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State Bar Court of California
Hearing Department
Los Angeles
ACTUAL SUSPENSION

ORIGINAL

PUBLIC MATTER

Counsel for the State Bar **Brian B. Baghai** **Deputy Trial Counsel** **845 S. Figueroa St.** **Los Angeles, CA 90017** **(213) 765-1376** Bar # **258112**	Case Number(s): **18-J-14403-CV**	For Court use only FILED JAN 2 8 2019 P.B. STATE BAR COURT CLERK'S OFFICE LOS ANGELES
In Pro Per Respondent **Maria Adriana Sanford** **Loyola Marymount University** **1 Loyola Marymount University** **CBA Bldg--C/O Adriana Sanford** **Los Angeles CA 90045** **(602) 316-9991** Bar # **235496**	Submitted to: **Assigned Judge** STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING **ACTUAL SUSPENSION** ☒ PREVIOUS STIPULATION REJECTED	
In the Matter of: **MARIA ADRIANA SANFORD** Bar # **235496** A Member of the State Bar of California (Respondent)		

Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

A. Parties' Acknowledgments:

(1) Respondent is a member of the State Bar of California, admitted **January 13, 2005**.

(2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.

(3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **18** pages, not including the order.

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law."

(6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."

(7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. It is recommended that (check one option only):

☐ Costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

☒ Costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. One-third of the costs must be paid with Respondent's membership fees for each of the following years: 2020, 2021, and 2022.

If Respondent fails to pay any installment as described above, or as may be modified in writing by the State Bar or the State Bar Court, the remaining balance will be due and payable immediately.

☐ Costs are waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs."

☐ Costs are entirely waived.

B. Aggravating Circumstances [Standards for Attorney Sanctions for Professional Misconduct, standards 1.2(h) & 1.5]. Facts supporting aggravating circumstances are required.

(1) ☐ **Prior record of discipline:**

(a) ☐ State Bar Court case # of prior case:

(b) ☐ Date prior discipline effective:

(c) ☐ Rules of Professional Conduct/ State Bar Act violations:

(d) ☐ Degree of prior discipline:

(e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below.

(2) ☐ **Intentional/Bad Faith/Dishonesty:** Respondent's misconduct was dishonest, intentional, or surrounded by, or followed by bad faith.

(3) ☐ **Misrepresentation:** Respondent's misconduct was surrounded by, or followed by, misrepresentation.

(4) ☐ **Concealment:** Respondent's misconduct was surrounded by, or followed by, concealment.

(5) ☐ **Overreaching:** Respondent's misconduct was surrounded by, or followed by, overreaching.

(6) ☐ **Uncharged Violations:** Respondent's conduct involves uncharged violations of the Business and Professions Code, or the Rules of Professional Conduct.

(7) ☐ **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.

(8) ☐ **Harm:** Respondent's misconduct harmed significantly a client, the public, or the administration of justice.

(9) ☒ **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of Respondent's misconduct. **See page 15.**

(10) ☐ **Candor/Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of Respondent's misconduct, or to the State Bar during disciplinary investigations or proceedings.

(11) ☒ **Multiple Acts:** Respondent's current misconduct evidences multiple acts of wrongdoing. **See page 15.**

(12) ☐ **Pattern:** Respondent's current misconduct demonstrates a pattern of misconduct.

(13) ☐ **Restitution:** Respondent failed to make restitution.

(14) ☐ **Vulnerable Victim:** The victim(s) of Respondent's misconduct was/were highly vulnerable.

(15) ☐ **No aggravating circumstances** are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [Standards 1.2(i) & 1.6]. Facts supporting mitigating circumstances are required.

(1) ☐ **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not likely to recur.

(2) ☐ **No Harm:** Respondent did not harm the client, the public, or the administration of justice.

(3) ☐ **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of Respondent's misconduct or to the State Bar during disciplinary investigations and proceedings.

(4) ☐ **Remorse:** Respondent promptly took objective steps demonstrating spontaneous remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of Respondent's misconduct.

(5) ☐ **Restitution:** Respondent paid $ on in restitution to without the threat or force of disciplinary, civil or criminal proceedings.

(6) ☐ **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced Respondent.

(7) ☐ **Good Faith:** Respondent acted with a good faith belief that was honestly held and objectively reasonable.

(8) ☐ **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct, Respondent suffered extreme emotional difficulties or physical or mental disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by Respondent, such as illegal drug or substance abuse, and the difficulties or disabilities no longer pose a risk that Respondent will commit misconduct.

(9) ☐ **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond Respondent's control and which were directly responsible for the misconduct.

(10) ☐ **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in Respondent's personal life which were other than emotional or physical in nature.

(11) ☐ **Good Character:** Respondent's extraordinarily good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of Respondent's misconduct.

(12) ☐ **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.

(13) ☐ **No mitigating circumstances** are involved.

Additional mitigating circumstances:

Pre-filing Stipulation, see page 16.

D. Recommended Discipline:

(1) ☒ **Actual Suspension:**

Respondent is suspended from the practice of law for **one (1) year**, the execution of that suspension is stayed, and Respondent is placed on probation for **one (1) year** with the following conditions.

- Respondent must be suspended from the practice of law for the first **thirty (30) days** of the period of Respondent's probation.

(2) ☐ **Actual Suspension "And Until" Rehabilitation:**

Respondent is suspended from the practice of law for , the execution of that suspension is stayed, and Respondent is placed on probation for with the following conditions.

- Respondent must be suspended from the practice of law for a minimum of the first of Respondent's probation and until Respondent provides proof to the State Bar Court of Respondent's rehabilitation, fitness to practice, and present learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

(3) ☐ **Actual Suspension "And Until" Restitution (Single Payee) and Rehabilitation:**

Respondent is suspended from the practice of law for , the execution of that suspension is stayed, and Respondent is placed on probation for with the following conditions.

- Respondent must be suspended from the practice of law for a minimum of the first of Respondent's probation, and Respondent will remain suspended until both of the following requirements are satisfied:

a. Respondent makes restitution to in the amount of $ plus 10 percent interest per year from (or reimburses the Client Security Fund to the extent of any payment from the Fund to such payee, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles; and
b. Respondent provides proof to the State Bar Court of Respondent's rehabilitation, fitness to practice, and present learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

(4) ☐ **Actual Suspension "And Until" Restitution (Multiple Payees) and Rehabilitation:**

Respondent is suspended from the practice of law for , the execution of that suspension is stayed, and Respondent is placed on probation for with the following conditions.

- Respondent must be suspended from the practice of law for a minimum of the first of Respondent's probation, and Respondent will remain suspended until both of the following requirements are satisfied:

  a. Respondent must make restitution, including the principal amount plus 10 percent interest per year (and furnish satisfactory proof of such restitution to the Office of Probation), to each of the following payees (or reimburse the Client Security Fund to the extent of any payment from the Fund to such payee in accordance with Business and Professions Code section 6140.5):

Payee	*Principal Amount*	*Interest Accrues From*

  b. Respondent provides proof to the State Bar Court of Respondent's rehabilitation, fitness to practice, and present learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

(5) ☐ **Actual Suspension "And Until" Restitution (Single Payee) with Conditional Std. 1.2(c)(1) Requirement:**

Respondent is suspended from the practice of law for , the execution of that suspension is stayed, and Respondent is placed on probation for with the following conditions.

- Respondent must be suspended from the practice of law for a minimum for the first of Respondent's probation, and Respondent will remain suspended until the following requirements are satisfied:

  a. Respondent makes restitution to in the amount of $ plus 10 percent interest per year from (or reimburses the Client Security Fund to the extent of any payment from the Fund to such payee, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles; and,

  b. If Respondent remains suspended for two years or longer, Respondent must provide proof to the State Bar Court of Respondent's rehabilitation, fitness to practice, and present learning and ability

in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

(6) ☐ **Actual Suspension "And Until" Restitution (Multiple Payees) with Conditional Std. 1.2(c)(1) Requirement:**

Respondent is suspended from the practice of law for , the execution of that suspension is stayed, and Respondent is placed on probation for with the following conditions.

- Respondent must be suspended from the practice of law for a minimum for the first of Respondent's probation, and Respondent will remain suspended until the following requirements are satisfied:

  a. Respondent must make restitution, including the principal amount plus 10 percent interest per year (and furnish satisfactory proof of such restitution to the Office of Probation), to each of the following payees (or reimburse the Client Security Fund to the extent of any payment from the Fund to such payee in accordance with Business and Professions Code section 6140.5):

Payee	*Principal Amount*	*Interest Accrues From*

  b. If Respondent remains suspended for two years or longer, Respondent must provide proof to the State Bar Court of Respondent's rehabilitation, fitness to practice, and present learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

(7) ☐ **Actual Suspension with Credit for Interim Suspension:**

Respondent is suspended from the practice of law for , the execution of that suspension is stayed, and Respondent is placed on probation for with the following conditions.

- Respondent is suspended from the practice of law for the first of probation (with credit given for the period of interim suspension which commenced on).

E. Additional Conditions of Probation:

(1) ☒ **Review Rules of Professional Conduct:** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126, and (2) provide a declaration, under penalty of perjury, attesting to Respondent's compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Respondent's first quarterly report.

(2) ☒ **Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions:** Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of Respondent's probation.

(3) ☒ **Maintain Valid Official Membership Address and Other Required Contact Information:** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has Respondent's current office address, email address, and telephone number. If Respondent does not maintain an office, Respondent must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to ARCR, within ten (10) days after such change, in the manner required by that office.

(4) ☒ **Meet and Cooperate with Office of Probation:** Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must schedule a meeting with Respondent's assigned probation case specialist to discuss the terms and conditions of Respondent's discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, Respondent may meet with the probation case specialist in person or by telephone. During the probation period, Respondent must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

(5) ☒ **State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court:** During Respondent's probation period, the State Bar Court retains jurisdiction over Respondent to address issues concerning compliance with probation conditions. During this period, Respondent must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to Respondent's official membership address, as provided above. Subject to the assertion of applicable privileges, Respondent must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

(6) ☒ **Quarterly and Final Reports:**

a. **Deadlines for Reports.** Respondent must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports, Respondent must submit a final report no earlier than ten (10) days before the last day of the probation period and no later than the last day of the probation period.

b. **Contents of Reports.** Respondent must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether Respondent has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.

c. **Submission of Reports.** All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

d. **Proof of Compliance.** Respondent is directed to maintain proof of Respondent's compliance with the above requirements for each such report for a minimum of one year after either the period of probation

or the period of Respondent's actual suspension has ended, whichever is longer. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

(7) ☒ **State Bar Ethics School:** Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending this session. If Respondent provides satisfactory evidence of completion of the Ethics School after the date of this stipulation but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward Respondent's duty to comply with this condition.

(8) ☐ **State Bar Ethics School Not Recommended:** It is not recommended that Respondent be ordered to attend the State Bar Ethics School because .

(9) ☐ **State Bar Client Trust Accounting School:** Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar Client Trust Accounting School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending this session. If Respondent provides satisfactory evidence of completion of the Client Trust Accounting School after the date of this stipulation but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward Respondent's duty to comply with this condition.

(10) ☐ **Minimum Continuing Legal Education (MCLE) Courses – California Legal Ethics [Alternative to State Bar Ethics School for Out-of-State Residents]:** Because Respondent resides outside of California, within after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must either submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that session or, in the alternative, complete hours of California Minimum Continuing Legal Education-approved participatory activity in California legal ethics and provide proof of such completion to the Office of Probation. This requirement is separate from any MCLE requirement, and Respondent will not receive MCLE credit for this activity. If Respondent provides satisfactory evidence of completion of the Ethics School or the hours of legal education described above, completed after the date of this stipulation but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward Respondent's duty to comply with this condition.

(11) ☐ **Criminal Probation:** Respondent must comply with all probation conditions imposed in the underlying criminal matter and must report such compliance under penalty of perjury in all quarterly and final reports submitted to the Office of Probation covering any portion of the period of the criminal probation. In each quarterly and final report, if Respondent has an assigned criminal probation officer, Respondent must provide the name and current contact information for that criminal probation officer. If the criminal probation was successfully completed during the period covered by a quarterly or final report, that fact must be reported by Respondent in such report and satisfactory evidence of such fact must be provided with it. If, at any time before or during the period of probation, Respondent's criminal probation is revoked, Respondent is sanctioned by the criminal court, or Respondent's status is otherwise changed due to any alleged violation of the criminal probation conditions by Respondent, Respondent must submit the criminal court records regarding any such action with Respondent's next quarterly or final report.

(12) ☐ **Minimum Continuing Legal Education (MCLE):** Within after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must complete hour(s) of California Minimum Continuing Legal Education-approved participatory activity in SELECT ONE and must provide proof of such completion to the Office of Probation. This requirement is separate from any MCLE requirement, and Respondent will not receive MCLE credit for this activity. If Respondent provides satisfactory evidence of completion of the hours of legal education described above, completed after the

date of this stipulation but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward Respondent's duty to comply with this condition.

(13) ☐ **Other:** Respondent must also comply with the following additional conditions of probation:

(14) ☐ **Proof of Compliance with Rule 9.20 Obligations:** Respondent is directed to maintain, for a minimum of one year after commencement of probation, proof of compliance with the Supreme Court's order that Respondent comply with the requirements of California Rules of Court, rule 9.20, subdivisions (a) and (c). Such proof must include: the names and addresses of all individuals and entities to whom Respondent sent notification pursuant to rule 9.20; a copy of each notification letter sent to each recipient; the original receipt or postal authority tracking document for each notification sent; the originals of all returned receipts and notifications of non-delivery; and a copy of the completed compliance affidavit filed by Respondent with the State Bar Court. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

(15) ☐ **The following conditions are attached hereto and incorporated:**

☐ Financial Conditions ☐ Medical Conditions

☐ Substance Abuse Conditions

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Respondent has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

F. Other Requirements Negotiated by the Parties (Not Probation Conditions):

(1) ☒ **Multistate Professional Responsibility Examination Within One Year or During Period of Actual Suspension:** Respondent must take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter or during the period of Respondent's actual suspension, whichever is longer, and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).) If Respondent provides satisfactory evidence of the taking and passage of the above examination after the date of this stipulation but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward Respondent's duty to comply with this requirement.

(2) ☐ **Multistate Professional Responsibility Examination Requirement Not Recommended:** It is not recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination because .

(3) ☐ **California Rules of Court, Rule 9.20:** Respondent must comply with the requirements of California Rules of Court, rule 9.20, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter. Failure to do so may result in disbarment or suspension.

For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court filed its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20

is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

(4) ☐ **California Rules of Court, Rule 9.20 – Conditional Requirement:** If Respondent remains suspended for 90 days or longer, Respondent must comply with the requirements of California Rules of Court, rule 9.20, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter. Failure to do so may result in disbarment or suspension.

For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court filed its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

(5) ☐ **California Rules of Court, Rule 9.20, Requirement Not Recommended:** It is not recommended that Respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20, because

(6) ☐ **Other Requirements:** It is further recommended that Respondent be ordered to comply with the following additional requirements:

In the Matter of:	Case Number(s):
MARIA ADRIANA SANFORD	18-J-14403

Nolo Contendere Plea Stipulations to Facts, Conclusions of Law, and Disposition

The terms of pleading nolo contendere are set forth in the Business and Professions Code and the Rules of Procedure of the State Bar. The applicable provisions are set forth below:

Business and Professions Code § 6085.5 Disciplinary Charges; Pleas to Allegations

There are three kinds of pleas to the allegations of a notice of disciplinary charges or other pleading which initiates a disciplinary proceeding against a member:

(a) Admission of culpability.

(b) Denial of culpability.

(c) Nolo contendere, subject to the approval of the State Bar Court. The court shall ascertain whether the member completely understands that a plea of nolo contendere will be considered the same as an admission of culpability and that, upon a plea of nolo contendere, the court will find the member culpable. The legal effect of such a plea will be the same as that of an admission of culpability for all purposes, except that the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, or the factual basis for, the pleas, may not be used against the member as an admission in any civil suit based upon or growing out of the act upon which the disciplinary proceeding is based.

Rules of Procedure of the State Bar, rule 5.56. Stipulations to Facts, Conclusions of Law, and Disposition

"**(A) Contents.** A proposed stipulation to facts, conclusions of law, and disposition must comprise:
[¶] . . . [¶]
(5) a statement that the member either:
(a) admits the truth of the facts comprising the stipulation and admits culpability for misconduct; or
(b) pleads nolo contendere to those facts and misconduct;
[¶] . . . [¶]
(B) Plea of Nolo Contendere. If the member pleads nolo contendere, the stipulation must also show that the member understands that the plea is treated as an admission of the stipulated facts and an admission of culpability."

I, the Respondent in this matter, have read the applicable provisions of Business and Professions Code section 6085.5 and rule 5.56 of the Rules of Procedure of the State Bar. I plead nolo contendere to the charges set forth in this stipulation and I completely understand that my plea will be considered the same as an admission of culpability except as stated in Business and Professions Code section 6085.5(c).

Jan 4, 2019	M Adriana Sanford	Maria Adriana Sanford
Date	Respondent's Signature	Print Name

ATTACHMENT TO

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION

IN THE MATTER OF: MARIA ADRIANA SANFORD

CASE NUMBER: 18-J-14403

FACTS AND CONCLUSIONS OF LAW.

Respondent pleads nolo contendere to the following facts and violations. Respondent completely understands that the plea for nolo contendere shall be considered the same as an admission of the stipulated facts and of her culpability of the statutes and/or Rules of Professional Conduct specified herein.

Case No. 18-J-14403 (Discipline in Other Jurisdiction)

PROCEDURAL BACKGROUND IN OTHER JURISDICTION:

1. On December 6, 1993, respondent was admitted to the practice law in the District of Columbia.

2. On July 21, 2014, the District of Columbia Office of Disciplinary Counsel ("ODC," formerly Office of Bar Counsel), filed a Specification of Charges against respondent with the District of Columbia Court of Appeal Board on Professional Responsibility, *In the Matter of M. Adriana Koeck*, et al., case no. 2008-D260 (Respondent's membership name upon admission to the California Bar on January 13. 2005, was Maria Adriana Koeck. Effective July 31, 2017, her name in the California State Bar membership records was changed to Maria Adriana Sanford). (See Exhibit 1, District of Columbia Court of Appeals Board on Professional Responsibility, Report and Recommendation of the Ad Hoc Hearing Committee, attached hereto, 39 pages).

3. The Specification of Charges alleged that respondent's conduct violated District of Columbia Rules of Professional Conduct, rules 1.6(a) and 1.6(g), in that she knowingly revealed client confidences and/or secrets, she used client confidences and/or secrets to the disadvantage of her client, GE, and she used GE confidences and/or secrets to her own advantage. (See Exhibit 1; Exhibit 2, District of Columbia Rules of Professional Conduct, attached hereto, 3 pages).

4. ODC personally served respondent with a Petition Instituting Formal Disciplinary Proceedings and the Specification of Charges. Respondent did not file an answer to the charges. (See Exhibit 1).

5. On September 12, 2014, the District of Columbia Court of Appeals ("D.C. Court of Appeals") appointed attorney Daniel Schumack to represent respondent for purposes of responding to ODC's motion for an order to have respondent submit to an independent medical examination, since respondent had claimed that she suffered from Post-traumatic Stress Disorder and was unable to assist in her own defense. (See Exhibit 1).

6. On December 22, 2014, the District of Columbia Board on Professional Responsibility issued a stay in the proceedings against respondent because she claimed that she suffered from Post-traumatic Stress Disorder and was unable to assist in her own defense. On January 27, 2015, the D.C.

Court of Appeals issued an order directing respondent to schedule an independent medical examination in Phoenix, Arizona (respondent was residing in Arizona at the time), but respondent did not comply. (See Exhibit 1).

