IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

LARRY KLAYMAN

Plaintiff,

v. CASE NO. 19-15104 -- MB

ROGER STONE,

PETER SANTILLI,

&

DEBORAH JORDAN,

Defendants

_____/

DEFENDANT ROGER STONE'S MOTION TO DISMISS THE COMPLAINT AND MOTION TO STRIKE THE COMPLAINT

Defendant, through counsel, files this motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fla. R. Civ. Pro. 1.140(b)(6) and motion to strike Plaintiff's claims pursuant to Fla. R. Civ. P. 1.140(f).

INTRODUCTION

Plaintiff Klayman alleges that Defendant Roger Stone has engaged in defamation, defamation *per se*, and defamation by implication by working "in concert" with the other two defendants. Quizzically, no conspiracy is alleged. These allegations fail to support any cause of action against Stone. Roger Stone, by trade, is a political pundit and commentator who is well-known for making unconventional and sometime controversial statements to the media. The complaint alleges none against Plaintiff.

Plaintiff is an attorney who is well-known for his 'throwing something on the wall in the

hopes that it sticks' approach to filling lawsuits. In fact, Plaintiff "likens his legal work to a MIRV missile, outfitted with many nuclear warheads, '[a]t least one will get through to accomplish the mission,'"[1] and has said that he's filed "thousands"[2] of lawsuits. Indeed, Klayman revels in the notoriety he receives for his controversial, numerous, and unsuccessful lawsuits.[3] Klayman is well-known to support conspiracy theories, such as the anti-Obama 'birther' theory.[4] The birther theory is the false claim that Barack Obama was not born in the United States and therefore his election and reelection to the presidency was a violation of the Constitution. His new favorite target is Roger Stone.

Plaintiff Klayman's allegations are threadbare assumptions of character based alleged conduct Stone may have said and done to others and not Plaintiff. Because Santilli or Jordan said something, Stone must have put them up to it – they are working together. According to Plaintiff Klayman, Stone is in the mafia or portrays himself as a mafia figure. Complaint ¶¶ 18, 97, 101. This is absurd.

Klayman accuses Santilli of making statements that have injured Klayman in his profession and business as a lawyer and public advocate, and personally. *See* Complaint ¶ 58. However, none of the statements were made by Stone.

In short, Plaintiff claims that because Stone has done bad things, he has worked in

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[1] David Montgomery, *Can Larry Klayman make history with his NSA lawsuit?*, The Washington Post Magazine, May 9, 2014, https://www.washingtonpost.com/lifestyle/magazine/can-larry-klayman-make-history-with-his-nsa-lawsuit/2014/05/08/0a858436-b5c0-11e3-8cb6-284052554d74_story.html?utm_term=.93d7fc5ef51e

[2] Dana Milbank, *Dana Milbank: Larry Klayman's legal massacre*, Florida Today, Jan. 3, 2015, https://www.floridatoday.com/story/opinion/columnists/syndicated/2015/01/03/dana-milbank-larry-klaymans-legal-massacre/21101645/.

[3] *Id.* ("He uses litigation as a press strategy. His lawsuits allow him to uncover documents and depose officials, which makes news and gets him headlines. 'You report more when I file a lawsuit,' Klayman explained. 'It's like a prizefight'").

[4] *Larry Klayman*, Southern Poverty Law Center, https://www.splcenter.org/fighting-hate/extremist-files/individual/larry-klayman (last visited March 22, 2019).

concert with the other defendants who have said bad things about Klayman. Some of those bad things said support an assault and an emotional distress claim. The causes of action for assault and emotional distress are frivolous. No claims of imminent violence are alleged and the same defamation allegations cannot support a separate cause of action for emotional distress. The lawsuit does not allege the elements of any cause of action. The lawsuit should therefore be dismissed with prejudice.

I. Standards for Dismissal

It has long been recognized in this state the importance and need to safeguard public debate, and freedom of speech requires that special scrutiny is given to defamation claims at the motion to dismiss stage. *See, e.g., Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 363 (Fla. 4th DCA 1997). "Where the court finds that a communication could not possibly have a defamatory or harmful effect, the court is justified in…dismissing the complaint for failure to state a cause of action…" *Wolfson v. Kirk*, 273 So.2d 774, 778 (Fla. 4th DCA 1973).

Florida requires that a plaintiff must set forth "ultimate facts" in support of each claim alleged in the complaint. *See* Fla. R. Civ. P. 1.10(b). The complaint "must set forth factual assertions that can be supported by evidence which gives rise to legal liability." *Barrett v. City of Margate*, 743 So.2d 1160, 1162-63 (Fla. 4th DCA 1999). Pleading "opinions, theories, legal conclusions or arguments" "is insufficient" for a plaintiff to meet the requirements of fact pleading in the complaint. *Id.* at 1163. What is clear in this case is that Stone is not alleged to have said anything – let alone something defamatory.

II. There is no Cause of Action as to Counts I, II, and III – Defamation, Defamation *Per Se*, and Defamation by Implication

A. Defamation

Under Florida law, defamation is comprised of five elements: "(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1006 (Fla. 2008). There is a further requirement under the First Amendment for plaintiffs that are public figures, which Klayman most certainly is.[5] "As a compromise to the First Amendment's protections of free speech and press, the Supreme Court has held that 'public officials' and 'public figures' must prove that a defendant's allegedly defamatory statement was made with 'actual malice,' meaning that it was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Klayman v. City Pages*, 2015 WL 1546173, at *12 (M.D. Fla. Apr. 3, 2015), *aff'd*, 650 Fed. Appx. 744 (11th Cir. 2016) (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-290 (1964)). This exacting standard reflects the United States' "profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open, [although] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Moreover, "[a]n intention to portray a public figure in a negative light, even when motivated by ill will or evil intent, is not sufficient to show actual

[5] "Because of Klayman's notoriety and high-profile work in the public realm, the Court considers Klayman a public figure." *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1251 (S.D. Fla. 2014), *aff'd* (Feb. 17, 2015), *see also Klayman v. City Pages*, 13-CV-143-OC-22PRL, 2015 WL 1546173, at *13 (M.D. Fla. Apr. 3, 2015), *aff'd*, 650 Fed. Appx. 744 (11th Cir. 2016), and *aff'd*, 650 Fed. Appx. 744 (11th Cir. 2016) (The Court notes that Klayman admits that he is a public figure).

malice unless the publisher intended to inflict harm through knowing or reckless falsehood." *Don King Prod., Inc. v. Walt Disney Co.*, 40 So.3d 40, 45 (Fla. 4th DCA 2010).

"A false statement of fact is absolutely necessary if there is to be recovery in a defamation action." *Friedgood v. Peters Pub'lg Co.,* 521 So.2d 236, 242 (Fla. 4th DCA 1988). "The allegedly defamatory words must be read in the context of the entire publication, and if the documents could not possibly have a defamatory effect, the complaint may be dismissed or a directed verdict granted. *Zorc v. Jordan*, 765 So.2d 768, 771 (Fla. 4th DCA 2000) (citing *Friedgood,* 521 So.2d at 242)). "A political publication may not be dissected and judged word for word or phrase by phrase. The entire publication must be examined." *Pullum v. Johnson*, 647 So.2d 254, 257 (Fla. 1st DCA 1994) (internal citations omitted) (quoting *Desert Sun Publishing Co. v. Superior Court for Riverside County*, 158 Cal.Rptr. 519, 521 (Ct. App. 1979).

> [T]he balance between the First Amendment and law of defamation sought by *Milkovich* protects speech that may injure the reputation of a person…who voluntarily enters the public political arena. In fact, because of the frequent use of ill-considered, name calling attacks in American political debate, '[w]e expect people who engage in controversy to accept that kind of statement as their lot. We think the first amendment demands a hide that tough.'

Pullam, 647 So.2d at 257 (quoting *Ollman v. Evans*, 750 F.2d 970, 1005 (D.C. Cir. 1984)).

The Supreme Court has made it clear that statements of opinion are not capable of being proven true or false, and therefore, not actionable for defamation. *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20 (1999). Under Florida state law, where, as in this case, a defendant provides commentary or opinion based on facts which are set forth in the publication, or which are otherwise known or available to the reader or listener as a member of the public, is non-actionable "pure opinion." *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 57 (Fla. 1st DCA 1981).

Both Klayman and Stone are well-known public figures who have based their career on defending and advocating unorthodox and controversial statements and issues. Mr. Klayman, as a lawyer, governed by the Rules of Professional Responsibility must govern himself accordingly and maintain a tough hide. *See Pullam,* 647 So.2d at 257. As noted above, Klayman was a leading proponent of the false and divisive "birther" controversy. This conspiracy theory was proven false time and time again, yet Plaintiff continued to promulgate this false and potentially harmful theory. It appears that Plaintiff can do and say whatever he pleases, but the moment someone publicly discloses their opinion of him, he files suit against them.

Suing people without factual support is Klayman's *modus operandi* and this behavior has earned him admonishments from several courts. In fact, as recently as August 2018, the Disciplinary Counsel for the District of Columbia found that Klayman had violated a number of Rules of Professional Conduct while acting as an attorney in Washington, D.C., Nevada, and the United States Court of Appeals for the Ninth Circuit. *See* Exhibit 1. His improper conduct includes asserting or controverting "an issue when there was no basis in law and fact for doing so that was not frivolous," "knowingly ma[king] a false statement of fact to a tribunal or failed to correct a false statement of material fact previously made to the tribunal," "knowingly ma[king] false statements of fact or material fact, and [failing] to disclose a fact necessary to correct a misapprehension known by the applicant to have arisen in the matter," "knowingly assist[ing] or induc[ing] another to violate the Rules of Professional Conduct or did so through the acts of another," "engag[ing] in conduct involving dishonest, deceit, and misrepresentation," and "engag[ing] in conduct seriously interfering with or prejudicial to the administration of justice." *See* Exhibit 1.[6] Furthermore, Klayman has been banned from appearing in the courtrooms of two

[6] Klayman has actually sued the individuals of the Disciplinary Counsel for the District of Columbia as well as the Office of the Disciplinary Counsel itself for "acting in concert in a conspiracy under the 'color' of state

federal Judges because of his egregious and unprofessional behavior.[7] None of Plaintiff's allegations show in any way how Stone published this purportedly defamatory statements with the knowledge that they were false or with reckless disregard. Furthermore, Klayman claims to be aggrieved based upon statements regarding the Bundy case, but his *pro hac vice* admission in the Nevada District Court was denied. *See* Complaint ¶¶ 5, 15, 38, 51, 52. *In re Bundy,* 840 F.3d 1034, 1049 (9th Cir. 2016), subsequent mandamus proceeding, 852 F.3d 945 (9th Cir. 2017). Plaintiff Klayman was not admitted to practice in Nevada and the basis of the claims against Santilli were his remarks about Klayman not properly representing Bundy in Nevada. Nothing defamatory and nothing Stone could be a part. Klayman's suit centers on how he was defamed regarding his representation of Cliven Bundy.

The United States Court of Appeals for the Ninth Circuit noted how "the district court found quite relevant, 'numerous other courts' findings that he [Klayman] is unfit to practice' based on his 'inappropriate and unethical behavior.'" *Id.* at 1045, included as Exhibit 2. Below are just a few of the findings of the District Court regarding Klayman's conduct which were affirmed by the 9th Circuit:

- "Klayman's record demonstrates more than an occasional lapse of judgment, it evinces a total disregard for the judicial process." Order Denying Pro Hac Vice Application at 4, *Stern v. Burkle*, 867 N.Y.S.2d 20 (Sup. Ct. 2008). (not available)
- Klayman's ability to appear *pro hac vice* in the United States District Court for the Southern District of New York was revoked in perpetuity and he was sanctioned for "undignified and discourteous conduct that was degrading to the [district court] and prejudicial to the administration of justice" by, among other

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law…intentionally violat[ing] Mr. Klayman's statutory, constitutional and other rights due to Mr. Klayman's political beliefs, public interest activism and gender, pursuant to their own individual biases, prejudices, political views, loyalties, and allegiance." Complaint at 2, *Klayman v. Fox, et al,* Case No. 1:18-cv-01579-RDM, 2018, ECF No.1.

