have mitigated, if not avoided, the losses.

Here, although respondent himself did not steal the money and his conduct was not venal, his acts in setting in place the firm's procedures, as well as his ensuing omissions, permitted his employee to do so. Moreover, the Baron funds were used for the benefit of respondent and the firm. That respondent has acted without venality can be a factor considered in mitigation, but is not probative of whether he has failed to preserve client funds (see e.g. Matter of Wilkins, 70 AD3d 1119, 1119-1120 [3d Dept 2010]; Matter of Abato, 51 AD3d 225, 228 [2d Dept 2008]).

Unquestionably, Anthony Galasso had devised a relatively sophisticated system and his fraud went undetected by the attorneys and accountant reviewing the documents he produced. However, respondent ceded an unacceptable level of control over the firm accounts to his brother, thereby creating the opportunity for the misuse of client funds. Had respondent been more careful in supervising the accounts and his employee, he would have been aware of the malfeasance at a much earlier time when he could have substantially mitigated the losses.

It cannot be said that there were no warning signs here. Specifically, a nearly $5,000 "discrepancy" in the escrow account was noted by Baron's accountant, which respondent permitted Anthony Galasso to resolve with the bank. Anthony

Galasso then corrected the "discrepancy" on a fabricated account statement by showing an internet transfer of funds from the firm IOLA to the Baron escrow account. In addition, when asked to obtain a $100,000 check from the escrow account payable to Wendy Baron, Anthony Galasso produced a check from the IOLA, which respondent then signed and provided to Mrs. Baron. The fabricated statement for the escrow account later reflected an expenditure of $100,000 by check number 1738, despite the fact that no checks had been written on the escrow account.

A discrepancy in an escrow account should, at a minimum, be alarming to a reasonably prudent attorney. This is not to say that attorneys are prohibited from delegating certain tasks to firm employees, but any delegation must be made with an appropriate degree of oversight. We stress that it is the ethical responsibility of the attorney -- not the bookkeeper, the office manager or the accountant -- to safeguard client funds.

To be clear, respondent is not being held responsible for the criminal behavior of his brother. Rather, it is his own breach of his fiduciary duty and failure to properly supervise his employee, resulting in the loss of client funds entrusted to him, that warrant this disciplinary action. We find that charges one through four and six through ten were properly sustained.

Respondent was also charged with the failure to timely comply with the Grievance Committee's lawful demands for information (charge five) in violation of former DR 1-102 (a)(5)

and (7) and Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4 (d) and (h). Petitioner maintains that, between May 12, 2008 and July 22, 2009, it made repeated requests for information to which respondent failed to fully and timely respond and that respondent's conduct impeded and delayed its investigation.[3]

We find the imposition of the separate charge on this basis to be unsupported by the record. It is difficult to characterize respondent's overall participation in the disciplinary process as anything other than active. Both respondent and his counsel were in regular correspondence with the Grievance Committee and provided copious documentation in response to their requests. When particular demands could not be immediately met, respondent generally acknowledged same, explained why and stated his intention to provide the information at the earliest opportunity. Under these particular circumstances, we find that respondent's level of compliance with this investigation is inconsistent with a sustained charge of failure to timely comply with the Committee's lawful demands. Upon remittal, the Appellate Division should reconsider whether the suspension previously imposed remains an appropriate

[3] In particular, the Grievance Committee took issue with the responses to its requests seeking: 1) a forensic examination conducted by outside accountants to audit all Galasso & Langione firm bank accounts in the relevant time period; 2) an accounting to trace all disbursements from the Baron escrow account; 3) detailed bookkeeping records for the firm's Signature Bank and M&T IOLA accounts; and 4) copies of documents relating to the financing and purchase of the office condominium.

sanction.

Accordingly, the order of the Appellate Division should be modified, without costs, by dismissing charge five of the petition and remitting the matter to that Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

* * * * * * * * * * * * * * * * *

Order modified, without costs, by dismissing charge five of the petition and remitting the matter to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion Per Curiam. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided October 23, 2012

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Filed 4/22/13

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MIGUEL MENDOZA, Plaintiff and Respondent, v. REED K. HAMZEH, Defendant and Appellant.	B239245 (Los Angeles County Super. Ct. No. BC460750)

APPEAL from an order of the Superior Court of Los Angeles County. Mary Ann Murphy, Judge. Affirmed.

Law Offices of Geoffrey T. Stover and Geoffrey T. Stover for Defendant and Appellant.

David A. Cordier for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part II of the Discussion.

Defendant Reed Hamzeh appeals from an order denying his anti-SLAPP motion and requiring him to pay plaintiff's attorney fees under Code of Civil Procedure section 425.16.[1] We affirm.

