In re Mark Edward McNabola
Attorney-Respondent

Commission No. 2018PR00083

Synopsis of Hearing Board Report and Recommendation
(March 2022)

During a trial, a courtroom clerk disclosed the contents of a jury note to Respondent. He did not inform opposing counsel or the court of the disclosure. The Administrator charged Respondent with engaging in an improper *ex parte* communication and dishonest conduct. The Hearing Board directed findings in Respondent's favor on these charges.

In a different matter, Respondent referred a client to his father for a loan. Respondent's father made ten loans to the client. After Respondent's representation ended, he provided a memorandum to the client's worker's compensation attorney outlining the amounts the client owed to Respondent's father. When the client failed to repay the loans, one of Respondent's partners represented Respondent's father in a collection lawsuit against the former client. The Hearing Board found that Respondent represented a client when the representation was materially limited by his responsibilities to a third person or his own interests. The Hearing Board did not find clear and convincing evidence that Respondent provided financial assistance to the client, improperly disclosed information to the client's disadvantage in the memorandum, or was involved in the representation of his father in the collection lawsuit.

The Administrator further charged Respondent with providing financial assistance to clients and acting dishonestly by allegedly directing a paralegal at his firm to make loans to clients and then reimbursing the paralegal in cash for the loan amounts. The Hearing Board directed findings in Respondent's favor as to these charges.

Following a dispute with his former partners that went to arbitration, Respondent issued a subpoena for an employee's cell phone records under the caption of the closed arbitration matter. The Hearing Board found that, in doing so, Respondent made a knowing misrepresentation. There was not clear and convincing evidence that Respondent's conduct resulted in actual prejudice to the administration of justice.

Based on the proven misconduct and significant evidence in mitigation, the Hearing Board recommended that Respondent be censured.

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

In the Matter of:

MARK EDWARD MCNABOLA,

Attorney-Respondent,

No. 6189613.

Commission No. 2018PR00083

REPORT AND RECOMMENDATION OF THE HEARING BOARD

SUMMARY OF THE REPORT

Respondent was charged with misconduct arising from several different matters. Specifically, he was charged with engaging in an improper ex parte communication with a courtroom clerk who disclosed the contents of a jury note to him and acting dishonestly by failing to inform opposing counsel and the Court of that communication. The Hearing Panel made a directed finding in Respondent's favor as to those charges.

Respondent was also charged with misconduct related to his referral of a client to Respondent's father for litigation loans. After Respondent's representation of the client ended, he provided a memorandum to the client's worker's compensation attorney outlining the amounts the client owed to Respondent's father. When the client failed to repay the loans, one of Respondent's partners represented Respondent's father in a collection lawsuit against the former client. The Hearing Panel found Respondent had a conflict of interest arising from the referrals and involvement in facilitating the loans, and failed to obtain the client's informed consent. The Panel did not find clear and convincing evidence that Respondent provided financial assistance to the client, improperly disclosed information to the client's disadvantage in the memorandum, or was

involved in the representation of his father in the collection lawsuit.

The Administrator further charged Respondent with providing financial assistance to clients by directing a paralegal at his firm to make loans to clients and then reimbursing the paralegal in cash for the loan amounts. The Hearing Panel directed a finding in Respondent's favor as to these charges.

Following a dispute with his former partners that went to arbitration, Respondent issued a subpoena for an employee's cell phone records under the caption of the closed arbitration matter. The Hearing Panel found Respondent made a knowing misrepresentation in doing so but did not find sufficient proof of prejudice to the administration of justice. Based on the proven misconduct and significant mitigation, the Hearing Panel recommended that Respondent be censured.

INTRODUCTION

The hearing in this matter was held remotely by video conference on April 19-23, 2021 and August 25-26, 2021, before a Panel of the Hearing Board consisting of Carl E. Poli, Chair, William J. Fenili, and Brian B. Duff. Matthew D. Lango and Chi (Michael) Zhang represented the Administrator. Respondent was present and was represented by Edward W. Feldman, Diane F. Klotnia, Mary Eileen Wells, Samuel J. Manella, and James E. Dahl.

PLEADINGS AND MISCONDUCT ALLEGED

The Administrator filed the original Complaint in this matter on October 9, 2018. Before us is the Third Amended Complaint. Following the Administrator's voluntary dismissal of Counts I and II and one charge in Count V, the remaining charges are: communicating ex parte with a judicial official without authorization of the court (Count III); engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (Counts III, VI and VII); representing a client when the representation may be materially limited by the lawyer's own interests (Count IV); providing

financial assistance to a client (Counts IV, VI); representing another person in a substantially related matter in which the person's interests were materially adverse to a former client's interests without obtaining the former client's informed consent (Count IV); using information acquired in the course of representing a former client to her disadvantage (Count V); and engaging in conduct prejudicial to the administration of justice (Count VII), in violation of Illinois Rules of Professional Conduct 1.7(a)(2), 1.8(e), 1.9(a), 1.9(c), 3.5(b), 8.4(c), and 8.4(d).

Respondent admitted some of the factual allegations, denied others, and denied engaging in any misconduct.

EVIDENCE

The parties jointly stipulated to numerous facts. At hearing, the Administrator presented testimony from seven fact witnesses, one opinion witness, and Respondent as an adverse witness. Administrator's Exhibits 2, 4, 5, 7-14, 20-22, 26, 28, 31-35, and 37-39 were admitted. (Tr. at 15, 17). Respondent testified on his own behalf and presented seven character witnesses. Respondent's Exhibits 1-12, 19, 23, 24, 36, 38-41, 43, 44, 50, 51, 55-57, 77, 85, 87, 97, 98, 110-113, and 129 were admitted. (Tr. 20-22).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Administrator bears the burden of proving the charges of misconduct by clear and convincing evidence. In re Thomas, 2012 IL 113035, ¶ 56. Clear and convincing evidence constitutes a high level of certainty, which is greater than a preponderance of the evidence but less stringent than proof beyond a reasonable doubt. People v. Williams, 143 Ill. 2d 477 (1991). The Hearing Board assesses witness credibility, resolves conflicting testimony, makes factual findings, and determines whether the Administrator met the burden of proof. In re Winthrop, 219 Ill. 2d 526, 542-43 (2006).

Motion for Directed Finding

At the close of the Administrator's case in chief, Respondent moved for a directed finding on all of the charges of misconduct. The ruling on a motion for directed finding is a two-step process. The Hearing Panel must first determine whether the Administrator presented sufficient evidence to establish a prima facie case by presenting at least some evidence on every element necessary to prove the alleged misconduct. The Hearing Panel will grant a motion for directed finding if the Administrator failed to establish a prima facie case. If the Hearing Panel determines the Administrator established a prima facie case, it must then determine whether all the evidence presented, including evidence favorable to the Respondent, is sufficient to prove the misconduct by clear and convincing evidence. Judgment should be entered for the Respondent only if, after the weighing process, the Panel determines the evidence is not sufficient to meet the Administrator's burden of proof. See Kokinis v. Kotrich, 81 Ill. 2d 151, 154-55 (1980); In re Bush, 09 CH 73 (Feb. 10, 2011) (Hearing Bd. at 17-18).

On July 12, 2021, the Panel granted Respondent's Motion for Directed Finding as to Count III in its entirety, the Rule 1.8(e) charge in Count IV, Count V in its entirety, and Count VI in its entirety. Its findings are discussed in detail below.

I. In Count III, the Administrator charged Respondent with engaging in improper ex parte communications with a courtroom clerk about the contents of a jury note and acting dishonestly by failing to tell the opposing party and the Court that he had advance notice of the contents of the note, in violation of Rules 3.5(b) and 8.4(c).