[7] *See In re Bundy*, 840 F.3d 1034, 1038 (9th Cir. 2016) *subsequent mandamus proceeding,* 852 F.3d 945 (9th Cir. 2017) (this case also gives a comprehensive history of Klayman's unprofessional and litigious behavior over the course of his career).

things, making accusations of racial and political bias and acting "abusive[ly] and obnoxious[ly]. *MacDraw Inc., v. CIT Grp. Equip. Fin., Inc.*, 994 F.Supp 447, 455 (S.D.N.Y. 1997), *aff'd* 138 F.3d 33 (2nd Cir. 1998). *See* Exhibit 3.

- Klayman was sanctioned for filing an untimely complaint and opposing the government's motion with "frivolous filings" that "wasted time and resources of defendants as well as of the court." *Wire Rope Importers' Ass'n v. United States*, 18 C.I.T. 478, 485 (Ct. Int'l Trade 1994). *See* Exhibit 4.

Bundy, 840 F.3d at 1045-1046, *see* Exhibit 2. The Court also noted, "Klayman has a reputation as a vigorous litigator, but this is not a flattering record, and not one that the district court should ignore" (*id.* at 1046-1047) following the detailed history of Klayman's unprofessional and beyond questionable behavior. Exhibit 2.

Stone is not alleged to have perpetuated any comments about Klayman, outside of "acting in concert."

B. Defamation *Per Se*

Defamation *per se* is actionable in Florida "if it imputes to another (a) a criminal offense amounting to a felony, or (b) a presently existing venereal or other loathsome and communicable disease, or (c) conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession, or office, or (d) the other being a woman, acts of unchasti[t]y." *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1247 (S.D. Fla. 2014); *see also Campbell v. Jacksonville Kennel Club, Inc.*, 66 So.2d 495, 497 (Fla. 1953).

Plaintiff does not allege Stone said anything. The complaint does not sufficiently allege how they worked in concert. They do not work or live in the same county. Like minded people are free to advocate similar political positions. This does not mean Stone compelled the other defendants to say something they did not independently conclude as an autonomous free-thinking person.

C. Defamation by Implication

"Defamation by implication arises where the publication is factually true, but conveys a false and defamatory meaning to the ordinary reader." *Spilfogel v. Fox Broad Corp.*, 2010 WL 11504189, *4 (S.D. Fla. 2010). A plaintiff can only state a claim for defamation by implication if the challenged statements can reasonably be read to convey a false, defamatory implication and on their face demonstrate that the author intends or endorses that false, defamatory implication. *See Jews for Jesus*, 997 So.2d at 1107. However, even if statements are defamatory by implication, "a defendant is still protected from suit if his statements qualify as an opinion." *Turner v. Wells,* 879 F.3d 1254, 1265 (11th Cir. 2018) (quoting *Brown v. Tallahassee Democrat, Inc.*, 440 So.2d 588. 590 (Fla. 1st DCA 1984)). More importantly however, while defamation by implication has been recognized by the Florida Supreme Court, the Court has only allowed one case of defamation by implication in the context of a public figure plaintiff asserting such a claim.[8]

Klayman has been accused of sexual harassment in various arenas. Indeed, a former client of Klayman's has filed a complaint with the D.C. Bar in which he notes that Klayman was accused of sexual harassment while employed at Judicial Watch.[9] Stone was aware of Mr. Santilli's complaint and said complaint predates the statement Klayman attributes to Stone. Klayman has also been accused of improper sexual advances by a former client, who has also filed a complaint with the D.C. Bar. *See* Exhibit 5.

Additionally, it is well known that Klayman, during divorce proceedings was found to have "on more than one occasion the Plaintiff [Klayman] act [sic] in a grossly inappropriately

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[8] *See Gottwald v. Bellamy*, 2011 WL 2446856 (M.D. Fla. June 15, 2011) (claims of defamation arising out of allegations of copyright infringement).

[9] *See* Peter T. Santilli, D.C. Bar Complaint 1/28/19, available at https://www.scribd.com/document/398428802/DC-Bar-Complaint-Against-Attorney-Larry-Klayman.

[sic] manner with the children. His conduct may not have been sexual in the sense that he intended to or did derive any sexual pleasure from it or that he intended that the children would. That, however, does not mean that he didn't engage in those acts or that his behavior was proper." *Klayman v. City Pages*, 650 Fed. Appx. 744, 746 (11th Cir. 2016) (citing records from Klayman's 2009 divorce hearing regading Klayman's behavior towards his own children). *See* Exhibit 5.

III. <u>There is no Cause of Action as to Counts IV Infliction of Emotional Distress</u>.

As to intentional infliction of emotional distress, the elements for this tort are:

(1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;

(2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;

(3) the conduct caused emotion distress; and

(4) the emotional distress was severe.

LeGrande v. Emmanuel, 889 So. 2d 991, 994 (Fla. 3d DCA 2004).

The statements alleged are insufficient to rise to the level of emotional distress from outrageous conduct. "Although we recognize that being branded a thief in front of one's parishioners might certainly be unsettling, embarrassing, and/or humiliating for a member of the clergy, we do not believe that this alleged conduct is the type of extreme and outrageous conduct needed to support a claim for the intentional infliction of emotional distress as a matter of law." *LeGrande v. Emmanuel*, 889 So. 2d 991, 995 (Fla. 3d DCA 2004) (citing *e.g., Shedeke v. Gomez*, 837 So.2d 1122, 1123 (Fla. 4th DCA 2003)).

Nothing alleged in the complaint as statements made is not fully supported by legal precedent and cited and provided with this motion. Outside of its obvious truthfulness, the allegations are not so outrageous it rises to the level of a separate tort. *See id.*

Furthermore, emotional distress cannot stem from a defamation action. "In short, regardless of privilege, a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as "outrageous." *Fridovich v. Fridovich*, 598 So. 2d 65, 70 (Fla. 1992) (citing *Boyles v. Mid–Florida Television Corp.,* 431 So.2d 627, 636 (Fla. 5th DCA 1983), approved on other grounds, 467 So.2d 282 (Fla.1985)). The outrageous conduct comes from the vague incantation of "acting in concert" claim by Plaintiff, a public figure, who slings false theories and then complains when it fails under scrutiny. This is not outrageous conduct it is the First Amendment in action.

IV. Failure to State a Claim as to Assault (Count V)

Plaintiff does not allege that Stone ever threatened to do physical harm. Plaintiff does not claim Stone had the apparent ability to act on the threat he did not make.

> An "assault" is an intentional, unlawful offer of corporal injury to another by force, or exertion of force directed toward another under such circumstances as to create a reasonable fear of imminent peril. *See Lay v. Kremer,* 411 So.2d 1347 (Fla. 1st DCA 1982).
>
> Thus, it must be premised upon an affirmative act—a threat to use force, or the actual exertion of force. Similarly, a battery consists of the intentional infliction of a harmful or offensive contact upon the person of another, *see Chorak v. Naughton,* 409 So.2d 35 (Fla. 2d DCA 1981), but [t]he defendant must have done some positive and affirmative act ... which must cause, and must be intended to cause, an unpermitted contact.
>
> Mere negligence, or even recklessness which only creates a risk that the contact will result, may afford a distinct cause of action in

> itself, but under modern usage of the term it is not enough for battery. W. Prosser, Law of Torts, § 9, at 35–36 (4th ed. 1971).

Sullivan v. Atl. Fed. Sav. & Loan Ass'n., 454 So. 2d 52, 54–55 (Fla. 4th DCA 1984).

Plaintiff's claim of assault is meritless. He does not allege a threat of a physical injury or physical action that threatened injury. Plaintiff does not allege even Stone said anything. The best the complaint does is claim Stone like "Mafia" stuff. This is insufficient and scandalous and should be dismissed or stricken.

V. Motion to Strike Plaintiff Klayman's Statements

"A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." Fla. R. Civ. P. 1.140(f). Furthermore, a motion to strike a matter as redundant, immaterial or scandalous should be "granted if material is wholly irrelevant, can have no bearing on equities, and no influence on the decision. *Pentecostal Holiness Church v. Mauney,* 270 So.2d 762, 769 (Fla. 4th DCA 1972). As such, Defendant Stone moves this Court to strike the following:

- "Awarding Plaintiff Klayman's attorney's fees and costs" (Compl. b). There is no statute or contract that supports such a remedy.
- "Awarding Plaintiff Klayman compensatory and actual including consequential and incidental damages in excess of $10,000,000 million U.S. Dollars." (Compl. a). There is no basis in the complaint for such a request, nor is it jurisdictional.
- Plaintiff Klayman's request for "preliminary and permanent injunctive relief" (Compl. b). Mr. Klayman has no claim for an injunction as he failed to move for it in his complaint.

- Paragraph 6 of Plaintiff's Complaint is surplusage and has nothing to do with the alleged defamation [what does it say?]
- Paragraphs 18, 98, 101, 102 because Klayman wasn't threatened in "Mafia style," nor does anything alleged in that paragraph have anything to do with the alleged cause of action.

For these reasons, the Court should strike the unsubstantiated assertions pursuant to Rule 1.140(f) of the Florida Rules of Civil Procedure.

CONCLUSION

The motion to dismiss should be granted and alternatively, the specified paragraphs of the complaint should be stricken.

Respectfully submitted,

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By: /s/ Robert C. Buschel
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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2020, I electronically filed the foregoing with the Clerk of Court using Florida Efiling. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the

manner specified, either via transmission of Notices of Electronic Filing generated by Florida Efiling or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic filing.

BUSCHEL GIBBONS, P.A.

BY: /s/ Robert Buschel
ROBERT C. BUSCHEL

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of	:	
	:	
LARRY E. KLAYMAN, ESQUIRE	:	
	:	
Respondent,	:	
	:	**Disciplinary Docket No. 2017-D051**
A Member of the Bar of the District of Columbia Court of Appeals.	:	
Bar Number: 334581	:	
Date of Admission: December 22, 1980	:	
	:	

SPECIFICATION OF CHARGES

The disciplinary proceedings instituted by this petition are based upon conduct that violates the standards governing the practice of law in the District of Columbia as prescribed by D.C. Bar R. X and XI, § 2(b).

Jurisdiction for this disciplinary proceeding is prescribed by D.C. Bar R. XI. Pursuant to D.C. Bar R. XI, § 1(a), jurisdiction is found because:

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on December 22, 1980, and assigned Bar number 334581. Respondent also is licensed in Florida. Respondent was licensed to practice in Pennsylvania but was administratively suspended based on his failure to comply with CLE requirements. Respondent has never been licensed to practice law in Nevada.

The facts giving rise to the charges of misconduct are as follows:

The Disciplinary Proceedings Pending Against Respondent in 2016

2. On or about November 15, 2012, Disciplinary Counsel submitted proposed charges against Respondent in Bar Docket No. 2008-D048. A contact member approved the charges, and

they were filed with the Court on September 27, 2013 and subsequently served on Respondent.

3. On June 23, 2014, Respondent signed an affidavit stipulating to the facts in a petition for negotiated discipline. Respondent averred that he accepted full responsibility for his misconduct, which the negotiated petition described as violations of Rule 1.9 (conflicts of interest) in three matters and Rule 8.4(d) (conduct seriously interfering with administration of justice) in one of the three matters. He agreed to a public censure for his misconduct.

4. After holding a hearing on the petition for negotiated discipline, the Hearing Committee issued an order on January 13, 2015, finding that a public censure was "unduly lenient." On that basis, the Committee rejected the petition for negotiated discipline but said the parties could revise and resubmit it.

5. On June 22, 2015, Disciplinary Counsel filed a motion to withdraw its petition for negotiated discipline. On August 3, 2015, the Hearing Committee denied the motion as moot, as the matter for negotiated disposition already was closed.

6. On August 31, 2015, the Board Office assigned the previously-filed charges against Respondent to another Hearing Committee. That Committee held a three-day hearing on the charges on January 26-28, 2016.

7. At the close of the hearing on January 28, 2016, the Hearing Committee made a preliminary, non-binding decision, finding that Respondent had violated at least one of the Rules. The Committee set a briefing schedule for post-hearing briefs.