BACKGROUND

In May 2011, plaintiff Miguel Mendoza filed this action against attorney Reed Hamzeh, asserting causes of action for civil extortion, intentional infliction of emotional distress and unfair business practices. The lawsuit arises from a May 6, 2009 letter (the demand letter) Hamzeh sent to Mendoza while Hamzeh was representing a client named Guy Chow regarding a dispute between Chow and Mendoza. The dispute concerned Mendoza's employment as the manager of Chow's print and copy business.

The demand letter from Hamzeh to Mendoza begins: "As you are aware, I have been retained to represent Media Print & Copy ("Media"). We are in the process of uncovering the substantial fraud, conversion and breaches of contract that your client has committed on my client. . . . To date we have uncovered damages exceeding $75,000, not including interest applied thereto, punitive damages and attorneys' fees. If your client does not agree to cooperate with our investigation and provide us with a repayment of such damages caused, we will be forced to proceed with filing a legal action against him, as well as reporting him to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud, the Better Business Bureau, as well as to customers and vendors with whom he may be perpetrating the same fraud upon [sic]." The letter goes on to list Mendoza's alleged transgressions, including failure to pay Media's employees, sales taxes and bills.

In his complaint in this action, Mendoza asserts "Hamzeh's threat to report Mendoza to the California Attorney General, the Los Angeles District Attorney, and the Internal Revenue Service constitute[s] the crime of extortion under California law." As set forth above, based on the demand letter, Mendoza brought causes of action against

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[1] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

Hamzeh for civil extortion, intentional infliction of emotional distress and unfair business practices.

In September 2011, Hamzeh filed his anti-SLAPP motion, asking the trial court to strike Mendoza‟s complaint on grounds the demand letter constitutes a protected litigation communication under the anti-SLAPP statute and Mendoza cannot establish a probability of prevailing on his claims because they are barred by the litigation and common interest privileges (Civ. Code, § 47, subds. (b) & (c)). Hamzeh argued he was entitled to attorney fees and costs under section 425.16, subdivision (c)(1).

On October 20, 2011, before filing an opposition to the anti-SLAPP motion, Mendoza‟s counsel sent a letter to Hamzeh‟s counsel stating his intention to seek an award of attorney fees under section 425.16, subdivision (c), on grounds the anti-SLAPP motion was frivolous or solely intended to cause unnecessary delay. Mendoza‟s counsel argued Hamzeh failed to cite in his anti-SLAPP motion the "controlling" California Supreme Court case, *Flatley v. Mauro* (2006) 39 Cal.4th 299, 305 (*Flatley*), holding settlement communications which constitute criminal extortion as a matter of law are not covered by the anti-SLAPP statute. Mendoza‟s counsel asserted "There is little doubt that Mr. Hamzeh committed extortion when he threatened to report my client to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service, the Better Business Bureau, etc. unless my client agreed to pay all damages allegedly caused (which at the time of the letter was represented to be in excess of $75,000) and to cooperate with their investigation."

Hamzeh did not withdraw his anti-SLAPP motion so, on December 1, 2011, Mendoza filed his opposition to the motion and sought attorney fees. Hamzeh filed a reply brief arguing "*Flatley* is inapposite because Hamzeh did not commit a crime." (Capitalized and bold font omitted.)

After hearing oral argument, the trial court denied the anti-SLAPP motion, concluding the communication at issue was not covered by the anti-SLAPP statute based

on the holding in *Flatley*, *supra*, 39 Cal.4th 299. The court awarded Mendoza $3,150 in attorney fees.[2]

DISCUSSION

I. Anti-SLAPP Motion

A. Standard of review

"Review of an order granting or denying a motion to strike under section 425.16 is de novo." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).) "We consider '"the pleadings, and supporting and opposing affidavits upon which the liability or defense is based."' (§ 425.16, subd. (b)(2).) However, we neither '"weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law."'" (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3.)

B. Section 425.16

Under section 425.16, a party may move to dismiss "certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity." (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1420-1421.) Section 425.16 provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

In evaluating an anti-SLAPP motion, we conduct a two-step analysis. First, we must decide whether the defendant "has made a threshold showing that the challenged

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[2] The trial court ruled on Mendoza's objections to evidence Hamzeh offered in connection with his anti-SLAPP motion. Hamzeh does not challenge this ruling on appeal.

cause of action arises from protected activity." (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 488.) For these purposes, protected activity "includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Second, if the defendant makes this threshold showing, we decide whether the plaintiff "has demonstrated a probability of prevailing on the claim." (*Taheri Law Group v. Evans*, *supra*, 160 Cal.App.4th at p. 488.)

