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

In the Matter of:	:	
	:	
TIMOTHY J. BATTLE,	:	
	:	
Respondent.	:	Board Docket No. 15-BD-061
	:	Bar Docket No. 2013-D253
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 306092)	:	

REPORT AND RECOMMENDATION
OF AD HOC HEARING COMMITTEE

I. INTRODUCTION

This disciplinary proceeding arises out of Respondent's conduct in 2010 and 2011 when he was representing a client (Robert Vohra, Esquire) in a disciplinary matter. Disciplinary Counsel[1] has alleged that Respondent revealed a former client's secrets in a brief filed on October 5, 2010, and that in April 2011 he violated the *Vohra* Hearing Committee Chair's instruction that he not participate in the cross-examination of his former client. Disciplinary Counsel has alleged that Respondent violated Rule 1.6(a) (revealing a former client's confidences and secrets without his authorization or other justification) as well as Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal, in this instance, a hearing committee order).

Based on this Hearing Committee's Findings of Fact and for the reasons discussed hereafter, we find by clear and convincing evidence that Respondent violated Rule 1.6(a) and

[1] The Specification of Charges was 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.

find that Disciplinary Counsel did not establish by clear and convincing evidence that Respondent violated Rule 3.4(c). The Hearing Committee recommends that Respondent receive a Board reprimand.

II. PROCEDURAL HISTORY

In a letter dated July 10, 2013, the Office of Disciplinary Counsel notified Respondent that it had commenced an inquiry into possible professional misconduct arising out of his representation of Mr. Vohra in Bar Docket No. 2006-D324. Disciplinary Counsel filed its Specification of Charges against Respondent on May 26, 2015. In the Specification of Charges, Disciplinary Counsel alleged violations of Rules 1.6(a) and (g), or alternatively, 1.6(e)(3), and 3.4(c). Respondent filed his Response to the Specification of Charges on July 8, 2015.

A pre-hearing conference was conducted on October 30, 2015, before the Chair of this Ad Hoc Hearing Committee, John J. Soroka, Esquire. At that conference, the parties discussed the schedule and Respondent's request to present testimony from Martin Shulman, Chair of Hearing Committee One, who presided over the *Vohra* proceeding. As to Chair Shulman's testimony, Chair Soroka requested that Respondent file a motion as to this request by November 20, 2015. The hearing was set for February 2-4, 2016. On November 20, 2015, Respondent filed a Motion to Dismiss or Permit Testimony by Chair of Committee Number One. Disciplinary Counsel filed an opposition to the motion on November 23, 2015. On January 29, 2016, Chair Soroka, denied the Motion to Permit Testimony by Chair of Hearing Committee Number One, and noted that the Hearing Committee would include a proposed disposition of the motion to dismiss in its Report and Recommendation to the Board.

A hearing was held on February 2 and 3, 2016, before an Ad Hoc Committee, comprised of John J. Soroka, Esquire, Chair; Mary Larkin, Public Member; and Rebecca C. Smith, Esquire,

Attorney Member. At the outset of the hearing, Respondent renewed his Motion to Dismiss or to Permit Testimony by Chair of Committee Number One. Chair Soroka denied the Motion to Permit Testimony by Chair of Committee Number One and reserved any ruling on the Motion to Dismiss. Chair Soroka addressed the need to protect the confidentiality of Disciplinary Counsel's Exhibit 12, the Brief filed by Respondent in the *Vohra* proceeding that contained alleged client confidences, and any related testimony. It was agreed that Exhibit 12 would be placed temporarily under seal (pending a motion to the Board to seal this exhibit) and the parties would review the hearing transcripts to identify portions to be redacted before placing the transcripts in the public record. Tr. 27-28.[2] Testimony was heard and exhibits were received. Disciplinary Counsel called as witnesses Lawrence Sizemore and Catherine Kello; Respondent called Sean Schmergel, Robert Vohra, and himself. Disciplinary Counsel Exhibits A-D and 1-18 were admitted; Respondent's Exhibits 4-6 were admitted.[3] Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on March 9, 2016; Respondent submitted his Proposed Findings of Fact and Conclusions of Law on April 6, 2016; Disciplinary Counsel submitted its Reply Brief on April 19, 2016.

[2] On April 5, 2016, the Board Chair granted Disciplinary Counsel's motion to seal the DX 12, as well as the hearing transcript and the parties' briefs. The parties were directed to file redacted versions of the sealed documents as part of the public record.

[3] On February 4, 2016, Disciplinary Counsel filed Exhibits 19 and 20, which were used for impeachment only, and which were not admitted into evidence. Disciplinary Counsel filed these exhibits so that they would be included in the case record. Respondent did not object to this filing.

III. FINDINGS OF FACT

1. Respondent, Timothy J. Battle, is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on March 5, 1980. His Bar number is 306092. DX A.[4] He also is a member of the Bar of the Supreme Court of Virginia. Tr. 268 (Battle).