A. Summary

The Hearing Panel directed a finding in Respondent's favor on Count III. Respondent's receipt of unsolicited information from a courtroom clerk was not sufficient to prove a violation of Rule 3.5(b) when the evidence did not establish that Respondent initiated the improper communication or continued it. The evidence did not establish that Respondent knew or had

reason to know that the clerk acted without authorization or that Respondent was given information that was not given to the opposing side. Under these circumstances, we do not believe that the Respondent's non-disclosure of the conversation to the Court and the opposing side constituted dishonest conduct.

B. Evidence Considered

On September 21, 2010, Scot and Patricia Vandenberg retained Respondent to represent them in a lawsuit filed in the Circuit Court of Cook County, arising from an accident that left Scot paralyzed. The Vandenbergs settled with one of the defendants, RQM, but went to trial against defendant Brunswick Boat Group/Brunswick Corporation (Brunswick). Judge Elizabeth Budzinski presided over the jury trial, which took place between May 15 and June 9, 2015. The Vandenbergs asked the jury to award damages in the amount of $105 million. (Stips. 2, 8, 13-18, 20).

After the trial ended around 3:00 p.m. on June 9, Judge Budzinski advised Respondent and opposing counsel, John Patton, that her clerk, Tatiana Agee, would call them if there were a jury question. It is a common practice among judges in the Daley Center for a judge's clerk to relay messages from the judge to attorneys by calling the attorneys one at a time. (Stip. 21; Tr. 312).

Shortly after the trial ended, while they were still in the courthouse, Charles Patitucci, the representative of Brunswick's insurer, AIG, offered Respondent $25 million to settle the case. Respondent communicated the offer to the Vandenbergs when he met them outside the courthouse. Respondent and the Vandenbergs then returned to Respondent's office. After ten or fifteen minutes of discussion, the Vandenbergs decided to accept the settlement offer. (Stips. 22, 23; Tr. 161).

At approximately 3:50 p.m., Susan Lazarra, the deputy sheriff assigned to Judge Budzinski, received a note from the jury that asked, "Can we find fault with RQM without finding fault with

Brunswick?" While on her way to deliver the note to Judge Budzinski, Lazarra met Agee in the hallway and gave her the note. (Stips. 29, 31).

When Agee handed Judge Budzinski the note, Judge Budzinski was on a telephone call but told Agee, "call everyone in the case and tell them to come over. There is a jury note." (Tr. 288). Judge Budzinski did not authorize Agee to disclose the contents of the note. (Tr. 284-85). She testified that typically her deputy gives her jury notes, because the deputy is the only person who has contact with the jury . According to Judge Budzinski's notation, she received the jury note at 3:50 p.m. (Tr. 286).

Agee called Respondent at 3:52 p.m. According to Respondent, Agee said there was a jury note, told him what the note said, and then said that Judge Budzinski wanted him to return to the courthouse. (Stips. 33, 34, 39; Tr. 851, 993-94). When asked how he responded to Agee, Respondent testified, "I said we are about to settle the case. That is what – please inform the Judge and see if we could have a couple more minutes before we went to court." (Tr. 995). Agee put him on hold or put the phone down. When she returned, she told Respondent "that's okay." Respondent did not make any other requests of Agee. (Tr. 995). Respondent did not ask Agee to withhold information from Brunswick. He did not know at the time whether Agee had already spoken to counsel for Brunswick. (Tr. 996). Agee was not called as a witness in this hearing.

The parties stipulated that the Vandenbergs gave Respondent authority to accept Brunswick's settlement offer before Agee called Respondent. (Stip. 40).

Brooke Reynolds, who was working as Judge Budzinski's extern, was sitting at the desk next to Agee's when Agee called Respondent. (Tr. 198-99). Reynolds could hear Agee speaking to Respondent but could not hear what Respondent said to Agee. (Tr. 194).

Judge Budzinski testified that it is an improper communication if a clerk reads a jury note to a lawyer. (Tr. 313). If that happened, she would expect an attorney to immediately advise her because that is an unusual circumstance. (Tr. 337).

Telephone records showed several calls to or from Respondent and the court, Patton, and Patitucci between 3:55 p.m. and 4:18 p.m. (Stip. 48). Respondent spoke to Patton at 4:02 p.m. He asked Patton where Patitucci was but did not mention the jury note. (Tr. 867). At approximately 4:03 p.m., Respondent spoke with Patitucci. He first asked Patitucci to increase the settlement offer. After Patitucci said he would relay the counter-proposal to his superiors, Respondent said the Vandenbergs accepted the $25 million offer. Patitucci felt it was strange for Respondent to accept the offer instead of waiting for a response to his counter-proposal. At the time, Patitucci did not know there was a jury note, and Respondent did not mention it. (Tr. 416-18).

Patitucci testified that if he had known a jury note existed, even if he did not know the nature of the question, he would have revoked the settlement offer. He would have wanted to hear the jury's question before continuing with settlement negotiations. (Tr. 434-35).

Respondent testified he assumed Brunswick had the same information he had about the jury note when he made the call to settle the case. (Tr. 860). Respondent's position is that he did nothing wrong with respect to the jury note, and there was no reason for him to assume Agee was disclosing the contents of the note only to him. (Tr. 873).

Respondent spoke to Judge Budzinski at approximately 4:15 p.m. Judge Budzinski testified that Respondent told her the case had settled and neither he nor attorney Patton were interested in the contents of the jury note. (Tr. 292). Respondent did not advise Judge Budzinski that he knew the contents of the note. (Tr. 874). Judge Budzinski's reaction was that she had

never known a lawyer who was not interested in a jury note. (Tr. 294). Respondent recalled Judge Budzinski asking what he wanted to do with the jury note in light of the settlement, and responding that the note did not matter. (Tr. 875). He denied saying that neither side was interested in the note and further denied implying that he did not know the contents of the note. (Tr. 1001-1002).

Respondent had another conversation with Patton at approximately 4:18 p.m., in which he told Patton the case was settled and he was sending his partner, Ruth Degnan, to court to dismiss the case. Patton told Respondent he wanted the jury to reach a verdict. Respondent did not agree with that idea. (Tr. 485-86). Patton was not aware of the jury note at the time of this conversation, and Respondent did not mention it. (Tr. 486).

At 4:19 p.m., Agee called Patton. (Stip. 46). According to Patton, Agee said the case was settled and Judge Budzinski wanted him to come to the courthouse to have the case dismissed. Patton told Agee he wanted the jury to continue deliberating. Agee then told Patton there was a jury note. Patton testified that, at that point, the jury note "was not a big deal" because the case was settled. (Tr. 487-88). Judge Budzinski then called Patton, and he advised her that he would like the jury to continue deliberating.

Around 4:40 p.m., attorneys Ruth Degnan and John Ouska returned to Judge Budzinski's chambers on behalf of the Vandenbergs and Brunswick, respectively. (Tr. 295). Respondent testified he sent Degnan because he was tired after the long trial. (Tr. 1003).

After Judge Budzinski read the jury note to the parties, neither Brunswick nor AIG objected to proceeding with the settlement. (Tr. 297). Patitucci was not present in chambers but learned what the jury note said at about 4:40 p.m. After learning the contents of the note, he did not retract the settlement offer because he did not know at the time about Agee's communications with

Respondent. (Tr. 426-27; 461-62). The settlement was entered on the record at 4:50 p.m. (Stip. 54).