C. *Flatley*, *supra*, 39 Cal.4th 299

In *Flatley*, *supra*, the California Supreme Court concluded the anti-SLAPP statute does not apply to communications which constitute criminal extortion as a matter of law because such communications are "unprotected by constitutional guarantees of free speech or petition." (39 Cal.4th at p. 305.) As the *Flatley* Court set forth:

"'Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear. . . .' (Pen. Code, § 518.) Fear, for purposes of extortion 'may be induced by a threat, either: [¶] . . . [¶] 2. To accuse the individual threatened . . . of any crime; or, [¶] 3. To expose, or impute to him . . . any deformity, disgrace or crime[.]' (Pen. Code, § 519.) 'Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat.' (Pen. Code, § 523.)" (*Flatley*, *supra*, 39 Cal.4th at p. 326.)

The threat to report a crime may constitute extortion even if the victim did in fact commit a crime. The threat to report a crime may in and of itself be legal. But when the threat to report a crime is coupled with a demand for money, the threat becomes illegal, regardless of whether the victim in fact owed the money demanded. (*Flatley*, *supra*, 39 Cal.4th at pp. 326-327.) "'The law does not contemplate the use of criminal process as a means of collecting a debt.' [Citations.]" (*Ibid.*) "Attorneys are not exempt from these principles in their professional conduct. Indeed, the Rules of Professional Conduct specifically prohibit attorneys from 'threaten[ing] to present criminal, administration, or disciplinary charges to obtain an advantage in a civil dispute.' (Cal. Rules of Prof. Conduct, rule 5-100(A).)" (*Id.* at p. 327.)

Of the anti-SLAPP cases the parties cite, *Flatley* has the most similar fact pattern to the case before us. As stated in the Supreme Court's opinion: "Plaintiff Michael Flatley, a well-known entertainer, sued defendant D. Dean Mauro, an attorney, for civil extortion, intentional infliction of emotional distress and wrongful interference with economic advantage. Flatley's action was based on a demand letter Mauro sent to Flatley on behalf of Tyna Marie Robertson, a woman who claimed that Flatley had raped her, and on subsequent telephone calls Mauro made to Flatley's attorneys, demanding a seven-figure payment to settle Robertson's claims. Mauro filed a motion to strike Flatley's complaint under the anti-SLAPP statute." (*Flatley*, *supra*, 39 Cal.4th at p. 305.)

In concluding the communications constituted extortion as a matter of law, and therefore the anti-SLAPP statute did not apply, the Supreme Court explained: "At the core of Mauro's letter are threats to publicly accuse Flatley of rape and to report and publicly accuse him of other unspecified violations of various laws unless he 'settled' by paying a sum of money to Robertson of which Mauro would receive 40 percent. In his follow-up phone calls, Mauro named the price of his and Robertson's silence as 'seven figures' or, at minimum, $1 million." (*Flatley*, *supra*, 39 Cal.4th at p. 329.) Mauro also insinuated in the demand letter that Flatley had committed "various criminal offenses involving immigration and tax law as well as violations of the Social Security Act." (*Id.* at p. 330.)

Mauro argued the litigation privilege set forth in Civil Code section 47, subdivision (b), applied to the demand letter. The Supreme Court concluded, regardless of whether the litigation privilege applied to the threats in the demand letter, such threats "are nonetheless not protected under the anti-SLAPP statute because the litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes, and it is not consistent with the language or the purpose of the anti-SLAPP statute to protect such threats." (*Flatley*, *supra*, 39 Cal.4th at p. 322.)

D. Analysis

The anti-SLAPP statute does not apply to the threats at issue in Hamzeh"s demand letter.[3] Hamzeh threatened to report Mendoza "to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud, [and] the Better Business Bureau," and to disclose the alleged wrongdoing to Mendoza"s customers and vendors if Mendoza did not pay "damages exceeding $75,000." Regardless of whether Mendoza committed any crime or wrongdoing or owed Chow money, Hamzeh"s threat to report criminal conduct to enforcement agencies and to Mendoza"s customers and vendors, *coupled with a demand for money*, constitutes "criminal extortion as a matter of law," as articulated in *Flatley*. (39 Cal.4th at p. 330.)

The fact Hamzeh did not list specific crimes in the demand letter does not mean the threat is not extortionate. "„[T]he accusations need only be such as to put the intended victim of the extortion in fear of being accused of some crime. The more vague and general the terms of the accusation the better it would subserve the purpose of the accuser in magnifying the fears of his victim . . . ." [Citations.]" (*Flatley*, *supra*, 39 Cal.4th at p. 327.)