2. Respondent has frequently represented lawyers and law firms, including providing professional responsibility advice and representing them in attorney discipline claims. Tr. 268-70, 296 (Battle).

3. Respondent also has taught, alone or as part of a panel, on ethics issues on approximately 100 occasions in Virginia and the District of Columbia. Tr. 268 (Battle).

4. Respondent provided Lawrence Sizemore, Esquire, advice from time to time. Tr. 36 (Sizemore), 274-78 (Battle); DX 12.

5. Respondent provided Mr. Vohra advice on professional responsibility matters and represented him in disciplinary matters, including a 2006 disciplinary proceeding. Tr. 282 (Battle).

6. In 2004, Mr. Sizemore represented Jeho Choi in a business transaction and related immigration matters. Mr. Sizemore determined that he needed to withdraw from the representation. He referred Mr. Choi to Mr. Vohra who began to represent Mr. Choi. Tr. 32-33 (Sizemore).

7. In 2006, Mr. Sizemore sought and received advice from Respondent in regard to his representation of Mr. Choi. Tr. 36-41 (Sizemore); DX 1 at 2.

[4] In this report, "DX" refers to Disciplinary Counsel's exhibits; "RX" refers to Respondent's exhibits; "Tr." refers to the February 2016, hearing transcript; DX 8 and DX 17 are transcripts of hearings in the underlying *Vohra* proceedings, and the page references to those exhibits are to the numbers on the transcript pages.

8. Catherine Kello was an Assistant Disciplinary Counsel assigned to investigate the conduct of Mr. Vohra arising from his representation of Mr. Choi. In the course of her investigation, she came across documents indicating that Mr. Vohra and Mr. Sizemore had formed a partnership. She telephoned Mr. Sizemore to obtain information about the partnership. Mr. Sizemore told Ms. Kello that there was no such partnership. Tr. 41-42 (Sizemore); 106-08 (Kello).

9. In 2006, Disciplinary Counsel subsequently filed a Specification of Charges against Mr. Vohra. The charges arose from Mr. Vohra's representation of Mr. Choi, and included a claim of dishonesty, resting in part upon Mr. Vohra's claim that he had formed a partnership with Mr. Sizemore. Tr. 109-10 (Kello). Respondent represented Mr. Vohra in the disciplinary matter. Tr. 282 (Battle).

10. The case against Mr. Vohra was scheduled for a hearing in September 2010. Ms. Kello subpoenaed Mr. Sizemore as a witness. Tr. 43 (Sizemore); Tr. 110, 117 (Kello).

11. On August 17, 2010, Ms. Kello met with Mr. Sizemore to prepare his testimony at the offices of his lawyer, John C. Keeney, Jr. Mr. Sizemore knew that Respondent was representing Mr. Vohra in the disciplinary proceedings. He informed Ms. Kello that Respondent had provided him legal advice in regard to his representation of Mr. Choi and that he objected to Respondent cross-examining him at the pending hearing. Tr. 43-44 (Sizemore); Tr. 110-12 (Kello).

12. Ms. Kello contacted Respondent about a possible conflict of interest arising from his representation of both Mr. Sizemore and Mr. Vohra. DX 2; Tr. 115-16 (Kello).

13. Respondent contended that there was no conflict of interest. On August 19, 2010, Ms. Kello moved to disqualify Respondent from representing Mr. Vohra. DX 3; Tr. 117 (Kello).

Chair Shulman postponed the September 1 hearing and converted the date to a pre-hearing conference to deal with the disqualification motion. DX 7; Tr. 117-18 (Kello).

16. At the pre-hearing conference, Chair Shulman set a briefing schedule for the motion to disqualify. In discussing the conflict of interest issues, Chair Shulman stated:

> It leads me to a point that I want to make to both counsel, which is that this is an issue that doesn't get decided just in the sterile legal context so that in your respective briefs the more you can tell me factually about the interchange and relationships involving the attorney-client relationships between Mr. Sizemore and Mr. Battle the more I can draw a judgment accurately as to whether there's a real problem here or not.

DX 8 at 18-19.

17. Disciplinary Counsel filed its Brief in Support of the Motion to Disqualify on September 13, 2010. DX 10; Tr. 118-19 (Kello).

18. Respondent filed his Brief in Opposition to the Motion to Disqualify (the "Brief in Opposition") on October 5, 2010. DX 12. The brief included multiple statements disclosing detailed information about and characterizations of Respondent's various legal representations of Mr. Sizemore. The particular statements at issue are set forth in a Confidential Appendix, attached hereto.

19. Respondent did not ask Mr. Sizemore's permission to reveal this information. Tr. 300-02 (Battle). Respondent did not seek to file the pleading under seal or take other measures to limit access to this information. Tr. 51-52 (Sizemore); Tr. 323-24 (Battle).