7. On April 23, 2015, the D.C. Court of Appeals ordered that respondent be suspended by consent based on her assertion of disability, and also ordered respondent to show cause why she should not be held in contempt for failing to comply with the Court's prior order of January 27, 2015. (See Exhibit 1).

8. On July 1, 2015, the D.C. Court of Appeals again issued an order directing respondent to submit to an independent medical examination within 60 days or respond to the Specification of Charges. Respondent did not submit to an independent medical examination and she did not respond to the charges. (See Exhibit 1).

9. On October 5, 2015, the previous stay in the proceedings issued by the D.C. Board on Professional Responsibility was lifted so that ODC could proceed in its case against respondent. On November 5, 2015, the D.C. Court of Appeals denied court-appointed attorney Daniel Schumack's request for further extensions on behalf of respondent. (See Exhibit 1).

10. On December 1 through December 3, 2015, the District of Columbia Court of Appeals Board on Professional Responsibility, Ad Hoc Hearing Committee ("Hearing Committee") conducted a disciplinary hearing, *In the Matter of M. Adriana Koeck*, case no. 14-BD-061. Respondent was served with a subpoena to appear through a video-conference arranged at an Arizona law office set up by Arizona Disciplinary Counsel, but she failed to appear. No counsel appeared on her behalf either. At the end of hearing testimony on December 3, 2015, the Hearing Committee left the record open for ODC to file a report on the feasibility of attaining respondent's testimony. (See Exhibit 1).

11. On December 9, 2015, ODC filed a memorandum indicating that the possibility of compelling testimony from respondent was "no longer practicable based on representations made by Arizona Bar Counsel." ODC further noted in its memorandum that they had obtained multiple orders from the D.C. Court of Appeals in their efforts to obtain respondent's participation, yet she still refused to comply even when a temporary suspension was imposed. (See Exhibit 1).

12. On January 11, 2017, the Hearing Committee issued its Report and Recommendation, finding by clear and convincing evidence that respondent violated rule 1.6(a) of the D.C. Rules of Professional Conduct on one occasion when she disclosed one of her client confidences and/or secrets to the press. The Hearing Committee dismissed the remaining five allegations, reasoning that respondent's disclosures of client confidences and/or secrets to law enforcement agencies in the United States and Brazil fell within the exception under rule 1.6(d)(2) of the D.C. Rules of Professional Conduct, which allows an attorney to reveal client confidences and secrets to the extent reasonably necessary to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud. (See Exhibits 1 & 2).

13. The Hearing Committee imposed discipline consisting of thirty days actual suspension with a requirement that she prove fitness to practice before being readmitted. (See Exhibit 1).

14. ODC then appealed the Hearing Committee's refusal to find five rule 1.6(a) violations by respondent arising from additional disclosures of her client's confidences. Respondent did not file an appeal. (See Exhibit 3, District of Columbia Court of Appeals Board on Professional Responsibility:

Report, Recommendation, and Order of the Board on Professional Responsibility, attached hereto, 39 pages).

15. On August 30, 2017, the District of Columbia Court of Appeals, Board on Professional Responsibility ("Board "), upon review of the decision of the Ad Hoc Hearing Committee, found respondent had violated rule 1.6(a) on four occasions by revealing client confidences and/or secrets to: (1) a reporter; (2) the United States Attorney's Office for the Northern District of Illinois; (3) Brazilian authorities; and (4) the Securities and Exchange Commission. The Board overturned the Hearing Committee's findings that respondent's disclosures to the U.S. Attorney, Brazilian authorities, and the Securities and Exchange Commission ("SEC") fell within the exception under rule 1.6(d)(2). The Board held that ODC "retains the ultimate burden to prove a violation of Rule 1.6(a) by clear and convincing evidence," and respondent must produce evidence showing that a disclosure falls within an exception to Rule 1.6(a). The Board found that because respondent failed to participate in the disciplinary process and come forward with evidence that an exception to Rule 1.6(a) applied, ODC had met its burden by clear and convincing evidence and was not required to disprove the exception's application. (See Exhibit 3).

16. The Board recommended that respondent be suspended for 60 days, and be required to demonstrate fitness to practice law before being readmitted. (See Exhibit 3).

17. On February 8, 2018, the District of Columbia Court of Appeals issued a Per Curiam Order ("Order"), in case no. 14-BS-1462, adopting the recommendation of the Board on Professional Responsibility. (See Exhibit 4, District of Columbia Court of Appeals Order, attached hereto, 4 pages).

18. The Order suspended respondent from the practice of law in the District of Columbia for sixty days with reinstatement subject to a showing of fitness. Thereafter, the Order became final. (See Exhibit 4).

19. The disciplinary proceeding in the other jurisdiction provided fundamental constitutional protection.

FACTS FOUND IN OTHER JURISDICTION:

20. On January 3, 2006, respondent began working as an in-house attorney at General Electric Consumer & Industrial ("GE"), a division of General Electric Co., in Louisville, Kentucky.

21. Shortly after she began working at GE, respondent became aware of potential fraudulent corporate conduct involving a scheme by GE to evade value added taxes in Brazil. She reported her findings to GE's general counsel, however the general counsel declined to pursue the matter. Later that year, on October 6, 2006, respondent received an unfavorable performance review. On November 29, 2006, before a scheduled meeting with GE Human Resources where respondent anticipated her employment would be terminated, she emailed the GE corporate ombudsmen, alleging misconduct by GE in Brazil and that she was being retaliated against for reporting it. GE investigated respondent's complaints and found them to be without merit. Respondent was fired on January 24, 2007.

22. Prior to her termination and upon the advisement of outside counsel, respondent made a copy of her computer hard drive at GE. A number of the documents on the hard drive were confidential and/or secret within the meaning of D.C. Rules of Professional Conduct, rule 1.6(b). Further, when she began her employment with GE, respondent had signed an Employee Innovation and Proprietary

Information Agreement, in which she agreed to return all written and other materials that are of a secret or confidential nature relating to the business of GE and to not use or otherwise disclose such materials.

23. In late August of 2007, respondent, with the assistance of a former law school professor, provided evidence of GE's conduct to an Assistant United States Attorney for the Northern District of Illinois. The materials included client confidences and/or secrets.

24. On November 15, 2007, respondent contacted Brazilian government authorities by email and informed them about GE's alleged past tax violations. This communication also included client confidences and/or secrets.

25. In January of 2008, respondent met with a New York Times reporter, David Cay Johnston, to answer questions about GE's alleged tax fraud scheme in Brazil. Respondent disclosed information to Mr. Johnston that constituted client confidences and/or secrets. Although the New York Times declined to publish Mr. Johnston's story, on June 30, 2008, Mr. Johnson's article was published in Tax Notes International, entitled, "Blame It on Rio: GE's Brazilian Headache," that was based in part on GE's client confidences and/or secrets respondent disclosed to Mr. Johnston.

26. On April 23, 2008, respondent, accompanied by her counsel, was interviewed by and provided GE's client confidences and/or secrets to representatives of the United States Securities and Exchange Commission ("SEC"). Respondent's counsel had subsequent conversations with SEC lawyers and provided them with information containing client confidences and/or secrets disclosed by respondent to her counsel.

CONCLUSIONS OF LAW:

27. As a matter of law, respondent's culpability of professional misconduct determined in the proceeding in the District of Columbia warrants the imposition of discipline under the laws and rules binding upon respondent in the State of California at the time respondent committed the misconduct in the other jurisdiction, pursuant to Business and Professions Code section 6049.1, subdivision (a).

AGGRAVATING CIRCUMSTANCES.

Multiple Acts of Wrongdoing [Std. 1.5(b)]: Respondent's conduct is aggravated by multiple acts of misconduct, involving four separate acts of failure to maintain client confidences. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647 [three instances of misconduct although not a pattern of practice are sufficient to support a finding that respondent engaged in multiple acts of misconduct].)

Indifference toward rectification or atonement for the consequences of the misconduct [Std. 1.5(k)]: Respondent did not answer the charges against her, did not attend the disciplinary hearing, did not offer any exhibits, did not testify on her own behalf or participate in any meaningful way in the District of Columbia disciplinary proceedings. Respondent was living in Arizona during the proceedings and failed to comply with subpoenas compelling her appearance by video at the hearing. Her indifference towards the proceedings and lack of remorse and insight is an aggravating factor. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279 [lack of insight into misconduct makes attorney an ongoing danger to the public].)

MITIGATING CIRCUMSTANCES.

Prefiling Stipulation: By entering into this stipulation with a plea of *nolo contendere*, respondent has not acknowledged her misconduct and is entitled to very limited mitigation for saving the State Bar significant resources and time. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079 [where mitigative credit was given for entering into a stipulation as to facts and culpability]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521 [where the attorney's stipulation to facts and culpability was held to be a mitigating circumstance]; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [Respondent entitled to very limited mitigation – "more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts"].)

AUTHORITIES SUPPORTING DISCIPLINE.

The Standards for Attorney Sanctions for Professional Misconduct "set forth a means for determining the appropriate disciplinary sanction in a particular case and to ensure consistency across cases dealing with similar misconduct and surrounding circumstances." (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.1. All further references to standards are to this source.) The standards help fulfill the primary purposes of discipline, which include: protection of the public, the courts and the legal profession; maintenance of the highest professional standards; and preservation of public confidence in the legal profession. (See std. 1.1; *In re Morse* (1995) 11 Cal.4th 184, 205.) Although not binding, the standards are entitled to "great weight" and should be followed "whenever possible" in determining level of discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 92, quoting *In re Brown* (1995) 12 Cal.4th 205, 220 and *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Adherence to the standards in the great majority of cases serves the valuable purpose of eliminating disparity and assuring consistency, that is, the imposition of similar attorney discipline for instances of similar attorney misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 190.) If a recommendation is at the high end or low end of a standard, an explanation must be given as to how the recommendation was reached. (Std. 1.1.) "Any disciplinary recommendation that deviates from the Standards must include clear reasons for the departure." (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

In this matter, respondent was found culpable of professional misconduct in the District of Columbia for four separate acts of knowingly revealing a confidence or secret of a client. To determine the appropriate sanction in this proceeding, it is necessary to consider the equivalent rule or statutory violation under California law. Specifically, respondent's misconduct in the District of Columbia demonstrates a violation of section 6068(e)[Failure to maintain inviolate the confidences of her client] of the California Business and Professions Code.

In determining whether to impose a sanction greater or less than that specified in a given standard, in addition to the factors set forth in the specific standard, consideration is to be given to the primary purposes of discipline; the balancing of all aggravating and mitigating circumstances; the type of misconduct at issue; whether the client, public, legal system or profession was harmed; and the member's willingness and ability to conform to ethical responsibilities in the future. (Stds. 1.7(b) and (c).)

The applicable sanction for respondent's misconduct is found in Standard 2.6(a), which applies to respondent's violation of California Business and Professions Code, section 6068(e). Standard 2.6(a)

provides that "Suspension is the presumed sanction when a member intentionally reveals client confidences or secrets."

Here, respondent knowingly revealed client confidences or secrets on four separate occasions. Respondent's misconduct is mitigated by entering into this pre-filing stipulation, but aggravated by multiple acts and indifference toward rectification or atonement for the consequences of the misconduct, which outweighs the single mitigating factor.

Therefore, in order to protect the public, the courts and the legal profession, to maintain the highest professional standards, and to preserve public confidence in the legal profession, and in consideration of the mitigating and aggravating circumstances, discipline consisting of a one year suspension, stayed, and one year probation, including thirty days actual suspension, on the terms and conditions set forth herein is appropriate.

Case law supports this level of discipline. *In the Matter of Gillis*, (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387, involved an attorney who was found culpable of violating Business and Professions Code ("B & P Code"), sections 6068(e) and 6106, for disclosing a confidential settlement agreement involving a client's wrongful death claim to a third party, an act that also involved moral turpitude. The court also found that the attorney violated California Rules of Professional Conduct, former rule 3-300, for entering into an unlawful business transaction with a client (an act that also involved moral turpitude in violation of B & P Code, section 6106); and that his attempt to mislead a State Bar investigation constituted moral turpitude in violation of B & P Code, section 6106. Multiple acts of misconduct were found in aggravation, and 26 years of discipline-free practice was a factor in mitigation. The Review Department imposed a six-month actual suspension.

Gillis and the instant case are similar in that both involve violations of B & P Code, section 6068(e), and aggravation consisting of multiple acts of misconduct. The instant case is distinguished from *Gillis* in that respondent only violated section 6068(e), and her misconduct did not involve moral turpitude. Thus a level of discipline short of six months actual suspension is appropriate. On balance, aggravation outweighs mitigation and thirty days actual suspension, on the terms and conditions set forth herein is appropriate, and accomplishes the purposes of attorney discipline.

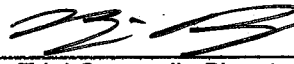
COSTS OF DISCIPLINARY PROCEEDINGS.

Respondent acknowledges that the Office of Chief Trial Counsel has informed respondent that as of November 15, 2018, the discipline costs in this matter are approximately $3,300. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

In the Matter of:	Case Number(s):
MARIA ADRIANA SANFORD	18-J-14403

SIGNATURE OF THE PARTIES

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Facts, Conclusions of Law, and Disposition.

Date		
1/4/2019		Maria Adriana Sanford
Date	Respondent's Signature	Print Name
Date	Respondent's Counsel Signature	Print Name
1/4/19		Brian B. Baghai
Date	Deputy Trial Counsel's Signature	Print Name

(Do not write above this line.)

In the Matter of:	Case Number(s):
MARIA ADRIANA SANFORD	18-J-14403

ACTUAL SUSPENSION ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- [X] The stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.
- [ ] The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
- [ ] All Hearing dates are vacated.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See Rules Proc. of State Bar, rule 5.58(E) & (F).) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after the filed date of the Supreme Court order. (See Cal. Rules of Court, rule 9.18(a).)**

January 28, 2019
Date

Cynthia Valenzuela
CYNTHIA VALENZUELA
Judge of the State Bar Court

EXHIBIT 1

CERTIFICATION

Re: In the Matter of M. Adriana Koeck
Board Docket No. 14-BD-061
Bar Docket No. 2008-D260

I, Meghan Borrazas, Case Manager for the Board on Professional Responsibility, do hereby certify that the enclosed is a true and correct copy of the Report and Recommendation of the Ad Hoc Hearing Committee in In the Matter of M. Adriana Koeck, Board Docket No. 14-BD-061, Bar Docket No. 2008-D260, as filed on January 11, 2017.

Meghan Borrazas
Case Manager

Dated: April 23, 2018

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

In the Matter of:	:	
	:	
M. ADRIANA KOECK,	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2008-D260
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 439928)	:	
	:	
LYNNE BERNABEI,	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2012-D376
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 938936)	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

I. INTRODUCTION

On July 21, 2014, Disciplinary Counsel[1] filed a joint Specification of Charges against Respondents M. Adriana Koeck[2], G. Robert Blakey, and Lynne Bernabei. The charges resulted from Respondent Koeck's alleged disclosures of client confidences and/or secrets to which she

[1] The Petition Instituting Formal Disciplinary Proceedings and the Specification of Charges were filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein. "BX" refers to Disciplinary Counsel's exhibits which were filed as "Bar Counsel's Exhibits." "RX" refers to Respondent Bernabei's exhibits. Respondent Koeck did not file any exhibits. "Stip." refers to the Stipulations Between Disciplinary Counsel and Respondents Lynne Bernabei and G. Robert Blakey, dated October 19, 2015. "Tr." refers to the transcript of the hearing on December 1, 2, and 3, 2015. "Prehearing Tr." refers to the transcript of a prehearing conference. Unless identified otherwise, all "Rules" refer to rules of the D.C. Rules of Professional Conduct (Amended 2007).

[2] Also known as Maria Adriana Koeck, Adriana Sanford, Adriana Fuenzalida, and Adriana Koeck-Fuenzalida.

became privy from her employment as in-house counsel with General Electric Company ("GE") and the alleged knowing assistance of Respondents Blakey and Bernabei in making those disclosures. Disciplinary Counsel further charges Respondent Bernabei with serious interference with the administration of justice in her threatening to make disclosures to the press if GE refused to mediate Koeck's employment claim.

On October 30, 2015, the Office of Disciplinary Counsel issued, and Respondent Blakey accepted, an Informal Admonition. On December 7, 2015, a Contact Member granted Disciplinary Counsel's motion to dismiss the Petition against Blakey.[3]

Disciplinary Counsel alleges that Respondent Koeck, prior to being fired by GE, made a copy of her computer hard drive which contained documents that contained client confidences and/or secrets within the meaning of Rule 1.6(b) of the Rules of Professional Conduct.[4] Prior to a November 29, 2006 meeting in which she was to be discharged, Respondent Koeck sent an email to the GE corporate Ombudsman and claimed that she was being retaliated against for reporting alleged tax fraud by GE in Brazil. As a result, GE conducted an internal investigation, but it concluded that Koeck's retaliation claim was without merit. Then, as originally planned, GE fired

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[3] Accordingly, this Report does not include Factual Findings or Legal Conclusions related to the charge against Blakey.

[4] The D.C. Rules of Professional Conduct makes a distinction between confidences and secrets as defined below:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to 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 likely be detrimental, to the client.

D.C. Rules of Prof'l Conduct R. 1.6(b).

her on January 24, 2007. On April 23, 2007, Koeck filed a Whistleblower Complaint[5] pursuant to the Sarbanes-Oxley Act of 2002 ("SOX Complaint") through her counsel at the time (not Blakey or Bernabei). On June 25, 2007, an Occupational Safety and Health Administration ("OSHA") Regional Administrator dismissed the SOX Complaint for failing to meet the 90-day statute of limitations, and two months later, Koeck's retained counsel withdrew from representation.

In late August 2007, Koeck contacted her former law professor, Respondent Blakey, who agreed to advise her on potential criminal liability related to her knowledge of GE's activities in Brazil. On November 27, 2007, Koeck additionally retained Respondent Bernabei and the law firm of Bernabei & Wachtel to represent her on any claims or counterclaims arising out of her employment at GE.

In the Specification of Charges, Disciplinary Counsel describes a series of improper disclosures by Koeck of GE confidences and/or secrets to (1) the United States Attorney's Office for the Northern District of Illinois; (2) Brazilian authorities; (3) members of the press; (4) representatives of the United States Securities and Exchange Commission ("SEC"); and (5) the Administrative Review Board ("ARB") of the Department of Labor.[6]

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[5] Section (a) of 18 U.S.C. § 1514A provides for "Whistleblower Protection for Employees of Publicly Traded Companies."

[6] At the Hearing, Disciplinary Counsel stated that it was no longer proceeding on allegations made in the Specification of Charges concerning disclosures related to the lawsuit filed by GE in U.S. District Court for the Eastern District of Virginia. Tr. 15-16; *see* Specification of Charges, ¶ 30. The Hearing Committee finds that the record does not contain evidence that establishes these specific disclosures violated any rules. We note, nevertheless, that Disciplinary Counsel does not have the authority to decline to pursue charges that have been approved by a Contact Member. *See In re Reilly*, Bar Docket No. 102-94 at 4 (BPR July 17, 2003).

The Specification of Charges alleges the following violations of the District of Columbia Rules of Professional Conduct:

A. Respondent Adriana Koeck:

Rules 1.6(a) and (g), in that she knowingly revealed client confidences and/or secrets, in that she used client confidences and/or secrets to the disadvantage of GE, and in that she used GE confidences and/or secrets to her own advantage.

B. Respondents G. Robert Blakey and Lynne Bernabei:

Rule 8.4(a), in that they knowingly assisted Respondent Koeck in violating Rules 1.6(a) and (g);

C. Respondent Lynne Bernabei:

Rule 8.4(d), in that she threatened to make disclosures of Respondent Koeck's client confidences and secrets to the press if GE refused to engage in mediation.