Hamzeh asserts, in applying *Flatley* to the present case, "the trial court read *Flatley* too broadly." We acknowledge the attorney"s conduct in *Flatley* was more egregious than Hamzeh"s conduct, in terms of nature and number of threats. Moreover,

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[3] Hamzeh "did not deny that he sent the letter . . . . We may therefore view this evidence as uncontroverted." (*Flatley*, *supra,* 39 Cal.4th at pp. 328-329.)

as Hamzeh points out, the Supreme Court "emphasize[d] that [its] conclusion that Mauro's communications constituted criminal extortion as a matter of law are based on the specific and extreme circumstances of this case." (*Flatley*, *supra*, 39 Cal.4th at p. 332, fn. 16.)[4]

Regardless of whether the threat in Hamzeh's demand letter may be characterized as particularly extreme or egregious, it still constitutes criminal extortion as a matter of law. As the Supreme Court explained in *Flatley*: "Extortion is the threat to accuse the victim of a crime or 'expose, or impute to him . . . any deformity, disgrace or crime' (Pen. Code, § 519) accompanied by a demand for payment to prevent the accusation, exposure, or imputation from being made." (39 Cal.4th at p. 332, fn. 16.) Hamzeh threatened to report Mendoza's "substantial fraud" to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service, the Better Business Bureau and Mendoza's customers and vendors if Mendoza did not pay "damages exceeding $75,000."

We do not read *Flatley* to mean the anti-SLAPP statute applies to *some* litigation communications which satisfy the criteria for criminal extortion if such communications are not particularly extreme or egregious. The rule must be a bright line rule. The anti-SLAPP statute does not apply to litigation communications which constitute criminal extortion as a matter of law. (*Flatley*, *supra*, 39 Cal.4th at p. 305.)[5]

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[4] In the same footnote where the above quote appears, the *Flatley* Court went on to explain that threats which are not coupled with a demand for money do not constitute criminal extortion: "Thus, our opinion should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion. [Citation.] . . . . Nor is extortion committed by an employee who threatens to report the illegal conduct of his or her employer unless the employer desists from that conduct. In short, our discussion of what extortion as a matter of law is limited to the specific facts of this case." (*Flatley*, *supra*, 39 Cal.4th at p. 332, fn. 16.)

[5] We will not discuss here the various cases Hamzeh cites in which courts have applied the anti-SLAPP statute to litigation communications, including demand letters. (See,

The trial court did not err in denying Hamzeh‟s anti-SLAPP motion because the anti-SLAPP statute does not apply to the threat in Hamzeh‟s demand letter on which Mendoza‟s complaint is based. Because Hamzeh did not make a threshold showing any cause of action in Mendoza‟s complaint arises from protected activity, we need not decide whether Mendoza has demonstrated a probability of prevailing on his causes of action (the second step in the two-step anti-SLAPP analysis).

II. Plaintiff's Award of Attorney Fees

Under section 425.16, subdivision (c), "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney‟s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." "„Frivolous‟ means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party." (§ 128.5, subd. (b)(2).)

Hamzeh challenges the award of attorney fees to Mendoza, arguing his anti-SLAPP motion was not frivolous or intended to cause delay. He does not challenge the amount of fees awarded to Mendoza. We review the trial court‟s award of attorney fees for abuse of discretion. (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 275.)

We do not find the trial court abused its discretion in awarding attorney fees to Mendoza. Hamzeh brought an anti-SLAPP motion, failing to cite *Flatley*, the controlling California Supreme Court case on the issue and a case with a strikingly similar fact pattern. Hamzeh‟s assertion that his conduct—threatening to report Mendoza to law enforcement agencies unless Mendoza paid money—does not constitute extortion is devoid of merit.

Further, Mendoza‟s counsel sent a letter to Hamzeh‟s counsel on October 20, 2011, stating Mendoza‟s intention to seek attorney fees and citing *Flatley* as the controlling case. Mendoza filed his opposition 41 days later on December 1, 2011, allowing sufficient time for Hamzeh to reconsider his position in light of *Flatley*.

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e.g., *Kashian v. Harriman* (2002) 98 Cal.App.4th 892.) Those cases do not involve extortion and are not on point.

Mendoza requests attorney fees on appeal. "Such fees are recoverable under the [anti-SLAPP] statute." (*Baharian-Mehr v. Smith*, *supra*, 189 Cal.App.4th at p. 275.) Mendoza is entitled to attorney fees and costs on appeal.

DISPOSITION

The order denying Hamzeh"s anti-SLAPP motion and awarding attorney fees to Mendoza is affirmed. Mendoza is entitled to recover attorney fees and costs on appeal in amounts to be determined by the trial court.

CERTIFIED FOR PARTIAL PUBLICATION.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

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SUPREME COURT OF ILLINOIS

MONDAY, NOVEMBER 19, 2012

THE COURT MADE THE FOLLOWING ANNOUNCEMENTS:

MISCELLANEOUS RECORD

M.R.24031 - In re: Thomas Earl Hildebrand, Jr. Disciplinary Commission.