20. On October 15, 2010, Mr. Sizemore, through counsel, submitted a brief to the Hearing Committee, renewing his request that Respondent not cross-examine him. Mr. Sizemore pointed out that he had not consented to "the more detailed disclosures [in the Brief in Opposition] that described Mr. Sizemore's matters." He wrote, "The fact that these confidences and secrets so easily slip out in a written brief . . . underscores the importance that a former client

not be cross-examined by his former attorney where the former attorney has the potential to misuse, even unwittingly, the confidences and secrets of his former client." DX 18 at 1-2.

21. On October 28, 2010, Disciplinary Counsel submitted a Reply in Support of its Motion to Disqualify and noted that "[b]ecause Mr. Sizemore has not waived his attorney-client privilege with Mr. Battle as to the matters set forth in Respondent's opposition (which is a public document), Disciplinary Counsel asks that the Chair place that filing under seal so as to protect Mr. Sizemore's confidences and secrets." DX 13 at 1 n.1.

22. On November 10, 2010, about one month after the Brief in Opposition was first filed, Disciplinary Counsel and Respondent filed a motion to substitute a brief that redacted portions of the Brief in Opposition and moved to place the un-redacted Brief in Opposition under seal. That motion was granted. DX 15; Tr. 126-27 (Kello).

23. On November 22, 2010, Chair Shulman conditionally denied the motion to disqualify Respondent from continuing to represent Mr. Vohra, but ordered that Respondent execute an affidavit providing, among other things, that he not "indirectly or directly convey" any "information imparted to [Respondent] by Mr. Sizemore that in any way relates to the Chois and/or Mr. Sizemore's representation of the Chois" and that during the hearing, he "not examine and/or cross-examine Mr. Sizemore in any way, and all such examination will be conducted separately and independently by an attorney other than [Respondent] or Mr. Vohra." DX 16 at 31.

24. Respondent executed the affidavit. Tr. 8-9 (Battle); Tr. 127-29 (Kello).

25. Mr. Vohra engaged Sean Schmergel, Esquire, for the limited purpose of cross-examining Mr. Sizemore at the hearing on April 11, 2011. Tr. 181-82 (Schmergel); RX 6.

26. Mr. Schmergel prepared for the cross-examination of Mr. Sizemore by using a memorandum Mr. Vohra wrote to Respondent ("the Vohra memorandum"). RX 4. This memorandum described the business relationship between Mr. Vohra and Mr. Sizemore. "We had an informal agreement that we would operate our respective practices and share work where possible but would remain separate profit centers." RX 4 at 1. Using the Vohra memorandum, Mr. Schmergel drafted a list of questions for his cross-examination of Mr. Sizemore. The list included one question referencing "separate profit centers": "The arrangement was that you would share some work when possible, but essentially would eat what you kill (separate profit centers)?" RX 5 at 1; Tr. 195-96 (Schmergel).

27. At the April 11, 2011 hearing, Respondent did not sit at counsel table during Mr. Sizemore's testimony. Tr. 206-07 (Vohra).

28. Following Ms. Kello's direct examination of Mr. Sizemore, there was a recess. During recess, Respondent did not talk to Mr. Schmergel or to Mr. Vohra. Tr. 184 (Schmergel); Tr. 206-07 (Vohra). Before the hearing resumed, as Mr. Schmergel was standing at the podium, Respondent passed a note to Mr. Vohra. Tr. 130-31, 166 (Kello); Tr. 270-72 (Battle); DX 17 at 313.

29. Ms. Kello called this note to Chair Shulman's attention. Tr. 131 (Kello).

30. When asked, Respondent stated, "I handed a note to Mr. Vohra, which I don't think is in violation of the secondary counsel rule, to remind Mr. Vohra to hit one particular point that's got nothing to do with confidentiality, and that's it. I handed Mr. Vohra a note. I don't believe that is – in fact, the note could be seen by the Panel, or by Ms. Kello. I don't think it violates any of the rules we're working under." DX 17 at 311-12.

31. Chair Shulman read the note into the record: "As well as I can read the note, it says, 'Sizemore never lost a dime or paid a debt or asked to pay a debt.' Then there's an arrow. And it looks like it might be a dollar sign, 'finances are always separate. . . . With separate profit contours'?" Respondent stated that the word was "centers," not "contours." DX 17 at 313.

32. Chair Shulman directed that Mr. Schmergel was prohibited from asking Mr. Sizemore any questions along "these lines." DX 17 at 313.[5]

33. On June 27, 2013, the Court of Appeals issued a final opinion in the Vohra disciplinary action. *In re Vohra*, 68 A.3d 766 (D.C. 2013). After the opinion was issued, the Office of Disciplinary Counsel initiated an investigation of Respondent's conduct. Respondent received the first inquiry from Disciplinary Counsel in July 2013. Tr. 136-39 (Kello); 290-91 (Battle).