Specification of Charges, p. 8 (emphasis added).

The matter is before an Ad Hoc Hearing Committee, consisting of Rudolph F. Pierce, Esquire, Chair; Marcia Carter, Public Member; and Bernadette Sargeant, Esquire, Attorney Member.

II. PROCEDURAL HISTORY

Disciplinary Counsel personally served Koeck with a Petition Instituting Formal Disciplinary Proceedings and the Specification of Charges. BX C. By agreement, Disciplinary Counsel served the Petition and Specification on Bernabei through her counsel. *Id.* On December 22, 2014, the Board issued a stay in the proceedings against Koeck because she claimed that she

suffered from Post-Traumatic Stress Disorder and was unable to assist in her own defense. Bernabei filed an amended answer on January 13, 2015. BX D. Koeck did not file an answer. On April 23, 2015, the D.C. Court of Appeals ordered that Koeck be suspended by consent, based on her assertion of disability, and it unsealed the disability proceedings. On April 27, 2015, the Hearing Committee Chair recommended the denial of Bernabei's request for a stay in which she argued that she should not have to defend against disciplinary charges without Koeck's participation. The Board Chair agreed with the recommendation and denied the motion to stay.[7]

Because Koeck claimed she was suffering from Post-Traumatic Stress Disorder, Disciplinary Counsel sought an order for an independent medical examination. Despite successive orders and extensions issued by the D.C. Court of Appeals, Koeck never appeared for an independent medical examination.[8] On October 5, 2015, the stay as to Koeck was lifted so that Disciplinary Counsel was able to proceed in its case against both Koeck and Bernabei. On November 5, 2015, the Court denied court-appointed Attorney Daniel Schumack's request for further extensions.[9] The Court also denied Disciplinary Counsel's request to vacate the temporary suspension of Respondent Koeck, and its order specified that no determination was made that Koeck was disabled or incapable for purposes of participating in the disciplinary proceedings.

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[7] The Board Chair denied the motion without prejudice to reconsideration upon a proffer that Respondent Koeck was unavailable, a proffer of her expected testimony, and an explanation as to how proceeding would violate Bernabei's right to due process.

[8] The D.C. Court of Appeals issued an order on January 27, 2015, directing Koeck to schedule an appointment with Dr. Legg of Phoenix, Arizona, but Koeck did not comply. On April 23, 2015, when the Court suspended Koeck from the practice of law, they also ordered her to show cause why she should not be held in contempt for failing to comply with the Court's prior order. On July 1, 2015, the Court issued an order directing Koeck to submit to an independent medical exam within 60 days or begin to defend the disciplinary proceedings on its merits.

[9] On September 12, 2014, Schumack was appointed to represent Koeck for purposes of responding to Disciplinary Counsel's motion for an order to submit to an independent medical examination.

Pre-hearing conferences were held on July 22, 2015 and September 11, 2015. At the first pre-hearing conference before the Hearing Committee Chair on July 22, Disciplinary Counsel was represented by Assistant Disciplinary Counsel, Hamilton P. Fox, III, Esquire; Respondent Bernabei was represented by Thomas B. Mason, Esquire, and Steven A. Fredley, Esquire; and Respondent Blakey was represented by Robert P. Trout, Esquire, and Jesse Winograd, Esquire. No counsel appeared on Koeck's behalf. Koeck, Bernabei, and Blakey did not attend. The parties informed the Chair that they intended to take Koeck's deposition prior to the hearing. At the second pre-hearing conference before the Chair on September 11, the same counsel were present except that Mr. Winograd was not present; Koeck, Bernabei, and Blakey were once again not present. The parties discussed having Koeck testify through a video-conference pursuant to a subpoena compelling either her deposition or remote testimony (Koeck lives in Arizona). Prehearing Tr. 68 (Sept. 11, 2015). Through counsel, Bernabei noted her continued objection in having to defend in a disciplinary hearing without Koeck's presence. *Id.* at 90-91. On August 20, 2015 and October 13, 2015, the Chair issued orders memorializing the two pre-hearing conferences.

On September 28, 2015, Bernabei filed a motion for the Committee to issue a subpoena *duces tecum* to GE to obtain documents related to communications between GE and Brazilian authorities. The Chair granted the motion by order on October 21, 2015. That same day, the Chair denied Disciplinary Counsel's motion for default against Koeck because the motion was not supported by sworn proof of the charges in the Specification, or proof of actual service or service by publication of the petition.

The hearing was held on December 1 through December 3, 2015. Blakey did not participate due to his acceptance of Disciplinary Counsel's issuance of an Informal Admonition.

Koeck had been served with a subpoena to appear through a video-conference arranged at an Arizona law office set up by Arizona Disciplinary Counsel, but she failed to appear. No counsel appeared on her behalf.

At the hearing, Disciplinary Counsel called three witnesses: Sarah Bouchard, Esquire, a partner at Morgan, Lewis, and Bockius, who was retained by GE as outside counsel to respond to Koeck's SOX Complaint; Mark Nordstrom, Esquire, in-house counsel for GE; and Roland Schroeder, Esquire, also in-house counsel for GE. Bernabei testified on her own behalf and called two other witnesses: David Cay Johnston, an investigative reporter formerly with the *New York Times*; and Richard Moberly, Esquire, an expert on Sarbanes-Oxley law and procedure before OSHA and the Department of Labor. At the end of hearing testimony on December 3, 2015, the Committee left the record open for Disciplinary Counsel to file a report on the feasibility of attaining Koeck's testimony. The Chair admitted Disciplinary Counsel exhibits (BX A-D and BX 1-88) and Respondent Bernabei's exhibits (RX 1-95). Tr. 343-44.

On December 9, 2015, Disciplinary Counsel filed a Memorandum indicating that the possibility of compelling testimony from Koeck was no longer practicable based on representations made by Arizona Bar Counsel.[10] Bernabei filed a Response that acknowledged Disciplinary Counsel's "diligent effort" in subpoenaing Koeck in Arizona but argued unfair prejudice resulting from not having Koeck's testimony as part of the record. On December 18,

[10] Disciplinary Counsel noted in its Memorandum that they had obtained multiple orders from the District of Columbia Court of Appeals in their effort to obtain Koeck's participation, yet she still refused to comply even when the temporary suspension was imposed. *See* Bar Counsel's Memorandum Concerning Compelling Testimony of Respondent Koeck at 3. The Memorandum also detailed Arizona Bar Counsel's position that under their local procedure, when a respondent does not comply with a subpoena, "their practice is to proceed without the respondent's participation" and the noncompliance is an aggravating factor when determining sanction. *Id.* at 1-2.

2015, the Chair issued an order stating that the record was closed with respect to the charged Rule violations, but it could be reopened without prejudice for the purpose of hearing Koeck's testimony if Bernabei was successful in compelling Koeck's testimony before issuance of the Hearing Committee's Report and Recommendation.[11]

On February 12, 2016, after consideration of the post-hearing briefs, the Hearing Committee issued an order stating that they had made a preliminary, non-binding determination that Disciplinary Counsel had proved rule violations by Respondents Koeck and Bernabei. The Hearing Committee then considered matters in aggravation and mitigation, as submitted by the parties in documentary form.[12] The Committee considered Bernabei's 28 additional exhibits in mitigation (RX 96-124) and her 11-page summary, as well as the parties' briefs on sanction.[13] On July 11, 2016, Bernabei filed a Motion and Notice of Supplemental Authority, to which Disciplinary Counsel had no objection aside from relevance. The Hearing Committee hereby grants Bernabei's motion and has considered the supplemental authority.

[11] Bernabei never notified the Hearing Committee that she had been successful in compelling Koeck's testimony.

[12] The Hearing Committee had offered the parties an opportunity to request a hearing, upon a showing of good cause, on sanction, but no party so requested.

[13] On April 21, 2016, the Chair denied Bernabei's request, which Disciplinary Counsel opposed, to submit supplemental mitigation evidence upon identification of the nature of Bernabei's specific rule violation.

III. FINDINGS OF FACT

1. Respondent M. Adriana Koeck is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on December 6, 1993, and subsequently assigned Bar number 439928.[14] BX B, ¶ 1.

2. Respondent Lynne Bernabei is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on December 14, 1977, and subsequently assigned Bar number 938936. BX A at 3; Stip. ¶ 1. Since 1987, Bernabei has operated her own law firm, specializing in representation of individuals in employment discrimination and retaliation matters. Tr. 346-47 (Bernabei).

A. Respondent Koeck's Employment with General Electric

3. Beginning on January 3, 2006, Koeck worked as an in-house attorney for the Consumer & Industrial Division (C&I) of General Electric (GE), located in Louisville, Kentucky. BX 1; Tr. 180. The Louisville office managed C&I's dealings in Latin America.

4. As a condition of her employment, Koeck signed an Employee Innovation and Proprietary Information agreement. BX 1. The agreement provided that Koeck would keep the company's information strictly confidential and, upon termination of employment with GE, she would return all materials of a secret or confidential nature relating to GE's business and not use or disclose these materials. *Id.* Koeck also signed an "ADR Policy Agreement," which generally required Koeck to arbitrate any claims against GE. BX 6 at 3. However, the ADR Policy Agreement permitted Koeck to pursue any employment-related charges with any applicable

[14] Although Disciplinary Counsel did not produce a copy of Koeck's registration statement, her Bar membership is not disputed.

federal, state, or local governmental agency, including the National Labor Relations Board. BX 4 at 7; Tr. 193 (Nordstrom).

5. In her position with GE, Koeck served "as the interface between legal issues happening in Latin America, Brazil, Argentina, Chile . . . and the broader businesses spread across the globe. [Koeck] had a regional responsibility for the basic C&I product overview." Tr. 169-70 (Nordstrom). Koeck's immediate supervisor was Raymond Burse, the General Counsel of C&I. *Id.* at 168-69.

6. At the time, C&I managed, among other things, the sale and distribution of electrical products in Latin America. Tr. 167-68 (Nordstrom). In Brazil, the sale and distribution process occurred as follows. First, GE delivered its electrical products to a central warehouse in Brazil. Next, the customer picked up the products it purchased. Within 120 to 180 days thereafter, the customer had to declare, in a writing delivered to GE, the region or state in which the product was to be used. *Id.* at 180-81, 277-78. The location of the "use" was significant, because the customer had to pay a value-added tax ("VAT") which varied from 7 to 19 percent, depending upon whether the product was used in a rural or populous state. *Id.* at 180.

7. While payment of the VAT was the customer's responsibility, payment could become GE's responsibility if it failed to use reasonable efforts to secure proper documentation of the location of the customer's use. In 2005, before Koeck began her employment at GE, the company learned "that there were some discrepancies . . . around land shipments into certain parts of Brazil"; that is, that customers reported that products were being used in a rural state (with a lower VAT) when, in fact, they were being used in a more populous one. Tr. 178-79 (Nordstrom).

8. Upon learning of these discrepancies in 2005, GE began an investigation to track the questionable shipments and to determine how these discrepancies occurred. Tr. 179-80

(Nordstrom). When Koeck joined the company in 2006, Koeck's supervisor, Raymond Burse, briefed her about the investigation and gave her the file concerning the matter. *Id.* at 182. Resolving these discrepancies became one of the "big issues" on Koeck's plate. *Id.* at 181-82. As described by GE Counsel Mark Nordstrom, Koeck "had a dual role" of figuring out how best to complete the documentation for the VAT "and at the same time pursue a collection with these customers." *Id.* at 182. Koeck "had the obligation of collecting receivables [money] from some of the same customers . . . these customers owed us money." *Id.*

9. In mid-November 2006, after eleven months of her working for GE, Jeff Barnes of Human Resources advised Koeck that Burse did not want her to either stay with the company or move to another GE business. BX 20 at 32, 101-14 (Koeck Letter Complaint to the Dept. of Labor).

10. Koeck was to be discharged at a November 29, 2006 meeting scheduled with a GE Human Resource employee, but immediately before that meeting, Koeck emailed the GE corporate Ombudsman (Eugene Mensching) claiming, among other things, that she was being retaliated against "for participating in and reporting illegal activity engaged in by [GE] personnel." BX 3 (November 29, 2006 e-mail from Koeck to Mensching), BX 4 (November 29, 2006 termination letter); Tr. 186-87 (Nordstrom). She alleged that, in the course of her compliance investigations, she had discovered tax fraud that GE had been perpetrating in Brazil. BX 3. She claimed that she was being terminated for raising concerns about the fraud to her supervisors. *Id.* Following her complaint to the GE Ombudsmen, Koeck made a copy of her work laptop's hard drive which, according to GE Counsel Sarah Bouchard, contained confidential and privileged documents. BX 76 at 18-19 (Koeck Decl., July 9, 2008); Tr. 94-95 (Bouchard).

11. GE postponed Koeck's discharge until it could investigate the allegations. Tr. 187-88 (Nordstrom). Following the receipt of Koeck's complaint, GE dispatched its senior labor employment counsel, Mark Nordstrom, to determine whether Koeck's allegation of a "retaliatory termination" was justified. *Id.* at 175-76.

12. Nordstrom investigated Koeck's allegations and found them to be without merit. Tr. 188-89 (Nordstrom). On January 18, 2007, Nordstrom informed Koeck that she was being terminated not because of retaliation but, rather, because she "lacked depth in commercial law, reliability, and follow-through, and [she was] unable to forge meaningful and constructive relationships or work well as part of the C&I Legal team." BX 5 at 3 (letter from GE to Koeck). On January 24, 2007, GE fired Koeck. BX 6 at 1 (letter from GE to Koeck).

B. Joseph W. Cotchett's Representation of Koeck Before OSHA

13. After her termination, Koeck retained Joseph W. Cotchett of the California firm Cotchett, Pitre & McCarthy LLP. Stip. ¶ 6. On April 23, 2007, Cotchett submitted a Whistleblower Complaint, pursuant to the provisions of the Sarbanes-Oxley Act of 2002 ("SOX") 18 USC § 1514A, with the United States Department of Labor, Atlanta Regional Office of the Occupational Safety and Health Administration ("OSHA"). *See* BX 8 (Complaint).

14. The 14-page Complaint detailed allegations of GE's tax fraud in Brazil, Koeck's actions in reporting the alleged fraud to supervisors, and their response. BX 8 at 13. Pursuant to Department of Labor regulations, OSHA notified GE of the Complaint and a copy was sent to the Securities and Exchange Commission ("SEC"). Tr. 382-83, 448-49 (Bernabei); 29 C.F.R.

§ 1980.104(a).[15] Neither Bernabei nor Blakey had any role in drafting or preparing the original SOX Complaint. Stip. ¶ 8.

15. The SOX Complaint alleged that the VAT fraud scheme by GE "entailed the use of fraudulent shipping invoices that falsely represented that GE products, such as lamps, were being shipped to duty-free or lower VAT-rate areas of Brazil, when in fact the products were being shipped to or picked up in higher tax areas." BX 8 at 4. The SOX Complaint also alleged efforts by GE to use Koeck's services to conceal and cover up the fraud. *Id.* at 4-6.

16. The SOX Complaint alleged that in March 2006, Koeck learned that GE representatives in Rio de Janeiro were blackmailing the company (GE) for additional commissions in exchange for their silence about the VAT fraud. BX 8 at 5. The Complaint alleged that representatives warned that if GE did not pay the additional commissions, they would disclose GE's conduct. *Id.* The Complaint further claimed that Koeck told her supervisors about this, and they instructed her to have the requested commissions paid but only after these representatives had agreed to sign a confidentiality agreement. *Id.*

17. Cotchett stated in the Complaint that GE would assert attorney-client privilege to prevent OSHA investigators from accessing relevant documents that were in GE's possession. BX 8 at 2 n.1. However, Cotchett maintained that "the privilege does not apply, since the documents reveal corporate counsel's complicity with others in corporate management in attempting to evade the disclosure obligations imposed by the Sarbanes-Oxley Act, *i.e.*, in commission of both fraud and crime." *Id.* Additionally, he asserted that "a number of the

[15] "Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and the substance of the evidence supporting the complaint . . . OSHA will provide an unredacted copy of these same materials . . . to the Securities and Exchange Commission." 29 C.F.R. § 1980.104(a).

documents also evidence corporate use of counsel to engage in ongoing violations of Brazilian tax laws and other fraud." *Id.*

18. On May 29, 2007, GE responded to the Complaint. *See* Stip. ¶ 9. On June 25, 2007, an OSHA Regional Administrator issued a decision finding that GE, Burse, and Earl Jones (C&I's General Counsel and Senior Compliance Counselor) were covered entities and individuals under SOX. BX 9 at 1-2 (Dept. of Labor Findings regarding Koeck's Complaint). The decision also found that Koeck was "an employee covered under 18 U.S.C. § 1514A," *i.e*, she had been an employee of a covered company. *Id.* at 2.[16] However, the OSHA Regional Administrator dismissed the Complaint for failure to meet the 90-day statute of limitations. *Id.* As a result, the OSHA Regional Administrator did not reach the merits of the retaliation claim. Stip. ¶ 10; BX 9 at 1-2. A copy of the decision was sent to the Deputy Director of the Division of Enforcement of the SEC. BX 9 at 3.

19. On July 24, 2007, Koeck noted her objections to the OSHA decision and appealed the dismissal of her claim. Stip. ¶ 11. In August 2007, Cotchett's firm withdrew from the representation. Stip. ¶ 12.

20. On August 31, 2007, Koeck notified the Administrative Law Judge ("ALJ") by letter that Cotchett was no longer representing her and that she was requesting a summary decision on the issue of the statute of limitations. *See* BX 20 at 87-95 (Letter from Koeck to Judge Donald W. Mosser). In the letter, Koeck asserted that her complaint was timely filed with OSHA and

[16] To be an entity covered by SOX, GE had to be a company with a class of registered securities that is required to file reports under Sections 12 and 15(d) of the Securities and Exchange Act of 1934. The OSHA decision determined that GE C & I was not a separate entity but was an operating division of GE. To be a "covered individual," Burse and Jones needed only to be considered employees of the entity. *See* BX 9 at 1-2 (June 29, 2007 OSHA Regional Administrator Findings).

requested that "the information in this letter and supporting papers and documentation be included as evidence" for a summary decision that her date of termination was January 25, 2007. *Id.* at 88.[17] Koeck attached 18 exhibits to her written submission, including a copy of the original SOX Complaint.[18]

C. Professor G. Robert Blakey's Representation of Koeck[19]

21. In late August 2007, Koeck sought the legal advice of her former Notre Dame Law School professor, G. Robert Blakey. *See* BX 76 ¶ 92 (Koeck Decl., July 9, 2008). Koeck provided Blakey with some of the confidential documents that she had copied from her GE computer. BX 85 ¶ 10 (Blakey Aff., Oct. 17, 2008). Blakey advised Koeck, "that the documents and information she had were not covered by the attorney-client relationship, because they fell within the crime/fraud exception." *Id.* ¶ 22.

22. Blakey advised Koeck that GE probably violated the mail fraud statute. *See* RX 78 at 2 (Blakey letter to ODC). He recommended that Koeck present evidence of GE's activities in Brazil to an Assistant United States Attorney in the Northern District of Illinois,[20] which she did. BX 85 at 3 (Blakey Aff.); BX 76 ¶ 93 (Koeck Decl., July 9, 2008). On November 14, 2007, Blakey

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[17] If the statute of limitations period were to start from the date of termination, rather than notification, Koeck's SOX complaint would have been timely.

[18] The 18 exhibits included: the OSHA Regional Administrator's June 25, 2007 Decision and Findings; the SOX Retaliation Complaint filed by Cotchett; over 14 of Koeck's internal email communications within GE; a reference letter; a document defining her scope of work at GE; a holiday greeting letter from Burse; Nordstrom's letter summarizing his investigation findings and conclusion; the GE Human Resources Manager's letter terminating Koeck on January 24, 2007; and a letter of commendation. BX 20 at 87-164.