Judge Budzinski allowed Brunswick's request for the jury to deliberate to verdict. The jury returned a verdict in Brunswick's favor after the settlement was put on the record. At Patitucci's request, Patton returned to the courthouse around 5:00 p.m. Patton testified the attorneys who were present on behalf of Brunswick and AIG were very upset after seeing the time written on the jury note. (Tr. 491). Patton then "stormed into the courtroom." He showed Judge Budzinski on his phone that he first received a call from Agee at 4:19 p.m. (Tr. 493).

On June 12, 2015, Brunswick moved to vacate the settlement and enter judgment on the jury's verdict. (Stip. 57). Following further proceedings, the appellate court ruled that the $25 million settlement agreement was enforceable. While the appellate court did not opine on whether Respondent violated the Rules of Professional Conduct, it determined that Brunswick failed to establish that Respondent had a duty to inform Brunswick of the jury note, and therefore failed to prove fraudulent concealment. (Adm. Ex. 11 at 11-12).

The Administrator's opinion witness, attorney Bruce Pfaff, testified that a reasonable lawyer would not have been involved in any communication with a courtroom clerk about the substance of a jury note. (Tr. 607). In Pfaff's opinion, a reasonable lawyer would have stopped the clerk from relaying the contents of the note and would not have assumed that a judge would authorize a clerk to reveal the contents of the note to one party. (Tr. 608). Additionally, a reasonable lawyer would have realized he received *ex parte* information about the substance of the case and should have asked the clerk if the judge authorized her to disclose the note and whether she was going to disclose it to the other party. (Tr. 613).

C. Analysis and Conclusions

For the reasons set forth below, we find the Administrator presented sufficient evidence to establish a *prima facie* case with respect to the charges in Count III, but the evidence did not meet the clear and convincing standard of proof.

Rule 3.5(b)-*Ex Parte* Communication

Rule 3.5(b) prohibits a lawyer from communicating *ex parte* with a judge, juror, prospective juror, or other official during a proceeding unless authorized to do so by law or court order. Rule 63A5(a) of the Illinois Code of Judicial Conduct makes an exception, however, for communications for "scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues," provided that the judge reasonably believes no party will gain a procedural or tactical advantage as a result of the *ex parte* communication.

The Administrator asserts that Respondent's receipt of information about the jury note, coupled with his response to Agee that "we're about to settle the case," established improper *ex parte* communication about the merits of the case. We disagree. Although Respondent admits Agee read the note to him, there is no evidence establishing that he asked her to disclose the note's contents or could have anticipated she would do so. We do not find attorney Pfaff's opinion that a reasonable attorney would have interrupted Agee to prevent her from reading the note to be realistic or humanly possible when, as was the case here, the attorney had no reason to foresee the disclosure.

Further, the Administrator failed to establish that Respondent imparted information to Agee about the merits of the case. The Administrator did not call Agee as a witness, and the Administrator's argument that Respondent purported to communicate Brunswick's position on settlement by using the word "we" when asking for more time before returning to court is tenuous at best. Respondent's testimony recounted a 30-second conversation that occurred almost seven

years ago. We did not take that testimony to be a verbatim account of his statements to Agee. We find the purpose of his response to Agee was to ask her to communicate his request for more time to Judge Budzinski. We consider this to have been a scheduling request rather than a communication about the substance of the case.

We also reject the Administrator's argument that Respondent violated Rule 3.5(b) by failing to notify opposing counsel and Judge Budzinski of Agee's improper disclosure. In order to impose such a duty, it would be necessary to find that Respondent knew the opposing side did not receive the same information he received. If Brunswick had received the same information, the communication would not have been improper. See, e.g., In re Barringer, 2011PR00079, M.R. 25465 (Sept. 17, 2012) (Hearing Bd. at 12) (declining to find a Rule 3.5 violation when an attorney communicated information to a judge by email without copying opposing counsel, but the information had already been disclosed at previous docket calls). Respondent testified he had no reason to believe Brunswick did not have the same information he had. We were not presented with persuasive evidence contradicting that testimony. We do not agree with the Administrator that the unusual nature of the disclosure and Respondent's experience as a litigator were sufficient to establish that Respondent knew he engaged in an improper *ex parte* communication. On the contrary, we believe a reasonable attorney would presume that a judge's clerk was carrying out her duties properly, not improperly.

The Administrator cites to ISBA Ethics Advisory Opinion 94-7 as authority for the proposition that an attorney who received but did not initiate an *ex parte* communication from the court nonetheless had a duty under the prior version of Rule 3.5 to notify opposing counsel of the communication. We do not find the Advisory Opinion or the case cited therein, In re Ragatz, 146 Wis. 2d 80 (1988), applicable to the facts of this case. The Advisory Opinion addressed whether

it was improper for an attorney to draft an order pursuant to a judge's *ex parte* request and to engage in further *ex parte* communications with the judge about the draft order. It concluded that it was a violation of Rule 3.5 to do so without notifying opposing counsel, and cited Ragatz in support. See Ragatz, 146 Wis. 2d 80 (after a judge mailed an attorney a proposed decision for a pending action in which the attorney represented one of the parties, the attorney improperly continued the correspondence without informing opposing counsel). Here, unlike the circumstances in Advisory Opinion 94-7 and Ragatz, the evidence did not establish that Respondent knew he received a communication about the merits that opposing counsel did not receive or that he further communicated about the merits in response to the unsolicited communication. Absent such evidence, we decline to find Respondent had a duty to disclose the communication under Rule 3.5(b).

For all of the foregoing reasons, we directed a finding in Respondent's favor based on our determination that the Administrator failed to meet the high burden of proving a violation of Rule 3.5(b) by clear and convincing evidence.

Rule 8.4(c)-Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation

Rule 8.4(c) provides that it is misconduct for an attorney to engage in dishonesty, fraud, deceit or misrepresentation. Respondent is charged with acting dishonestly by failing to tell Judge Budzinski, Patitucci, and Patton that he had advance notice of the jury note. Dishonesty may be found when an attorney purposely fails to disclose information and does so with intent to deceive. In re Witt, 145 Ill. 2d 380, 397 (1991). We may consider circumstantial evidence in making our findings. In re Edmonds, 2014 IL 117696 at ¶ 54.

The Administrator did not meet its burden of establishing that Respondent acted with an intent to deceive or to conceal the fact that Agee told him the contents of the jury note. Initially, we note the appellate court's finding in the underlying litigation that fraudulent concealment was

not proven because Brunswick failed to establish that Respondent had a duty to inform Brunswick of the jury note. We may take judicial notice of a court's findings and judgment and consider them along with all of the other evidence when determining whether the Administrator proved misconduct. In re Owens, 144 Ill. 2d 372, 378-79 (1991); In re Ebert, 09 CH 108, M.R. 25341 (Sept. 17, 2012) (Hearing Bd. at 47). Although the issue before the appellate court was somewhat different than our considerations under the Rules of Professional Conduct, we do take notice of the appellate court's finding.

In addition, the parties' stipulation in this proceeding that the Vandenbergs gave Respondent authority to accept Brunswick's settlement offer before Respondent spoke to Agee is significant in evaluating this charge. In light of the timing of the settlement offer and the Vandenbergs' decision, we find credible Respondent's testimony that he was not concerned with the jury note because his clients had already agreed to settle the case. We further find that the phone calls Respondent placed to Patitucci, Patton, and the Court prior to the time the settlement was placed on the record were consistent with Respondent's efforts to finalize the settlement and obtain a good result for his clients. We do not find Respondent's failure to mention the jury note to those persons or his decision to send another attorney to Judge Budzinski's chambers to be persuasive evidence of deceptive intent because, in Respondent's mind, the case was effectively settled. While the Administrator's evidence arguably gives rise to a suspicion of concealment, suspicious circumstances do not satisfy the Administrator's burden of proof. In re Winthrop, 219 Ill. 2d at 550. Accordingly, Respondent is entitled to a directed finding on this charge.