The petition by respondent Thomas Earl Hildebrand, Jr. for leave to file exceptions to the report and recommendation of the Review Board is denied. The petition by Thomas Earl Hildebrand, Jr. for reinstatement to the roll of attorneys licensed to practice law in Illinois pursuant to Supreme Court Rule 767 is denied.

Order entered by the Court.

Karmeier, J., took no part.

M.R.25404 - In re: John Stephen Narmont. Disciplinary
M.R.24641 Commission.

(25404) The petitions by the Administrator of the Attorney Registration and Disciplinary Commission and respondent John Stephen Narmont for leave to file exceptions to the report and recommendation of the Review Board are denied. Respondent is suspended from the practice of law for six (6) months minus one (1) day and until he completes the Attorney Registration and Disciplinary Commission Professionalism Seminar.

Suspension effective December 10, 2012.

Respondent John Stephen Narmont shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension.

Order entered by the Court.

(24641) The rule to show cause that issued to John Stephen Narmont pursuant to Supreme Court Rule 774 on June 3, 2011, and continued until further order of the Court on July 20, 2011, is discharged.

Order entered by the Court.

M.R.25478 - In re: Joel M. Ward. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Joel M. Ward, who has been disciplined in the State of California, is suspended from the practice of law in the State of Illinois for one (1) year, with the suspension stayed in its entirety pending his successful completion of a three (3) year period of probation subject to the conditions imposed upon respondent by the Supreme Court of California.

Respondent Joel M. Ward shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension/probation.

Order entered by the Court.

M.R.25504 - In re: Howard Reich. Disciplinary Commission.

The motion by the Administrator of the Attorney Registration and Disciplinary Commission to approve and confirm the report and recommendation of the Review Board is allowed, and respondent Howard Reich is suspended from the practice of law for six (6) months.

Suspension effective December 10, 2012.

Respondent Howard Reich shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension.

Order entered by the Court.

M.R.25509 - In re: Bruce Paul Golden. Disciplinary Commission.

The petition by respondent Bruce Paul Golden for leave to file exceptions to the report and recommendation of the Review Board is denied. Respondent is disbarred, as recommended by the Review Board.

Order entered by the Court.

M.R.25512 - In re: Francis H. Kennedy, Jr. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Francis H. Kennedy, Jr., who has been disciplined in the State of Missouri, is reprimanded in the State of Illinois.

Order entered by the Court.

M.R.25519 - In re: Lawrence Joseph Fleming. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Lawrence Joseph Fleming, who has been disciplined in the State of Missouri, is suspended from the practice of law in the State of Illinois for six (6) months, with the suspension stayed in its entirety by a one (1) year period of probation subject to the conditions imposed upon respondent by the Supreme Court of Missouri.

Respondent Lawrence Joseph Fleming shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension/probation.

Order entered by the Court.

M.R.25520 - In re: Thomas R. Carnes. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 allowed, and respondent Thomas R. Carnes, who has been disciplined in the State of Missouri, is suspended from the practice of law in the State of Illinois for six (6) months, with the suspension stayed in its entirety by a one (1) year period of probation subject to the conditions imposed upon respondent by the Supreme Court of Missouri.

Respondent Thomas R. Carnes shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension/probation.

Order entered by the Court.

M.R.25521 - In re: Bruce Alan Carr. Disciplinary Commission.

The motion by the Administrator of the Attorney Registration and Disciplinary Commission to approve and confirm the report and recommendation of the Review Board is allowed, and respondent Bruce Alan Carr is suspended from the practice of law for nine (9) months.

Suspension effective December 10, 2012.

Respondent Bruce Alan Carr shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension.

Order entered by the Court.

M.R.25527 - In re: Sandra L. Craig. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Sandra L. Craig, who has been disciplined in the State of Missouri, is disbarred in the State of Illinois.

Order entered by the Court.

M.R.25528 - In re: Andre L. Brady. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Andre L. Brady, who has been disciplined in the State of Maryland, is disbarred in the State of Illinois.

Order entered by the Court.

M.R.25529 - In re: Avalon e'lan Betts-Gaston. Disciplinary Commission.

The petitions by the Administrator of the Attorney Registration and Disciplinary Commission and respondent Avalon e'lan Betts-Gaston for leave to file exceptions to the report and recommendation of the Review Board are denied. Respondent is disbarred, as recommended by the Review Board.

Order entered by the Court.

M.R.25537 - In re: Markian Bohdan Lewun. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission for leave to file exceptions to the report and recommendation of the Review Board is denied. Respondent is suspended from the practice of law for thirty (30) days, as recommended by the Review Board.

Suspension effective December 10, 2012.