8. On March 3, 2016, Disciplinary Counsel filed its post-hearing brief, recommending that Respondent be suspended based the evidence demonstrating he violated Rule 1.9 in three matters and Rule 8.4(d) in one of the three matters.

9. Respondent did not file his post-hearing brief until sometime after March 16, 2016.

The Criminal Charges Against Cliven Bundy in Federal Court in Nevada

10. On March 2, 2016, a federal grand jury in the District of Nevada returned a sixteen-count superseding indictment against Cliven Bundy, four of his sons, and 14 others, charging them with conspiracy, assault on a federal officer, obstruction of justice, and other crimes.

11. Following his indictment, Bundy retained a Nevada lawyer, Joel Hansen, and Respondent to represent him in the criminal matter, which was before the United States District Court for the District of Nevada.[1]

12. Under the Local Rules for the District Court in Nevada, an attorney who has been retained to appear in a particular case but is not a member of the bar of the district court "may appear only with the court's permission . . . by verified petition on the form furnished by the clerk." Nev. Dist. Ct. Local R. IA 11-2(a). The Rule further states that "[t]he court may grant or deny a petition to practice under this rule." *Id.* 11-2(h).

Respondent's Petition to be Admitted *Pro Hac Vice* as Counsel for Bundy

13. On March 22, 2016, Respondent filed a Verified Petition stating that Bundy had retained him in connection with the Nevada criminal case and requesting *pro hac vice* admission to practice before the district court.

14. In his verified petition and in other pleadings Respondent filed with the United States District Court in Nevada and the United States Court of Appeals for the Ninth Circuit, Respondent listed his offices at 2020 Pennsylvania Avenue, NW, Suite 800 (later Suite 345), Washington, D.C. 20006.

[1] Hansen later sought permission to withdraw for health reasons, and the district court approved his request on the condition that Bundy find substitute local counsel. On October 24, 2016, Nevada attorney Bret Whipple entered his appearance as counsel for Bundy.

15. The Verified Petition included Respondent's sworn responses to a number of inquiries. The fifth question or request for information read:

> That there are or have been no disciplinary proceedings instituted against petitioner, nor any suspension of any license, certificate or privilege to appear before any judicial, regulatory or administrative body, or any resignation or termination in order to avoid disciplinary or disbarment proceedings, except as described in detail below.

16. Respondent wrote in response:

> The only disciplinary case pending is in the District of Columbia, disclosed in the attached. During my 39 years as an attorney, I have remained continually in good standing with every jurisdiction that I have been admitted to, but have responded to a few complaints explained in the attached statement. I also allowed my bar membership in Pennsylvania to lapse for lack of use by not completing CLE's [sic] there, but remain eligible for reinstatement. See attached statement.

17. Respondent provided further information in an attached statement. With respect to the disciplinary case in D.C., Respondent stated:

> [The proceeding] was filed almost 8 years ago over a claim by Judicial Watch, my former public interest group that I founded and was Chairman and General Counsel, after I left Judicial Watch to run for the U.S. Senate in Florida in 2003-04, that by representing a former client, employee and donor that it had abandoned, sexually harassed and defrauded that I was in conflict of interest. I represented the persons pro bono, did not breach any confidences with Judicial Watch, and did so only to protect their interests in an ethical fashion. I did not seek to break any agreements with Judicial Watch but rather to have them enforced to help these persons. The matter is likely to be resolved in my favor and there has been no disciplinary action.

18. As to other bar complaints, Respondent explained that he "agreed to a public reprimand before The Florida Bar" for failing to timely pay a mediated settlement to a client, but that there was "no showing of dishonesty" and he was never suspended from the practice of law. Respondent also revealed that, 22 and 18 years earlier, "two judges vindictively stated that I could not practice before them after I challenged rulings they had made on the basis of bias and prejudice." He explained that those exclusions applied only to the two judges themselves, Judge

William D. Keller of the U.S. District Court for the Central District of California and Judge Denny Chin of the U.S. District Court for the Southern District of New York. He said that the "bars of the District of Columbia and Florida reviewed these rulings and found that I did not act unethically" and that he was currently in good standing in both jurisdictions.

19. On March 31, 2016, the district court denied Respondent's Verified Petition "for failure to fully disclose disciplinary actions and related documents." The district court found that Respondent's statement that the matter regarding Judicial Watch pending in D.C. "is likely to be resolved in my favor and there has been no disciplinary action" was "misleading and incomplete." The district court had, on its own, learned that in the D.C. disciplinary proceedings, Respondent had signed an Affidavit of Negotiated Discipline and a Petition for Negotiated Discipline in which he stipulated to misconduct in three different cases and consented to a public censure. Respondent had failed to disclose either of these documents to the district court. The district court found that they were "admissions of three separate incidents of stipulated misconduct that were not clearly disclosed in [Respondent]'s Verified Petition."

20. The district court denied the petition, but without prejudice. The district court then explained:

> Should Klayman wish to file a new Verified Petition with the Court, the following information should be included: (1) the case numbers for the cases before Judge William D. Keller and Judge Denny Chin that resulted in these judges precluding Klayman's practice before them; (2) verification of the review by the Bar Associations of the District of Columbia and Florida finding that Klayman did not act unethically before Judges Keller and Chin; (3) an updated Certificate of Good Standing from the Supreme Court of Florida; (4) the Florida Bar Association's reprimand verifying that there was no showing of dishonesty in connection with their disciplinary action; (5) the Exhibits attached to this Order [the Affidavit of Negotiated Disposition and Petition for Negotiated Discipline that Respondent signed and were filed in the D.C. disciplinary proceeding on June 23, 2004]; and (6) verification that the matter in the District of Columbia disciplinary case referenced in the Verified Petition has been resolved with no disciplinary action.

21. On April 7, 2016, Respondent filed a "Supplement to and Renewed Verified Petition" for permission to practice in the court as counsel for Bundy in his criminal case.[2] Respondent provided evidence and explanations for items (1) - (5) of the district court's requirements as follows: (1) he provided the case names and citations for the actions involving Judges William D. Keller and Denny Chin; (2) he provided a letter from the D.C. Bar finding no ethical violation in the Keller and Chin matters, but said that the Florida Bar's files were no longer accessible; (3) he provided an updated letter of good standing from the Supreme Court of Florida; (4) he provided a copy of Florida's reprimand; and (5) he provided the exhibits attached to the district court's March 2016 order. As to the district court's sixth requirement, Respondent disputed the conclusion the district court drew from the documents it had identified. The court, he said, "appears to have misunderstood the nature and current posture of the disciplinary proceeding underway" in the District of Columbia.

> [T]he prior attempted negotiated discipline never entered into effect and Mr. Klayman never chose to pursue any further proposed negotiated discipline as he . . . did not violate any ethical provision of the District of Columbia Code of Professional Responsibility. Bar Counsel and Mr. Klayman had attempted to resolve the matter by agreement, but Mr. Klayman later thought the better of having signed the affidavit and agreeing to negotiated discipline it [sic] since he feels strongly that he acted ethically at all times.

With his supplement statement, Respondent provided a letter prepared by Professor Ronald Rotunda giving his "expert" opinion that "Respondent ha[d] not committed any offense that merits discipline." Respondent also attached his "post-hearing brief" to the Hearing Committee in the D.C. disciplinary matter, but did not describe the evidence offered at the

[2] The district court noted that, contrary to its order, Respondent did not file a new Verified Petition. Thus, it construed his Renewed Petition as a request for reconsideration of the original Verified Petition.

hearing (although he did say it did not include his affidavit or prior admissions), and the brief itself did not explain the procedural posture of the D.C. disciplinary proceeding. Respondent did not include the brief Disciplinary Counsel had filed in the matter. Respondent repeated that he was "confident of ultimately prevailing . . . since the ultimate finding of the Committee which heard the evidence is simply a recommendation" that the Board and D.C. Court would review.

22. The district court treated Respondent's renewed filing as a request for reconsideration and denied it on April 19, 2016. The district court did not discuss the first five conditions imposed in its March 31 Order, but only the sixth – the D.C. disciplinary matter. The court noted that Respondent "admit[ted] that [the D.C. matter] is still pending," and thus there was "no error with its prior ruling." The court ordered that "Klayman's Verified Petition shall remain denied without prejudice until such time as Klayman can provide proof that the ethical disciplinary proceeding in the District of Columbia has been resolved in his favor."

The Bivens Action Against the Federal District Judge and Others

23. On May 10, 2016, a few weeks after the district court denied Respondent's renewed request for *pro hac vice* admission, Bundy filed a Bivens action against Chief Judge Gloria Navarro (the district court judge who had denied Respondent's *pro hac vice* petition) and others including Senator Harry Reid and his son, and President Obama for allegedly conspiring against him. In the complaint, Bundy alleged, among other things, that the district court had denied Respondent *pro hac vice* admission for political reasons and she was biased and prejudiced.

24. On May 20, 2016, Bundy filed a motion to disqualify Chief Judge Novarra based on the allegations in the Bivens lawsuit pending against her. The district court denied the motion.

25. Respondent did not sign and was not listed as counsel on the Bivens complaint against the district court judge and others. Respondent, however, was listed as "of counsel" on subsequent pleadings filed on behalf of Bundy in the Bivens action, and his D.C. Bar number and D.C. office were provided in the caption of those pleadings.

26. On October 12, 2016, the Bivens action was dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(A) based on the stipulation of all the parties. The parties dismissed the action approximately a week after the Ninth Circuit issued a briefing schedule in connection with Respondent's first petition for writ of mandamus.

Respondent's Successive Petitions for Writ of Mandamus

27. On July 6, 2016, Respondent filed an Emergency Petition for Writ of Mandamus with the Ninth Circuit. Respondent requested that the Ninth Circuit compel the district court to admit him *pro hac vice* and argued that Bundy's Sixth Amendment right to counsel would be violated if he were forced to go to trial without his attorney of choice.

28. Chief Judge Navarro filed a response to the Ninth Circuit defending the district court's decision not to admit Respondent. The district court also offered additional evidence and grounds for its refusing to grant Respondent *pro hac vice* status, including: (1) Respondent had failed to accurately and truthfully describe the D.C. disciplinary proceedings and had failed to disclose that a hearing committee had rejected the negotiated disposition because the sanction of public censure was unduly lenient; (2) Respondent failed to mention or disclose other court findings relevant to question five on the petition, and the district court listed eight cases in which the courts had revoked or denied Respondent *pro hac vice* status because of his "inappropriate and unethical behavior"; (3) Respondent had misrepresented the two cases in which two district court had banned him from their courtrooms and had failed to disclose that the trial court's decisions

were affirmed on appeal, and the Second Circuit in affirming one of the decisions found that Respondent's challenge to a district court's impartiality was "insulting and smacked of intimidation"; and (4) that Respondent had been involved in the Bivens action that Bundy filed against President Obama, Senator Reid, and the district court judge who denied Respondent's *pro hac vice* admission, alleging they had conspired to violate his civil rights.

29. On October 28, 2016, the Ninth Circuit denied Respondent's request for mandamus relief. The Ninth Circuit concluded:

> Klayman has made misrepresentations and omissions to the district court regarding the ethics proceedings before the District of Columbia Bar; he has shown a pattern of disregard for local rules, ethics, and decorum; and he has demonstrated a lack of respect for the judicial process by suing the district judge personally. By any standard, the district court properly denied his petition to be admitted *pro hac vice*. Bundy is entitled to a fair trial, defended by competent, vigorous counsel of his choosing. But his right to such counsel does not extend to counsel from outside the district who has made it a pattern or practice of impeding the ethical and orderly administration of justice.[3]

30. On November 10, 2016, Respondent filed an emergency petition with the Ninth Circuit requesting rehearing en banc. On December 13, 2016, the Ninth Circuit denied the petition for rehearing.

31. On January 17, 2017, Respondent filed an emergency petition for writ of mandamus with the Supreme Court, which he supplemented twice. Respondent misrepresented that Bundy's trial would commence on February 6, 2017, when it was actually scheduled to begin 30 days after the completion of the February 6, 2016 trial of other defendants in the case. The Supreme Court denied the petition on February 27, 2017. *In re Bundy*, 137 S. Ct. 1213 (S. Ct. 2017).