II. In Count IV, Respondent is charged with engaging in a conflict of interest by referring a client to Respondent's father for litigation loans, improperly providing financial assistance to a client by having his employees prepare promissory notes and utilizing his father for loans when Respondent could not make such loans himself, and representing his father in a collection action against his former client, in violation of Rules 1.7(b)[1], 1.8(d)[2], and 1.9(a).

A. Summary

Respondent's referral of client Carol Kinnally to William McNabola, M.D., Respondent's father, for litigation loans, coupled with the involvement of Respondent's staff in facilitating the loans, established a conflict of interest for which Respondent should have sought Kinnally's informed consent. The Administrator did not prove that Respondent provided financial assistance to Kinnally or that Respondent represented Dr. McNabola in his collection lawsuit against Kinnally.

B. Evidence Considered

Respondent represented Carol Kinnally in connection with a personal injury claim and an underinsured motorist claim arising from an accident that occurred in 2003. Kinnally also had a worker's compensation claim arising from the accident, which Respondent referred to attorney Marc Stookal. (Stip. 77; Tr. at 1178.). Kinnally is now known as Carol O'Brien, but to be consistent with the pleadings we will refer to her as Kinnally.

Kinnally Loans

During the representation, Kinnally told Respondent she was having financial problems and intended to borrow money from a commercial litigation lender. (Stip. 79). She testified that Respondent said, "Don't go to those places, they charge you an exorbitant amount of interest. I can get you the money." (Tr. 1181). Respondent testified it was his practice to tell clients he was prohibited from loaning them money, but would give the client the names of two or three private lenders. Respondent wanted to protect clients from paying the high interest rates commercial

lenders charged. (Tr. 1402-1403, 1410-11).

According to Kinnally, Respondent told her his father, Dr. McNabola[3], could loan money to her. Between November 2003 and July 2006, Kinnally obtained ten loans, totaling $83,000, from Dr. McNabola. All of the loans had an interest rate of 10 percent. (Stip. 80). Kinnally testified she received the loans "through Mark, but he said it was his father's money." (Tr. 1181).

Kinnally testified that the only people she dealt with at Respondent's firm regarding the loans were Respondent and Tracey Battistoni, Respondent's assistant. Kinnally would tell Respondent the amount of the loan she needed, and she would either go to Respondent's office to "sign a form" or Respondent would have a messenger bring the form to her home. Kinnally testified that Respondent insinuated that the loan would be coming from him, but it would be under his father's name. (Tr. 1183-85). Respondent denied doing so and denied that any loan funds came from him. (Tr. 1409-10).

Respondent acknowledged that his staff facilitated the preparation and signing of the promissory notes. (Tr. 1481-82). Although Respondent testified, he did not know who drafted the notes, (Tr. 901-902), he admitted the allegation in the Third Amended Complaint that stated as follows:

> In each of the transactions above, the note drafted by Respondent's firm contained an accelerator clause which provided that in the event of default in whole or in part on the note, an attorney can at any time thereafter appear in court and confess judgment in favor of the holder of the note for such amount as is unpaid, without process, in favor of the holder of the note.
>
> (Ans. to Third Amended Complaint at ¶ 115).

Respondent answered that allegation "Admitted, except that McNabola denies the characterization of the so-called "accelerator clause" to the extent it is inconsistent with the terms of the clause, and refers the Hearing Board to the notes for contents thereof."

The confession of judgment clause, which the Third Amended Complaint referred to as an "accelerator clause," was included in all of the promissory notes for Kinnally's loans. By signing the promissory note, Kinnally agreed that if she defaulted in whole or in part, she authorized an attorney of any court of record to appear on her behalf and confess a judgment, without process. The confession of judgment clause further provided that Kinnally was responsible for the costs of collection, including attorney fees; she waived and released "all error which may intervene in any such proceedings;" and she consented to immediate execution of the judgment. (Adm. Ex. 39).

Dr. McNabola had an office in Respondent's firm. (Tr. 691). Respondent testified he did not have much contact with his father when they were both in the office. (Tr. 1021). Kinnally never spoke to or met Dr. McNabola. She had informal discussions with Respondent about the terms of the promissory notes. (Tr. 1192-93).

Respondent denied that referring Kinnally to his father for a loan materially limited his representation of her. (Tr. 1033). He denied knowing that Kinnally took additional loans from Dr. McNabola beyond the first loan. (Tr. 1414). His position is that his father was an independent, third-party lender. Respondent has always been aware of the provisions of Rule of Professional Conduct 1.8. (Tr. 890-91, 893).

Respondent submitted as evidence a letter from ARDC attorney Emily Adams, dated January 11, 2016, relaying her decision to close an inquiry into loans from Dr. McNabola to Taofiki Ayoola, another former client of Respondent's. The letter indicated that the Rules of Professional Conduct do not prohibit an attorney's family members or close friends from providing financial assistance to clients. (Resp. Ex. 60).

Kinnally's personal injury case settled on March 16, 2004 for $100,000. Her underinsured motorist claim settled for $460,672 in November 2004. (Stips. 84, 85). The final distribution of

the underinsured motorist settlement funds was held in abeyance pending the outcome of Kinnally's worker's compensation claim.

After the matters for which Respondent represented Kinnally ended, Respondent monitored the status of Kinnally's worker's compensation matter and occasionally spoke with attorney Stookal about it. (Tr. 928-29). In September 2011, the worker's compensation matter settled for $215,000. (Stip. 87).

Kinnally testified that the day after her worker's compensation claim settled Respondent called her and "screamed at the top of his lungs" that he would "bury" her if she did not repay Dr. McNabola. (Tr. 1199). According to Kinnally, Respondent called and threatened her three more times within the first few days of the settlement. (Tr. 1199-200). Respondent denied making calls to Kinnally about the loans and denied threatening her in any way. (Tr. 1417-19).

At Respondent's direction, his paralegal, Lauren O'Keefe, prepared a memorandum to Kinnally's worker's compensation attorney, Marc Stookal, dated September 21, 2011. The memorandum accounted for the Kinnally settlement proceeds and disbursements, and itemized the principal and interest Kinnally owed Dr. McNabola, which totaled $135,104. (Stip. 93; Tr. 65-67; Adm. Ex. 22). The memorandum also outlined deferred fees, costs, and expenses owed to Respondent's firm. (Tr. 1055). Its concluding sentence stated, "With an expected WC net of $175,000 (per Marc Stookal), and **various debts as outlined above totaling $162,663.97, Carol will receive $12,336.03** after distribution of the net WC funds." (Emphasis in original). Respondent testified it was his standard procedure to inform worker's compensation counsel of applicable costs and liens. He denied that the purpose of the memorandum was to collect the funds Kinnally owed to Dr. McNabola. (Tr. 929-30). Stookal did not disburse any portion of the worker's compensation settlement funds to Dr. McNabola. (Stips. 94, 95).

Collection Lawsuit

Kinnally did not repay her loans from Dr. McNabola. (Stip. 83). In 2011, attorney Richard Carbonara filed a complaint against Kinnally on Dr. McNabola's behalf, seeking repayment. In February 2012, attorney Karen Enright entered an additional appearance on behalf of Dr. McNabola. At that time, Enright worked for the firm of Winters, Enright, Salzetta & O'Brien, LLC. In September 2012, Enright, who had previously worked at the McNabola firm, returned to McNabola Law Group as a partner. (Stips. 97-99).