[19] Neither party called Blakey to testify at the hearing, but his affidavit and supplemental letter to the Office of Disciplinary Counsel was made part of the record. *See* BX 85; RX 78.

[20] As to why the initial contact was with the Northern District of Illinois U.S. Attorney's Office, Blakey had a personal contact within that particular office. *See* BX 85 ¶ 13 (Blakey Aff.).

and Koeck learned that the U.S. Attorney's Office for the Northern District of Illinois had forwarded the confidential GE documents detailing possible fraud to the U.S. Department of Justice in Washington, D.C. BX 76 ¶ 28.

23. Koeck's first contact with Brazilian federal authorities was in November 2007. BX 70 at 1 (July 1, 2008 email from Koeck to Bernabei). She contacted officials of the Brazilian Public Federal Ministry (Ministerio Publico Federal) to determine "how and where to report" GE's illegal activities, and she subsequently engaged in telephone conversations with the Ministry over a period of months. BX 76 ¶ 99 (Koeck Decl., July 9, 2008). Thereafter, Koeck forwarded to the Ministry a copy of the SOX complaint and a 53-page narrative prepared by her for a reporter named David Hilzenrath at *The Washington Post*. BX 70.

24. Blakey confined his advice to Koeck to disclosures she should make to protect herself against potential criminal liability, and he recommended that she retain an additional attorney with expertise in employment law and whistleblower complaints. Stip. ¶ 14. Blakely gave Koeck the names of two firms, one of which was Bernabei & Wachtel, PLLC. *Id.*

D. Bernabei's Representation of Koeck on the SOX Complaint

25. At Koeck's first meeting at Bernabei & Wachtel PLLC on November 17, 2007, she met with Bernabei and Emily Read, Esquire, an associate. Tr. 360 (Bernabei). In an earlier correspondence between Koeck and Bernabei's office, Koeck was asked to bring to the meeting materials from prior legal proceedings and other documentation to support her claim. *Id.* at 359. Accordingly, Koeck brought the SOX Complaint and internal GE documents in her possession,

including legal memoranda prepared for GE by retained foreign counsel in Brazil. *Id.* at 361-64, 368-70.[21]

26. Bernabei testified that Koeck told her and Emily Read that she [Koeck] had been asked to collect certifications from customers purporting to show where the products were being used, but felt that the certifications were false so it made her feel "uncomfortable." Tr. 363 (Bernabei). As described by Bernabei, Koeck believed these agents or customers of GE were "blackmailing GE for hush money to quiet down the VAT tax fraud allegations and . . . [Koeck] had been asked to pay them off and sign confidentiality agreements." *Id.*

27. On November 27, 2007, Koeck formally retained Bernabei's firm to handle the SOX matter before the Department of Labor. Stip. ¶ 15; BX 10 at 1 (Retainer Agreement).

28. Based on agreement of counsel, on December 19, 2007, the case was transferred from the ALJ in Cincinnati, Ohio to an ALJ in Washington, D.C. RX 8 (Order).

29. On January 28, 2008, Bernabei filed a motion for partial summary judgment, arguing that Koeck's Complaint had been timely filed and that its dismissal was improper. *See* BX 20 (Complainant's Motion for Partial Summary Judgment and Supplemental Memorandum of Points and Authorities in Support Thereof). The motion was filed by Bernabei to supplement Koeck's earlier *pro se* motion for summary decision filed August 31, 2007.[22] *Id.* at 1. Bernabei included with her motion exhibits previously submitted by Koeck as well as a 20-page Declaration sworn to by Koeck. *See id.* at 19-39 (Koeck Decl., January 28, 2008). The Declaration restated,

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[21] Bernabei testified that Koeck told her "she had several lawyers' letters from Brazilian lawyers that indicated that they thought that GE was maybe criminally liable for VAT tax fraud." Tr. 362.

[22] Koeck did not formally move for summary judgment, but she did request that the letter and its attachments be considered as evidence for the ALJ's summary decision on the statute of limitations issue.

but did not expand, the disclosures made in the original SOX Complaint filed by Cotchett. *Compare* BX 8 at 4-8, *with* BX 20 at 21-27 (VAT fraud, independent contractor classifications, and bribery scheme).

30. On March 13, 2008, the ALJ, like the OSHA Regional Administrator, determined that Koeck's SOX Complaint was untimely and ordered it dismissed. BX 24 (ALJ Findings of Fact and Conclusions of Law).

31. On March 24, 2008, Sarah Bouchard (a partner at Morgan, Lewis, & Bockius who acted as GE's outside counsel) sent a letter to Bernabei asserting that Koeck had failed to return all GE documents and had wrongfully disclosed privileged information to an outside party. BX 31 at 1. Bouchard demanded that Koeck immediately return all copies of confidential and privileged materials. *Id.* Bernabei refused to return the documents. *See* BX 37, 40, 46-49 (Letters exchanged between Bouchard and David Wachtel, Esquire). On April 30, 2008, David Wachtel, Bernabei's law partner, wrote to Bouchard that the documents Koeck had taken were "evidence of crimes or fraud committed by GE" and, therefore, she had a right to keep the documents. BX 47 ("As we stated previously, the right to retain copies of documents is implicit in the right to make disclosures.").

32. On May 9, 2008, Bernabei filed an appeal of the ALJ's decision with the Administrative Review Board ("ARB"). *See* BX 50 (Appellant's Initial Brief); RX 18 (same). In her briefing materials, Bernabei included the exhibits and Declaration that she previously filed with the ALJ. Tr. 416 (Bernabei); *see also* BX 50 at 3. Bernabei believed ". . . they [the ARB] don't have to limit themselves to the issue on which it was dismissed below." Tr. 425.

E. Disclosures to the Press As Strategy Aimed to Assist Appeal

33. After Koeck retained Bernabei on November 27, 2007, she and Blakey met and agreed that Koeck should inform the press about GE's activities in Brazil. BX 85 ¶ 22 (Blakey Aff.). Beginning in December 2007, Bernabei spoke with Koeck about having a press strategy and talking to the press. BX D (Bernabei's Amended Answer, ¶ 17).

34. Bernabei testified "[I] was eager for something to appear in the press . . . I was telling her [Koeck] that I think it would be a good thing for her DOL case." Tr. 558 (Bernabei); *see also* Tr. 556-62. Further evidence of Bernabei's support of the press strategy is documented in the following emails between Bernabei and Koeck. *See* BX 11, 14, 15, 19, 21, 23, 33, 53, and 54.

35. At some point in the fall of 2007, David Cay Johnston, a *New York Times* reporter at the time, received a telephone call from Blakey who asked if Johnston "might be interested in material about a long-running series of felonies committed by General Electric in another country." Tr. 604-05 (Johnston). Thereafter, Johnston received "hundreds of pages of documents" from Blakey or Koeck. *Id.* at 606. Subsequently in January 2008, Johnston interviewed Koeck about the alleged tax fraud in Brazil and she provided additional documents in her possession regarding GE's activities there. *Id.* at 607-08; Stip. ¶ 19; BX 76 at 26; BX 85 at 5 (Blakey Aff., Oct. 17, 2008).

36. Following Koeck's meeting with Johnston, she received a series of emails from Bernabei. *See* BX 19 ("Any news on the *New York Times* front? . . . any heads up you could give me would be great.); BX 21 at 1 ("Are you available for a telephone confidence call to talk about press on Friday? I'm increasingly worried that unless something appears quickly we will have a hard time if we get an adverse ruling from the DOL."); BX 23 ("What has happened to the *New*

York Times article? As you know I'm eager to have something printed before the DOL rules."); BX 29 ("We filed the appeal yesterday, hopefully things will burst open on Monday."); and BX 33 ("I'm beginning to think the *New York Times* will run the story in the Sunday edition. Do you think that's a possibility? Will it mention you. I continue to believe this is the best thing for your case.").

37. After the *New York Times* declined to publish Johnston's article, Bernabei asked Koeck to speak with a *Washington Post* reporter named David Hilzenrath, whom Bernabei had contacted previously, to see whether he would be interested in writing about a whistleblower at GE. Tr. 442-43 (Bernabei). Subsequently, at Bernabei's request, Koeck summarized the events regarding the VAT tax fraud and other allegedly fraudulent events in Brazil in a narrative outline for Hilzenrath's review. BX 55 at 1-4 (email communications between Bernabei and Koeck on June 2-4, 2008); BX 56 (email from Bernabei to Emily Read, directing her to speak to Koeck about finishing the outline and talking with the press); BX 57 at 1-3 (email communications by Bernabei asking Koeck which outline narrative of GE's VAT and other fraud she could send to Hilzenrath).

38. On June 30, 2008, Johnston's article, "Blame It on Rio, GE's Brazilian Headache," was published in *Tax Notes International*. RX 33 (copy of article). Johnston testified that the article relied on GE internal documents that Koeck had obtained and his interview of Koeck. Tr. 605-14.[23] Indeed, reference to the GE documents is made plain in the article:

> The tax schemes and subsequent events are detailed in hundreds of pages of internal GE e-mails, memos, and legal opinions .... A lawyer for a participant in some of the events provided the documents on the condition that the source not be identified. The internal documents offer a rare and candid look at how, behind closed doors,

[23] The article describes an internal GE PowerPoint on the VAT fraud and "lengthy opinion letters [in which] Brazilian lawyers warned of 'criminal tax implications,' 'untrue fiscal documentation,' and 'fraud'... [warranting] charges of tax evasion, labor tax fraud, collusion, and other crimes." RX 33 ("Blame It on Rio: GE's Brazilian Headache," by David Cay Johnston, *Tax Notes International*, p. 1068 (June 30, 2008)).

> GE executives, managers, and lawyers dealt with evidence of the systematic tax cheating that flourished over many years.

RX 33 at 1. Although the Committee was not shown these documents, the Committee heard testimony from Roland Schroeder, GE in-house counsel, that confirmed the existence of confidential legal opinion letters by Brazilian attorneys who had advised GE of its possible criminal liability for failure to pay the appropriate VATs. Tr. 275-77 (Schroeder).

F. Bernabei's and Koeck's Meeting with the SEC and the End of Disclosures

39. On April 21, 2008, Koeck emailed Bernabei to say she had set up a meeting with the SEC, and "they are very interested in the information [about GE]." BX 43 (email from Koeck to Bernabei). On April 23, 2008, Koeck and Bernabei met with SEC attorneys to discuss the substance of her complaint (Tr. 447) and provided copies of GE's confidential documents. BX 76 ¶ 103 (Koeck Decl.); BX 43.

40. On June 6, 2008, GE filed a complaint against Koeck, *General Electric Company v. Adriana Koeck*, in the U.S. District Court for the Eastern District of Virginia. BX 59 (Complaint). The complaint sought an injunction to restrain Koeck from further disclosing privileged and confidential material and to compel the return of all such material in her and her counsel's possession. *Id.* at 14. On July 28, 2008, Koeck's counsel (attorneys with Nealon & Associates, PC) stipulated that no further disclosures would be made and that Koeck would: (1) return copies of all documents she took from GE; (2) make available two copies of her computer hard drive for review by GE's forensic computer expert; and (3) make available for mirroring or copying any external media devices in her possession, custody, or control that she used to obtain GE documents. This agreement was codified into a court order. RX 63 at 1-2 (Stipulation and Order, *General Electric Company v. Adriana Koeck*, No. 08-591 (July 28, 2008)).

41. On August 8, 2008, Koeck discharged Bernabei and her firm. BX 83 (Letter from Koeck to Bernabei).

IV. PROPOSED CONCLUSIONS OF LAW

As described below, the Hearing Committee finds by clear and convincing evidence that Respondent Koeck violated Rule 1.6(a).[24] The Hearing Committee also finds by clear and convincing evidence that Respondent Bernabei violated Rule 8.4(a), but did not violate Rule 8.4(d).

A. Koeck was entitled to make a claim of retaliatory termination under the provisions of Sarbanes-Oxley (SOX).

(1) SOX Section 806 provides authority for employees to file claims against employers for retaliation. Section 806 of SOX, codified as 18 U.S.C. § 1514A, provides that publicly traded companies and their employees may not "discharge, demote, suspend, threaten, harass or in any other manner discriminate against" an employee because of any lawful act done by the employee to:

> Provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, or television fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . . .

18 U.S.C. § 1514A(a)(1). The provision grants an employee the ability to file a SOX retaliation complaint. Section 1514A(b) directs the employee to file a complaint with the Secretary of Labor

[24] Disciplinary Counsel charged a violation of both Rule 1.6(a) and (g), but the latter is definitional and not a disciplinary rule so we make no findings on Rule 1.6(g) ("The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment.").

or, if the Secretary has not issued a final decision within 180 days, to bring suit for *de novo* review in U.S. district courts. 18 U.S.C. § 1514A(b).

(2) Koeck was an employee of GE and had been assigned responsibility, among other things, for resolving discrepancies in GE's investigation of a VAT reporting problem. FF 3, 8.[25] Koeck served "as the interface between legal issues happening in Latin America, Brazil, Argentina, Chile . . . and the broader businesses spread across the globe." FF 5. As a result, Koeck's duties involved investigating GE's Latin American operations for compliance issues. FF 5, 10. Despite dismissing Koeck's SOX Complaint on statute of limitations grounds, the OSHA Regional Administrator still found that Koeck was an employee covered by 18 U.S.C. § 1514A. FF 18. Accordingly, pursuant to 18 U.S.C. § 1514A(b), Koeck was entitled to file her SOX retaliation complaint with the Secretary of Labor.

B. Koeck was permitted to use client confidences to the extent reasonably necessary to advance her claim.

(1) In *Willy v. Admin. Review Bd.*, 423 F.3d 483, 499-500 (5th Cir. 2005), the court concluded that an attorney has the right, under federal common law, to affirmatively use privileged materials to establish a retaliatory discharge claim in a whistleblower action. Koeck's retaliatory termination claim against GE was such an action pursuant to 18 U.S.C. 1514A.

(2) Rule 8.5 of the Rules of Professional Conduct for the District of Columbia provides, as to choice of law, that "for conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits . . . ." *See* Rule 8.5(b)(1). If there is any doubt regarding the meaning of the Rule, Comment 4 to the Rule makes

[25] We cite to the preceding numbered Factual Findings as "FF #."

clear that a lawyer shall be subject only to the rules of the professional conduct of that tribunal. Rule 8.5, cmt. [4].[26] Administrative agencies of the Department of Labor (DOL) apply federal common law which looks to the American Bar Association ("ABA") Model Rules as the basis of its analysis of client confidences and attorney-client privilege. *See, e.g., Willy, supra*, at 495 (applying federal common law and ABA Model Rules). Therefore, since Koeck's SOX claim was filed at the DOL, we consider the propriety of her disclosures under the ABA Model Rules of Professional Conduct.

> In relevant part, ABA Model Rule 1.6 provides:
>
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . .
>
> (5) to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client . . . .

Model Rules of Prof'l Conduct R. 1.6.[27] Thus, no ethical violation was committed by Koeck in making disclosures of client confidences to advance her claim so long as the revelations were reasonably necessary.

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[26] Pursuant to Rule 1.0 (n) of the D.C. Rules of Professional Conduct:

> "Tribunal" denotes . . . [an] administrative agency or other body acting in an adjudicative capacity. A[n] . . . administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

[27] In contrast with the D.C. Rules of Professional Conduct, ABA Model Rule 1.6 (b)(5) allows an attorney to reveal confidences and/or secrets of a client to establish a claim in a controversy with the client, whereas the D.C. Rule only allows such disclosures when used by an attorney defensively. *See* Rule 1.6(e)(3) (disclosures permitted "to the extent reasonably necessary to

(3) Disciplinary Counsel contends that Koeck was required to satisfy the reporting provisions of 17 C.F.R. § 205.2(a)(1) of SOX. Indeed, Disciplinary Counsel maintained that before Koeck could properly file a retaliatory termination action, the internal reporting requirements of § 205 required her to report her concerns about GE actions in Brazil up to its Board of Directors. We have not been able to satisfy ourselves that Koeck qualifies as an attorney "appearing and practicing before the Commission" as defined in § 205.2(a)(1)(ii), (iii), and (iv). However, we are satisfied that if she was so qualified, she would qualify as a subordinate attorney as defined by § 205.5 ("An attorney who appears and practices before the Commission . . . under the supervision or direction of another attorney . . . is a subordinate attorney."), and her mandatory internal reporting requirements were satisfied when she reported her concerns to her supervisor. *See* § 205.5(c) (subordinate attorney complies by reporting to supervising attorney). In this case, it is undisputed that Koeck reported her concerns about GE activities in Brazil both to her immediate supervisor, Raymond Burse, and to the GE corporate ombudsman, Eugene Mensching. FF 8, 10, 18.

C. Koeck and Bernabei did not violate the "reasonable and necessary" constraint placed on an attorney using client confidences when they filed appellate papers with the ARB or when they appeared before the SEC.

(1) Initially a 14-page complaint detailing allegations of GE's fraudulent activities in Brazil was filed with the DOL by Joseph Cotchett whom Koeck had retained to file her SOX claim. FF 13-16. After OSHA dismissed the complaint on statute of limitations grounds, Koeck filed a letter for summary decision *pro se* to the ALJ. FF 20. Subsequently, Bernabei was retained and

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establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client").

supplemented Koeck's submission with a Motion for Partial Summary Judgment supported by a Declaration signed by Koeck. FF 29.[28] After the ALJ's denial of the motion, Bernabei filed an appeal to the ARB in which she included the Declaration which had been previously filed with the ALJ. FF 32. Disciplinary Counsel does not question the propriety of the material filed with the ALJ; rather, he limits his objection to the Declaration which Koeck and Bernabei included with the materials filed with the ARB. Disciplinary Counsel's objection is difficult to understand. Even though Disciplinary Counsel contends the ARB appeal related only to an ALJ's limited ruling on the statute of limitations, and therefore, Bernabei's appellate materials should have been limited, according to Disciplinary Counsel, to addressing that issue, we assume he agrees that the ARB was entitled to see some version of Koeck's Complaint. As we indicated in the Findings of Fact above, the difference between Koeck's 14-page Complaint and the Declaration attached to the Partial Motion for Summary Judgment filed with the ALJ is more a matter of form than substance.

Cosmetics aside, we have a more substantive disagreement with Disciplinary Counsel; namely, we do not accept the premise that the ARB was limited to ruling only on the issue determined by the ALJ. If the ARB had reversed the ALJ's ruling on the statute of limitations, we read the applicable law to say the ARB was free to consider broader issues. *See, e.g., In re Overall v. Tennessee Valley Authority*, 2001 Ad. Rev. Bd. LEXIS 87, ARB Nos. 98-111, 98-128 (April 30, 2001) at 28 (The ARB is "not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature"). Moreover, we are reluctant to second guess seasoned counsel when it comes to determining what information can best advance a litigant's

[28] In filing the Motion for Partial Summary Judgment, Bernabei appears to have followed the procedure prescribed in Federal Rules of Civil Procedure Rule 56(c)(1)(A) and (c)(4), which provide for a Declaration in support of the motion.

chances on appeal. We are comforted here by the fact that nothing presented to the ARB was seemingly outside the record compiled before the ALJ.

(2) Finally, since the SEC received the original 14-page complaint which contained references to GE's confidential information, *see* 29 C.F.R. § 1980.104(a) ("Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint,. . . [and] provide an unredacted copy of these . . . materials to the . . . Securities and Exchange Commission"), we find it difficult to conclude that Koeck and Bernabei were prohibited from discussing the matters contained in the complaint with representatives of the SEC. Moreover, the SEC is the regulatory agency with the greatest interest in GE's behavior not only with respect to "material violations" of the securities laws but also with respect to violations of 18 U.S.C. §§ 1341 (fraud and swindles), 1343 (wire fraud), 1344 (bank fraud), 1348 (securities and commodities fraud), and any other provision of Federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1)(A) (providing whistleblower protection to those who provide information to the SEC).