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[3] Chief Judge Gould dissented based on his conclusion that Bundy's Sixth Amendment right to chosen counsel should have taken precedence over the issue of Respondent's candor.

32. On March 9, 2017, Respondent filed a second emergency petition for writ of mandamus with the Ninth Circuit, raising many of the same arguments he had in his first petition and additional arguments that Ninth Circuit found had no merit or were false.

33. The Ninth Circuit denied Respondent's second petition in a per curiam opinion on March 30, 2017. *In re Bundy*, 852 F.3d 945 (9th Cir. 2017). The Ninth Circuit found that Respondent's second petition was "procedurally irregular" and substantively had "no merit[]". The Ninth Circuit found that there was no credible evidence to support Respondent's claim that the district court had threatened Bret Whipple, Bundy's lawyer in the criminal case, with contempt, and that Respondent's claims about Whipple, including that he had little or no federal criminal defense experience, were "demonstrably false." The Ninth Circuit concluded that the documents Respondent filed "in support of the petition for a writ of mandamus – by themselves and without looking to our earlier decision's consideration of Klayman's record – entirely support the district court's decision [to deny him *pro hac vice* admission]. The petition and reply contain patently false allegations and lack the most basic of due diligence in fact checking." 852 F.3d at 953.[4]

34. On April 3, 2017, Respondent filed an emergency petition for rehearing en banc. No judge requested a vote on whether to rehear the matter en banc, and the Ninth Circuit denied Respondent's request for an en banc rehearing on May 15, 2017.

35. On May 18, 2017, Respondent filed a "Motion to Correct the Record Regarding False Allegations of Misstatements to this Court and the District Court" and an accompanying brief. Respondent alleged that the district court and Judge Bybee of the Ninth Circuit (the judge who had written the decisions denying Respondent's first two mandamus petitions) had made false allegations against him. Respondent insisted he had not made any misrepresentations or omitted

[4] Chief Judge Gould dissented but for the reason he did in his dissent of the first petition.

any information he was required to disclose. He alleged that "the 'issue' of [his] truthfulness only arose when the District Court was pressed for a reason why it had arbitrarily and capriciously denied [his] *pro hac vice* application by [the Ninth Circuit] and thereby fabricated this diversionary tactic to protect itself."

36. The Ninth Circuit denied Respondent's "Motion to Correct the Record" on May 23, 2017.

37. On June 14, 2017, Respondent filed a "Motion for a Separate Judicial Panel to Rule on Klayman's Motion to Correct Record." Respondent alleged that Judge Bybee should not be allowed "to rule on his own misconduct."

38. The Ninth Circuit denied the motion the next day, June 15, 2017.

39. Respondent again sought review by the Supreme Court, filing a petition for writ of mandamus on July 21, 2017, and two supplemental briefs. The Supreme Court denied the petition for review on October 2, 2017 and denied Respondent's subsequent petition for rehearing on October 30, 2017.

40. While he was seeking review by the Supreme Court of the denial of his second mandamus petition, Respondent filed a third emergency petition for writ of mandamus with the Ninth Circuit on October 2, 2017.

41. The Ninth Circuit denied the petition two days later on October 4, 2017.[5]

42. On October 6, 2017, Respondent filed under seal an emergency motion for a separate judicial panel with a "judicial council complaint." The Ninth Circuit denied the motion for a separate judicial panel that same day.

[5] As he had had before, Chief Judge Gould dissented, saying he would grant the petition to give Bundy his lawyer of choice.

43. On December 20, 2017, Chief Judge Navarro declared a mistrial in the criminal against Bundy, who continued to be represented by Whipple. On January 8, 2018, Chief Judge Navarro granted the motions of Bundy and other defendants to dismiss the charges against them with prejudice.

44. Several months before Chief Judge Navarro's rulings of December 20, 2017, the Hearing Committee issued its report in Respondent's disciplinary matter finding that he had violated Rule 1.9 in three matters and Rule 8.4(d) in one of those matters, and recommending he be suspended for 90 days with a fitness requirement.

45. On February 6, 2018, the Board on Professional Responsibility issued its report and recommendation in the disciplinary matter against Respondent. The Board accepted the Committee's findings of fact, agreed that Respondent had violated Rule 1.9 in three matters, but disagreed that he violated Rule 8.4(d), although saying it was a "close question." The Board also recommended a 90-day suspension, but without a fitness requirement.

46. On February 6, 2018, the same day the Board issued its report, Respondent filed his fourth petition for writ of mandamus with the Ninth Circuit, which he amended on February 7, 2018. Respondent contended that the Ninth Circuit's and district court's previous orders should be vacated because they were now moot based on the dismissal of the underlying criminal matter against Bundy. Respondent also contended that "Judge Bybee's order" must be vacated because of Judge Bybee's alleged bias. According to Respondent, Judge Bybee's decision to rule against Respondent "can only be explained by the appearance of Judge Bybee's extrajudicial bias and prejudice stemming from his personal relationships, friendships, and associations with Judge Navarro and Sen. Reid, . . ." Respondent requested that Judge Bybee not be included in the judicial panel ruling on his fourth petition.

47. In support of his claim that Judge Bybee had extrajudicial bias, Respondent made a number of assertions that had no basis and were frivolous, that included but were not limited to:

(a) Judge Bybee demonstrated his bias and reacted to his friendship and personal relationship with the District Court Judge and Sen. Reid, by asking Respondent questions about the Bivens action filed against the District Court Judge, Sen. Reid, and President Obama during the oral argument in the first mandamus petition (the questions Respondent attributed to Judge Bybee were asked by another Judge on the Panel);

(b) Judge Bybee assumed in his questions (which were actually asked by another judge) that Respondent had something to do with the Bivens action (Respondent had initially said that he was a plaintiff in the Bivens action before clarifying he was not a party, although he was involved in the action as he was listed "of counsel" in numerous pleadings filed on behalf of Bundy);

(c) Judge Bybee and Judge Navarro "are close friends and associates" by virtue of the fact that Judge Bybee was a "founding faculty member" of UNLV's law school, and Judge Navarro received her undergraduate degree from UNLV;

(d) Judge Bybee had a "longstanding relationship, friendship and association" with Sen. Reid as evidenced by Sen. Reid's statements about Judge Bybee in 2003 in connection with his nomination to the Ninth Circuit in 2003, and Judge Bybee was "return[ing] the favor" by denying Respondent's *pro hac vice* application; and

(e) Judge Bybee and Sen. Reid had a "social and familiar relationship" because Judge Bybee's wife Shannon and Sen. Reid were both inducted within one year of one another as members of the same UNLV organization (Shannon Bybee, a male, was never married to Judge Bybee, and died in 2003).

48. Respondent further alleged that "[t]he fact remains, however, that Mr. Klayman has never once been found to have acted unethically by any bar association who reviewed his conduct before a judge." When Respondent made this statement, he knew that the Hearing Committee had found by clear and convincing evidence that he had violated Rule 1.9 in three matters, and Rule 8.4(d) in one of those matters.

49. Respondent also alleged that Judge Gould "clearly and unequivocally found that [Respondent] had fulfilled his obligation of candor and truthfully answered all the questions presented to him . . ." Respondent then quoted a statement by Judge Gould in his initial dissent, but omitted the Judge's concluding sentence in the quoted paragraph which read: "Yet, for [Respondent] to tell the district court that it was wrong about the negotiated discipline being in effect and to not also tell the court why the disposition lacked effect – its rejection by the bar committee – may have been a relevant omission."

50. On February 13, 2018, the Ninth Circuit denied Respondent's request that Judge Bybee be recused from the matter.

51. On April 24, 2018, the Ninth Circuit denied Respondent's fourth writ of mandamus.[6]

52. On July 20, 2018, Respondent filed another petition for writ of mandamus with the United States Supreme Court. In this petition, Respondent repeated his claim that although the district court had found he had been untruthful, "Judge Gould, in his forceful, compelling, well-

[6] Judge Gould dissented. He said he did not share Respondent's view that there had been any bias against him by any member of the panel, but found "these proceedings have become overblown." Judge Gould reiterated his belief that the initial denial of Respondent's *pro hac vice* admission was wrong.

reasoned, and factually accurate dissents emphatically found that this was not the case." Judge Gould's dissenting opinions did not support Respondent's claim. See paragraph 49 above.

53. Respondent's conduct violated the following D.C. Rules of Professional Conduct and/or the Nevada Rules of Professional Conduct, and/or Rule 46(c) of the Federal Rules of Appellate Procedure for the United States Court of Appeals for the Ninth Circuit,[7] as made applicable by D.C. Rule 8.5(b)(1) – all of which prohibit the same or substantially similar conduct:

a. Rule 3.1, in that Respondent asserted or controverted an issue when there was no basis in law and fact for doing so that was not frivolous;

b. Rule 3.3(a), in that Respondent knowingly made a false statement of fact to a tribunal or failed to correct a false statement of material fact previously made to the tribunal;

c. Rule 8.1, in that in his application and supplemental application for admission to the district court, Respondent knowingly made false statements of fact or material fact, and he failed to disclose a fact necessary to correct a misapprehension known by the applicant to have arisen in the matter;

d. Rule 8.4(a), in that Respondent knowingly assisted or induced another to violate the Rules of Professional Conduct or did so through the acts of another;

e. Rule 8.4(c), in that Respondent engaged in conduct involving dishonesty, deceit, and misrepresentation; and

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[7] FRAP 46(c) provides that "[a] court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule." In determining what constitutes "conduct unbecoming" a lawyer, the Ninth Circuit has looked to the ABA Model Rules and the state rules where the lawyer maintains his practice. *See, e.g., Rodriquez v. Robbins*, 797 F.3d 758, 759 (9th Cir. 2015); *In re Girardi*, 611 F.3d 1027, 1035 (9th Cir. 2010)

f. Rule 8.4(c), in that Respondent engaged in conduct involving dishonesty, deceit, and misrepresentation; and

g. Rule 8.4(d), in that Respondent engaged in conduct seriously interfering with or prejudicial to the administration of justice.

Respectfully submitted,

Hamilton P. Fox, III
Disciplinary Counsel

Julia Porter
Deputy Disciplinary Counsel

OFFICE OF DISCIPLINARY COUNSEL
515 Fifth Street, N.W.
Building A, Room 117
Washington, D.C. 20001
(202) 638-1501

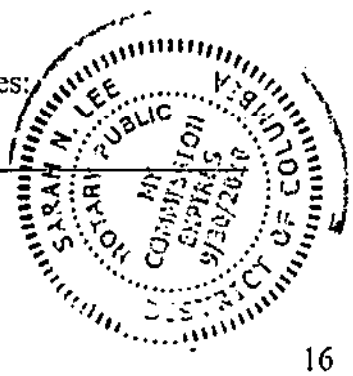
VERIFICATION

I do affirm that I verily believe the facts stated in the Specification of Charges to be true.

Julia L. Porter
Deputy Disciplinary Counsel

Subscribed and affirmed before me in the District of Columbia this 20th day of August 2018.

My Commission Expires: _____



Notary Public

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

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

In the Matter of:	:	
	:	
LARRY E. KLAYMAN,	:	
	:	Board Docket No.17-BD-063
Respondent.	:	Bar Docket No. 2011-D028
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 334581)	:	

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

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REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

I. INTRODUCTION AND SUMMARY

Respondent Larry E. Klayman is charged in a four-count Specification of Charges with multiple violations of the Rules of Professional Conduct for the District of Columbia (Rules) -- specifically Rules 1.2(a), 1.4(b), 1.5(b), 1.5(c), 1.6(a)(1), 1.6(a)(3), 1.7(b)(4), 1.16(a)(3), and 8.4(c). This disciplinary matter arises out of Respondent's representation of a client in 2010 and perhaps for a few weeks before and after 2010. As fully discussed hereinafter, the Hearing Committee unanimously recommends that the Board conclude that Disciplinary Counsel has established by clear and convincing evidence that Respondent violated one or more of Rules 1.2(a), 1.4(b), 1.5(b), 1.5(c), 1.6(a)(1), 1.6(a)(3), 1.7(b)(4), and 1.16(a)(3) in a total of at least fourteen instances or sets of circumstances.[1] The Hearing Committee also recommends that Respondent be suspended from the practice of law under the aegis of the District of Columbia Bar for a period of 33 months and that his readmission to the Bar be conditioned upon his establishing that he has been rehabilitated and is fit to resume the practice of law.