On October 12, 2012, Enright filed a routine motion for leave to substitute McNabola Law Group as counsel for Dr. McNabola and provided notice to Kinnally through her counsel of record, Steve Jacobson. The motion did not set forth any information about Respondent's previous representation of Kinnally. The Order granting the motion contains a notation that no objection was stated. (Stips. 100, 101; Adm. Exs. 20, 26).

Respondent denied knowing Enright was representing his father when she rejoined Respondent's firm. (Tr. 1039). He later testified he knew of the representation before Enright rejoined his firm. It did not "raise a red flag" in Respondent's view "because there was no private information of Carol Kinnally's that was ever at issue." (Tr. 1093-94). Respondent testified his firm did not ask Kinnally to sign a written conflict waiver because, "We don't have that in our firm. We don't have conflicts that come up. It is not like a business firm. We deal with one client at a time." (Tr. 1095). Respondent did not appear or perform any work on the collection lawsuit. (Stip. 102; Tr. 1040).

Kinnally could not recall whether she discussed Enright's motion to substitute with attorney Jacobson. (Tr. 1326). She was not aware of the order allowing McNabola Law Group to substitute as counsel for Dr. McNabola. (Tr. 1330-31).

Dr. McNabola's case against Kinnally ended on December 27, 2012, when the court granted summary judgment in Kinnally's favor. (Adm. Ex. 28).

C. Analysis and Conclusions

Rule 1.7(b)-Concurrent Conflict of Interest

The Third Amended Complaint charges Respondent with violating Rule 1.7(a)(2) by referring Kinnally to Dr. McNabola for loans. However, the referrals and loans that gave rise to the conflict of interest charge occurred prior to the adoption of Rule 1.7(a)(2) in 2010, and should have been charged as a violation of Rule 1.7(b) of the 1990 Illinois Rules of Professional Conduct. This error is not fatal to the Administrator's case, as the prior version of the Rule is not significantly different from the current Rule, and Respondent was adequately advised of the nature of the charge against him.

Rule 1.7(b)(2) provides that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client or to another person, or by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after disclosure. Respondent denies that a conflict existed but admits he did not seek Kinnally's informed consent. Thus, the issue before us is whether a conflict existed.

A concurrent conflict of interest exists if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interests or responsibilities to another person. We consider the potential for diverging interests, not whether any actual disagreement occurred. In re LaPinska, 72 Ill. 2d 461, 469-70 (1978). Respondent owed Kinnally a duty of undivided fidelity and loyalty. See Winthrop, 219 Ill. 2d at 543-44. Based on the evidence that Respondent and his staff orchestrated the loans, with terms that included a confession

of judgment clause that strongly favored Dr. McNabola, we determine there was a significant potential for diverging interests that should have been apparent to Respondent.

In In re Tellefsen, 2013PR00049 (March 2015) (Hearing Bd. at 30), the Hearing Board dismissed a conflict of interest charge involving a business transaction between a lawyer's client and the lawyer's parents, finding that the mere fact that the lawyer and his parents were related was not sufficient to establish a conflict of interest. We do not consider Tellefsen controlling in this matter because Respondent's involvement in Kinnally's loans went far beyond merely being related to Dr. McNabola.

Dr. McNabola was not only Respondent's father but had an office in Respondent's firm and was a regular presence there. And although Respondent did not represent Dr. McNabola with respect to the loans or benefit financially from them, it is undisputed that Respondent and his staff acted on Dr. McNabola's behalf to orchestrate the loans. In fact, other than supplying the funds, Respondent and his employees carried out all of the tasks that a lender would normally undertake, including discussing the amount of the loans with Kinnally, preparing the promissory notes, arranging for their execution, and delivering loan checks to Kinnally. Kinnally dealt only with Respondent and his staff, never with Dr. McNabola. These circumstances were not consistent with Dr. McNabola being an "independent lender."

The involvement of Respondent's firm in creating the promissory notes is particularly important with respect to the question of whether Respondent maintained his duty of undivided loyalty to Kinnally. Respondent admitted in his Answer that the notes were "drafted by Respondent's firm." Each note contained a confession of judgment clause, pursuant to which Kinnally agreed that, if she were to default in whole or in part, any attorney of any court of record could appear in court on Kinnally's behalf, without process to Kinnally, and confess a judgment

on her behalf. She also consented to bearing responsibility for the costs of collection, including attorney's fees, waiving and releasing "any error which may intervene in any such proceedings," and consenting to immediate execution of the judgment. This clause substantially favored the interests of Dr. McNabola over those of Kinnally, and even would have authorized Respondent to have confessed judgment on Kinnally's behalf. We take judicial notice of the statutory provision barring the inclusion of confession of judgment clauses in consumer transactions, such as Kinnally's loans, and rendering such clauses unenforceable. See 735 ILCS 5/2-1301(c). This inclusion of an illegal provision in the promissory notes further demonstrated a division of Respondent's loyalties.

We have no reason to dispute Respondent's testimony that he was trying to help Kinnally by referring her to a private lender who would charge less interest than a commercial lender. However, Respondent was clearly trying to help his father as well, by securing Kinnally's agreement to loan terms that were not in her best interests. Under these circumstances, we find Respondent was obligated to obtain Kinnally's informed consent.

We reject Respondent's argument that the Administrator's statements about a matter involving a different client of Respondent's who also obtained loans from Dr. McNabola constituted admissions that are fatal to the Administrator's conflict of interest charge. Specifically, Respondent points to a closure letter by counsel for the Administrator, which stated that the Illinois Rules of Professional Conduct do not prohibit an attorney's family members or close friends from providing financial assistance to clients. That statement related to a matter involving a different client, and does not constitute an admission in this matter. The case Respondent cites for the proposition that a statement by an agent may be an admission on the part of the principal is not on point, as it did not involve statements made in separate matters involving different parties. See

Pietruszynski v. McClier Corp., 338 Ill. App. 3d 58 (1st Dist. 2003).

Moreover, the Administrator has the discretion to re-open and prosecute closed matters at any time, if circumstances warrant. Comm. R. 54. If a decision to close an investigation does not restrict the Administrator's ability to later seek discipline in that same matter, then it certainly does not limit the Administrator's ability to pursue discipline in a different matter involving a different client.

Consequently, for the foregoing reasons, we find the Administrator proved by clear and convincing evidence that Respondent violated Rule 1.7(b).

Rule 1.8(d)-Providing Financial Assistance to a Client

Similar to the previous charge, the events that gave rise to this charge occurred prior to 2010. Thus, the applicable Rule is Rule 1.8(d) of the 1990 Illinois Rules of Professional Conduct rather than Rule 1.8(e) of the 2010 Rules of Professional Conduct, as charged in the Third Amended Complaint. Rule 1.8(d) provides that, when representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to a client, with exceptions allowed for litigation expenses upon certain conditions. The Administrator alleges Respondent violated this Rule by directing his employees to draft and witness promissory notes for clients and utilizing his father to advance loans to clients when Respondent was not permitted to do so.

The Administrator did not present sufficient evidence on all of the elements of this charge to establish a *prima facie* case. There was no evidence establishing that Respondent was the source of the loan funds Kinnally received. While it is undisputed that his staff facilitated the loans, clerical assistance is different from financial assistance, and we are not aware of any case law equating the two. Accordingly, Respondent is entitled to a directed finding in his favor on this charge.