IV. CONCLUSIONS OF LAW

A. Respondent's Motion to Dismiss Should be Denied.

As noted above, Respondent filed a pre-hearing motion to dismiss. Pursuant to Board Rule 7.16(a), we recommend that the motion to dismiss be denied.

Respondent argues that the case should be dismissed because none of the participants in the *Vohra* case complained about his conduct, but instead, the complaint originated from Assistant Disciplinary Counsel Catherine Kello, who prosecuted this matter. There is no merit to Respondent's argument. D.C. Bar R. XI, § 6(a) empowers Disciplinary Counsel to "investigate all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of

[5] During the hearing, Ms. Kello asked that the note be made a part of the record, and Chair Shulman said that he would confer with his colleagues and consider this request. DX 17 at 314. The hearing continued for the afternoon without any further discussion of the issue. DX 17 at 315-64. The note was not found in the record. Tr. 133 (Kello).

[the Court of Appeals], which may come to the attention of Disciplinary Counsel or the Board *from any source whatsoever,* where the apparent facts, if true, may warrant discipline." (emphasis added). Thus, there is no requirement that one of the participants in the *Vohra* hearing lodge a complaint about Respondent's conduct.

Respondent also argues that the case should be dismissed because there is no clear and convincing evidence that he violated any disciplinary rule. As discussed below, we find clear and convincing evidence that he violated Rule 1.6(a).

For the foregoing reasons, we recommend that the Board deny Respondent's motion to dismiss.

B. Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Rule 1.6(a).

The Specification of Charges alleges that Respondent violated Rule 1.6(a) and (g) in that he revealed a former client's confidences or secrets and used them to the disadvantage of the former client and for the advantage of himself and /or Mr. Vohra.

Rule 1.6(a) provides:

> 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.

A "confidence" is defined in Rule 1.6(b) as "information that is protected by the attorney-client privilege under applicable law." A "secret" is defined as "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."

Comment 8 to Rule 1.6 explains:

> The rule of client-lawyer confidentiality applies . . . not merely to matters communicated in confidence by the client (*i.e.*, confidences) but also to all information gained in the course of 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 (*i.e.* secrets). This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge. It reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client.

In discussing the definition of "secret" under Rule 1.6(b), the Court has stated:

> [T]here can be no doubt that the information about [the attorney's client] disclosed by [the attorney] was so "gained." If there had been no professional relationship, then the alleged facts of which [the attorney] complained—[the client's] non-payment of her fees, her lack of cooperation, and her misrepresentation—would not have existed, and [the attorney] would [not] have known them . . . .

In re Gonzalez, 773 A.2d 1026, 1030 (D.C. 2001). Rule 1.6(g) provides that "[t]he lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment."

Before turning to our analysis of the charges against Respondent, we note that the Specification of Charges alleged that Respondent violated Rule 1.6(a), "in that he revealed a former client's confidences or secrets and used them to the disadvantage of the former client and for the advantage of himself and/or Mr. Vohra's advantage." Read as a whole, Disciplinary Counsel charged that Respondent violated Rule 1.6(a)(1), (2) and (3). However, Disciplinary Counsel did not offer evidence that Respondent used the former client's confidences to the former client's disadvantage or to Respondent's and/or Mr. Vohra's advantage. Disciplinary Counsel now asserts that Respondent's disclosure of client secrets was the result "of careless inattention to the Rules rather than malice." We agree with Disciplinary Counsel that there is no

evidence that Respondent used client confidences and secrets to his former client's disadvantage and to his and/or Mr. Vohra's advantage. Thus, to the extent that the Specification of Charges can be understood to charge violations of Rule 1.6(a)(2) and 1.6(a)(3), we find that Disciplinary Counsel has not proven those charges by clear and convincing evidence.[6] We now turn to our analysis of the alleged Rule 1.6(a)(1) violation.

1. Client Secrets

Respondent does not dispute that the information disclosed was obtained through the attorney-client relationship, but contends that the statements are not secrets because: (1) Mr. Sizemore never asked him to keep the information inviolate; (2) the statements are not "embarrassing"; and (3) the statements are not detrimental. Mr. Sizemore testified that he did not consent to the disclosure of this information[7] and considered the information to be client secrets, the disclosure of which was embarrassing and detrimental to him. Tr. 47-52 (Sizemore). As discussed in the Confidential Appendix, we agree with Mr. Sizemore that the information disclosed was embarrassing and detrimental. Disciplinary Counsel proved by clear and convincing evidence that these statements constitute client "secrets."[8] *Gonzalez*, 773 A.2d

[6] The Specification of Charges alleged in the alternative that Respondent violated Rule 1.6(e)(3) in that he made disclosures not reasonably necessary to respond to a disciplinary charge or allegation by a client. In its post-hearing brief, Disciplinary Counsel did not argue that Respondent's conduct was a separate and independent violation of Rule 1.6(e)(3), but rather, it argued that Rule 1.6(e)(3)'s exception to Rule 1.6(a)'s prohibition on the disclosure of confidences and secrets did not apply to the facts of this case. We agree with Disciplinary Counsel that the exception does not apply, but we do not find that Respondent violated Rule 1.6(e)(3). Instead, for the reasons discussed elsewhere, Respondent violated Rule 1.6(a)(1) because his disclosure of client secrets was not permitted by any exception found in Rule 1.6.