Respondent Markian Bohdan Lewun shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension.

Order entered by the Court.

M.R.25538 - In re: Robert William Rooney, Jr. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose discipline on consent pursuant to Supreme Court Rule 762(b) is allowed, and respondent Robert William Rooney, Jr. is suspended from the practice of law for two (2) years and until further order of the Court, with the suspension stayed after ninety (90) days by a two (2) year period of probation subject to the following conditions:

a. Respondent shall comply with the provisions of Article VII of the Illinois Supreme Court Rules on Admission and Discipline of Attorneys and the Illinois Rules of Professional Conduct and shall timely cooperate with the Administrator in providing information regarding any investigations relating to his conduct;

b. Respondent shall reimburse the Commission for the costs of this proceeding as defined in Supreme Court Rule 773 and shall reimburse the Commission for any further costs incurred during the period of probation;

c. At least thirty (30) days prior to the termination of the period of probation, respondent shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct;

d. Probation shall be revoked if respondent is found to have violated any of the terms of probation. The remaining period of suspension shall commence from the date of the determination that any term of probation has been violated, and will continue until further order of the Court;

e. Respondent shall notify the Administrator within seven (7) days of any arrest or charge alleging his violation of any criminal or quasi-criminal statute or ordinance;

f. Respondent shall attend meetings as scheduled by the Commission probation officer. Respondent shall submit quarterly written reports to the Commission probation officer concerning the status of his practice of law and the nature and extent of his compliance with the conditions of probation;

g. Respondent shall notify the Administrator within fourteen (14) days of any change of address;

h. Respondent shall continue in his course of treatment with Dr. Fred Levin, or such other qualified mental health professional acceptable to the Administrator, and shall report to Dr. Levin, or such other qualified mental health professional, on a regular basis of not less than once per month, with the Administrator advised of any change in attendance deemed warranted by such professional;

i. Respondent shall comply with all treatment recommendations of Dr. Levin or such other qualified mental health professional, including the taking of medications as prescribed;

j. Respondent shall provide to Dr. Levin, or such other qualified mental health professional, an appropriate release authorizing the treatment professional to: (1) disclose to the Administrator on at least a quarterly basis information

pertaining to the nature of respondent's compliance with any treatment plan established with respect to respondent's condition; (2) promptly report to the Administrator respondent's failure to comply with any part of an established treatment plan; (3) respond to any inquiries by the Administrator regarding respondent's mental or emotional state or compliance with any established treatment plans;

k. During the period of suspension and the period of probation, respondent shall come under the care of a primary care physician acceptable to the Administrator, on at least an annual basis for routine maintenance and management of medical problems; and

l. Respondent shall provide to the primary care physician, an appropriate release authorizing the primary care physician, on at least an annual basis, to report to the Administrator information pertaining to respondent's health and treatment.

Suspension effective December 10, 2012.

Order entered by the Court.

M.R.25540 - In re: Richard A. Van Kalker. Disciplinary Commission.

The motion by the Administrator of the Attorney Registration and Disciplinary Commission to approve and confirm the report and recommendation of the Hearing Board is allowed, and respondent Richard A. Van Kalker is censured.

Order entered by the Court.

M.R.25551 - In re: Richard James Salas. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Richard James Salas, who has been disciplined in the State of California, is disbarred in the State of Illinois.

Order entered by the Court.

M.R.25553 - In re: Alan Mark Schnitzer. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Alan Mark Schnitzer, who has been disciplined in the State of California, is suspended from the practice of law in the State of Illinois for six (6) months and until further order of the Court.

Order entered by the Court.

M.R.25558 - In re: Patrick G. Drury. Disciplinary Commission.

The motion by Patrick G. Drury to strike his name from the roll of attorneys licensed to practice law in Illinois pursuant to Supreme Court Rule 762(a) is allowed, effective immediately.

Order entered by the Court.

M.R.25559 - In re: Al Henry Williams. Disciplinary Commission.

The motion by Al Henry Williams to strike his name from the roll of attorneys licensed to practice law in Illinois pursuant to Supreme Court Rule 762(a) is allowed, effective immediately.

Order entered by the Court.