D. The crime-fraud exception of Rule 1.6(d) permits the disclosures made to the Assistant U.S. Attorney and the Brazilian officials.

(1) While an argument can be made that Koeck's decision to report information concerning GE's activities to an Assistant U.S. Attorney in Illinois and to officials in Brazil is within the scope of SOX provisions, *see* 18 U.S.C. § 1514A(a)(1)(A), we are more comfortable concluding that they fall within the scope of Rule 1.6(d)(2) of the D.C. Rules of Professional

Conduct.[29] Rule 1.6(d) allows for a limited exception to the general rule of client confidentiality. It provides in its entirety that:

> (d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:
>
> (1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or
>
> (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

(2) The evidence indicates that questions arose at least as early as 2005 about the documentation GE's customers were providing concerning the location where purchased products were to be used.[30] FF 7, 8. Koeck maintained in her SOX claim that GE continued to sell products to these customers despite their questionable documentation and that GE required her to collect receivables from these customers and to do other things which involved her in GE's illegal activities. FF 14-16. Indeed, GE's in-house counsel Roland Schroeder confirmed that some of the opinion letters from Brazilian counsel retained by GE (among the documents removed by Koeck) stated that GE's failure to pay the taxes could result in criminality. FF 38.[31] No evidence was presented to rebut Koeck's assertions that her services were involved in an ongoing fraud.

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[29] Because Koeck is licensed to practice law only in this jurisdiction, the District of Columbia, her conduct in making disclosures to a U.S. Attorney's Office, Brazilian authorities, and the press is covered by the D.C. Rules of Professional Conduct. *See* Rule 8.5(b)(i).

[30] The implication was, apparently, that GE employees either knew or should have known that GE products were not being *used* in the locations indicated in the documents provided by the customer(s); thus, circumventing the premise of the Brazil VAT. FF 6-8, 38.

[31] The Hearing Committee was not shown the opinion letters or the confidential information which Koeck took from GE.

See, e.g., X Corp. v Doe, 805 F. Supp. 1298, 1310 (E.D. Va. 1992) (for invocation of crime-fraud exception, purported crime or fraud need not be conclusively proven, but respondent must demonstrate more than mere suspicion); *United States v. Jacobs*, 117 F.3d 82, 87-88 (2d Cir. 1997) (party wishing to invoke crime-fraud exception must demonstrate that a factual basis for showing a probable cause to believe a fraud or crime has been committed).

On this record, therefore, we cannot say that Koeck's assertions about the criminal activities of GE or her involvement in them are unreasonable. Surely the material which Koeck removed from GE to support her claim suggests more than mere suspicion. Accordingly, Koeck's reporting of her concerns about GE's activities in Brazil to law enforcement officials here in the United States and in Brazil seems to fall squarely within the language of the exception described in Rule 1.6(d)(2). The alleged tax fraud and bribery scheme if true were reasonably certain to result in injury to the financial interests of Brazil, to violate the laws of the United States, and to do damage to the reputation of GE as well as to the interests of its shareholders. *See* FF 6-8; 38.

E. Koeck violated Rule 1.6(a) with her disclosures to the press, and Bernabei violated Rule 8.4(a) by knowingly assisting her.

We find no basis, however, in SOX or in Rule 1.6(d) to justify Koeck's or Bernabei's disclosures of GE's confidences and/or secrets to the press. Those provisions expressly limit the circumstances in which client documents or confidences may be revealed. Rule 1.6(d)(2) provides that a lawyer "may reveal client confidences and secrets, to the extent reasonably necessary . . . to prevent, mitigate, or rectify substantial injury to the financial interests or property of another . . . ." That requirement was satisfied in our judgment when Koeck reported her concerns to law enforcement in the United States and in Brazil, but not so when it came to speaking to the press. Comment 19 to Rule 1.6 provides that: "Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would

harm the client." Rule 1.6, cmt. [19]. These limitations are consistent with the recognition of the duty of confidentiality as a bedrock legal principle that must be zealously protected. *See, e.g., In re Gonzalez*, 773 A.2d 1026, 1030 (D.C. 2001) ("'By turns both sacred and controversial, the principle of the confidentiality of client information is well-embedded in the traditional notion of the Anglo-American client-lawyer relationship.'") (quoting Charles W. Wolfram, *Modern Legal Ethics* § 6.1.1, at 242 (1986)). In this case, the record is clear that Koeck and Bernabei sought to use the press not to report crime or to protect financial interests, but rather, to gain leverage in the advancement of Koeck's SOX claim, nothing more. That purpose clearly was not within the limitations provided by SOX or Rule 1.6(d) of the D.C. Rules of Professional Conduct. Hence, Bernabei violated Rule 8.4(a) by knowingly assisting Koeck's violation of Rule 1.6(a). Bernabei's testimony and email exchanges with Koeck reveal that their principle purpose was to advantage the employment litigation. *See* FF 33, 34, 36, 37.

F. Bernabei did not violate Rule 8.4(d).

As to whether Bernabei interfered with the administration of justice, we conclude that Disciplinary Counsel has not proven by clear and convincing evidence that Bernabei's statement (about her "marching orders" to go to the press if GE counsel did not agree to mediation) constituted a violation of Rule 8.4(d). We find that if the statement affected the administration of justice, it did so in a *de minimis* manner. *See, e.g., In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

G. No due process violation

At the start of proceedings and before the Hearing Committee closed the record of evidence, Bernabei objected to having to defend the disciplinary charge without Koeck's participation. As to this claim, we find no prejudice and no violation of due process. The record is clear that Bernabei was not prejudiced by Koeck's absence. The basis upon which we found

that Bernabei violated Rule 8.4(a) rested almost entirely on Bernabei's own statements. Nothing that Koeck could have testified to would change the fact that Blakey and Bernabei were the architects of the press strategy and that its purpose was to enhance Koeck's chances for a favorable outcome in her SOX case.

V. RECOMMENDED SANCTION

The discipline imposed in a matter should serve to maintain the integrity of the legal profession, protect the public and the courts, and deter similar misconduct by the respondent-lawyer and other lawyers. *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). Further, the sanction imposed must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1).

A Hearing Committee should take into consideration the following factors when determining an appropriate sanction: (1) seriousness of the misconduct; (2) prejudice, if any, to the client; (3) whether the conduct involves dishonesty and/or misrepresentation; (4) violations of any other disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether the attorney acknowledges the wrongful conduct; and (7) circumstances in mitigation. *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013).

A. Sanction for Koeck

Disciplinary Counsel has recommended that Koeck be suspended for 30 days with a requirement that she prove fitness to practice before being readmitted. We adopt this recommendation.

For a lawyer who exceeds the limitations to a bedrock principle of the profession, who repeatedly ignores the orders of the court, who rejects every effort by Disciplinary Counsel to

arrange a convenient venue to enable her to participate in a proceeding resulting from her conduct, some sanction is to be expected. The only question, of course, is how severe. As to Koeck, "that lawyer," we think Disciplinary Counsel has recommended a temperate sanction. We accept it because of the factors enumerated in *In re Martin*, the sanction we recommend for Bernabei, *see infra*, the informal admonition given to Blakey, and the fact that this is Koeck's first offense.

We are aware that sanctions for a single violation of Rule 1.6 of the Rules of Professional Conduct have ranged from informal admonition to public censure. *See, e.g., In re Ponds*, 876 A.2d 636, 637 (D.C. 2005) (per curiam) (public censure for disclosure of confidential information in a motion to withdraw); *Gonzalez, supra*, 773 A.2d at 1032 (informal admonition). In *Gonzalez*, the respondent violated Rule 1.6 when he filed a motion to withdraw in which he disclosed client confidences and attached several letters containing confidential client information. *Gonzalez, supra*, 773 A.2d at 1027. We note too that other jurisdictions have imposed six-month and 12-month suspensions where disclosures to the press were made in violation of an attorney's ethical obligation of client confidentiality. *See, e.g., In re Schafer*, 66 P.3d 1036, 1038 (Wash. 2003) (en banc) (six-month suspension for disclosure of client confidences to various individuals including the press); *In re Lackey*, 37 P.3d 172, 180 (Ore. 2002) (per curiam) (12-month suspension for disclosing secrets gained from prior employment to the press). However, for the reasons enumerated above, we are satisfied with the discipline we recommend.

Regarding the fitness requirement, the Court explained in *In re Cater*, 887 A.2d 1, 24 (D.C. 2005), that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. *Id.* at 22. "[T]he open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run . .

. ." *Id.* In situations where the respondent refused to participate in disciplinary proceedings, the Court stated that three factors are relevant in assessing whether a "serious doubt" exists concerning a respondent's fitness: "(1) the respondent's level of cooperation in the pending proceedings, (2) the repetitive nature of the respondent's lack of cooperation in disciplinary proceedings, and (3) 'other evidence that may reflect on fitness.'" *Cater, supra*, at 24. These factors weigh in favor of the imposition of a fitness requirement in this case. Bluntly stated, Koeck has thumbed her nose at the disciplinary process. *See In re Hallmark*, 831 A.2d 366, 377 (D.C. 2003) (respondent's failure to cooperate with Bar Counsel and Board and "persistent disregard for the disciplinary process" warrants a fitness requirement); *In re Lea*, 969 A.2d 881, 893-94 (D.C. 2009) (absence of respondent from the proceeding "was itself an evidentiary fact that the committee could properly consider"). Koeck's repeated failure to comply with orders of this Committee, the Board, and the D.C. Court of Appeals for an independent medical evaluation, manifest a blatant disregard for the disciplinary process. Indeed, the fact that Koeck has not even bothered to attempt to lift her temporary suspension for failing to comply with orders of the D.C. Court of Appeals is further evidence of her dismissive attitude.

B. Sanction for Bernabei

As to Bernabei, Disciplinary Counsel contends that a sanction of public censure is warranted. Bernabei contends that if she did commit a rule violation, she should suffer no sanction due to the unsettled area of law or, in the alternative, only an informal admonition.

After considering all the circumstances, we recommend a sanction of informal admonition. We simply do not see Bernabei's conduct in this case as being more egregious than that of Blakey. They both were architects of the press strategy followed by Koeck. Indeed, the evidence reveals that Johnston of the *New York Times* was Blakey's contact and that, following Blakey's telephone

conversation with Johnston, he received the large bulk of GE documents referred to in his article and testimony. We see no justification for treating Blakey and Bernabei differently. We are aware of Disciplinary Counsel's contention that a sanction of public censure is warranted because (1) a Rule 8.4(d) violation exists where Bernabei "exacerbated the situation by seriously interfering with the administration of justice . . . [and] abetted and even enlarged her client's misconduct"; and (2) she refused to acknowledge any wrongdoing. We disagree. Assisting Koeck's disclosures to the press was a violation of Rule 8.4(a) as we ruled, but we fail to see how Bernabei's statement – that she had "marching orders" to contact the press if GE did not agree to mediate the SOX appeal – seriously interfered with the administration of justice.

Furthermore, even Disciplinary Counsel acknowledges the extensive mitigation evidence presented by Bernabei that reveals a long and successful career attested to by many former clients and colleagues. *See* RX 97-121. Finally, while not acknowledging any misconduct, Bernabei fully cooperated with Disciplinary Counsel and the Committee in these proceedings and she has no prior record of discipline.

CONCLUSION AND RECOMMENDATION

For reasons set forth in this Report and Recommendation, the Hearing Committee recommends that Respondent Koeck be suspended for 30 days and that before being permitted to resume the practice of law, she be required to demonstrate fitness to do so pursuant to D.C. Bar Rule XI, § 3(a)(2). As to Respondent Bernabei, the Hearing Committee recommends that she be sanctioned with an informal admonition.

Respectfully submitted,

AD HOC HEARING COMMITTEE

By: _____
Rudolph F. Pierce, Esquire
Chair

_____
Marcia Carter

_____
Bernadette Sargeant, Esquire

Dated: JAN 11 2017

Ms. Sargeant has filed a separate concurring statement.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

In the Matter of:	:	
	:	
M. ADRIANA KOECK,	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2008-D260
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 439928)	:	
	:	
LYNNE BERNABEI,	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2012-D376
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 938936)	:	
	:	
Respondents.	:	

SEPARATE STATEMENT OF BERNADETTE SARGEANT

Although I agree with the sanction imposed on Respondent Koeck, I do not believe that on the record before us, the Hearing Committee can conclude that Koeck was justified in disclosing client confidences to either the U.S. Attorney's Office in the Northern District of Illinois or to Brazilian officials.

The only information we have that Koeck acted in good faith and based on more than a mere suspicion of wrongdoing is Koeck's unproved assertion that she was asked to undertake actions that she perceived were in furtherance of GE's complicity with customers' apparent misrepresentations regarding their VAT obligations. *See* FF 26 (Bernabei recalling Koeck's assertions). At the time, Koeck was an inexperienced attorney whose judgment may have been questionable and, in my view, her unexamined opinion (flatly stated in self-serving documents drafted in support of her post-termination claims against GE) should not serve as the basis for a finding that she had sufficient justification to disclose client confidences under Rule 1.6(d). On

such a record, I do not believe that we can conclude that GE "used or [was] using a lawyer's services to further a crime or fraud" so as to permit the disclosure of GE's confidences and secrets under the crime-fraud exception. *See* Rule 1.6(d); *see also In re Public Defender Service*, 831 A.2d 890, 903 (D.C. 2003) ("'sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney'" not sufficient to invoke crime-fraud exception to attorney-client privilege) (quoting *In re Grand Jury Proceedings (Corporation)*, 87 F.3d 377, 381 (9th Cir. 1996)); *In re Omnicom Group, Inc.*, 233 F.R.D. 400, 405 (S.D.N.Y 2006) ("court findings [relating to crime-fraud exception] that would deprive the client['s confidences] of protection should be based on an adequate record and bear some assurance of reliability").

Koeck's judgment is further called into question by her disturbing and persistent failure to cooperate with this Hearing Committee, including her repeated failure to comply with court orders. As is detailed in this Report and Recommendation at Part V. A., *supra*, Koeck has demonstrated a stunning lack of respect for her obligations as a member of the Bar, and, for that reason alone, her mere assertions should not serve as the basis for a finding that the exception provided in Rule 1.6(d) permitted the disclosing of client confidences and secrets to law enforcement.

I agree that Bernabei violated Rule 8.4(a) in knowingly assisting Koeck's rule violation and encouraging her disclosures to the press. Even if the crime-fraud exception was properly invoked, I would not consider Koeck's disclosures to the press to be "reasonably necessary," and the record shows that Bernabei knowingly assisted and encouraged this clear rule violation. *See* Rules 8.4(a), 1.6; *see also* Rule 1.6, cmt. [21] ("[A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."); Rule 1.6, cmt. [19] ("Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would harm the client.").

With regard to information in the record that Blakey advised Koeck that her disclosure to law enforcement authorities would be justified under the crime-fraud exception, I note that Blakey relied on Koeck's characterization of relevant events – a characterization which we are unable to assess for the reasons described above including Koeck's repeated and deliberate failures to cooperate with this Committee.

Respectfully submitted,

Bernadette Sargeant, Esquire
Attorney Member

Dated: JAN 11 2017

EXHIBIT 2

D.C. Rules of Professional Conduct

https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/index.cfm

Rules of Professional Conduct: Rule 1--Client-Lawyer Relationship

1.0 Terminology (/bar-resources/legal-ethics/amended-rules/rule1-0.cfm)
1.1 Competence (/bar-resources/legal-ethics/amended-rules/rule1-01.cfm)
1.2 Scope of Representation (/bar-resources/legal-ethics/amended-rules/rule1-02.cfm)
1.3 Diligence and Zeal (/bar-resources/legal-ethics/amended-rules/rule1-03.cfm)
1.4 Communication (/bar-resources/legal-ethics/amended-rules/rule1-04.cfm)
1.5 Fees (/bar-resources/legal-ethics/amended-rules/rule1-05.cfm)
1.6 Confidentiality of Information (/bar-resources/legal-ethics/amended-rules/rule1-06.cfm)
1.7 Conflict of Interest: General (/bar-resources/legal-ethics/amended-rules/rule1-07.cfm)
1.8 Conflict of Interest: Specific Rules (/bar-resources/legal-ethics/amended-rules/rule1-08.cfm)
1.9 Conflict of Interest: Former Client (/bar-resources/legal-ethics/amended-rules/rule1-09.cfm)
1.10 Imputed Disqualification: General Rule (/bar-resources/legal-ethics/amended-rules/rule1-10.cfm)
1.11 Successive Government and Private or Other Employment (/bar-resources/legal-ethics/amended-rules/rule1-11.cfm)
1.12 Third-Party Neutrals (/bar-resources/legal-ethics/amended-rules/rule1-12.cfm)
1.13 Organization as Client (/bar-resources/legal-ethics/amended-rules/rule1-13.cfm)
1.14 Client with Diminished Capacity (/bar-resources/legal-ethics/amended-rules/rule1-14.cfm)
1.15 Safekeeping Property (/bar-resources/legal-ethics/amended-rules/rule1-15.cfm)
1.16 Declining or Terminating Representation (/bar-resources/legal-ethics/amended-rules/rule1-16.cfm)
1.17 Sale of Law Practice (/bar-resources/legal-ethics/amended-rules/rule1-17.cfm)
1.18 Duties to Prospective Client (/bar-resources/legal-ethics/amended-rules/rule1-18.cfm)

Rules of Professional Conduct: Rule 1.6--Confidentiality of Information

(a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

(1) reveal a confidence or secret of the lawyer's client;

(2) use a confidence or secret of the lawyer's client to the disadvantage of the client;

(3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

(b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to 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.

(c) A lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or

(2) to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

(d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

(e) A lawyer may use or reveal client confidences or secrets:

(1) with the informed consent of the client;

(2) (A) when permitted by these Rules or required by law or court order; and

(B) if a government lawyer, when permitted or authorized by law;

(3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client;

(4) when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a confidence or secret in order to carry out the representation;

(5) to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee; or

(6) to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law, including these Rules.

(f) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e).

(g) The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment.

(h) The obligation of a lawyer under paragraph (a) also applies to confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer.

(i) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Lawyer Counseling Committee, or as a trained intervenor for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Information obtained from another lawyer being counseled under the auspices of the committee, or in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule.

(j) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Practice Management Service Committee, formerly known as the Lawyer Practice Assistance Committee [1] (#n1), or a staff assistant, mentor, monitor or other consultant for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Communications between the counselor and the lawyer being counseled under the auspices of the committee, or made in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule. However, during the period in which the lawyer-counselee is subject to a probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, such information shall be subject to disclosure in accordance with the order. (k) The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.

Comment

EXHIBIT 3

CERTIFICATION

Re: In the Matter of M. Adriana Koeck
Board Docket No. 14-BD-061
Bar Docket No. 2008-D260

I, Meghan Borrazas, Case Manager for the Board on Professional Responsibility, do hereby certify that the enclosed is the true and correct copy of the Report, Recommendation, and Order of the Board on Professional Responsibility in In the Matter of M. Adriana Koeck, Board Docket No. 14-BD-061, Bar Docket No. 2008-D260, as filed with the District of Columbia Court of Appeals on August 30, 2017.