[7] In his October 2010 brief, Mr. Sizemore stated that he had not consented to the disclosure of this information, and, by Mr. Sizemore's conduct, it is apparent that he objected to the disclosure of this information. DX 18.

[8] The Specification of Charges alleges that Respondent disclosed client "confidences" as well as "secrets." However, in its post-hearing brief, Disciplinary Counsel argues only that Respondent

at 1030.

2. Exceptions Permitting Disclosure

Rule 1.6 prohibited Respondent from disclosing these "secrets" unless one of the exceptions set forth in that Rule applied. Respondent contends that disclosure was permitted under Rule 1.6(e)(2)(A) (disclosures required by court order) or Rule 1.6(e)(3) (disclosures to the extent reasonably necessary to establish a defense to a disciplinary charge formally instituted against the lawyer based on conduct in which the lawyer was involved). We conclude the disclosure is not within either exception.

Court Order Exception

Respondent invoked the court order exception relying on the statement of Chair Shulman at the September 1, 2010, pre-hearing conference:

> [T]his is an issue that doesn't get decided just in the sterile legal context so that in your respective briefs the more you can tell me factually about the interchange and relationships involving the attorney-client relationships between Mr. Sizemore and Mr. Battle the more I can draw a judgment accurately as to whether there's a real problem here or not.

DX 8 at 18-19.

Disciplinary Counsel argues that this exception does not apply because Chair Shulman's statement is not a "court order." We agree. Rule 1.6(e)(2)(A) uses the term "court," and not "tribunal." While a hearing committee arguably could be a "tribunal,"[9] there is no basis for finding it to be a "court." Further, Chair Shulman's statement is hardly an order "requiring disclosure," but instead is a request for information or a suggestion as to information that would

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disclosed "secrets," and asserts that Respondent did not disclose "confidences." We agree that Respondent did not disclose "confidences."

[9] *See* Rule 1.0(n) ("'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity.").

be helpful in resolving the disqualification issues.[10]

Even if it were an "order," as Comment 28 to Rule 1.6 makes clear, "a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it." Respondent in this instance proceeded in disclosing information, without seeking any clarification from Chair Shulman, challenging the request, seeking protective treatment of the information, notifying Mr. Sizemore of the information he planned to disclose, or even carefully crafting his response to provide information in a more objective and discrete manner so as to avoid the disclosure of client secrets. Thus, Disciplinary Counsel has established by clear and convincing evidence that the disclosure was not permitted by Rule 1.6(e)(2)(A).

Disclosure in Defense of a Disciplinary Action

Rule 1.6(e)(3) provides that "[a] lawyer may use or reveal client confidences or secrets . . . to the extent reasonably necessary to establish a defense . . . to respond to specific allegations by the client concerning the lawyer's representation of the client." The "Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer." Rule 1.6, cmt. [24]. Further, Comment 25 makes clear that disclosure under Rule 1.6(d)(3) is permissible only in response "specific" charges of misconduct by the client and not "in response to general criticism." Moreover, when responding to specific charges of misconduct "disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the

[10] Respondent characterizes Chair Shulman's statement to be "an instruction." "I want briefs and here is what I want." Tr. 327-28 (Battle). Even that interpretation is short of an "order requiring disclosure."

information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."

Respondent argues that his defense to the motion to disqualify and Mr. Sizemore's objection to his participation in cross-examining Mr. Sizemore should fall within this exception, claiming that it would "exalt form over substance." Respondent's Brief at 9. Disciplinary Counsel argues that the exception does not apply because no disciplinary proceedings had been instituted against Respondent.

Rule 1.6 safeguards a basic tenet of the legal profession—the requirement to maintain client confidences so that clients will be able to freely communicate with their lawyers. As the Supreme Court noted in the *Upjohn* case, "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U. S. 383, 393 (1981). Exceptions, therefore, should be few in number and strictly construed. Comments 24 and 25 make clear that this exception applies only to a formally instituted "civil, criminal, or disciplinary action against the lawyer." A motion to disqualify is not a formally instituted disciplinary action and thus does not create an exception permitting the disclosure of secrets. As such, Disciplinary Counsel has established by clear and convincing evidence that the disclosure was not permitted by Rule 1.6(e)(3).