Rule 1.9(a)-Representation of a Client in a Matter Adverse to a Former Client's Interests

Rule 1.9(a) directs that a lawyer who has formerly represented a client in a matter may not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests, unless the former client gives informed consent. The Administrator charges Respondent with violating this Rule because attorneys from his firm represented Dr. McNabola in his collection lawsuit against Kinnally. While we do not believe the representation of Dr. McNabola by Respondent's firm was appropriate, we do not believe Respondent should be held responsible for that representation when he was not involved in it.

We agree with the Administrator that the collection lawsuit in which Karen Enright and McNabola Law Group filed a substitute appearance on behalf of Dr. McNabola was substantially related to the matters in which Respondent represented Kinnally. Matters are "substantially related" if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. Comment [3] to Rule 1.9. Comment [3] provides the example that a lawyer who has represented a business person and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. We find this matter analogous to the foregoing example. The loans and Dr. McNabola's ability to recover those loans were tied to Kinnally's lawsuits, including those for which Respondent represented her as well as the worker's compensation matter. Respondent and his firm had access to private information, including the timing, amounts, and distributions of Kinnally's settlements, which could have been used to materially advance Dr. McNabola's collection lawsuit.

It is undisputed that no attorney from Respondent's firm made an effort to obtain Kinnally's informed consent to Enright's representation of Dr. McNabola. We reject Respondent's argument that Kinnally's attorney in the collection lawsuit, Steve Jacobson, gave informed consent by not objecting to Enright's routine motion to substitute. Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Illinois Rule of Professional Conduct 1.0(e). Enright's motion contained no such information and explanation, and it was not Jacobson's responsibility to make that communication on Enright's behalf.

That said, because Respondent neither represented Dr. McNabola nor had any involvement in the collection lawsuit, the Administrator has not proven a violation of Rule 1.9(a). The plain language of the Rule refers to a lawyer, not a firm, who has formerly represented a client and thereafter represents another person with interests materially adverse to the former client's. The Administrator's argument that Respondent violated Rule 1.9(a) by allowing his firm to substitute as counsel for Dr. McNabola is not persuasive because there was no evidence that Respondent had control over his partner's decision to represent Dr. McNabola. The Administrator notes, correctly we believe, that pursuant to Rule 1.10, Respondent's conflict was imputed to Enright when she became a partner at McNabola Law Group. The Administrator has not charged Enright, however, but seeks to hold Respondent responsible for Enright's representation. Neither Rule 1.9 nor Rule 1.10 provides a basis for doing so. Accordingly, we find the Administrator failed to meet his burden of proof that Respondent violated Rule 1.9(a).

III. Respondent is charged in Count V with using information acquired during his representation of a former client to her disadvantage, in violation of Rule 1.9(c)(1).

A. Summary

The Administrator did not establish by clear and convincing evidence that Respondent's submission of a memorandum to Kinnally's worker's compensation attorney, which included information about her outstanding debts to Dr. McNabola, constituted misconduct.

B. Evidence Considered

We consider the evidence set forth in Section II, above.

B. Analysis and Conclusions

At hearing, the Administrator voluntarily dismissed the charge that Respondent engaged in a conflict of interest by sending the memorandum to Stookal. Thus, the only charge remaining in Count V is whether, in submitting the memorandum, Respondent used information relating to his former representation of Kinnally to Kinnally's disadvantage, in violation of Rule 1.9(c)(1). We do not find clear and convincing evidence that submitting the memo to Stookal constituted "using information related to the representation to the disadvantage of the former client."

We find credible Respondent's testimony that it was his standard practice to provide information to worker's compensation counsel about any outstanding amounts that a client owed. We have reviewed the language of the memorandum and find it to be advisory rather than a demand or attempt to pressure Stookal to disburse funds to Dr. McNabola. We further find it was in Kinnally's best interests for Stookal to have accurate information about amounts Kinnally owed, given that Stookal was responsible for disbursing the worker's compensation settlement. It is also significant that Respondent provided the information to Stookal on a confidential basis. Respondent could reasonably assume that Stookal, as Kinnally's attorney, would use the information in Kinnally's best interests. Stookal did in fact exercise his judgment when making

distributions and did not make any payments to Dr. McNabola on Kinnally's behalf. For these reasons, the Administrator did not present sufficient evidence to establish that Respondent used information related to the prior representation to Kinnally's disadvantage. Accordingly, we find that Respondent is entitled to a directed finding in his favor on Count V.

IV. Respondent is charged in Count VI with providing financial assistance to clients by instructing Lauren O'Keefe to make loans to clients, instructing firm employees to facilitate the loans, and acting dishonestly by doing so despite his knowledge that providing financial assistance to clients is prohibited, in violation of Rules 1.8(e) and 8.4(c).

A. Summary

Respondent is entitled to a directed finding on the charges related to O'Keefe's loans to clients. The Administrator's evidence was not sufficient to prove the charges by clear and convincing evidence.

B. Evidence Considered

Lauren O'Keefe worked for Respondent's firm as a paralegal from 2010 until early 2013. (Tr. 688). She testified that during the course of her employment Respondent directed her to make four loans to firm clients. All of the loans were made with an interest rate of twenty percent. According to O'Keefe, Respondent said he would reimburse her in cash for the principal amounts and she could keep the interest. (Tr. 710). She testified she would not have made the loans without Respondent telling her to do so. (Tr. 742).

O'Keefe testified that in late 2010 or early 2011, Respondent told her to loan $2,000 to client Melanie DiMuzio. (Tr. 707). O'Keefe used a firm template to create a promissory note and, after DiMuzio signed the note, gave a $2,000 check to DiMuzio's son, who worked at the McNabola firm. O'Keefe did not know if DiMuzio ever repaid the loan. (Tr. 712-14).

O'Keefe further testified that Respondent reimbursed her for the DiMuzio loan by giving her $2,000 in cash, sometime between December 27, 2011 and January 13, 2012, while they were

walking back to the office after having lunch. (Tr. 712-13). She later testified that Respondent gave her several hundred dollars while they were walking back from lunch and gave her the rest at a later time. (Tr. 730-731).

O'Keefe made two loans to firm client Stephanie Prince. The first loan, for $1,200, was made in January 2012 and second, for $1,287.45, was made on March 9, 2012. (Tr. 715, 719-20). O'Keefe testified that Respondent gave her $1,200 in cash to reimburse her for the first loan. (Tr. 716-17). She could not recall when or where this took place. She deposited the cash in her Chase Bank account. (Tr. 718). Respondent did not reimburse her for the second loan to Prince. (Tr. 720). When Prince's case was resolved in 2013, O'Keefe received a check for the principal and interest of both loans she made to Prince. (Tr. 718-19). By that time O'Keefe no longer worked for Respondent. She did not pay any of the principal amount she received to Respondent. (Tr. 727).

On March 9, 2012, O'Keefe made a $2,000 loan to firm client Manuel Cordon. She testified that Respondent directed her to prepare the promissory note for the loan because Cordon's family needed money. O'Keefe testified that Respondent gave her $2,000 in cash sometime around March 9, 2012. (Tr. 722-24, 731).

A redacted bank record from O'Keefe's Chase Bank checking account showed cash deposits of $980 on January 13, 2012; $1,750 on February 3, 2012; and $300 on February 13, 2012. (Resp. Ex. 51 at 29). O'Keefe testified that the majority of the cash deposits were reimbursements from Respondent for client loans. (Tr. 735, Resp. Ex. 51). She further testified that an $1,800 check from her parents, which she deposited on March 19, 2012, originated from Respondent. O'Keefe testified that, after giving O'Keefe $1,800 in cash, Respondent suggested that she give the cash to her parents and have them write her check, in order to avoid making a

large cash deposit. (Tr. 739-40).