II. PROCEDURAL HISTORY

Disciplinary Counsel filed its Specification of Charges (Sp. Ch.) on July 20, 2017, and it was served on Respondent on September 29, 2017. Respondent filed his

[1] We also recommend that the Board find that Disciplinary Counsel has not proven by clear and convincing evidence that Respondent violated Rule 8.4(c).

Answer on December 8, 2017. Opening statements and Disciplinary Counsel's evidence were heard on May 30 and 31 and June 1, 2018. Respondent's case was presented on June 25, 26, and 27. Closing arguments for Disciplinary Counsel and Respondent were presented on June 27. The members of the Ad Hoc Hearing Committee were Warren Anthony Fitch, Esquire, Chair; Mary C. Larkin, Public Member; and Michael E. Tigar, Esquire, Attorney Member. Assistant Disciplinary Counsel H. Clay Smith, III, Esquire, appeared on behalf of Disciplinary Counsel; Frederick J. Sujat, Esquire, appeared on behalf of Respondent, who nevertheless assumed the major litigation responsibilities during the hearing. Disciplinary Counsel submitted Exhibits (DX) A-D, 1-54,[2] and Supplemental Exhibits (SX) 1-38 -- all were admitted into evidence. Tr. 276-79, 315, 320, 842, 1417-20, 1617-18; HC Order July 11, 2018 (admitting Disciplinary Counsel's Exhibit 54 into evidence). Respondent submitted Exhibits (RX) 1-30, Supplemental Exhibits (RSX) 1-6, and a pleading filed earlier in the case[3] -- all were admitted as well. Tr. 621-23, 1263. Disciplinary Counsel filed its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on August 24, 2018. Respondent filed his on October 30, 2018. Disciplinary Counsel filed its Reply on November 13, 2018. Respondent filed his Surreply on November 20, 2018.

[2] During the Hearing on June 27, Disciplinary Counsel marked for identification Respondent's prior discipline in Florida as Exhibit 53. We hereby admit this into evidence but it is relevant only to our Sanction analysis.

[3] The pleading is titled "Supplemental Response of Disciplinary Counsel to Respondent's Motion for Modest Continuance and to Reschedule Hearing" (RS) and was filed on May 14, 2018.

III. FINDINGS OF FACT

A. BACKGROUND OF THE REPRESENTATION

1. Ms. Elham Sataki, the client in the matter giving rise to this disciplinary proceeding, was born and raised in Iran, where she lived for approximately 12 years. Tr. 69.[4] She and her family moved to Sweden after the 1979 Iranian revolution and she later graduated from the University of Stockholm with a degree in psychology. Tr. 69-70. Ms. Sataki subsequently moved to the United States and trained in cosmetology in Texas. Tr. 71.

2. Ms. Sataki moved in approximately 2001 to Los Angeles, where she lived for approximately six years and worked both in cosmetology and as an anchor or co-host on news and politics programs on an Iranian-oriented network and another network. Tr. 70-72.

3. By letter dated October 16, 2007 (by which time she had moved to Arlington, VA and done some broadcasting work for the Voice of America (VOA)), Ms. Sataki applied for the position of International Broadcaster (Persian) at the International Broadcasting Bureau (IBB) of VOA. RX 901-07.[5] Ms. Sataki received

[4] "Tr." refers to the six-volume, consecutively paginated transcript of the evidentiary hearing in this matter.

[5] "RX__" hereinafter refers to the consecutively numbered pages in Respondent's 30 submitted exhibits; "HX__" similarly refers to the consecutively numbered pages of exhibits discussed in the July 24, 2019 Order. Respondent did not paginate his exhibits and, in addition, his exhibits lack any form of organization. The disorganization and absence of pagination imposed an onerous and time-consuming burden on the Hearing Committee. This burden was further exacerbated because many of Respondent's exhibits consist of prolix and redundant pleadings or other submissions in cases at issue in this matter. (As many as 6 copies of some pleadings and other documents appear among Respondent's exhibits.). A paginated copy of Respondent's exhibits has been prepared for the record before the Board and the Court of Appeals.

a letter dated January 30, 2008 from the Office of Human Resources in IBB of the Broadcasting Board of Governors (BBG) offering her a position as an International Broadcaster (Persian) in VOA's Persian News Network Division (PNN) in Washington, DC. RX 915, 913.[6] Ms. Sataki commenced work at PNN/VOA on or about February 19, 2008 as an anchor and international reporter covering stories involving human rights, students' rights, and women's rights. Tr. 72-73; RX 838-39, 865, 884-86, 894-97.

4. Ms. Sataki received favorable Performance Appraisals for the first two-plus months (February 19, 2008-April 30, 2008) and the first fourteen-plus months (February 19, 2008-April 30, 2009) of her employment at the PNN of IBB/VOA. RX 219-26, 874-82, 865-73; *but see* RX 819, 821, 927, 929. In approximately December 2008, Ms. Sataki sent emails to a VOA News administrator, Alex Belida, in which she proposed "a two-anchor show very fast beat with headline news, entertainment, and informational material targeting the young generation," and noted her "strong connections in [the] Los Angeles Iranian music industry." HX 1. In an email to Mr. Belida dated August 26, 2009, Ms. Sataki referred to their "several discussions about new [ideas]" and stated, "One of my new ideas which could sound

During the process of reviewing and analyzing the exhibits in this matter as part of the Hearing Committee's preparation of this Report, the Hearing Committee encountered scores of entries in Respondent's exhibits that revealed Ms. Sataki's Social Security Number, date of birth and financial account numbers. Board Rule 19.8 (f) requires that all such "personal identifiers" be "excluded" from any filed document. Respondent complied with this requirement after being ordered to do so by the Hearing Committee.

[6] The first page of the two-page offer of employment letter appears at RX 915; the second page of the letter appears at RX 913.

a little bit shocking at the beginning but I think it's the best: is that I completely move to Los Angeles office and start working for PNN directly from there;" she also set forth additional advantages to her being based in Los Angeles and, finally, suggested an alternative approach for her assignments if she remained in Washington, again targeted to "our younger audience." HX 2; *see also* RX 49, Tr. 106, 334-35. Under cover of an email dated January 5, 2010, Ms. Sataki sent Mr. Belida a longer proposal consisting of program ideas and re-assignment to Los Angeles. HX 3.

5. In the midst of her discussions with Mr. Belida regarding programming ideas, Ms. Sataki reported to her VOA supervisors in approximately May 2009 that she was being sexually harassed at work by the co-host of "Straight Talk," the program she had just recently begun working on. Tr. 76-77; RX 4-22 (Final Decision of VOA Office of Civil Rights (OCR/VOA Final Decision) (3/23/11)). Her complaint was processed by OCR/VOA during the remainder of 2009 and thereafter. RX 4-22. In late July 2009 both Respondent and the alleged harasser were removed from their joint assignment and re-assigned to different PNN/VOA programs. Tr. 78; RX 5.

6. Ms. Sataki met Respondent for the first time in approximately November 2009, while she was covering a speech on the United States Capitol steps by an Iranian politician. Tr. 73, 74. Respondent, who was also in attendance, introduced himself as a lawyer and proposed that she report on an Iran-related matter that he was working on. Tr. 74, 322-24, 973-75. They exchanged business cards. *Id.*

7. Respondent telephoned Ms. Sataki several times about covering the matter he had mentioned. Tr. 75-76, 324-25. Ms. Sataki responded that she could not cover the story because of a difficult situation at work. Tr. 79-80. Understanding that Respondent was an attorney, Ms. Sataki told him that she was being sexually harassed at work. *Id*; *see also* Tr. 76-78.

8. Respondent invited Ms. Sataki to dinner to further discuss her problems at work. Tr. 80, 325. Respondent acknowledged at the hearing, "And it was clear to me, I hadn't really asked her there for a professional reason. I had no desire that I knew of at the time to represent her. I just wanted to get to know her and see what she did and if she might be interested, you know, in doing some stories and that kind of thing." Tr. 976. During the dinner, Respondent stated that he could help her develop her career outside VOA. Tr. 81. Ms. Sataki also told Respondent, "Larry, I've got a big problem," referring again to her situation at work. Tr. 327, 329, 976. She began to cry at that point. "I was sobbing to every person who I was talking at that time, because I was going through a deep depression, and every time I talk about that, I would cry." Tr. 332; *see also* Tr. 327, 976; Tr. 1228. Ms. Sataki told Respondent during the dinner that she desired to transfer to the Los Angeles office of PNN in order to be away from the alleged harasser:

> Q. And you told me,[7] did you not, that "My goal is to get b[ac]k to work out of the presence of the alleged harasser, Falahati, and to go back to work with the Persian news network in Los Angeles."

[7] Ms. Sataki was cross-examined by Respondent, not by Mr. Sujat.

> A. I said that I have written a proposal, yes, and I'm trying to transfer myself to Los Angeles. I mentioned that to you, yes.

Tr. 334; *see also* Tr. 335. Respondent thereupon agreed to assist her:

> And I said, "Well, I'll try to help you, and, you know, I'll do it out of friendship. We're now friends. . . ." and so it was clear that I would do it pro bono for her and try to help her, you know.
>
> * * * * *
>
> . . . I sympathized with her, because I had gone through a hard time in my life. I had gone through a hard time in my personal life. I had gone through a hard time financially. . . . So my heart went out to her, and I identified with her. To some extent, and I – you know, by trying to help her and others that I was helping, I was trying to forget about my own problems that I had.

Tr. 977-78; *see also* Tr. 1020-21.

B. ESTABLISHMENT OF THE ATTORNEY-CLIENT RELATIONSHIP -- JANUARY 2010

9. Ms. Sataki engaged Respondent in approximately January 2010 to represent her in connection with the PNN/VOA matter. Tr. 82. Respondent did not provide Ms. Sataki a written retainer agreement or any other document setting forth the basis of his fee, the expenses for which she would be responsible, or the scope of his representation. *Id.* [8]

[8] Ms. Sataki testified as follows in this regard:

> Q. Did you ever have a writing from Mr. Klayman reflecting the terms of this attorney/client relationship?
>
> A. I don't understand the question.
>
> Q. Did Mr. Klayman give you a written agreement, representation agreement?

10. Respondent and Ms. Sataki also agreed during the dinner or shortly thereafter that Respondent would represent Ms. Sataki on a contingency fee basis and subsequently agreed that Respondent would pay Ms. Sataki's expenses in connection with her move to Los Angeles, for which he would be reimbursed from any recovery over and above his contingency fee. Tr. 83-84, 110-11, 333. Respondent did not provide Ms. Sataki with a written contingent fee agreement setting forth the terms of the contingent fee arrangement. Tr. 84. [9]

A. I don't believe so. I don't know. I really don't know. I know we had emails going back and forth later regarding this, but I don't remember that now. I don't know. In my mind I don't remember.

Tr. 84. We have considered carefully the ambiguous nature of this testimony, but we base our finding that Respondent did not provide Ms. Sataki a written document stating the terms of the engagement on abundant circumstantial evidence. *See* Finding of Fact (FF) 59, 76, 77, 79 & 59 n.20; *see* also SX 10, 26, 30. Additionally Respondent has not produced a written fee agreement despite clearly being on notice of this issue and has not denied that there was not a written fee agreement.

[9] Ms. Sataki testified as follows in this regard:

Q. Did you have a fee agreement or arrangement with Mr. Klayman?

A. Well, we talked about that, at the end, whatever it is, that it's going to be 40 percent goes to him. . . . Which he later changed it to 50 percent.

Q. Were there any other arrangements you had with respect to the representation, financial arrangements?

A. Well, in the beginning when he -- when I moved -- he moved me to Los Angeles and he paid for everything.

Q. Ok. Was that part of the representation agreement?

A. Well, that's what he said, that he -- because I told him that I can't afford moving to LA, and he said he's going to pay for everything, but then he gets his money back when he gets his 40 percent. All that's going to be included there, on top of that.