M.R.25567 - In re: Ronald Jay McDermott. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose discipline on consent pursuant to Supreme Court Rule 762(b) is allowed, and respondent Ronald Jay McDermott is suspended from the practice of law for six (6) months and until further order of the Court, with the suspension stayed after sixty (60) days by a two (2) year period of probation subject to the following conditions:

a. Respondent shall abstain from the usage of any and all alcohol and all unprescribed controlled substances;

b. Respondent shall, upon request by the Administrator, submit to random substance testing by a mental health professional or facility approved by the Administrator, within eight (8) hours of receiving notice by the Administrator that he shall submit to the testing. The results of the tests shall be reported to the Administrator. Respondent shall pay any and all costs of such testing;

c. Respondent shall continue to participate in Alcoholics Anonymous or other 12-step program approved by the Administrator by attending at least three (3) meetings per week. Respondent is to maintain a log of his attendance at the meetings and submit it to the Administrator with his quarterly reports;

d. Respondent shall maintain a sponsor in the 12-step program. Respondent shall provide the name, address, and telephone number of the sponsor to the Administrator within fourteen (14) days of being placed on probation;

e. Respondent shall be responsible for ensuring that the sponsor communicates with the Administrator, in writing, every three (3) months regarding respondent's participation and progress, including any lapses in sobriety or usage of controlled substances or illegal drugs;

f. Respondent shall report any lapses in sobriety or usage of a non-prescribed controlled substance or illegal drug to the Administrator within 72 hours of that usage;

g. Respondent shall notify the Administrator within fourteen (14) days of any change of address, and any change in treatment professionals, 12-step programs, or 12-step program sponsors;

h. Respondent shall participate in a course of treatment with a psychotherapist and psychiatrist acceptable to the Administrator and shall comply with all treatment recommendations of the therapist and psychiatrist. The frequency and duration of treatment shall be determined by the therapist, the psychiatrist and respondent;

i. Respondent shall provide his therapist and psychiatrist with appropriate releases authorizing those treating professionals to (1) disclose to the Administrator on at least a quarterly basis information pertinent to the nature of respondent's compliance with any treatment plan; (2) promptly report to the Administrator respondent's failure to comply with the plan; and (3) respond to any inquiries by the Administrator regarding respondent's mental or emotional state or compliance with the treatment plan;

j. At least thirty (30) days prior to the termination of the period of probation, respondent shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct;

k. Respondent shall comply with the Illinois Rules of Professional Conduct and shall timely cooperate with the Administrator in providing information regarding any investigations relating to his conduct;

l. Respondent shall reimburse the Commission for the costs of this proceeding as defined in Supreme Court Rule 773 and shall reimburse the Commission for any further costs incurred during this period of probation;

m. Probation shall be revoked if respondent is found to have violated any of the terms of his probation. The remaining period of suspension shall commence from the date of the determination that any term of probation has been violated and shall continue until further order of the Court; and

n. Probation shall terminate without further order of Court provided that respondent complies with the above conditions.

Order entered by the Court.

The motion by respondent Ronald Jay McDermott to expedite effective date of discipline to the date of the Court's final order of discipline is allowed.

Order entered by the Court.

M.R.25577 - In re: Jeffrey Alan Avny. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose discipline on consent pursuant to Supreme Court Rule 762(b) is allowed, and respondent Jeffrey Alan Avny is suspended from the practice of law for thirty (30) days.

Suspension effective December 10, 2012.

Respondent Jeffrey Alan Avny shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension.

Order entered by the Court.

M.R.25580 - In re: Harry P. Friedlander. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Harry P. Friedlander, who has been disciplined in the State of Arizona, is censured in the State of Illinois and placed on probation until he successfully completes the terms of his probations imposed by the Supreme Court of Arizona.

Order entered by the Court.

M.R.25581 - In re: John Joseph Pawloski. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent John Joseph Pawloski, who has been disciplined in the State of Missouri, is suspended from the practice of law in the State of Illinois for six (6) months and until further order of the Court, with the suspension stayed in its entirety by a two (2) year period of probation subject to the conditions imposed upon respondent by the Supreme Court of Missouri.

Respondent John Joseph Pawloski shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension/probation.

Order entered by the Court.

M.R.25582 - In re: Lisa Anne Webber-Hicks. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Lisa Anne Webber-Hicks, who has been disciplined in the State of Tennessee, is censured in the State of Illinois.

Order entered by the Court.

M.R.25583 - In re: Paul Arthur Silich. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Paul Arthur Silich, who has been disciplined in the State of Iowa, is reprimanded in the State of Illinois.

Order entered by the Court.

M.R.25584 - In re: Richard Steven Connors. Disciplinary Commission.

The motion by the Administrator of the Attorney Registration and Disciplinary Commission to approve and confirm the report and recommendation of the Hearing Board is allowed, and respondent Richard Steven Connors is disbarred.

Order entered by the Court.

M.R.25588 - In re: David Arnold Milks. Disciplinary Commission.

The petition by respondent David Arnold Milks for leave to file exceptions to the report and recommendation of the Review Board is denied. Respondent is disbarred, as recommended by the Review Board.

Order entered by the Court.