Meghan Borrazas
Case Manager

Dated: April 23, 2018

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
M. ADRIANA KOECK,[1]	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2008-D260
An Administratively Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 439928)	:	
	:	
LYNNE BERNABEI, ESQUIRE	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2012-D376
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 938936)	:	

REPORT, RECOMMENDATION, AND ORDER
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

INTRODUCTION

Respondent M. Adriana Koeck disclosed confidences and secrets of her former client. Her lawyer, Respondent Lynne Bernabei, participated with her in some, but not all, of those revelations. Their conduct raises questions at the heart of what it means to be an attorney:

> The broad commitment of the lawyer to respect confidences . . . is [her] talisman. Touching the very soul of lawyering, . . . the privilege of clients to bind their lawyers to secrecy is universally honored and

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[1] Also known as Maria Adriana Koeck, Adriana Sanford, Adriana Fuenzalida, and Adriana Koeck-Fuenzalida.

> enforced as productive of social values more important than the search for truth.

In re Gonzalez, 773 A.2d 1026, 1030 (D.C. 2001) (quoting *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978)).

Professional rules that safeguard client confidences are "designed to preserve the trust of the client in his lawyer, without which the practice of law, whatever else it might become, would cease to be a profession." *Id.* (quoting *Fred Weber, Inc.*, 566 F.2d at 604). Confidentiality and privilege are indispensable to the attorney-client relationship. *See Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). A lawyer's advice is of questionable value if it is not based on all relevant, material facts. Without confidentiality, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Absent a strict duty of confidentiality, the role of an attorney could change from that of a client's representative and zealous advocate to "a combination of prosecutor, judge, and jury" who "gather[s] information about possible fraud, render[s] a decision, and then exact[s] a punishment – disclosure – as he [sees] fit in a context in which the client no longer has a legal representative or advocate." *Report of the Legal Ethics Committee of the American College of Trial Lawyers on Duties of Confidentiality* at 21 (March 2001).

In this case, we must determine whether Respondents' disclosures violated these core professional concerns. More particularly, we must assess whether Ms. Koeck violated Rule 1.6(a) of the D.C. Rules of Professional Conduct ("Rules") by

disclosing client information, and whether Ms. Bernabei violated Rule 8.4(a) by knowingly assisting her.

The Hearing Committee concluded that Ms. Koeck did violate Rule 1.6(a) on one occasion, when she disclosed confidences of her former client to a newspaper reporter. The Hearing Committee also found that Ms. Bernabei violated Rule 8.4(a) when she knowingly assisted Ms. Koeck in doing so. It recommended that Ms. Koeck be suspended for thirty days, with a requirement that she prove fitness before being readmitted. It recommended an informal admonition for Ms. Bernabei.

Disciplinary Counsel[2] filed exceptions to the Hearing Committee's refusal to find: (1) five Rule 1.6(a) violations by Ms. Koeck, arising from additional, discrete disclosures of her client's confidences; (2) one additional Rule 8.4(a) violation by Ms. Bernabei, based on her knowing assistance to Ms. Koeck in one of those disclosures; and (3) a Rule 8.4(d) violation by Ms. Bernabei, based on a litigation-related statement she made to opposing counsel. Disciplinary Counsel does not challenge the Hearing Committee's recommended sanction for Ms. Koeck, but argues that public censure is the appropriate sanction for Ms. Bernabei's misconduct.

Respondent Bernabei concedes the violation found by the Hearing Committee, accepts its sanction recommendation, and asks the Board to affirm its Report. *See* Respondent Lynne Bernabei's Brief in Opposition ("Bernabei Br.") at 3.

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[2] The Specification of Charges was filed by the Office of Bar Counsel, whose title the Court of Appeals changed, effective December 19, 2015.

Respondent Koeck did not participate in the disciplinary proceeding and did not file any exceptions to the Report.

We adopt the Hearing Committee's findings of fact because they are supported by substantial evidence in the record as a whole, and we have made supplemental fact findings, citing directly to the record (*see* Board Rule 13.7). We have reviewed the Hearing Committee's conclusions of law and recommended sanction *de novo*. *See In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam).

We conclude that Disciplinary Counsel proved that Ms. Koeck violated Rule 1.6(a) on four separate occasions, not merely the one found by the Hearing Committee. Her improper disclosures of GE's confidences and secrets were made to the U.S. Attorney's Office for the Northern District of Illinois, to the press, to Brazilian authorities, and to the SEC. We otherwise agree with the Hearing Committee's conclusions concerning the misconduct of Respondent Bernabei, although we disagree with some of its reasoning. Finally, we agree with the Hearing Committee's recommendation to issue an informal admonition for Ms. Bernabei, and we recommend a sixty-day suspension with fitness for Ms. Koeck.

I. PROCEDURAL HISTORY

On July 21, 2014, Disciplinary Counsel filed a Specification of Charges against Ms. Koeck, Ms. Bernabei, and G. Robert Blakey.[3] The Specification alleged multiple improper disclosures by Ms. Koeck of confidences and secrets of her

[3] On October 30, 2015, Mr. Blakey accepted an Informal Admonition, and on December 7, 2015, a Contact Member granted a motion to dismiss the petition against him.

former employer General Electric Corporation ("GE"), all in violation of Rules 1.6(a) and (g). The Specification also alleged that Respondents Bernabei and Blakey, in their capacity as attorneys for Ms. Koeck, violated Rule 8.4(a) by knowingly assisting those disclosures. Finally, the Specification charged that Ms. Bernabei seriously interfered with the administration of justice, and thus violated Rule 8.4(d), when she made an inappropriate statement to opposing counsel while representing Ms. Koeck in litigation adverse to GE.

Disciplinary Counsel personally served the Specification of Charges on Ms. Koeck, but she never answered it. On December 22, 2014, the Board stayed the proceedings against her after she claimed that a disability (Post-Traumatic Stress Disorder) prevented her from assisting in her own defense. She thereafter failed to comply with multiple orders of the Court of Appeals to submit to an independent medical examination. On April 23, 2015, the Court ordered her to show cause why she should not be held in contempt for her failure to comply with its prior orders, and ordered that she be suspended by consent. It also unsealed the disability proceedings. On July 1, 2015, the Court again ordered her to submit to a medical examination within sixty days, or respond substantively to the Specification of Charges. Again she failed to comply and, on October 5, 2015, the Board lifted the stay of the proceedings against her.

The hearing took place on December 1-3, 2015. Ms. Koeck, who lived in Arizona at the time, was subpoenaed to provide remote testimony from a site in that State, but defied the subpoena and failed to appear. The Hearing Committee, with

one member filing a separate concurring statement, issued its Report and Recommendation on January 11, 2017.

II. FINDINGS OF FACT

A. Ms. Koeck's Abbreviated Tenure as In-House Counsel

On January 3, 2006, Ms. Koeck began working as an in-house counsel for GE's Consumer & Industrial Division (C&I), located in Louisville, Kentucky. FF 3.[4] As a condition of her employment, she signed an agreement requiring her to keep the company's information strictly confidential and to return all secret or confidential materials to GE when her employment terminated. FF 4. GE thus timely insisted that she hold "inviolate" the information that she received during the course of her employment. *See* Rule 1.6(b).

The Louisville C&I office was responsible for managing the sale and distribution of electrical products in Latin America. FF 3. Ms. Koeck was principally assigned to deal with legal issues arising in Brazil, Argentina, and Chile. FF 5.

In Brazil, C&I distributed products through a centrally located warehouse. FF 6. Within 120 to 180 days of sale, its Brazilian customers were required to declare (in written reports delivered to C&I) the Brazilian region in which a product was to be used. *Id.* The location of "use" was significant, because the customer had

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[4] The Hearing Committee's Findings of Fact are designated "FF __" and references to its Report and Recommendation are designated "HC Rpt. at __." Disciplinary Counsel's and Respondent's exhibits are designated "BX" and "RX" respectively. The hearing transcript is designated "Tr. __," and that of the oral argument before the Board is designated "OA Tr.__."

to pay a value-added tax ("VAT") which varied from 7 to 19 percent, depending upon whether the product was used in a rural or a populous area. *Id.*

In 2005, C&I learned of discrepancies in the VAT reports. FF 7. Some customers were reporting that GE products were being used in a rural state (with a low VAT) when they were actually utilized in a more populated area (with a high VAT). *Id.* GE undertook—prior to hiring Ms. Koeck—an investigation that sought to track questionable shipments and to determine why the discrepancies occurred. FF 8.

Ms. Koeck's immediate supervisor was the General Counsel of C&I, who briefed her about the investigation. FF 5, 8. Resolving the VAT reporting discrepancies became one of her principal assignments. FF 8. She was responsible for determining how properly to complete the documentation for the VAT, and to collect taxes owed by delinquent customers. *Id.* Ms. Koeck's relationship with C&I's General Counsel quickly deteriorated, however, and as early as June 26, 2006, she sought a transfer out of the division. BX 76 at 8.

B. Ms. Koeck's Termination and Sarbanes-Oxley Complaint

In mid-November 2006, eleven months into her employment at C&I, Ms. Koeck learned that the C&I General Counsel wanted to fire her. FF 9. On November 29, 2006, immediately before a scheduled meeting at which GE intended to do so, she sent an e-mail to the GE Corporate Ombudsman claiming retaliation "for participating in and reporting illegal activity engaged in by [GE] personnel." FF 10. She alleged that she had discovered that GE had perpetrated tax fraud in Brazil and

was terminating her because she raised concerns about the fraud with her supervisors. *Id.* At the time, she also made a personal copy of her work laptop's hard drive, downloading confidential and privileged GE documents. FF 10.

GE's senior employment counsel investigated Ms. Koeck's retaliatory termination claim and concluded that it was meritless. FF 12. On January 18, 2007, GE fired her because she "lacked depth in commercial law, reliability, and follow-through, and [she was] unable to forge meaningful and constructive relationships or work well as part of the C&I Legal team." *Id.*

Following her termination, Ms. Koeck retained a California attorney who, on April 23, 2007, lodged a whistleblower retaliation complaint against GE, C&I, and her supervisors pursuant to Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 USC § 1514A. BX 8-9. The complaint was contained in a letter to the United States Department of Labor ("DOL"), Atlanta Regional Office of the Occupational Safety and Health Administration ("OSHA"). The DOL Secretary has delegated investigatory and initial adjudicatory responsibility over all SOX complaints to OSHA. OSHA's findings and orders can be appealed to an Administrative Law Judge, *see* 29 C.F.R. § 1980.107(b), and then to the Federal Administrative Review Board ("ARB"), *see* 29 C.F.R. § 1980.109(e). The ARB's decisions are reviewable in federal court. 29 C.F.R. § 1980.112(a); *see also* 29 C.F.R. § 1980.114(a).

Ms. Koeck's complaint, as did her complaint to the corporate ombudsman, alleged tax fraud by GE in Brazil, her reporting of the fraud to her supervisors, and GE's unsatisfactory response. FF 14. It claimed that GE's shipping invoices

fraudulently represented that GE products were being shipped to duty-free or low VAT-rate areas of Brazil, when in fact the products were destined for high-tax areas. FF 15. The complaint also alleged that GE had used Ms. Koeck's services to conceal the fraud, and had terminated her because she reported the fraud to her superiors. FF 15-17; BX 8. Pursuant to DOL regulations, OSHA notified GE of the filing and provided a copy of the complaint and supporting materials to the Securities and Exchange Commission. FF 14; *see* 29 C.F.R. § 1980.104(a).

Two months later, on June 25, 2007, the OSHA Regional Administrator dismissed the SOX complaint because it had not been timely filed. FF 18. Ms. Koeck appealed the dismissal, after which her California attorney withdrew from the case. FF 19. Appearing *pro se*, Ms. Koeck requested the Administrative Law Judge ("ALJ") handling the appeal to issue a summary decision on the statute of limitations issue; she supplied him with copies of the SOX complaint and a host of additional GE documents, including its internal e-mail communications. FF 20.

C. Mr. Blakey Represents Ms. Koeck, Who Discloses GE Information to the U.S. Attorney's Office and Brazilian authorities.

In late August 2007, Ms. Koeck sought legal advice from her former Notre Dame Law School professor, G. Robert Blakey. FF 21. She claimed to be concerned about her potential criminal liability in Brazil, and she provided Mr. Blakey with documents she had taken from GE. *Id.*; BX 85 ¶ 11.

Mr. Blakey advised Ms. Koeck "that the [GE] documents and information she had were not covered by the attorney-client relationship, because they fell within the

crime/fraud exception." FF 21. Mr. Blakey also concluded from the documents that GE had probably committed mail fraud. FF 22; RX 78 at 2.

Pursuant to Mr. Blakey's recommendation, Ms. Koeck reported the matter to a Blakey acquaintance in the U.S. Attorney's Office in Chicago. FF 22. She provided that office with copies of documents that she claimed "evidenced GE's fraud and tax evasion schemes." BX 76 ¶ 93. The U.S. Attorney's office later forwarded those materials to the Department of Justice in Washington, D.C. FF 22.

In November 2007, Ms. Koeck contacted Brazilian federal authorities to determine "how and where to report" GE's purported transgressions. FF 23. She subsequently talked about the matter with the Brazilian Ministry over a period of months and provided Brazilian authorities with a copy of her Sarbanes-Oxley complaint, supplemented by her fifty-three-page fact narrative. *Id.*; RX 78 at 7.

Her disclosures to the U.S. Attorney's Office and to Brazilian authorities underlie two of the Rule 1.6 charges against her.

D. Ms. Bernabei Represents Ms. Koeck, Who Discloses GE's Confidences and Secrets to the Press and the SEC.

Mr. Blakey also recommended that Ms. Koeck contact the law firm of Bernabei & Wachtel, PLLC, whose attorneys were experienced in employment and whistleblower law. FF 24. Ms. Koeck first met with Ms. Bernabei and her associate on November 17, 2007. FF 25. She related her story and provided them with the SOX complaint and other corroborative documents taken from GE, including legal memoranda prepared by GE's outside counsel in Brazil. *Id.* On November 27, 2007,

Ms. Bernabei agreed to represent Ms. Koeck and assumed principal responsibility for handling the DOL litigation. FF 27.

As part of the litigation plan for her new client, Ms. Bernabei determined to implement a "press strategy." FF 33. Mr. Blakey concurred in that approach. FF 33-34. In mid-December, 2007, within a month of being retained, Ms. Bernabei told the lawyer representing GE in the DOL matter "words to the effect of 'I have marching orders to go the press unless you . . . agree[] to mediate within the next week or so.'" Tr. 67; *see also* Tr. 400.

The Specification of Charges broadly interpreted that statement as a threat "to make disclosures of . . . confidences and secrets to the press if GE refused to engage in mediation," and alleged that by making it, Ms. Bernabei interfered with the administration of justice in violation of Rule 8.4(d). Specification, ¶ 34(C). GE's lawyers viewed the statement as an unprofessional remark that seemed to be a "shakedown" (Tr. 68, 239-40), but effectively disregarded it: GE did not agree to mediation, did not complain about the remark within the DOL proceedings, and never mentioned it in any subsequent correspondence with Ms. Bernabei. Tr. 69, 139-140, 239-240.

The attempt to invoke mediation having failed, on January 28, 2008, Ms. Bernabei filed a motion for partial summary judgment with the ALJ in the DOL matter, supplementing Ms. Koeck's earlier *pro se* filing. FF 29. The motion contained the same exhibits previously submitted by Ms. Koeck, to which was added

a new twenty-page sworn declaration by Ms. Koeck that restated, without expanding, the disclosures contained in the original unsworn SOX complaint. *Id.*

1. The Press Disclosure

Ms. Bernabei remained eager for something to appear in the press because she felt that a news article would be the "best thing" for the lawsuit. FF 33, 34, 36; *see* Tr. 550-51. Ms. Koeck agreed with that tactic, but felt that Mr. Blakey should contact the press. BX 15. He was not counsel of record in the DOL litigation and she felt he would appear more credible to a reporter because he would seem to be "an independent party." *Id.*

Mr. Blakey accordingly contacted a reporter and asked if he "might be interested in material about a long-running series of felonies committed by General Electric in another country." FF 35. The reporter clearly was interested. Ms. Koeck thereafter met and discussed her story with him, and provided him with hundreds of pages of internal GE documents. *Id.* The reporter eventually authored an article that appeared in *Tax Notes International* on June 30, 2008, titled "Blame It on Rio, GE's Brazilian Headache." FF 38. The article detailed GE's VAT-related issues, relying heavily on the internal GE documents that Ms. Koeck—not named in the article—had supplied. *See id.*; RX 33 at 1 ("A lawyer for a participant in some of the events provided the documents on the condition that the source not be identified.").[5]

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[5] Evidently frustrated with the delay in press coverage, in May 2008 Ms. Bernabei contacted a reporter at a second newspaper to gauge his interest in writing about what she described to him as a "whistleblower at GE." Tr. 443-44. She urged Ms. Koeck to send information to that reporter

Ms. Koeck's disclosures to the reporter underpin the Hearing Committee's finding of the Rule 1.6 violation by her, and Ms. Bernabei's knowing assistance with those disclosures supports the finding of a Rule 8.4(a) violation by her. No exceptions to those findings have been filed.

2. The SEC Disclosure

On March 13, 2008, the ALJ agreed with the OSHA determination that the whistleblower complaint had been untimely filed and dismissed it. FF 30.

During that same time frame, Ms. Koeck arranged with her neighbor—an SEC attorney—to meet with other SEC officials to discuss GE. Tr. 445. She asked Ms. Bernabei to accompany her to that meeting. *Id.*; FF 39. Ms. Bernabei agreed, believing that her client had the right to disclose evidence of crime and fraud to the SEC, particularly since it had already received Ms. Koeck's SOX filings directly from DOL. Tr. 445-49. The meeting took place on April 23, 2008. FF 39. Ms. Koeck discussed the substance of her complaint and provided copies of GE's confidential documents to the SEC staff. *Id.* In a follow-up letter, Ms. Bernabei—at the SEC's request—provided Ms. Koeck's estimate of the dollar amounts of GE's allegedly fraudulent activity, and also sent the SEC additional SOX litigation filings. Tr. 449-450.

"to get the process started." BX 53; Tr. 570. Ms. Koeck, however, was reluctant to do so. BX 53-54; Tr. 570-72. Although Ms. Koeck did prepare a narrative outline, it was not sent to the reporter because he had no interest in pursuing the matter. FF 37-38; Tr. 444-45, 573.

The disclosures to the SEC underpin another Rule 1.6 charge against Ms. Koeck, and a second Rule 8.4(a) charge against Ms. Bernabei.

On May 9, 2008, Ms. Bernabei appealed the ALJ's dismissal to the Administrative Review Board. FF 32. She included with the appeal the entire record before the ALJ because the scope of review was not limited to the statute of limitations issue. *Id.*[6]

E. GE's Counter-offensive

While working on his story, the reporter sought comments from GE and, although he did not identify his source, asked GE detailed questions about documents that GE knew Ms. Koeck had been able to access. Tr. 235-36. Since GE's dispute with her was "brewing" at the time, GE "put two and two together" and concluded that she had disclosed its confidences to the reporter. *Id.*; BX 59 at ¶¶ 28-29. Thus, on March 24, 2008, GE's lawyer wrote to Ms. Bernabei asserting that it had "reason to believe" that Ms. Koeck had wrongfully failed to return GE's confidential documents and had disclosed privileged information to an outside party. FF 31; BX 31 at 1. GE demanded that Ms. Koeck immediately return all copies of confidential and privileged materials. FF 31. Ms. Bernabei's law partner refused to

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[6] In its briefing to the Board, Disciplinary Counsel does not take exception to the Hearing Committee's conclusion that Ms. Bernabei did not knowingly assist improper disclosures of GE's confidences and secrets in the appellate brief filed with the ARB. *See* HC Rpt. at 25-27. Disciplinary Counsel apparently no longer challenges the disclosures made by Ms. Koeck in either her *pro se* filing or the pleadings filed before ARB. Disciplinary Counsel, however, contends that Ms. Koeck was required to report up to the GE Board of Directors before filing her Sarbanes-Oxley complaint with the Department of Labor. *See* ODC Br. at 13-20. Disciplinary Counsel contends that by not doing so, Koeck violated Rule 1.6(a) in filing her whistleblower complaint. *See id.* at 17-21.

accede to the demand, contending that the documents were "evidence of crimes or fraud committed by GE" that Ms. Koeck had a right to retain and disclose. *Id.*

On June 6, 2008, GE filed a civil action against Ms. Koeck in the U.S. District Court for the Eastern District of Virginia, seeking to prevent further disclosures and to compel the return of all GE documents in her and Ms. Bernabei's possession. FF 40. The court later entered a stipulated order mandating that Ms. Koeck make no further disclosures, that she return the GE documents she had taken, and that she permit GE's forensic examination of her computer devices. *Id.*

On August 8, 2008, Ms. Koeck discharged Ms. Bernabei and her firm. FF 41. In or around January 2009, GE and Ms. Koeck entered into a settlement of their mutual claims and filed a stipulation of dismissal of the civil action brought by GE. *See* RX 73; Tr. 128-136, 155-56.