3. No Actual Disclosure

Respondent further contends that there was no "actual disclosure" because the Brief in Opposition was only in the public record for one month before it was placed under seal. He characterizes this as a "hypothetical" disclosure and argues "no harm, no foul" because there is no evidence that any person other than parties to the proceeding and Disciplinary Counsel viewed the public filing.

Importantly, Rule 1.6, as a code of conduct, focuses on the lawyer's actions, not the consequence of the actions. The unlikelihood that information would be seen does not permit the disclosure of information in the public record. Rule 1.6 prohibits a lawyer from taking the action of "revealing" confidences or secrets, and if those confidences or secrets are to be revealed, requires the lawyer to take further action to limit access to the secrets or confidences. In filing the Brief in Opposition, Respondent revealed secrets and did not take action to protect those secrets from further disclosure.[11]

The Hearing Committee finds clear and convincing evidence that Respondent revealed client secrets in violation of Rule 1.6(a)(1).

C. Disciplinary Counsel did not prove by clear and convincing evidence that Respondent violated Rule 3.4(c).

Rule 3.4(c) provides that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." The "obligation" at issue here is the Hearing Committee order that Respondent not participate in the cross-examination of Mr. Sizemore. We have not found any cases in which a violation of a Hearing Committee order gave rise to a Rule 3.4(c) violation.

Disciplinary Counsel contends that a hearing committee is a tribunal under Rule 1.0(n) and thus that Chair Shulman's order constitutes a rule of a tribunal. Respondent did not address this point. While a hearing committee acts in a quasi-judicial role, it is not clear that it acts in an "adjudicative capacity." Rule 1.0(n) defines "tribunal" to include an administrative body acting

[11] One month after the initial filing, Respondent joined the motion by Disciplinary Counsel to file a redacted brief and place the un-redacted brief under seal. Disciplinary Counsel, not Respondent, initiated this request. Tr. 121-22, 126 (Kello). At the hearing in this action, Respondent said that filing the brief under seal was done out of "an abundance of caution. I don't know if it was necessary. I didn't disagree with it and if someone wanted to do it, fine." Tr. 365-66 (Battle).

in an adjudicative capacity. A body "acts in an adjudicative capacity when a neutral official . . . will render a ***binding*** legal judgment directly affecting a party's interest in a particular matter." (emphasis added.) A hearing committee has the power "to submit findings and recommendations on formal charges of misconduct to the Board, together with the record of the hearing." D.C. Bar R. XI, § 5(c). Thus, we question whether a hearing committee's action is binding within the meaning of Rule 1.0(n). Without resolving this question, we conclude, based on a review of all the evidence, that Disciplinary Counsel has not established by clear and convincing evidence that Respondent violated Chair Shulman's order, and thus, there is no violation of Rule 3.4(c).

Chair Shulman's order required that Respondent not participate in any way in the cross-examination of Mr. Sizemore. At issue is whether Respondent, in passing a note to Mr. Vohra shortly before the cross-examination of Mr. Sizemore, was attempting to participate in the cross-examination. Respondent denies this and insists that he passed the note to Mr. Vohra to remind him to "hit" a certain point in his upcoming testimony. Disciplinary Counsel contends that, under the circumstances, Respondent's explanation is not credible.

While the evidence presents conflicting information on several points, there is no dispute that Respondent passed a note to Mr. Vohra shortly before Mr. Schmergel began the cross-examination of Mr. Sizemore and did so in the open, in front of Disciplinary Counsel and the Hearing Committee. As Respondent testified, "The note was given, not in a sneaky or any kind of deceptive fashion, sitting right there in front of a panel that can see everything, to Mr. Vohra only." Tr. 270-71 (Battle).

A review of the testimony of Ms. Kello, Mr. Vohra, Mr. Schmergel and Respondent, presents conflicting information as what happened with the note. Ms. Kello testified that Mr.

Vohra passed the note to Mr. Schmergel. Tr. 131, 166 (Kello). Mr. Vohra denied passing the note to Mr. Schmergel. Tr. 207-08, 223 (Vohra). Mr. Schmergel testified that he did not receive any note from Mr. Vohra or Mr. Battle. Tr. 186, 187 (Schmergel). Mr. Schmergel also testified that he did not have any contact with Mr. Battle in preparing the cross-examination. Tr. 183-84 (Schmergel). We conclude that Mr. Schmergel did not receive the note.

The actual content of the note (as reflected in DX 17 at 313) is ambiguous. The note does not state—"pass this to Mr. Schmergel," or "ask Sizemore about profit centers." The note states "finances are always separate" with "separate profit centers"—which certainly could be a topic for Mr. Vohra, but also for Mr. Sizemore.[12]

Mr. Vohra's testimony is conflicting as to the significance of the note. On direct examination he testified, "I didn't think the note was that important, so I just put it down." Tr. 208 (Vohra). On cross-examination, he testified, "My recollection is I looked at the note, it seemed like a nonevent to me. I just put it back on my table." Tr. 223 (Vohra). When asked by one of the Hearing Committee members what he thought when he first read the note, Mr. Vohra testified, "I think it was Mr. Battle saying make sure the questions are asked of Sizemore related to being separate profit centers." Tr. 229 (Vohra).