Tr. 83-84. Ms. Sataki later testified on cross-examination by Mr. Klayman as follows:

> Q. And I told you that I would help you as a friend, did I not?
>
> A. You told me you help me, yes.
>
> Q. Yeah, and that you had no money, that I would help you and not charge you, correct?
>
> A. Yes. We talked about that. At the end, you're going to get 40 percent. I explained, I don't have any money to pay for a lawyer, but then you said that I -- we can -- at the end, "because this is a strong case and I'm going to help you with that," and we get 40 percent. We talked about that.
>
> Q. It's not true that that 40 percent came up at that time at that dinner. It did not come up, did it?
>
> A. I don't remember.
>
> Q. Then why did you just say that?
>
> A. Well, we -- is it we're still talking about that particular dinner?
>
> Q. Yes.
>
> A. Only?
>
> Q. Yes, at Clyde's.
>
> A. Ok. Maybe it didn't, but definitely -- the percentage of it maybe didn't come up, but the fact that, "We're going to definitely win," according to you, "that you have a strong case," and you're going to collect your money at the end, that came up.
>
> * * * * *
>
> Q. When we met I told you that I would try to help you, that I wasn't going to charge you for my legal services because it was offered in friendship.
>
> A. Yes, you said that.

Tr. 332-33, 336. As with FF 9, we have considered carefully the ambiguous nature of this testimony, but we base our findings that there was a contingency fee agreement and that Respondent did not provide Ms. Sataki with a written statement setting forth the terms of the

C. INITIAL STEPS AND DEVELOPMENTS IN THE REPRESENTATION -- FEBRUARY-MARCH 2010

11. Respondent notified PNN/VOA by letter dated February 5, 2010 that he was representing Ms. Sataki with respect to her sexual harassment complaint. RX 5-6, 115. Respondent's February 5, 2010 letter demanded that Ms. Sataki be returned to the "Straight Talk" program. RX 6. Respondent and Ms. Sataki also met several times with Tim Shamble, the PNN/VOA employee union representative. RX 1; Tr. 337-38. During those conferences, Mr. Shamble emphasized PNN/VOA's intransigence in his view on employee complaints. Tr. 337, 979; *see also* RX 1 (Shamble Declaration, ". . . it is very difficult to negotiate any settlement with them [VOA] because of management's attitude and approach to employees.").[10]

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contingency fee arrangement on abundant circumstantial evidence. *See, e.g.*, FF 58, 59, 76, 77, 91; SX 10, 26, 30.

[10] Mr. Shamble provided the following details in this regard:

> Q. Now did there come a point in time that you met me?
>
> * * * * *
>
> A. She had contacted me and said that she had hired an attorney that she had met, and she brought you in to discuss the case. So I met you in my office.
>
> Q. And we met with Ms. Sataki present?
>
> A. Yes.
>
> Q. Did we have several meetings in that regard with her?
>
> A. Yes.
>
> Q. During the course of those meetings, did we decide on whether we would try to pursue settlement or not first?

Respondent and Ms. Sataki also raised with Mr. Shamble the idea of requesting that Ms. Sataki be transferred to the PNN/VOA office in Los Angeles, California; Ms. Sataki had not previously mentioned this idea to Mr. Shamble. Tr. 937.

12. In approximately early February 2010, Respondent and Mr. Shamble had several unproductive negotiation sessions with VOA's general counsel in which they asked that Ms. Sataki be transferred to PNN's Los Angeles office. Tr. 338, 351, 979.

13. Ms. Sataki was granted leave for the period of February 9 through February 18, 2010. RX 5; Tr. 338-40. She used this leave to travel to Los Angeles. *Id.*; Tr. 1002-03.

14. In this same period, following up on the negotiation sessions, Respondent and Mr. Shamble, the employee union representative, submitted a written request to VOA, with supporting documentation, that Respondent be transferred to Los Angeles as a reasonable medical accommodation. Tr. 341, 351-52. Respondent explained, "I thought it was a good idea for a number of reasons. I suggested it to her and she said she always wanted to be in LA anyway and she didn't

---

> A. Yes. I mean, we always -- our policy in the union is we would rather do settlement than grievance or any other kind of option. And that was our objective was to somehow come to a settlement.
>
> Q. Did Ms. Sataki agree to do settlement, try settlement first?
>
> A. Yes, absolutely. Yes.

Tr. 889-90.

want to ever pass by Falahati again. So that was how that decision was arrived at." Tr. 1005; *see also* Tr. 1004-06.

15. Ms. Sataki was continuing at this time to experience a great deal of anxiety. Tr. 347.[11] Respondent arranged for her to receive psychological assistance from Dr. Arlene Aviera and another mental health professional and assumed responsibility for their fees. Tr. 348-50, 1003; *see also* DX 4 at 34-35;[12] Tr. 1295-99, 1307-10.

16. Respondent and Mr. Shamble followed up their initial written submission (FF 14) with more letters seeking the same relief. RX 115-17, 260-63 (letter dated February 21, 2010, from Larry Klayman to Paul Kollmer-Dorsey); *see also* RX 6; RX 161, 231 (letter dated February 22, 2010 from Tim Shamble to Broadcasting Board of Governors). In his letter, Respondent described Ms. Sataki's physical and mental condition, recounted acts of workplace harassment and retaliation by her coworker Mehdi Falahati, and demanded that Ms. Sataki be offered a position in Los Angeles, so that "she can return to work in the Los Angeles Field Office after her convalescence." RX 260-63. Respondent also argued that Ms. Sataki "qualifies as a disabled person under Section 501 et seq. of the Rehabilitation Act of 1973, 29 U.S.C 79l(b) et seq. and thus [for] a 'reasonable medical' accommodation, under Section 504 et seq., 29 U.S.C. 793 (a)." RX 261. Respondent notified VOA in

[11] Ms. Sataki testified, "I was shaking and crying all day long, every day. To everybody, not only you, everybody, because I was depressed at that time." Tr. 347.

[12] "DX at __" refers to Disciplinary Counsel's exhibit letter or number (DX A-D, 1 to 54) and the page number of that exhibit.

this letter that Ms. Sataki had suffered a nervous breakdown on February 19, 2010 following VOA's rejection of her initial requests for relief and that she would be extending her stay in Los Angeles in order to receive treatment for her condition. RX 261-63. Respondent also stated that he would begin litigation on Ms. Sataki's behalf if VOA refused this request and cited an opinion by Judge Ellen Huvelle of the United States District Court for the District of Columbia in *Navab-Safavi v. Broadcasting Board of Governors*, Civ. No. 08-1225 (Sept. 3, 2009), in which Judge Huvelle had sustained *Bivens* claims against individual BBG board members (including then-Secretary of State Rice) against a F. R. Civ. P. 12(b)(6) motion. RX 262. Respondent concluded by stating:

> If you think that I will hesitate to take this route if necessary, you have not researched my background very well. I am personally offended by a government establishment that puts its own political machinations and petty and vindictive gamesmanship ahead of a good, decent and hardworking professional like Ms. Sataki.

Id.

17. By letter dated February 22, 2010, Acting VOA General Counsel Paul Kollmer-Dorsey conveyed to Respondent VOA's denial of her Los Angeles transfer request on reasonable accommodation grounds which had been raised in Respondent's letter the preceding day. The VOA letter also requested more medical information in support of the reasonable accommodation request, offered to detail Ms. Sataki to a different assignment on the Middle East Desk of VOA's Central News Bureau in Washington, asserted VOA's inability to detail Ms. Sataki to Los Angeles because of a lack of any full-time positions in VOA's Los Angeles office,

and noted her possible eligibility for paid leave under the Family and Medical Leave Act. RX 232-34; 1311-13.

18. Ms. Sataki testified about this development as follows:

> Q. And you didn't find that acceptable, did you?
>
> A. We together, you as my attorney and me, we didn't find that acceptable. You were advising me through the whole thing.
>
> * * * * *
>
> A. And I told you at that time that they're trying to get me in trouble and retaliate, because if they put me there and I can't do the assignment that they want me to do, then they're going to fire me.
>
> Q. You thought you were being set up, in effect?
>
> A. Exactly, and I explained that to you and you agreed with me.

Tr. 344, 346.

19. Ms. Sataki and Respondent thereupon discussed their next steps:

> Q. And at that point I said to you, "Ellie, I'll do whatever I can to help you, and I've had a lot of experience dealing with government agencies. I've been a lawyer for so many years. I'll do my best, but I can't guarantee any result but it seems to me you have a strong case.
>
> A. And you said, "I'm going to transfer you within two weeks to LA." I remember the week -- exactly "two weeks," you said that.
>
> * * * * *
>
> Q. So you told me you'd like to live in the valley, in Sherman Oaks, and you told me, "I like this apartment. I've seen it in

Sherman Oaks on Ventura Boulevard."

A. That is after you told me that, "We can transfer you to LA," and I said, "I have an apartment in DC. I have to live there. . . . I cannot afford my own place in LA now, because I don't know what's happening with the paycheck, if I don't go back to my work in DC." . . . . But you said that, "No, we can transfer you to LA. I know what I'm doing. I'm setting up your doctors, and once you are seeing your doctors here in LA, they're going to have to agree that you go see your doctors while you're working in LA." You explained that to me, how the legal way works, and that's why you set up all my doctors in LA, not in Washington, D.C."

* * * * *

Q. And I then said, you know, "If you really want that apartment there, Ellie, I'll try to get the apartment for you, so you can stay here and you don't have to be back in D.C."

A. It wasn't that I -- "You really want the apartment?" We talked about that. . . . I told you that I can't afford moving to LA because I don't have money. You said, "Ellie, I'll help you."

Tr. 358, 361-63.

20. On or about March 1, 2010, Respondent filed a civil action on behalf of Ms. Sataki against Mr. Falahati in the Superior Court for the District of Columbia, alleging, *inter alia*, assault and battery and defamation (the *Falahati* action). Tr. 369, 394, 981; RX 129-37, 320-28. On March 19, 2010, the United States removed *Sataki v. Falahati* to the United States District Court for the District of Columbia and also filed a "Westfall Certification" under 28 U.S.C. § 2679(d). RX 280-84, 288-89, 311-18. The certification operated to substitute the United States as defendant in the place of Mr. Falahati. *Id.* The *Falahati* action was assigned to Judge Colleen Kollar-

Kotelly. RX 285. The United States subsequently moved, on June 3, 2010, to dismiss the action, arguing that the United States had not waived sovereign immunity for the alleged intentional torts and that plaintiff had not exhausted her administrative remedies prior to filing suit. RX 388-414.

21. On March 3, 2010, Respondent supplemented the prior submissions to VOA with information provided by Dr. Aviera and other mental health professionals. Tr. 351-52, 354; RX 6; *see also* RX 185, 229. Also on March 3, 2010, Paul Kollmer-Dorsey wrote to Respondent, reiterating that "BBG is not able to grant Ms. Sataki's demand to detail her to the Los Angeles office of PNN" and again asserting that "[t]he Agency does not have a position for a full-time PNN employee in its Los Angeles office." He noted that Ms. Sataki had exhausted her annual leave but could take leave without pay under the Family and Medical Leave Act. RX 265-66.

22. Ms. Sataki found an apartment in Los Angeles in mid-March and Respondent paid four months' rent in advance in return for credit on six-months' rent under the one-year lease that commenced in April, 2010. Tr. 363-65, 504; RX 1158-69. Respondent also lived and worked in Los Angeles during and after this period. *See* Tr. 1067.

23. On March 25, 2010 Respondent filed with the VOA Office of Civil Rights (OCR/VOA) a Formal Complaint of Discrimination, dated March 24, 2010, on behalf of Ms. Sataki against Mr. Falahati and their VOA supervisors. RX 6, 1150; Tr. 981.

D. DEVELOPMENTS DURING APRIL AND MAY 2010

24. On April 2, 2010, Respondent filed a civil action on Ms. Sataki's behalf in the United States District Court for the District of Columbia against the members of the BBG, including then Secretary of State Hillary Rodham Clinton, who was an Ex-Officio Member of the BBG, and several members of BBG management and PNN chief, manager, supervisors and producers (the *BBG* action). DX 3; Tr. 394-95; *see also* Tr. 405-09; DX 4.[13] Respondent filed a Notice of Related Case, the *Falahati* action, on the same date. DX 3 at 18. Respondent characterized the *BBG* action as one brought under the doctrine established in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (U.S. 1971) and also relied upon *Wagner v. Taylor*, 836 F.2d 566 (D.C. Cir. 1987), as a basis for the preliminary injunction that he sought in the action. Tr. 981-82, 997-98.