On cross-examination, O'Keefe acknowledged previous testimony that she and her parents "routinely exchanged large sums of money." (Tr. 758). She further acknowledged she did not keep a record of the cash payments Respondent gave her. (Tr. 759). She did not know why the amounts of her cash deposits differed from the amounts of the DiMuzio and Prince loans. She believes she must have deposited some of her own cash along with the cash from Respondent, but she does not know the amount or the source of the other cash. (Tr. 766-67).

Respondent denied directing O'Keefe to make the loans at issue or having any knowledge at the time that she made the loans. (Tr. 906, 908-909). He further denied giving cash to O'Keefe to loan to a client. (Tr. 1062). Respondent knew Prince was seeking a loan, so he asked a group of lawyers in his office if they knew anyone who would be willing to loan money to Prince. (Tr. 907). He denied that his employees drafted promissory notes for loans to clients or that he directed them to do so. (Tr. 1069).

C. Analysis and Conclusions

Rule 1.8(e)-Providing Financial Assistance to Client

Respondent is charged with violating Rule 1.8(e), which prohibits an attorney from providing financial assistance to a client in connection with pending or contemplated litigation. The Administrator alleges Respondent provided financial assistance by supplying O'Keefe with cash to fund the loans and by directing firm employees to prepare and witness promissory notes for the loans.

It is undisputed that O'Keefe made loans to clients Prince, DiMuzio, and Cordon. However, we did not find sufficient evidence tying these loans to Respondent to prove a violation of Rule 1.8(e). O'Keefe's testimony about receiving large sums of cash from Respondent was not reliable. She changed her testimony regarding how Respondent allegedly reimbursed her for the

DiMuzio loan and also acknowledged exchanging large amounts of cash with her parents. Although her bank records showed cash deposits around the time of the loans at issue, the deposit amounts did not correspond to the alleged reimbursements from Respondent. While we acknowledge that it seems unlikely for a paralegal to make over $6,000 in loans of her own volition, suspicious circumstances, standing alone, are not sufficient to meet the Administrator's burden of proof. Winthrop, 219 Ill. 2d at 550.

With respect to the allegation that directing employees to prepare and witness promissory notes violated Rule 1.8(e), we agree with Respondent that such assistance was clerical in nature, not financial. Accordingly, we find the Administrator's evidence did not establish a violation of Rule 1.8(e) by clear and convincing evidence, and Respondent is entitled to a directed finding on this charge.

Rule 8.4(c)-Dishonest Conduct

In light of our finding that the Administrator did not prove that Respondent provided the funds O'Keefe loaned to clients, the Administrator did not establish a basis for finding that Respondent engaged in any dishonest conduct. Accordingly, Respondent is entitled to a directed finding in his favor on this charge.

IV. In Count VII, Respondent is charged with acting dishonestly and engaging in conduct prejudicial to the administration of justice by issuing a subpoena for an employee's cell phone records under the caption of a matter he knew was closed, in violation of Rules 8.4(c) and 8.4(d).

A. Summary

The evidence established that Respondent knowingly issued a subpoena under a closed case caption in an effort to obtain Lauren O'Keefe's cell phone records. This constituted a violation of Rule 8.4(c). Because there was no response to the subpoena, we do not find that Respondent's conduct prejudiced the administration of justice.

B. Evidence Considered

In 2011, a dispute arose between Respondent and his law partner, Michael Cogan. The matter went to arbitration and was closed on May 1, 2012. In July 2012, Cogan and another partner, John Power, left Cogan & McNabola and started their own firm, Cogan & Power. Former Cogan & McNabola attorney Jon Papin also joined the Cogan & Power firm. (Stip. 106).

Following the firm breakup, there was a great deal of animosity between Respondent and Papin, who Respondent described as "a psychopath." (Tr. 939). Respondent suspected that Lauren O'Keefe, who still worked for Respondent, was providing proprietary, confidential and privileged firm information to Papin. (Stip. 107). Because of his suspicions, Respondent asked O'Keefe on at least two occasions to let him read her text messages and to give him her email password. O'Keefe refused to do so. Respondent also directed O'Keefe to go to the Apple Store and ask if an Apple employee could recover her deleted text messages. (Tr. 746-47).

After O'Keefe refused to give Respondent access to her phone, Respondent asked his assistant, Tracey Battistoni, to find out who owned O'Keefe's phone. The firm accountant advised Battistoni that the firm had purchased the phone but also stated, " She had lost/stolen phone and I believe she replaced that herself." (Tr. 917-18; 1076-77; Resp. Ex. 19). O'Keefe denied that the firm purchased or provided her phone. For a period of time, she ported her cell phone number to the McNabola Law Group plan, and the firm paid her cell phone bills. She removed herself from the firm plan in September or October of 2012. (Tr. 743-44).

Respondent instructed Battistoni to obtain O'Keefe's phone records. It was his position that O'Keefe's cell phone was the property of his firm. He "had no idea" whether O'Keefe had her phone number before she started working for the firm. (Tr. 911-12).

A subpoena bearing Respondent's signature was issued to Apple on October 2, 2012, under the caption for the concluded Cogan v. McNabola arbitration matter. The subpoena was

accompanied by a cover letter bearing Respondent's signature, which stated as follows, in relevant part:

> Re: Cogan v. McNabola
> AAA Arbitration # 51 194 Y 01022 11
>
> Dear Sir or Madam:
>
> In accordance with the Subpoena enclosed, please be advised that I am the owner of wireless number 312.804.xxxx. Therefore, no customer notification is necessary. Please waive the waiting period and expedite the response to this subpoena.

A rider to the subpoena listed O'Keefe's cell phone number and email address and stated, "This cell phone is the property of McNabola Law Group." The rider asked Apple to provide text messages exchanged between O'Keefe, Papin, and Power. (Tr. 754-55; Adm. Ex. 38).

Respondent did not recall reviewing the subpoena and believes Battistoni may have stamped his signature. Battistoni, who did not testify, has been his assistant for many years. According to Respondent, it was not unusual for Battistoni to prepare a subpoena without specific instruction from Respondent. Respondent denied directing or authorizing Battistoni to issue the subpoena under the arbitration caption. (Tr. 1073). He testified that if he had reviewed the subpoena it would not have gone out. (Tr. 912-13). He acknowledged it was a mistake to issue the subpoena under the closed arbitration matter but denied it was done intentionally. (Tr. 916-17). Apple did not produce any records in response to the subpoena. (Tr. 918).

O'Keefe testified she was fired from McNabola Law Group in January 2013, after Respondent told her she did not receive a bonus because she would not give him access to her cell phone. She subsequently hired an attorney and reached a settlement with Respondent for $50,000. (Tr. 749, 772-73).

C. Analysis and Conclusions

Rule 8.4(c)- Dishonesty, Fraud, Deceit or Misrepresentation

Rule 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c) is broadly construed to include any intentional conduct calculated to deceive, including the suppression of truth and the suggestion of falsity. In re Quitschau, 2017PR00084, M.R. 029433 (Sept. 20, 2018) (Hearing Bd. at 21); Edmonds, 2014 IL 117696 at ¶ 53. Whether dishonesty is present is an issue of fact, to be determined based on all the circumstances. See In re Rodriguez, 2012PR00169, M.R. 26591 (May 16, 2014) (Hearing Bd. at 13).