Respondent was questioned at length about the note. Respondent testified that the note was intended to remind Mr. Vohra to make the point about profit centers in Mr. Vohra's upcoming direct testimony and that Respondent did not intend for this note to be communicated

[12] Separate profit centers referred to the idea that Mr. Sizemore and Mr. Vohra would operate separately from a financial perspective. The Vohra memorandum highlighted the "separate profit center" point and this reasonably would be part of Mr. Vohra's direct testimony. RX 4. Based on Mr. Sizemore's direct testimony, it is not apparent this would have been a point to make on cross-examination. Mr. Sizemore did not suggest that they had joint financial arrangements or that he lost money as a result of Mr. Vohra's actions. DX 17 at 271-73. Mr. Schmergel included a question along these lines in his outline for cross-examination of Mr. Sizemore, RX 5 at 1, but he prepared those questions based on the Vohra memorandum.

to Mr. Schmergel. Tr. 270-72, 332-34 (Battle). "I wanted Mr. Vohra to hit that later because there was lots of testimony by other witnesses that implied Mr. Vohra was somehow taking advantage of Mr. Sizemore's name or was getting benefit out of it, which he wasn't." Tr. 337-38 (Battle). When questioned as to why he felt the need to pass the note to Mr. Vohra right before the cross-examination of Mr. Sizemore, Respondent acknowledged that he "certainly could have waited until later." Tr. 337 (Battle).

Going back to the April 2011 hearing, Respondent was acutely aware of the prohibition on his participating in cross-examination. Right before the direct examination of Mr. Sizemore, Respondent requested a motion *in limine* clarifying the scope of Mr. Sizemore's testimony, noting a particular need for clarification because "I am not allowed to do anything as a result of the previous discussion and ruling." DX 17 at 256. When this incident occurred, Respondent promptly offered the note to the Panel and Ms. Kello, stating, "I don't think it violates any of the rules we're working under." DX 17 at 311-12. Chair Shulman prohibited Mr. Schmergel from asking any questions about profit centers, but at the time did not make any further comments on what is now alleged to be a knowing violation of Chair Shulman's order. DX 17 at 313-14.

Under the clear and convincing evidence standard, Disciplinary Counsel must offer "evidence that will produce in the mind of the trier of fact a *firm belief or conviction* as to the facts sought to be established." *In re Dortch*, 860 A. 2d 346, 358 (D.C. 2004) (emphasis added) (quoting *In re T. J.*, 666 A.2d 1, 16 n.17 (D.C. 1995)). Respondent was aware of the prohibition and appeared to respect that prohibition. He insisted in his statements in 2011 and in his testimony in this hearing that he was not attempting to participate in the cross-examination and did not violate the prohibition. We question why Respondent felt the need to pass a note to Mr. Vohra right before cross-examination and question his judgment in passing a note to Mr. Vohra

under the circumstances, but we also find it incredible that Respondent would brazenly violate Chair Shulman's order by passing a note related to cross-examination. Taking all the evidence together, the Hearing Committee does not have a "firm belief or conviction" that Respondent was attempting to participate in the cross-examination of Mr. Sizemore. Thus, the Hearing Committee does not find a violation of Rule 3.4(c).

V. RECOMMENDED SANCTION

Disciplinary Counsel recommends a public censure. Respondent seeks dismissal of the action, arguing he did not violate any rules, or in the alternative a *de minimis* sanction. For the reasons discussed below, the Hearing Committee recommends that Respondent receive a Board reprimand.

A. The factors to consider

In determining the appropriate sanction, the factors to be considered include: (1) the seriousness of the misconduct; (2) the presence of misrepresentation or dishonesty; (3) Respondent's attitude toward the underlying conduct; (4) prior disciplinary violations; (5) other mitigating circumstances; (6) whether counterpart provisions of the Rules of Professional Conduct were violated; and (7) prejudice to the client. *See, e.g.*, *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

The Court of Appeals has further instructed that the discipline imposed in a matter, although not intended to punish a lawyer, should serve to maintain the integrity of the legal profession, protect the public and the courts, and deter future or similar misconduct by the respondent-lawyer and other lawyers. *Hutchinson*, 534 A.2d at 924; *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc). Additionally, 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).

1. Seriousness of the Misconduct

In assessing the seriousness of Respondent conduct, Disciplinary Counsel has stated that Respondent appears to have acted out of "careless inattention to the Rules rather than malice, and he did not disclose confidences, *i.e.*, privileged communications." Disciplinary Counsel Brief at 14. Having observed Respondent and having considered the testimony and the exhibits, the Hearing Committee concurs. While, violations of a lawyer's duty to protect the client's secrets are not to be taken lightly, the Hearing Committee concludes that Respondent made this misstep, not out of malice, but rather because he was caught up in defending Mr. Vohra and failed to adequately consider his broader professional responsibilities, including responsibilities to his former client.