[13] In this regard, Respondent observed during his testimony:

> . . . I included Hillary Clinton because she's the head of the board of governors, and there's nothing in that complaint that attacks her for politics or being the former First Lady or anything like that. She was just sued like everybody else, that's all. That was the reason for that, to put pressure on her. She wasn't singled out.
>
> * * * * *
>
> . . . I didn't name anyone in particular. I just named the entire board of directors who are responsible, and I put on notice the board of governors what was going on, that they should resolve it.
>
> So there was no attempt to single out Hillary Clinton or anybody else. My friend Blanquita Cullum was also named, and I did it for Ms. Sataki and actually destroyed a friendship.

Tr. 1028-29, 1536-37; *see also* Tr. 56-57, 997-98.

25. *BBG* was assigned to Judge Ellen Huvelle, RX 485, but was randomly re-assigned to Judge Richard Roberts. DX 3 at 18; RX 527. On May 25, 2010, *BBG* was re-assigned "by direction of the [District Court's] Calendar Committee" from Judge Roberts to Judge Colleen Kollar-Kotelly. DX 3 at 15; DX 7 at 3; HX 4.

26. Asked at the hearing if she was "aware that Hillary Clinton sat on top of the board of governors at Voice of America, in her official position," Ms. Sataki answered "Yes." Tr. 481. Ms. Sataki "didn't agree" to adding Ms. Clinton and other defendants because she "thought . . . that's going to hurt my case," and she told Respondent the case was "getting too big." Tr. 480. She wanted Respondent to "just keep the case small, [just against] the actual people, the boss and not get everybody in." *Id.*

27. During April, Respondent and Ms. Sataki also had further discussions about the goals and strategies in her dispute with PNN/VOA:[14]

---

[14] Mr. Shamble was present for some of the discussions regarding the use of publicity:

> Q. And we talked about that in the presence of Mr. Shamble as well, correct?
>
> A. Correct.
>
> * * * * *
>
> Q. Did there come a time when we had discussions, you [Mr. Shamble], me and her, about using publicity to try to coax the agency into settlement or a reasonable solution?
>
> A. [Mr. Shamble] Yes.
>
> Q. Was she present at the time?
>
> A. Yes. It was in my office.

Q. And at the time I told you that, a lot of what we're doing is trying to force them into a settlement. We were always trying to force them into a settlement by raising the stakes for them, correct?

A. Yes.

Q. And in addition to that, what could sometimes influence -- what frequently influences the government in this town is publicity, is to get favorable publicity, because people in administrative agencies and judges tend to react to cases that are known and are out there for the public to know about.

* * * * *

A. You told me that and I responded that I don't want it to be. . . .

* * * * *

Q. And, in front of Mr. Shamble, you understood that we were going to use publicity to try to change the attitude of your managers and their approach towards you to try to get a settlement.

A. Again, it was you saying that that's going to happen. I -- I was -- I did raise my concern that it could backfire on me and also everybody's going to find out about it.

Tr. 395-97, 758; *see generally* Tr. 104-05, 755-62. Respondent did not discuss at this time the specific type of publicity he contemplated. Tr. 778-79. Mr. Shamble recalled that "[v]arious options were discussed, whether newspaper, magazine or, you know." Tr. 939.

Tr. 397, 892; *see also* Tr. 905-06.

28. Ms. Sataki explained to Respondent that she wanted her case to be handled "very quietly," "as quiet as possible, so nobody finds out," because she did not want anyone to know about the sexual harassment. Tr. 88-90, 772-75. In her experience, people in the Persian community treated sexual harassment claims as actual acts of intercourse or rape:

> Q. What did you tell Mr. Klayman about how you wanted to proceed in this case?
>
> A. Well, because it was a sexual harassment case, and because of the community and my background, I wanted it to be very quietly handled. I even, the first time I went to my executive producer and I told my executive producer what my co-host did to me, I asked him to keep it off the record, because I didn't want anybody to know. . . . So sexual harassment, in the Persian community, is rape. It's the actual act of intercourse and rape. So to this day I have to answer all those questions.

Tr. 88-89; *see also* Tr. 89-90, 772-75.

29. At this point in time, Respondent and Ms. Sataki did not reach an agreement on the extent of Respondent's proposed publicity strategy or on the specific disclosures to be made.

30. Respondent initially appeared to agree to respect Ms. Sataki's wishes. Tr. 90. However, Ms. Sataki eventually acquiesced to Respondent's proposed publicity strategy to a limited extent because she trusted his judgment as an attorney and he had convinced her it would be best for her case. Tr. 91, 397-98, 775-76; *see also* FF 48. Mr. Shamble believed that "'Elham understood this and approved it.'" Tr. 907 (quoting Supplemental Declaration of Tim Shamble -- RX 962).

31. During this same time period, Ms. Sataki became concerned that Respondent was pursuing a romantic relationship with her:

> Q. Did there come a time when Mr. Klayman attempted to pursue a personal relationship with you?
>
> A. Yes.
>
> Q. Do you recall when that was?
>
> A. . . . April, 2010.
>
> Q. Can you tell the hearing committee how you became aware of that?
>
> A. It started with that he started getting upset why I'm not inviting him to the gatherings or to places that I go and I don't take him with me. That made him upset. And so I had arguments with him. He would nonstop text or email, or phone calls, and talked to me that I talk about respect, that I'm not respecting him, and why I'm not taking him to the gatherings.
>
> Then he explained his feelings to me and told me that he loves me and then he told me that he never loved anyone the way he loved me ever in his life and that nobody is going to love me the way he loved me, no other man can ever love me the way he loves me.
>
> And so this was going on, and he -- and I through the whole time asked him to be my friend, but the most I can -- he's my attorney and the most I can do is a friendship, nothing more than friendship. Then he would lecture me on a friendship, what a friendship is, and then he would put lines of emails that a friend wouldn't do this or a friend wouldn't do that . . . .
>
> So, I -- the reason I couldn't, even as a friend, take him anywhere was because of his body language or the way he would look at me.

> I was in a sexual harassment case and I couldn't have my attorney in public acting in the body language and the eye contact the way that people are going to say . . . "Oh . . . she has something going on with her attorney?"

Tr. 118-20; *see also* Tr. 115.[15] Respondent acknowledged that beginning in this period, ". . . I really started to care about her deeply. I really did." Tr. 983.

32. Ms. Sataki raised her concerns with Dr. Aviera, her psychologist, and a conference of the three of them was arranged. Tr. 125, 138.

33. On April 7, 2010, in advance of the meeting, Respondent wrote to Dr. Aviera a three-page, single-spaced letter in which he stated, *inter alia*:

> . . . Ellie is more than important to me, as I have told you and her. I think there is a very beautiful side to Ellie and this has touched my heart, to understate things. . . . I have not helped her for money; I love Ellie;
>
> Ellie thinks that I am acting improperly like a "jealous boyfriend." I do not believe this to be true. . . . Today, she called me about her case and the conversation unfortunately turned personal in part. I said to her that while we have no personal relationship, we are partners professionally and that we need to be considerate of each others' [*sic*] feelings. . . .
>
> Ellie in my view is not capable of seeing the forest from the trees at this time. I discount a lot, but I am human and have feelings. Because I do care so much about Ellie, I too have trouble seeing the proverbial forest from the trees. Its [*sic*] very hard to be a lawyer and feel so much for your client. . . .
>
> Ellie will not do anything with me on a personal basis

[15] In response to Disciplinary Counsel's investigation of the issue, Respondent denied that he sought a romantic relationship with Ms. Sataki. DX 51 at 1-3; *see also* Tr. 1430. He suggested that "she imagines that people are sexually coming on to her," "often claims sexual harassment" or "perhaps, she is just lying." DX 51 at 3; Tr. 1424-33.

> (even watching a film on DVD) and makes up reasons, most of which don't make sense, why this is so. (She also tries to get rid of me as quickly as possible when I am in her presence). . . .
>
> She shut the door to ever having a personal relationship with me. . . .
>
> Ellie is going through a difficult time . . . . I don't think Ellie can, because of her state, come to any conclusions on her own at this time as to why she and I are having problems, much more how we can together solve them. . . .
>
> I don't want to make her life more difficult, but only better. From the moment I met her, I wanted to see her happy. I knew that I had met a very special person.

DX 24; RX 978; *see also*. Tr. 1433-34.

Respondent also stated in the letter that, on their first trip to Los Angeles together, "she belatedly and begrudgingly introduced me as her 'lawyer,' rather than friend, and then avoided me during the encounter. I found this very peculiar at the time, as it [*sic*] she did not want to otherwise let people know about her legal problems." DX 24 at 1.[16] Although he denied being the "jealous boyfriend," the letter also included extended complaints about her attention and affection for her "'roommate' Kaveh," his view that Ms. Sataki "want[ed] to meet a rich Persian guy and that I am seen as an impediment to this," and his acknowledgement that "Ellie has told me that she does not trust me personally." *Id.* at 1-3.

[16] At the Hearing, Respondent denied that Ms. Sataki "ever" told him that she did not want people to know about her legal problems, characterizing it as "completely false." Tr. 1310-12 (Klayman). When confronted with his letter to Dr. Aviera, he claimed that he did not hear the question and appeared to acknowledge that he was aware of her concerns about publicity at least early in the representation. Tr. 1312-13.

34. During their meeting with Dr. Aviera, Respondent became upset and left precipitously. Tr. 139.

35. Soon after, on April 9, 2010, Respondent sent Ms. Sataki an e-mail which listed seven attributes of a "friend," including "Someone who is not worried about the appearance of being your friend; i.e. that someone (i.e., the Persian community) might think you are his or her girlfriend, boyfriend, wife, husband or whatever. (. . . It has been your concern with me.)." SX 1; *see also* Tr. 1435-39, 1441-42.

36. On April 23, 2010, Respondent wrote to Ms. Sataki another long message, in which he stated, *inter alia*:

> When someone u deeply care for tells u stuff like, "you'll never be my Boyfriend . . . how would u feel?
>
> Last nite u did not respect me. You could have called me from the home of ur rich Persian family friend.
>
> I am very sad because I really do love u Ellie. . . .
>
> Its [*sic*] best for me and u that I get out of ur life in a personal sense. U would never want to be with a non-Persian anyway.

SX 2; *see also* Tr. 1442-44.

37. Ms. Sataki replied to Respondent the same day, stating *inter alia*: "I wish we didn't have this unfortunate problem in this stage of my life, but as you know better than anyone else I'm so tired and anxious that I can't even think about anything else but my case." SX 3 (second email in exhibit); Tr. 1447-48.

38. Respondent immediately responded, stating *inter alia*:

> U do not have to worry about money. I honor my commitments in all respects. Ur apartment is prepaid for 6 months and I will pay any expense that must be paid as I prepare to go to the judge with "full ammunition." I am not trying to bribe you. I simply love you and would not let u fail.
>
> * * * *
>
> I never demanded that u love me. I never asked you for anything. Its [*sic*] just that you keep slamming the car door in my face. Going to Turkey with u, or even to Movieguide, does not require u to love me.
>
> I am human. You are -- and this is not said for effect -- the only woman I've ever really loved. You know, when I walk down the street in Beverly Hills and see an attractive woman, my thoughts immediately flip to you. I see no one else. This has never happened like this with me before.
>
> This is, as I wrote in my book, by far the most important and personally rewarding thing I've ever done. My loving you has given me true meaning in my life.

SX 3 (first email in exhibit). Respondent testified in his case that in this email he was trying to convey that

> I had really strong feelings, believed in her and loved her. . . . So that's what I was trying to convey. I'm human. Things happen in life that you don't expect, and when they do, you have to deal with them. But in this case it actually made me work harder for her.

Tr. 1195; *see also* Tr. 1444-46.