III. CONCLUSIONS OF LAW

A. Ms. Koeck Violated Rule 1.6(a) on Four Occasions.

Rule 1.6(a) states that a lawyer "shall not knowingly reveal" a confidence or secret of her client unless excused by one of the limited exceptions to the Rule. The Rule 1.6 prohibition encompasses client "confidences" (that is, information protected by the attorney-client privilege) as well as client "secrets" (which comprehensively include "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"). *See* Rule 1.6(b). Here, there is no dispute that Ms. Koeck disclosed GE's confidences and secrets (1)

to a reporter; (2) to the United States Attorney's Office for the Northern District of Illinois; (3) to Brazilian authorities; (4) to the SEC; and (5) to the Department of Labor.

The Hearing Committee analyzed in detail the circumstances of the first four disclosures in order to assess whether they fell within an exception designated by Rule 1.6. In particular, relying on "Koeck's assertions that her services were involved in an ongoing fraud," it parsed the record and concluded that Ms. Koeck violated Rule 1.6 only in connection with her disclosure to the press. HC Rpt. at 28-29. The Committee found that disclosures to the U.S. Attorney and Brazilian authorities were appropriate under the "crime-fraud" exception in Rule 1.6(d), and that disclosures to the SEC were appropriate under federal securities laws. HC Rpt. at 25-29.[7]

The Hearing Committee undertook its detailed examination despite the fact that Ms. Koeck utterly disdained participation in the disciplinary process. She did not answer the charges against her, did not attend the disciplinary hearing, did not offer any exhibits, and did not testify on her own behalf. As a result of her intransigence, the Hearing Committee could only seek to determine the propriety of

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[7] The Committee also concluded, without analysis, that since the SEC had already received the SOX complaint, Respondents could discuss the matters contained within it. We do not accept that abstract premise. A disclosure may be inappropriate even if the information at issue has otherwise become public. Comment 19 to Rule 1.6 provides, "Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would harm the client."

her actions by turning to second-hand, historical evidence of her contentions, a considerable amount of which was self-serving, unsworn hearsay that she generated in a litigation context.[8]

Disciplinary Counsel argues that the Hearing Committee overreached in this respect because Disciplinary Counsel "should not be required to disprove every exception to Rule 1.6 when a respondent fails to participate in the proceedings." ODC Br. at 23. We agree.

The Board recently addressed a similar issue, albeit after the Hearing Committee in this case completed its work. In *In re Szymkowicz*, Bar Docket Nos. 2005-D179 *et al.* (BPR May 19, 2017), a conflict of interest case, we concluded that although Disciplinary Counsel always carries the burden to prove a Rule violation by clear and convincing evidence, a respondent must produce evidence (or explain why evidence is unavailable) to support a defense or exception to a charge before Disciplinary Counsel is required to disprove that defense or exception. That is, although Disciplinary Counsel always shoulders the *persuasion* burden of proof, the *production* burden—the obligation to come forward with some evidence—may shift to a respondent in a disciplinary case:

> [O]nce Disciplinary Counsel presents evidence of a conflict of interest . . . a respondent may offer evidence showing that he or she obtained

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[8] As one Hearing Committee member appropriately observed, Ms. Koeck's "unexamined opinion . . . should not serve as the basis for a finding that she had sufficient justification to disclose client confidences under Rule 1.6(d)." Separate Statement of Bernadette Sargeant at 1. We agree, particularly in light of her "disturbing and persistent failure to cooperate with [the] Hearing Committee," her "repeated failure to comply with court orders," and her "stunning lack of respect for her obligations as a member of the Bar." *See id.* at 2.

> informed consent. . . . Disciplinary Counsel retains the ultimate burden to prove a violation of a Rule by clear and convincing evidence, and therefore *must rebut any evidence of informed consent.* If a respondent fails to raise informed consent as a defense (or to explain adequately why such evidence is unavailable), Disciplinary Counsel need not prove the absence of informed consent.

Szymkowicz, Bar Docket Nos. 2005-D179 *et al.*, at 6 (emphasis added).

The rationale of *Szymkowicz* applies squarely to the facts of this case. We conclude that Disciplinary Counsel retains the ultimate burden to prove a violation of Rule 1.6(a) by clear and convincing evidence. If a respondent produces evidence showing that a disclosure falls within an exception to Rule 1.6(a), Disciplinary Counsel must prove that the exception does not apply. However, if a Respondent fails to come forward with evidence of an exception to Rule 1.6(a), or to explain adequately why such evidence is unavailable, Disciplinary Counsel need not disprove the exception's application. *See In re Burton*, 472 A.2d 831, 846 (D.C. 1984) (per curiam) (appended Board Report) ("Once [Disciplinary] Counsel had presented a *prima facie* case, Respondent was free to present any evidence or arguments he wished. While Respondent was not obligated to present any defense, neither was [Disciplinary] Counsel obligated . . . to rebut all conceivable defenses and arguments that Respondent theoretically might have made, but in fact did not present, to the hearing committee.").

This principle applies with particular force here, where a respondent did not participate in the disciplinary process and Disciplinary Counsel consequently had no opportunity to test her claims under oath. A respondent cannot sit idly by and force the disciplinary system to scour an inadequate record to identify and resolve all

possible arguments, issues, and defenses that the respondent chose not to assert on her own behalf. *See In re Shannon*, Board Docket No. 09-BD-094, at 25-26 (BPR Nov. 27, 2012) (where Disciplinary Counsel has offered evidence that the respondent engaged in a conflicted representation, "the respondent cannot sit on his hands . . . and require [Disciplinary] Counsel to prove the negative"), *recommendation adopted where no exceptions filed*, 70 A.3d 1212 (D.C. 2013) (per curiam). The disclosure of a client's confidences and secrets may not be excused by such a deficient showing.

For these reasons, we conclude that Ms. Koeck violated Rule 1.6(a) when she disclosed GE's confidences and secrets, not only to the press, but to the U.S. Attorney's Office, to Brazilian authorities, and to representatives of the SEC.

B. Ms. Koeck's Sarbanes-Oxley Complaint Did Not Violate Model Rule 1.6.[9]

Disciplinary Counsel also accused Ms. Koeck of violating Rule 1.6(a) when she filed her retaliation complaint and supporting documents with OSHA.[10] This

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[9] Disciplinary Counsel charged Ms. Koeck with violating D.C. Rule 1.6 in regard to the disclosures made before the Department of Labor, rather than Model Rule 1.6. As explained in this section, however, we find that the Model Rules are applicable to those disclosures. We recognize that amending charges during the course of disciplinary proceedings may raise questions of due process. *See In re Ruffalo*, 390 U.S. 544, 552 (1968) (finding that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process"). However, because Ms. Koeck did not appear in this case, did not claim prejudice, and was not in fact prejudiced, but rather benefits from our finding that D.C. Rule 1.6 does not apply under our choice of law analysis, we do not find it necessary to address any due process implications arising from our application of Model Rule 1.6.

[10] Disciplinary Counsel did not except to the Hearing Committee's finding that Ms. Bernabei did not violate Rule 8.4(a) in connection with the DOL filings she supervised. HC Rpt. 25-27.

charge stands on a different footing: unlike her other disclosures, our assessment of Ms. Koeck's culpability for disclosures in the retaliation complaint does not invoke any exception to Rule 1.6. Rather, we must assess whether her filing of the complaint violated Rule 1.6 in the first instance.

Under D.C. Rule 1.6, an in-house counsel:

> may not reveal or use employer/client secrets or confidences offensively in making a claim for employment discrimination or retaliatory discharge—unless, of course, such disclosures are authorized by another exception to D.C. Rule 1.6 (*e.g.*, the crime/fraud exceptions in subsection (d)).

D.C. Bar Ethics Op. 363 (Oct. 2012). This is so because D.C. Rule 1.6 principally contemplates *defensive* disclosure of client confidences or secrets. *See* Rule 1.6(e)(3) (disclosure of information defensively permitted "to the extent reasonably necessary" to respond to allegations by the client or in defending a civil claim). *Offensive* disclosure is permitted only in a fee collection action, and then only "to the minimum extent necessary." Rule 1.6(e)(5).

The ABA Model Rule of Professional Conduct, on the other hand, more generously permits offensive use of client confidences or secrets. In relevant part, Model Rule 1.6 provides:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . .
>
> (5) *to establish a claim or defense* on behalf of a lawyer in a controversy between the lawyer and the client . . . . (emphasis added).

Thus, under the Model Rules, an in-house lawyer may reveal client information in a wrongful discharge case against her former employer. Model Rule 1.6(b)(5); *see*

ABA Formal Op. 01-424, at 4 (Sept. 22, 2001) ("We conclude that a retaliatory discharge or similar claim by an in-house lawyer against her employer is a 'claim'" on behalf of a lawyer that can be asserted under this exception).

Ms. Koeck's SOX complaint was filed with the DOL, a "tribunal" within the meaning of the disciplinary rules.[11] The D.C. Rules have a specific choice of law provision relating to "tribunals." Rule 8.5(b)(1) provides:

> For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise . . . .

The Hearing Committee determined that administrative agencies of the Department of Labor "apply federal common law which looks to the American Bar Association ("ABA") Model Rules as the basis of its analysis of client confidences and attorney-client privilege." HC Rpt. at 24 (citing *Willy v. Admin. Review Bd.*, 423 F.3d 483, 496, 499-500 (5th Cir. 2005) (applying federal common law and ABA Model Rules when examining ARB decision)). It thus considered the propriety of Ms. Koeck's disclosures under the ABA Model Rule 1.6, and concluded that she was authorized to disclose client confidences in her retaliation complaint. HC Rpt. at 23-24. Indeed, this principle seems well established. *See Tides v. Boeing Co.*, 644 F.3d 809, 810-11 (9th Cir. 2011) (disclosures to SEC in whistleblower cases permitted); *Van*

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[11] "'Tribunal' denotes . . . [an] administrative agency, or other body acting in an adjudicative capacity. A[n] . . . administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." Rule 1.0(n); Model Rule 1.0(m).

Asdale v. Int'l Game Tech., 577 F.3d 989, 994-96 (9th Cir. 2009) (rejecting argument that state ethics rules barred use of confidential information in litigating an attorney's SOX whistleblower retaliation claim); *Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d 829, 850-54 (N.D. Cal. 2016) (allowing in-house counsel to bring SOX claims even though it would require disclosure of his former employer's privileged information); *Jordan v. Sprint Nextel Corp.*, No. 06-105, at 3 (ARB Sept. 30, 2009) (lawyer "not precluded from relying on statements or documents covered by the attorney-client privilege in pursuit of his SOX whistleblower complaint").

We agree with that conclusion. Insofar as this case involves disclosures made in the DOL proceeding, the Model Rules apply. Disciplinary Counsel does not seriously contend otherwise, ODC Br. at 16, and practical considerations reinforce that view. Ms. Koeck's Sarbanes-Oxley complaint arose out of events in Kentucky; her complaint was necessarily filed with OSHA's Regional Office in Georgia; the case was assigned to an investigator in Tennessee; and after the OSHA office dismissed the complaint, it was assigned to an ALJ in Ohio and then to an ALJ in Washington, D.C., where it was eventually appealed to the ARB. FF 3, 13, 28; RX E at 3. The uniform application of the Model Rules throughout the proceeding ensured a consistent, well-ordered ethics regime.

Disciplinary Counsel concedes that Ms. Koeck could properly disclose GE confidences and secrets to the DOL because of the preemptive effect of Sarbanes-Oxley. "Because SOX is a federal statute, it is likely, and for purposes of these proceedings [Disciplinary] Counsel will agree, that it is permissible for a member of

the D.C. Bar to disclose client confidences and secrets to establish a SOX claim, and not just to defend against a claim brought by a client." ODC Proposed Findings of Fact at 13; *see also* ODC Post-Hearing Br. at 17 ("Disciplinary Counsel . . . assumes, for the purposes of this litigation only, that [Sarbanes-Oxley] preempts Rule 1.6 in that it allows a lawyer to use client confidences to the extent reasonably necessary to establish a Section 806 whistleblower retaliation suit against an organization-client").

Nevertheless, Disciplinary Counsel—although candidly acknowledging that "no case . . . squarely holds that an in-house lawyer must report up the chain of command before filing a SOX retaliation claim in the Department of Labor" (ODC Br. at 19)—contends that before filing her SOX complaint, Ms. Koeck was obligated to exhaust the "reporting up" requirements in Rule 1.13 and the SEC's professional conduct standards (17 C.F.R. § 205.2(a)(1)).[12] ODC Br. at 20-21. We reject both contentions.

First, Rule 1.13 has no bearing on this case. Disciplinary Counsel charged Ms. Koeck with violating only Rule 1.6(a) and (g). She was not charged with a Rule 1.13 violation. Disciplinary Counsel may not properly seek to engraft Rule 1.13's procedural protocols onto the Rule 1.6 charge. We note that Rule 1.13 specifically provides that it "does not limit or expand the lawyer's responsibility under Rule[]

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[12] Rule 1.13(b) provides: "Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."

1.6 . . . ." Rule 1.13, cmt. [7]; *see also* Model Rule 1.13, cmt. [6] ("[T]his Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but *does not modify, restrict, or limit* the provisions of Rule 1.6(b)(1) – (6)." (emphasis added)).

Second, Disciplinary Counsel argues that internal reporting requirements of 17 C.F.R. § 205 also required Ms. Koeck to report further "up the chain" to GE's Board of Directors before filing her Section 806 complaint. The Hearing Committee correctly concluded, however, that the record was unclear as to whether Ms. Koeck was covered by Sarbanes-Oxley but, if she was, it was as a subordinate attorney who had fulfilled the reporting duties imposed upon her:

> We have not been able to satisfy ourselves that Koeck qualifies as an attorney "appearing and practicing before the Commission" as defined in § 205.2(a)(1)(ii), (iii), and (iv). However, we are satisfied that if she was so qualified, she would qualify as a subordinate attorney as defined by § 205.5 ("An attorney who appears and practices before the Commission . . . under the supervision or direction of another attorney . . . is a subordinate attorney"), and her mandatory internal reporting requirements were satisfied when she reported her concerns to her supervisor. *See* § 205.5(c) (subordinate attorney complies by reporting to supervising attorney).

HC Rpt. at 25. Ms. Koeck reported her concerns to her supervisor (her operating division's General Counsel), and also lodged her complaint with the GE Corporate Ombudsman. Sarbanes-Oxley required no more of her.

Finally, Disciplinary Counsel criticizes the substance of Ms. Koeck's Sarbanes-Oxley retaliation complaint, arguing that the disclosures were not reasonably necessary to the assertion of a retaliation claim because Ms. Koeck filed

a "false retaliation claim." *See* ODC Br. at 15-16. While Model Rule 1.6(b)(5) permits disclosures "to the extent the lawyer reasonably believes necessary . . . to establish a claim," Disciplinary Counsel argues it can "never be either reasonable or necessary to make a false claim." *Id.* at 16. Once again, however, we agree with the Hearing Committee that the filings were "reasonably necessary" to an adequate exposition of Ms. Koeck's complicated assertions of fraud, her purported discovery of the fraud, and the alleged retribution for her reporting of it. *See* HC Rpt. at 25-27.

For these reasons, we conclude that Ms. Koeck did not violate Model Rule 1.6 in connection with her filing of the retaliation complaint.[13]

C. Ms. Bernabei Violated Rule 8.4(a) on One Occasion.

Rule 8.4(a) provides that it is professional misconduct for an attorney to "knowingly assist or induce another to [violate or attempt to violate the Rules of Professional Conduct] . . . ." To act "knowingly" within the meaning of the Rule is to act with "actual knowledge of the fact in question," and knowledge "may be inferred from circumstances." Rule 1.0(f). Disciplinary Counsel contends that Ms. Bernabei violated Rule 8.4(a) when she assisted Ms. Koeck in making disclosures first to the press and later to the SEC. Ms. Bernabei concedes the former allegation

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[13] Before the Board, Disciplinary Counsel does not challenge the Hearing Committee's rejection of a Model Rule 1.6 violation for disclosures made in the appellate brief to the ARB or the Motion for Partial Summary Judgment. Disciplinary Counsel's contention before the Board is focused on the initial failure to report up the chain of command prior to the filing the initial complaint. *See* ODC Br. at 12-20; ODC Reply Br. at 2.

and disputes the latter. The parties fundamentally disagree over the state of mind necessary to establish a violation of the Rule.

The Hearing Committee did not meaningfully address the state of mind issue. It simply concluded that Ms. Bernabei violated 8.4(a) with respect to the press disclosures because her "[principal] purpose was to advantage the employment litigation." HC Rpt. at 30. It found no Rule 8.4(a) violation with respect to the SEC disclosure because it found the disclosure to have been proper. *See id.* at 27.

Disciplinary Counsel argues for a rigid liability standard with a minimal scienter component. That proposed standard is particularly problematic here, where the misconduct charge is predicated upon legal advice the respondent lawyer gave to a client. According to Disciplinary Counsel, even if Ms. Bernabei "genuinely, but mistakenly believed, that Ms. Koeck's disclosures were permissible," she violated the Rule. ODC Reply Br. at 15. Indeed, even where a lawyer acts without fault—that is, has done everything appropriate to avoid malpractice—and is completely convinced that advice provided to a client is correct, Disciplinary Counsel would find a violation if the advice turns out to be wrong. In effect, Disciplinary Counsel argues for a rule of strict liability. *See* OA Tr. 17-18.

Respondent, on the other hand, contends that "knowingly" to assist a client in a Rule violation requires knowledge of that violation. Bernabei Br. at 32. Ms. Bernabei argues that because she believed that Ms. Koeck's disclosures to the SEC were appropriate, she did not "knowingly" assist Ms. Koeck to violate Rule 1.6, and thus did not violate Rule 8.4(a). *Id.* at 32-33.

To that end Ms. Bernabei relies on elemental grammatical construction explained, albeit in a criminal case, by the Supreme Court in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). *Id.* In *Flores-Figueroa*, the Court construed a statute that provided for enhanced penalties if a person, in the course of committing one of an enumerated list of crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person . . . ." *Flores-Figueroa*, 556 U.S. at 652-53 (quoting 18 U.S.C. § 1028A(a)(2)). The government argued the term "knowingly" does not "modify the statute's last phrase ('a means of identification of another person') or, at the least . . . does not modify the last three words of that phrase ('of another person')." *Id.* at 648. The Court held, however, that as a "matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Id.* at 650; *see also United States v. Olson*, 856 F.3d 1216, 1220 (9th Cir. 2017) (for conviction of misprision of felony, government must prove not only that principal engaged in conduct that satisfies essential elements of the underlying felony, but also the defendant's knowledge that the conduct itself was a felony). It follows that it is equally "natural" to read Rule 8.4(a)'s word "knowingly" as applying to the underlying Rule violation.