We need not be naïve or impractical in appraising an attorney's conduct. In re Discipio, 163 Ill. 2d 515, 524 (1994). We do not find credible or plausible Respondent's testimony that Battistoni issued the subpoena and drafted the accompanying letter and rider using the arbitration case caption without any instruction from or discussion with Respondent. Likewise, we do not find credible Respondent's testimony that he did not review either the cover letter or the subpoena, both of which bore his signature and contained the arbitration case caption, before they were sent. Rather, we find that Respondent was determined to gain access to O'Keefe's phone records and was aware the subpoena was issued under the caption of a case he knew was closed. This finding is based on the totality of the evidence, including our credibility findings, Respondent's admitted intense animosity toward Papin and suspicion of O'Keefe, and his persistent efforts to gain access to O'Keefe's cell phone. Accordingly, we find that Respondent's use of the closed arbitration caption was a misrepresentation that violated Rule 8.4(c).

Rule 8.4(d)-Prejudice to the Administration of Justice

Rule 8.4(d) prohibits attorneys from engaging in conduct that is prejudicial to the administration of justice. In order to prove this charge, the Administrator must establish actual

prejudice. In re Karavidas, 2013 IL 115767, ¶ 91. We find he failed to do so.

Actual prejudice has been found when an attorney's conduct has an impact on court proceedings or causes additional work for the court or opposing counsel. See In re Martin, 2011PR00048, M.R. 26610 (May 16, 2014). Here, there was no evidence that any tribunal, attorney, or representative of Apple spent time or resources addressing the subpoena. Accordingly, we find no violation of Rule 8.4(d).

EVIDENCE IN MITIGATION

Mitigation

Respondent believed he was helping his clients by assisting them with obtaining loans from private lenders at a lesser interest rate than they would have paid to commercial lenders. He stopped referring clients to private lenders after the ARDC suggested it was problematic. (Tr. 1070-71, 1420).

Respondent volunteers his time and makes financial contributions to Loyola Academy, DePaul University, and numerous charitable and religious organizations, including Boys Hope Girls Hope, Dreams for Kids, the Mulliganeers, Catholic Charities, Irish Fellowship of Chicago, Children's Charities of Chicago, Prevent Child Abuse America, Misericordia, Center of Concern, Legal Assistance Program for Catholic Charities, and Vincentian Outreach Center. He has also volunteered as a coach for youth sports. (Tr. 1436-62; Resp. Ex. 98).

Respondent is also involved in professional organizations, including the Illinois Trial Lawyers Association, the Illinois Bar Association, the Chicago Bar Association, the Catholic Lawyers Guild of Chicago, the Society of Trial Lawyers, and the American Association for Justice. He has authored several legal articles, been invited to speak to legal organizations, and served as an adjunct professor at the DePaul College of Law. (Tr. 1465; Resp. Ex. 98).

Attorneys Kevin Burke and Thomas Tuohy testified that Respondent is held in high regard in the legal community and has a reputation for trustworthiness and integrity. (Tr. 1532-36; 1571-78). Respondent also presented character testimony from Michael Zindrick, M.D., an orthopedic surgeon; Stan Smith, Ph.D., a forensic economist; Father Brian Paulson, president of the Jesuit Conference of Canada and the United States; Nancy Zalesky, friend and former client; and Jean Ponsetto, former athletic director of DePaul University. Several of the character witnesses attested to Respondent's charitable works, and all of them described Respondent as an honest and trustworthy person of high integrity (Tr. 1502-1510; 1518-25, 1545-48, 1553-1561, 1627-34).

Prior Discipline

Respondent has no prior discipline.

RECOMMENDATION

A. Summary

Based on the proven misconduct and the substantial evidence in mitigation, we recommend that Respondent receive a censure.

B. Analysis and Conclusions

Having found that Respondent committed misconduct, we must address our sanction recommendation. The purpose of the disciplinary process is not to punish attorneys, but to protect the public, maintain the integrity of the legal profession, and safeguard the administration of justice from reproach. In arriving at our recommendation, we consider these purposes as well as the nature of the misconduct and any factors in mitigation and aggravation. In re Gorecki, 208 Ill. 2d 350, 360-61 (2003). We seek consistency in recommending similar sanctions for similar types of misconduct, but must decide each case on its own unique facts. In re Edmonds, 2014IL117696, ¶ 90.

The Administrator asks us to recommend a censure. Respondent asserts that no sanction is warranted. The proven misconduct falls on the lower end of the spectrum of misconduct but nonetheless warrants a sanction. Respondent failed to properly protect Carol Kinnally's interests by referring her to his father for loans and facilitating those loans without obtaining informed consent. He also made a misrepresentation to Apple for the self-serving purpose of obtaining his employee's phone records.

In aggravation, we do not believe Respondent testified truthfully about the circumstances surrounding the issuance of the subpoena to Apple. Lack of candor before the Hearing Board is a factor that may be considered in aggravation. Gorecki, 208 Ill. 2d at 366. Although Respondent's lack of candor is concerning, we do not find it necessitates increasing our recommended sanction.

There is significant mitigation in this case. Respondent has no prior discipline in over 35 years of practice, and he cooperated in this proceeding. He presented impressive evidence of charitable service and good character from seven character witnesses.

Also, in mitigation, Respondent stopped referring clients to friends and family members for litigation loans. With respect to the Kinnally loans, Respondent did not benefit financially from them, and we accept his testimony that he sought to help Kinnally obtain a loan at a lower interest rate than she would pay to a commercial lender. It is also relevant that a significant amount of time has passed since the events that gave rise to the proven misconduct, with no additional misconduct in recent years.

The Administrator has cited the following cases in which attorneys have been censured for misconduct similar to Respondent's: In re Kesinger 98 SH 106, M.R. 15782 (May 25, 1999) (censure for representing both the borrower and the lender in a loan transaction); In re Koehler 2014PR00126, M.R. 27424 (Sept. 21, 2015) (censure for loaning funds to a client without

obtaining the client's informed consent and filing a frivolous complaint for unpaid legal fees that should have been filed in the client's bankruptcy proceeding), and In re Papoutsis, 2015PR00094, M.R. 28150 (Sept. 22, 2016) (censure for obtaining an opposing party's credit report without authorization). While the circumstances of the case before us are unusual and do not precisely line up with the foregoing cases, we find them sufficiently comparable to support a recommendation of a censure in this matter.

Based on our observations of Respondent, we feel confident he will not repeat his misconduct and does not pose a risk to the public or the legal profession. Accordingly, we believe a censure adequately serves the purposes of the disciplinary process and recommend that Respondent, Mark Edward McNabola, be censured.

Respectfully submitted,

Carl E. Poli
William J. Fenili
Brian B. Duff

CERTIFICATION

I, Michelle M. Thome, Clerk of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and keeper of the records, hereby certifies that the foregoing is a true copy of the Report and Recommendation of the Hearing Board, approved by each Panel member, entered in the above entitled cause of record filed in my office on March 21, 2022.

/s/ Michelle M. Thome
Michelle M. Thome, Clerk of the
Attorney Registration and Disciplinary
Commission of the Supreme Court of Illinois

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[1] The Third Amended Complaint charged Respondent with violating Rule 1.7(a)(2) but, as explained in the Report, the conduct in question occurred before 2010 so the applicable Rule is Rule 1.7(b) of the 1990 Illinois Rules of Professional Conduct.

[2] Because this charge also involved conduct that occurred prior to 2010, it should have been charged as a violation of Rule 1.8(d) of the 1990 Illinois Rules of Professional Conduct.

[3] Dr. McNabola passed away in 2016.