M.R.25590 - In re: Eugene C. Stahnke. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission for leave to file exceptions to the report and recommendation of the Review Board is denied. Respondent is suspended from the practice of law for eighteen (18) months and until he successfully completes the Attorney Registration and Disciplinary Commission Professionalism Seminar, as recommended by the Review Board.

Suspension effective December 10, 2012.

Respondent Eugene C. Stahnke shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension.

Order entered by the Court.

M.R.25599 - In re: John Farano, Jr. Disciplinary Commission.

The motion by John Farano, Jr. to strike his name from the roll of attorneys licensed to practice law in Illinois pursuant to Supreme Court Rule 762(a) is allowed, effective immediately.

Order entered by the Court.

M.R.25608 - In re: Theodore Stanley Proud. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose discipline on consent pursuant to Supreme Court Rule 762(b) is allowed, and respondent Theodore Stanley Proud is censured.

Order entered by the Court.

M.R.25611 - In re: Kenneth Alan Goldman. Disciplinary
M.R.23800 Commission.

(25611) The petitions by the Administrator of the Attorney Registration and Disciplinary Commission and respondent Kenneth Alan Goldman for leave to file exceptions to the report and recommendation of the Review Board are allowed. Respondent is suspended from the practice of law for three (3) years and until further order of the Court.

Order entered by the Court.

(23800) The rule to show cause that issued to Kenneth Alan Goldman pursuant to Supreme Court Rule 761 on April 1, 2010, and continued until further order of the Court on June 10, 2010, is discharged.

Order entered by the Court.

M.R.25612 - In re: Charisse Angela Bruno. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose discipline on consent pursuant to Supreme Court Rule 762(b) is allowed, and respondent Charisse Angela Bruno is suspended from the practice of law for one (1) year and until further order of the Court.

Order entered by the Court.

M.R.25620 - In re: J. W. Pierceall. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose discipline on consent pursuant to Supreme Court Rule 762(b) is allowed, and respondent J. W. Pierceall is suspended from the practice of law for ninety (90) days.

Suspension effective December 10, 2012.

Respondent J. W. Pierceall shall reimburse the Client Protection Program Trust Fund for any Client Protection payments arising from his conduct prior to the termination of the period of suspension.

Order entered by the Court.

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SUPREME COURT OF ILLINOIS

WEDNESDAY, JANUARY 16, 2013

THE COURT MADE THE FOLLOWING ANNOUNCEMENTS:

MISCELLANEOUS RECORD

M.R.24012 - In re: Derrick B. Reese. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission for order and judgment for costs pursuant to Supreme Court Rule 773 is allowed. Costs in the amount of $500 are assessed against Derrick B. Reese, and he is directed to pay the costs in full to the Attorney Registration and Disciplinary Commission within thirty (30) days of the entry of this order.

Judgment in the amount of $500 is entered for the Attorney Registration and Disciplinary Commission and against Derrick B. Reese.

Order entered by the Court.

M.R.24910 - In re: Christopher Anthony Millet. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission for order and judgment for costs pursuant to Supreme Court Rule 773 is allowed. Costs in the amount of $1,000 are assessed against Christopher Anthony Millet, and he is directed to pay the costs in full to the Attorney Registration and Disciplinary Commission within thirty (30) days of the entry of this order.

Judgment in the amount of $1,000 is entered for the Attorney Registration and Disciplinary Commission and against Christopher Anthony Millet.

Order entered by the Court.

M.R.25174 - In re: Patrick Nicholas Burkhart. Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission for order and judgment for costs pursuant to Supreme Court Rule 773 is allowed. Costs in the amount of $1,000 are assessed against Patrick Nicholas Burkhart, and he is directed to pay the costs in full to the Attorney Registration and Disciplinary Commission within thirty (30) days of the entry of this order.

Judgment in the amount of $1,000 is entered for the Attorney Registration and Disciplinary Commission and against Patrick Nicholas Burkhart.

Order entered by the Court.

M.R.25509 - In re: Bruce Paul Golden. Disciplinary Commission.

The motion by the Administrator of the Attorney Registration and Disciplinary Commission for excess costs pursuant to Supreme Court Rule 773 in the amount of $2,567.07 is allowed. Respondent Bruce Paul Golden is directed to pay the costs in full to the Attorney Registration and Disciplinary Commission within thirty (30) days of the entry of this order.

Order entered by the Court.

M.R.25611 - In re: Kenneth Alan Goldman. Disciplinary Commission.

The motion by the Administrator of the Attorney Registration and Disciplinary Commission for excess costs pursuant to Supreme Court Rule 773 in the amount of $19,531.89 is allowed. Respondent Kenneth Alan Goldman is directed to pay the costs in full to the Attorney Registration and Disciplinary Commission within thirty (30) days of the entry of this order.

Order entered by the Court.