Disciplinary Counsel places principal reliance on the somewhat ambiguous statement in *In re Wiggins*, Bar Docket No. 428-03, at 29 (HC Rpt. Feb. 7, 2006), *adopted by BPR*, July 31, 2006, *recommendation adopted in relevant part, In re Pennington*, 921 A.2d 135, 145 (D.C. 2007) that a respondent acted "knowingly" if

she was "aware of the critical facts underlying the violation." *See* ODC Post-Hearing Br. at 10; ODC Reply Br. at 14-15. Thus, Disciplinary Counsel argues, because "Ms. Bernabei does not dispute that she knew the information that Ms. Koeck revealed was confidential and secret and that GE vigorously objected to its disclosure," she "should have known that Ms. Koeck was violating a core ethical duty to her client by breaching her client's confidentiality" and thus violated the rule "[e]ven if [she] genuinely, but mistakenly believed, that Ms. Koeck's disclosures were permissible." ODC Reply Br. at 15.

Disciplinary Counsel, however, stretches the holding of *Wiggins* too far. *Wiggins* actually supports the argument posited by Ms. Bernabei.

In *Wiggins*, the respondent (Wiggins) advised his client (Pennington) that she (Pennington) could make core misrepresentations to her client. Bar Docket No. 428-03, at 30.

Before the Court of Appeals, Wiggins "concede[d] that Pennington's 'proposed course of conduct was fraudulent and that he knew it to be so . . . .'" *Pennington*, 921 A.2d at 144 (quoting Wiggins's brief). When Wiggins advised Pennington to mislead her client, he "knew, and certainly should have known, that her 'breach of her ethical responsibilities was an *obvious* one.'" *Id.* (emphasis added) (quoting Hearing Committee Report). Moreover, the *Wiggins* Hearing Committee rejected the rigid standard urged by Disciplinary Counsel in this case:

> Our conclusion *does not . . . saddle lawyers with "strict liability" for faulty legal advice. . . . We have no doubt that there are many gradations of poor legal advice that will not rise to the level of an ethical violation.* By the same token, however, ethical misconduct does

> not cease to be cognizable as such merely because it occurs through or in connection with the dispensation of legal advice. . . . In certain instances, advising a client can lead to an ethical violation. Rule 1.2(e) defines one such instance, *i.e., where an attorney knowingly counsels a client to engage in fraudulent conduct. We find that that is precisely what Respondent did in this case.*

Wiggins, Bar Docket No. 428-03, at 26 (emphasis added) (internal citations omitted). *Wiggins* thus compels the conclusion that, in the context of providing legal advice to a lawyer, violation of Rule 8.4(a) requires scienter with respect to the impropriety of a client's conduct. That is, the "critical facts underlying the violation" of Rule 8.4(a) of which a respondent must be aware include knowledge of the client-lawyer's predicate Rule violation. *See, e.g., In re LeBlanc*, 972 So. 2d 315, 318 (La. 2007) (per curiam) (knowingly assisting a judge's violation of Louisiana Rules of Professional Conduct where respondent "'clearly did know [the judge's solicitation of a donation to relative's political campaign] [was] wrong at the time he made the cash payment to Judge Green'") (quoting Hearing Committee Report). A respondent's testimony concerning his or her subjective awareness in that regard can be determinative so long as it is objectively reasonable under the circumstances. *Cf.* Rule 1.6, cmt. [21] ("Paragraphs (c) and (d) permit disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.").

We believe that that this is the appropriate construction of Rule 8.4(a), and are also of the view that Disciplinary Counsel's interpretation of the Rule would be counterproductive. Rule 1.6 is written in such a way as to encourage attorneys to

seek legal advice with respect to their ethical duties. Thus, attorneys may disclose client confidences and secrets "to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law, including these Rules." Rule 1.6(e)(6). Such disclosures are authorized "because of the importance of a lawyer's compliance with the Rules of Professional Conduct and other law." Rule 1.6, cmt. [13]. The Rule recognizes that the optimal way for attorneys to comply with their ethical obligations, which frequently raise complex and subtle questions, is to seek the counsel of others who are experienced in professional responsibility matters. In return, professional responsibility attorneys willingly accept a risk that is endemic to the practice of law, *i.e.*, that they will be held liable for acts of legal malpractice. It is far less likely that they would willingly advise clients on difficult matters if, as Disciplinary Counsel would have it, they risk strict liability for a Rule violation despite their best efforts and good faith.

Applying these principles in the instant case, we are of the view that Ms. Bernabei violated Rule 8.4(a) on only one occasion.

Ms. Koeck's violation of Rule 1.6(a) was patently obvious when it came to disclosing GE confidences to the press. As the Hearing Committee concluded, Respondents

> sought to use the press not to report crime or to protect financial interests, but rather, to gain leverage in the advancement of Ms. Koeck's SOX claim, nothing more. That purpose clearly was not

> within the limitations provided by SOX or Rule 1.6(d) of the D.C. Rules of Professional Conduct.

HC Rpt. at 30. Both Respondents "knew, and certainly should have known, that her 'breach of her ethical responsibilities was an obvious one.'" *Pennington*, 921 A.2d at 135 (quoting Hearing Committee Report). Ms. Bernabei quite properly concedes the violation and makes no claim to the contrary.

The disclosures to the SEC, however, are of a different nature. Ms. Bernabei contends that she firmly believed that Ms. Koeck was authorized to report the GE matters to the SEC because her client "had a right to disclose to the SEC what she believed to be evidence of crime [or] fraud. Her services had been used in furtherance of that . . . ." Tr. 446. For that reason, she felt the documents were no longer privileged and could be disclosed to the SEC. Tr. 380; *see* 17 C.F.R. § 205.3(d)(2)(iii); Rule 1.6(d)(2). *See generally* Bernabei Br. at 25-26.

The factual record supports the conclusion that Ms. Bernabei subjectively believed that disclosure to the SEC was permitted.

- She had substantial experience with the substantive legal issues involved. The month before her retention in the DOL case, she co-authored an article concluding that in-house attorneys do not violate the attorney-client privilege by reporting corporate fraud and misconduct. *See* RX 6 (Lynne Bernabei, Alan R. Kabat, & Jason M. Zuckerman, *Seven Questions for Sarbanes-Oxley Whistleblowers to Ask*, The Practical Lawyer, Oct. 2007).
- She believed her client's narrative to be credible, and tested it to her own satisfaction by reviewing the corroborating documentation provided to her.

Tr. 361-63, 378, 470, 531-32. Ms. Koeck "provided . . . multiple timelines. [H]er stories were always consistent. She went over and over again who she reported to, what their response would be, and provided memos to verify that." Tr. 363-64.

- Her opinion was consistent with that of her law partner and an associate who, at her request, had (albeit superficially) researched the ethical disclosure issue and determined that disclosure would "be safe." RX 7; Tr. 386, 391-92, 394. Her view was also consistent with that of the California lawyer who filed the SOX complaint (who alleged that GE's attorney-client "privilege does not apply, since the documents reveal corporate counsel's complicity . . . in commission of both fraud and crime," *see* FF 17), and with that of Mr. Blakey, a prominent criminal law professor. BX 85 at ¶¶ 1-7, 26.

It is also clear that Ms. Bernabei's subjectively held belief was objectively reasonable. The factual and legal issues arising out of alleged tax fraud and attendant disclosure standards were complex, subtle, and far from settled. "No one disputes that Sarbanes Oxley is complex." ODC Reply Br. at 18-19; *see also* ODC Br. at 4, 21; ODC Brief on Sanction at 6 ("Although Ms. Bernabei purports to be an expert in whistleblower cases, the applicable law—Sarbanes-Oxley and Rules 1.6 and 1.13—is complex and compliance requires rigorous analysis."). This case is a far cry from the "obvious" and "readily apparent" issues confronting the respondent in *Wiggins*.

Assessing all of the relevant circumstances, we conclude that Ms. Bernabei did not know that disclosure to the SEC was improper and her belief was objectively reasonable. Disciplinary Counsel thus did not prove that she violated Rule 8.4(a) in relation to Ms. Koeck's disclosures to the SEC.[14]

D. Ms. Bernabei's Statement to GE's Counsel Did Not Seriously Interfere with the Administration of Justice.

Rule 8.4(d) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that seriously interferes with the administration of justice." To violate Rule 8.4(d), the attorney's conduct must meet the following criteria: (i) the conduct must be improper; that is, "the attorney must either take improper action or fail to take action when, under the circumstances, he or she should act"; (ii) the conduct itself must bear directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) the conduct must taint the judicial process in more than a *de minimis* way; that is "at least potentially impact upon the process to a serious and adverse degree." *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996) (citation omitted).

Disciplinary Counsel argues that Ms. Bernabei's statement to GE's litigation counsel (that she had "marching orders" from her client to go the press if GE did not agree to mediation) sufficiently tainted the judicial process so as to violate Rule 8.4(d). Effectively recognizing that the remark had no actual effect on the DOL case, Disciplinary Counsel urges that a "smaller defendant might succumb to similar

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[14] Because our decision is based on our assessment of Ms. Bernabei's state of mind, we need not—and do not—determine whether GE engaged in crime or fraud, or whether the disclosures to the SEC were authorized by Sarbanes-Oxley or Rule 1.6.

threats if opposing counsel threatened to go public with embarrassing or detrimental attorney-client secrets," and "[a]ccordingly, there was at least a potential severe or adverse effect on the judicial process." ODC Br. at 35.

Ms. Bernabei never explicitly threatened to expose GE's confidences, and the record indicates that her statement was literally true: If GE did not mediate, Ms. Koeck and Mr. Blakey intended to go to the press. Tr. 554-55. Moreover, "litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Often a lawyer involved in the litigation is in the best position to assist in furthering these legitimate objectives." Rule 3.6, cmt. [1].

Nevertheless, the remark was perceived as a crass and unsophisticated threat. It was also self-defeating, since it served only to antagonize and motivate GE in its dispute with Ms. Koeck. Statements such as that made by Ms. Bernabei do nothing to advance the legitimate interests of a client, and most assuredly fail to meet the objectives of courtesy, respect, and fair dealing to which capable trial lawyers aspire. Nevertheless, the issue before us is whether the statement violated Rule 8.4(d), and we conclude that it did not.

It is undisputed that the remark had no effect on the proceedings before the DOL, the only proceeding that was underway at the time. Undoubtedly aware that adverse publicity is an unavoidable risk of contemporary litigation, GE—though offended by the statement—did nothing in reaction to it. GE did not agree to mediate, filed no motion or complaint with the tribunal, sought no sanctions, and

failed even to mention the remark in later correspondence with Ms. Bernabei. *See* Tr. 69, 139-140, 239-240; Bernabei Br. at 34-35. The statement thus had no actual effect on the administration of justice.

Nor could the statement have the potential impact urged upon us by Disciplinary Counsel. An inappropriate request or demand to compel mediation does not potentially impact the judicial process to any adverse degree because it can not lead to a waste of a tribunal's time. *Cf. In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009) (Rule 8.4(d) violation where unnecessary expenditure of a tribunal's time and resources). All mediation proceedings are privileged and inadmissible, and any resulting settlement can have only a salutary, not adverse, effect on the judicial process.

In any event, we are unwilling to extend Rule 8.4(d) to apply to statements between counsel during settlement discussions. Unpleasant, hyperbolic, or offensive statements in settlement-related conferences are to be frowned upon but simply do not violate that Rule. Indeed, the type of harm that Disciplinary Counsel seeks to avoid through an expansive application of Rule 8.4(d) is precisely that addressed by the proscriptions in Rule 8.4(g), which forbids a lawyer to "seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter." *See also* D.C Bar Ethics Op. 220 (Sept. 1991) ("Threats to File Disciplinary Charges"). The statement in this case, however, threatened neither, and we decline to expand Rule 8.4(g) through a back-door expansion of Rule 8.4(d).

Accordingly, the Hearing Committee correctly concluded that Ms. Bernabei did not violate Rule 8.4(d). *See* HC Rpt. 30.[15]

IV. SANCTION

As to Ms. Bernabei, we have reviewed *de novo* the Hearing Committee's recommendation of an informal admonition and hereby adopt it. As the Committee noted, Ms. Bernabei fully cooperated with Disciplinary Counsel's investigation, offered extensive mitigation evidence, and has no prior record of discipline. Because we do not find a Rule 8.4(d) violation, we decline to adopt Disciplinary Counsel's position that public censure is warranted for the combined Rule 8.4(a) and (d) violations.

As to Ms. Koeck, we have found three additional Rule 1.6 violations in addition to that found by the Hearing Committee: for her disclosures to the U.S. Attorney's Office, to Brazilian authorities, and to the SEC. These three additional

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[15] Disciplinary Counsel argues that the Hearing Committee erred in admitting the testimony of Richard Moberly, who was qualified as an expert on the Sarbanes-Oxley Act and Department of Labor Procedures and whose testimony in the former area was properly limited by the Chair. *See* ODC Br. at 36-39; Tr. 733.

The admissibility of expert testimony is within the discretion of a Hearing Committee. Testimony by legal experts about practices and procedures is not unusual. *See, e.g., In re Outlaw*, 917 A.2d 684, 686 (D.C. 2007) (per curiam) (expert testimony admitted in the field of personal injury practice in D.C. and Virginia); *In re Fair*, 780 A.2d 1106, 1111-1112 (D.C. 2001) (expert testimony admitted in the field of probate law). Ironically, although the Hearing Committee did not cite it, Disciplinary Counsel relied on and cited Mr. Moberly's testimony in a post-hearing brief. *See* ODC Post-Hearing Br. at 18, 22-27.

In any event, we will not render an advisory opinion, as requested by Disciplinary Counsel (ODC Br. at 38-39), concerning testimony that is not material and not relied upon either by the Hearing Committee or this Board. *In re Cooper*, 936 A.2d 832, 835 (D.C. 2007) (per curiam) ("Courts should not decide more than the occasion demands." (citation omitted)).

rule violations significantly increase the seriousness of her misconduct, the prejudice to GE, and the number of rule violations. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (providing that in determining the appropriate sanction, the Court considers: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his or her wrongful conduct; and (7) circumstances in mitigation or aggravation). For that reason, we believe a sixty-day suspension with a fitness requirement is warranted.[16] As noted *supra* and by the Hearing Committee, *see* HC Rpt. at 33, Ms. Koeck's repeated noncompliance with orders of the Committee, the Board, and the Court, as well as her failure to cooperate with Disciplinary Counsel, make a fitness requirement necessary and appropriate. *See In re Cater*, 887 A.2d 1, 6 (D.C. 2005) ("[T]o justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law."); *In re Hallmark*, 831 A.2d 366, 377 (D.C. 2003).

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[16] While case law is somewhat limited in our jurisdiction, we are aware of other jurisdictions that have imposed suspensory sanctions in comparable cases. *See, e.g., In re Schafer*, 66 P.3d 1036, 1038 (Wash. 2003) (en banc) (six-month suspension for disclosure of client confidences to various individuals including the press); *In re Lackey*, 37 P.3d 172, 180 (Ore. 2002) (per curiam) (one-year suspension for disclosing secrets gained from prior employment).

CONCLUSION

Having determined that Disciplinary Counsel has proven, by clear and convincing evidence, that Ms. Koeck violated Rule 1.6(a) with her disclosures to the press, a U.S. Attorney's Office, Brazilian authorities, and the SEC, we recommend that she be sanctioned with a sixty-day suspension and that, before being permitted to resume the practice of law, she be required to demonstrate fitness to do so pursuant to D.C. Bar Rule XI, § 3(a)(2).

Having reviewed the record and case law, we adopt the Hearing Committee's conclusion that Ms. Bernabei violated Rule 8.4(a) by knowingly assisting Ms. Koeck's disclosures to the press. The Board hereby directs Disciplinary Counsel to issue an informal admonition to Ms. Bernabei.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____

Robert C. Bernius
Chair

Dated: AUG 30 2017

This matter was decided during the 2016-17 term of the Board. All members of the Board concur in this Report and Recommendation, except Mr. Bundy, Mr. Carter, and Ms. Soller, who are recused.

EXHIBIT 4

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14-BS-1462

IN RE M. ADRIANA KOECK,
AKA ADRIANA SANFORD, RESPONDENT.

An Administratively Suspended Member of the Bar
of the District of Columbia Court of Appeals
(Bar Registration No. 439928)

On Report and Recommendation
of the Board on Professional Responsibility
(BDN 260-08)

(Decided February 8, 2018)

Before FISHER,* BECKWITH, and EASTERLY, *Associate Judges.*

PER CURIAM: In this case, the Board on Professional Responsibility has adopted the Ad Hoc Hearing Committee's uncontested findings that respondent M. Adriana Koeck violated Rule of Professional Conduct 1.6 (a) when she improperly disclosed confidences and secrets of her former employer to a

* Judge Fisher concurs in the judgment only.

newspaper reporter. In addition, the Board has determined that respondent violated Rule 1.6 (a) by making separate disclosures of confidences to the United States Attorney's Office for the Northern District of Illinois, the government of Brazil, and the Securities and Exchange Commission. Based on its determination that Respondent committed four separate rule violations, the Board has recommended a sixty-day suspension with a fitness requirement. (The Hearing Committee recommended a thirty-day suspension with a fitness requirement.) Respondent did not participate in these disciplinary proceedings at any stage, and she did not file any exceptions to the Committee's report or to the Board's Report and Recommendation.

Under D.C. Bar R. XI, § 9 (h)(2), "if no exceptions are filed to the Board's report, the [c]ourt will enter an order imposing the discipline recommended by the Board upon the expiration of the time permitted for filing exceptions." *See also In re Viehe*, 762 A.2d 542, 543 (D.C. 2000) ("When . . . there are no exceptions to the Board's report and recommendation, our deferential standard of review becomes even more deferential."). We discern no reason to depart from the Board's determination of misconduct to the extent it is based on the Committee's findings, adopted by the Board, that respondent disclosed the confidences of a prior client to a newspaper reporter, provided no defense for her disclosure, and did not respond

to Disciplinary Counsel's request for information. *See In re Burton*, 472 A.2d 831, 846 (D.C. 1984) (Disciplinary Counsel must prove each violation, and, if respondent raises a defense to the disclosure of confidential client information, Disciplinary Counsel must establish the defense does not apply.). Moreover, the Board's recommended sanction—a sixty-day suspension with a fitness requirement—is reasonable in light of the facts supporting this single violation of Rule 1.6 (a), *see, e.g.*, *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (in determining the appropriate sanction, the court considers the seriousness and extent of the conduct and respondent's response to the allegations); *In re Cater*, 887 A.2d 1, 6 (D.C. 2005) (to impose a fitness requirement the record must contain clear and convincing evidence that casts doubt on attorney's fitness to practice law), and Ms. Koeck's failure to object to discipline by this court in any measure.

Accordingly, it is

ORDERED that M. Adriana Koeck is hereby suspended for a period of sixty days with reinstatement subject to a showing of fitness. For the purposes of reinstatement respondent's period of suspension will not begin to run until such

time as she files an affidavit that fully complies with the requirements of D.C. Bar R. XI, § 14 (g).

So ordered.

A true Copy
Test:

Julio Castillo
Clerk of the District of Columbia Court of Appeals

BY _____
DEPUTY CLERK

Julio Castillo
Clerk of the District of Columbia
Court of Appeals

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on January 28, 2019, I deposited a true copy of the following document(s):

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

MARIA A. SANFORD
11301 W. OLYMPIC BLVD
SUITE #667
LOS ANGELES, CA 90064

MARIA ADRIANA SANFORD
LAYOLA MARYMOUNT UNIVERSITY
1 LOYOLA MARYMOUNT UNIVERSITY
CBA BLDG—C/O ADRIANA SANFORD
LOS ANGELES, CA 90045

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

BRIAN B. BAGHAI, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on January 28, 2019.

Paul Barona

Paul Barona
Court Specialist
State Bar Court