2. Misrepresentation or Dishonesty

Disciplinary Counsel contends that Respondent's statement that he did not intend to the pass the information to Mr. Schmergel for cross-examination "is troubling, because it is not true." Disciplinary Counsel Brief at 14. Having observed Respondent and considering all of the evidence, the Hearing Committee does not conclude that Respondent made a false statement during the disciplinary process.

3. Respondent's Attitude Toward the Underlying Misconduct

Disciplinary Counsel notes that Respondent, "who should be expert in professional responsibility law, does not recognize and acknowledge his misconduct." Disciplinary Counsel Brief at 15. Throughout this matter, Respondent has failed to acknowledge that he made an error in disclosing client secrets. He repeatedly stated that the information was not client secrets "in this context." Tr. 310, 359. We find that Respondent concluded that he was not disclosing client

secrets because the disclosures were made in the context of the motion to disqualify (Tr. 310), in a public record that was not of interest to the public (Tr. 325), and he "had no bad information on Mr. Sizemore" (Tr. 274-79). When asked whether in hindsight, filing the Brief in Opposition under seal was a necessary action to protect the secrets, Respondent stated, "I think it's an abundance of caution. I don't know if [it] was necessary. I didn't disagree with it and if someone wanted to do it, fine." Tr. 366 (Battle). Even at this late date in the proceeding, Respondent continued to communicate an indifference to his obligations in regard to client secrets.

4. Prior Discipline

Respondent has no prior disciplinary history.

5. Number of Violations

Respondent violated one rule in a single representation; there is not a pattern of misconduct.

6. Prejudice to the Client

Apart from the concerns raised by Mr. Sizemore (Tr. 47), the Hearing Committee finds that he suffered no actual prejudice.

B. Recommended sanction

The Hearing Committee recommends a sanction of a Board reprimand. In considering similar cases, we reviewed *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001), involving the disclosure of client secrets.[13] The facts in *Gonzalez* are very similar. Mr. Gonzalez included information constituting client secrets in a motion to withdraw and its attachments. *Id.* at 1028. Mr. Gonzalez justified disclosing this information on the basis that it was necessary to provide a

[13] Respondent notes that he was counsel for respondent Gonzalez. Respondent's Brief at 14 n.4.

reasonably detailed justification for the withdrawal. *Id.* Mr. Gonzalez did not seek to file the motion *in camera*. *Id.* at 1032. In imposing a sanction, the Board observed that Mr. Gonzalez "had made a mistake he is not likely to make again . . . ." *Id.* at 1028. The Board recommended an informal admonition, and the Court of Appeals agreed. *Id*. at 1032.

The instant case is distinguishable from *Gonzalez* in two important aspects. First, the disclosures in *Gonzalez*, although improper, were directly relevant to the motion to withdraw. In this instance, Respondent disclosed information well beyond that which was relevant to the motion to disqualify. Second, Respondent has failed to express any remorse or demonstrate any sensitivity to the issues around client secrets, and thus there is no basis to conclude that Respondent will not make this mistake again. Under the circumstances, the Hearing Committee concludes that an informal admonition by Disciplinary Counsel is not an appropriate sanction.

Disciplinary Counsel cites a number of cases supporting public censure, while noting that "the sanction primarily reflects Respondent's obdurate refusal to recognize his misconduct." Disciplinary Counsel Brief at 15. We distinguish this case from the cited cases in that it involves a single violation (as distinguished from *In re Watkins*, 881 A.2d 585 (D.C. 2005)) and involves the less serious misconduct of disclosing client secrets—not the disclosure of privileged information, neglect or dishonesty.

It may be that Respondent's real failing was that he lost objectivity in representing Mr. Vohra and, in doing so, compromised his responsibilities to a former client. Respondent considered this disciplinary proceeding to be retaliation by Disciplinary Counsel against him because Mr. Vohra received a lesser sanction than sought by Disciplinary Counsel. Tr. 22, 290 (Battle). Throughout this proceeding, Respondent has not been able to step back and reflect on his error.

Mindful that the purpose of a sanction is not to punish an attorney, but rather to promote the protection of the public, we believe the conduct in this case merits a reprimand by the Board.

VI. CONCLUSION

We recommend that the Board find that Respondent violated Rule 1.6(a)(1) and that he receive a Board reprimand.

AD HOC HEARING COMMITTEE

/JJS/
John J. Soroka, Esquire
Chair

/MCL/
Mary C. Larkin
Public Member

/RCS/
Rebecca C. Smith, Esquire
Attorney Member

Dated: November 4, 2016

The Chair thanks Ms. Smith for her work as the primary drafter of this report.