39. The next day, April 24, 2010, Respondent wrote Ms. Sataki another long complaint about her failure to call him, lamenting that he was a "low priority" in her life, and asserting that she "did not want . . . to call me in front of the rich

Persian family." SX 4; *see also* Tr. 1451-53.

40. On April 23, 2010, the *World Net Daily* (*WND*) published an article by Bob Unruh titled *$150M case claims anti-freedom bias at Voice of America* and sub-titled *Washington gadfly brings complaint on behalf of news anchor*. RX 138-40.[17] The article included a photograph of Respondent and was based on "an announcement by Klayman." *Id.* at 138. The article reported, *inter alia*:

> In a recent column by Klayman on WND, he wrote that nowhere does the fire of freedom burn so bright "as in the Persian people, many of whom, having fled the tyrannical Islamic regime in Iran over the last 31 years, now live in the United States."
>
> They have watched, he wrote, the effects of Islam on their country, "through barbaric imprisonments, torture and executions in the name of Allah."
>
> He said if the freedom fighters in Iran are successful, "it would not only eliminate Iran's nuclear threat, but change the entire dynamic of the Middle East, and the world."

Id. at 139.

41. On April 30, 2010, *WND* published an article written by Respondent and titled *Nuclear War-Fear -- How to free the Iranian people -- Exclusive: Larry Klayman rips Obama for Carteresque appeasement of Iranian regime.* DX 23 at 41-43. In the article, a critique of the Carter, Bush and Obama administrations' Iranian policies, Respondent wrote:

> Layer on top of this a Voice of America – the U.S. government

[17] *WND*, an on-line publication, appears to have had a circulation in excess of 5 million viewers. Tr. 442. As of the time of the hearing, at least two of the articles by Respondent featuring Ms. Sataki's case still appeared on the *WND* site. Tr. 444.

> organ that is supposed to promote freedom in Iran and around the world – being neutered by the Obama administration, as it now broadcasts, ala the president himself, self-flagellistic anti-American rhetoric. . . . Indeed, in recent days I was forced to file suit against the Board of Governors and other managers of the Persian News Network of VOA over their successful efforts in viciously destroying a prominent and very popular Persian television anchor, Elham Sataki, because of her personal political views that VOA should be doing much more to promote freedom in Iran. Even the one Republican governor of VOA, Blanquita Collum – a fellow female broadcaster in her own right – stood by and watched Ms. Sataki be rendered mentally and physically disabled as a result of the retaliation the managers meted out, for fear that she herself would be retaliated against by the Obama administration.

DX 23 at 42.

42. In an email to Ms. Sataki dated May 8, 2010, Respondent stated, "Ellie: . . . I thought of someone who can take over your legal representation. His name is Tim Shea." Mr. Shea was an attorney who had worked with Mr. Shamble on PNN/VOA employment cases. He also promised to send her "a check every two weeks the equivalent of your paycheck" until "all is resolved," and wished her the best for "you, your family and Kaveh." SX 5; RX 977; Tr. 1079-81, 1197-98.

43. Later the same day, Respondent sent Ms. Sataki another email in which he stated, *inter alia*:

> When someone loves someone as much as I do you, and when the person you love does not want to be around you and expresses no feelings of any kind towards you, it creates a very difficult emotional situation. I came back from DC to be with you and your mom and your[*sic*] clearly did not want me around. This hurt me deeply.

* * * * *

> Its [*sic*] not healthy for you or me. You will get better legal representation with someone else, like Tim Shea, who does not have an emotional conflict and can keep his mind clear.
>
> I do not regret falling in love with you, but first you saw me as "Fallahati" and now "your ex". I truly love you, I am feeling real pain, this is not easy, but I have to get out of your life totally.
>
> * * * * *
>
> So I am going to leave you alone. Always remember that I love you. This will not change and I will always see you that way. At least I found it once in my life. That is something most people never do….

DX 26; SX 6; RX 976-77; Tr. 1268-70. Ms. Sataki testified as to her reaction to this email as follows:

> I'm just upset, hurt and angry that he can't concentrate on my case and instead of concentrating on my case and the fact that I'm jobless, career-less, and he's still concentrating on his feelings for me . . . . I begged him, I plead to him, I screamed, I cried, begging him, "Please, please, stay my attorney and focus on my case, not me."

Tr. 142.

44. On May 9, 2010, Respondent emailed to Ms. Sataki, a copy of a letter he had written Dr. Aviera earlier in the day. In the email to Ms. Sataki, Respondent stated: "I do love you dear. This is very painful for me." In the letter to Dr. Aviera, Respondent recounted the evolution of his feelings toward Ms. Sataki, and stated ". . . I do truly love Ellie. . . . But I do not want to hurt her and my own emotions have

rendered me non-functional even as a lawyer." He further inquired whether Dr. Aviera had helped write a recent email from Ms. Sataki to him, asked "And, should not love factor into Ellie's well-being and rehabilitation?", observed "I do not believe that I met her by accident. . . . [a]nd, then I fell in love with her, totally", and questioned "whether Ellie should have been counseled -- if indeed this was your advice -- that at this stage of her life she cannot feel and express something for someone who truly loves her." DX 25; SX 7; *see also* Tr. 1453-66.

45. On May 11, 2010, WND published another article written by Bob Unruh titled *Lawyer accuses VOA manager of pro-Iranian bias*. DX 23 at 36-40; RX 1015. Respondent had prompted the author to write this article because, he testified, "I thought it would be helpful, to try to settle Ms. Sataki's case." Tr. 1217. The article included the following:

> The claims have emerged in a lawsuit filed against VOA seeking $150 million in damages for a woman who was dismissed from her post following her expression of support for freedom for Iranians.
>
> The case was filed against Voice of America alleging its managers at the Persian News Network knowingly advocated anti-American sentiment in their programs and then used sexual harassment to drive out an anchor who objected.
>
> The case has been brought by Larry Klayman, the founder of Judicial Watch and also Freedom Watch, USA on behalf of Elham Sataki, who now suffers serious health problems because of the stress created by the conflict, according to the documentation in the case.

DX 23 at 36. The article later refers to Respondent as the author of *WHORES: Why*

and How I Came to Fight the Establishment, and at the end of the article Respondent's book is listed under "Related offers." *Id.* at 36-39. Respondent testified as follows with respect to the promotion of his autobiography in this and a number of ensuing articles he authored and which were similar to this May 11, 2010 article:

> Q. So is it correct that you received no remuneration for or in association or connection with this group of articles?
>
> A. That is correct.
>
> Q. And is it true that, at least during this period of time that's relevant to this case, that you received no remuneration from this publisher for books by you that they published?
>
> A. Correct. Correct, that Larry Klayman did not.

Tr. 1216; *see also* Tr.1318-21.

46. On May 12, 2010, the Director of VOA's Office of Human Resources, wrote to Ms. Sataki, c/o Respondent, as follows:

> This responds to the email dated May 7, 2010, from your attorney, Mr. Klayman . . . [i]n which he states that you are prepared to and will report to work in the Los Angeles office on May 14, 2010.
>
> You are hereby directed not to report for duty to any agency duty station in Los Angeles, California, at any time without explicit authorization from the agency. Your duty station is Washington, D.C.
>
> * * * * *
>
> As you know, you have been placed on approved leave without pay through May 14, 2010. Since your clinician now advises that

> you can report to work on May 14, 2010, and the Agency has arranged the circumstances of your detail to meet the other conditions outlined by Dr. Avlera [*sic*], you are directed to report for duty on May 14, 2010, to the Office of Human Resources . . . at 10:00 a.m.

RX 787-88, 920-21. Respondent recommended that Ms. Sataki not accept the government's offer of accommodation:

> Q. You didn't want to do that, correct?
>
> A. You advised me not to do that.
>
> * * * * *
>
> Q. So you were willing to be in the same building with Medhi Falahati?
>
> A. If it would cost my job, if would cost my job -- I lost my career. I lost my job, and I lost a government job that could provide a future for me. So if I had to deal with that and --
>
> * * * * *
>
> So I was still working there. It was a tough situation, but I was trying to handle it. I was still working there. . . . so then I started doing as my attorney tells me, as I'm not an attorney and my attorney knows best. But --
>
> Q. Ms. --
>
> A. Before that, choosing between a career and my job, and if I have to just stay tough and take it and continue and hope for the better, I would have done it.

Tr. 652-54 (emphasis added). In an email dated May 14, 2010, Respondent notified Mr. Kollmer-Dorsey of VOA that Ms. Sataki had reported for work at VOA's Los

Angeles office, asked that Ms. Sataki be allowed to begin work "immediately," and stated that she "is ready to accept an assignment and has a proposal for a package or interview." RX 925. In an email later the same day, the Director of VOA's Office of Human Resources reiterated her directive in her May 12, 2010 letter: "The information in my letter is clear and easily understandable -- Ms. Sataki is directed not to report to work in Los Angeles." RX 924.

47. An article titled *The government war on a freedom-loving beauty* appeared in *WND* on May 14, 2010. The article was sub-titled *Exclusive: Larry Klayman goes to bat for harassed broadcaster fighting for a free Iran*. The article was authored by Respondent. DX 23 at 33-35; RX 29. The article first recounts Ms. Sataki's life history. DX 23 at 33. It then describes her experience at PNN as follows:

> But when she gets to Voice of America, Ellie sees that VOA is not what she or the other Persian broadcasters at PNN had thought. The agency, managed by people who have little regard for VOA's mission to promote the values of the United States and freedom in Iran, treat their professional broadcasters like circus animals. Either they jump, like performing circus dogs, through the hoops they want -- which is to kiss the derriere of the Iranian radical Islamic mullahs in Tehran -- or they will be destroyed.

Id. Respondent ". . . was also trying to get them to clean up the situation about the division of politics at Voice of America, because you did have these two factions." Tr. 988-89. Mr. Shamble, who agreed with Respondent that PNN/VOA "has always been politically divergent," Tr. 883, distributed this article at an event on the mall. Ms. Sataki accompanied Mr. Shamble to this event and joined him in "distributing it to people in the vicinity." Tr. 893, 1213-14.

48. During this same period of time, Respondent and Mr. Shamble contacted some members of Congress and/or personnel in their offices, including Speaker John Boehner, Senator Tom Coburn, Senator John McCain, Senator Joe Lieberman and Congressman Dana Rohrbacher in an effort to obtain assistance from them in Ms. Sataki's matter. Tr. 449-58, 913-14, 985-88; *see also* RX 968. Mr. Shamble assumed that Ms. Sataki was aware of these steps. Tr. 913-14. Ms. Sataki testified that she was aware of at least some of these contacts. Tr. 452-58. The chief of staff in Congressman Rohrbacher's California office had several follow-up meetings and telephone conversations with Ms. Sataki. Tr. 458, 463. In a meeting at one point, Ms. Sataki testified,

> She [the staff person] saw what's going on with Mr. Klayman, and, from the body language, the first time we were in the office, and she approached me and she told me, "Something is wrong. Are you afraid of this man?" And that is why the first hug that she gave me in the hallway. . . .
>
> Q. [by Respondent] In fact I was in the hallway at the time, too, correct?
>
> A. Yes.

Tr. 465-66. Ms. Sataki "told her [the staff member] what's going on:"

> At that time he -- Mr. Klayman wanted to have more than a client/attorney relationship with me, and it was -- by then I was completely mentally destroyed because of the roller coaster he was putting me through, because it was for months . . . it was ongoing and ongoing and wouldn't stop. . . .

Tr. 115.

49. At some point in May 2010, Ms. Sataki accompanied Respondent to an

event in Los Angeles. Tr. 120, 124. Respondent argued publicly with Ms. Sataki because, in her view, she sat facing the stage with her back towards him and she "talked to other people and all that, and that upset him very much." Tr. 120. Respondent also chastised Ms. Sataki, "'Why didn't you look at me? . . . Why you so afraid that people are going to think that I'm your boyfriend? Why you so scared of that?'" Tr. 122. As they were leaving, Respondent became so upset that "[h]e couldn't control himself. . . . He was making a scene that everybody could see." Tr. 121. She tried to calm him down, succeeding only when she threatened to walk away. *Id.*

50. As they were driving away, however, "it was no stopping. He was going on and on and on, talking, talking, talking, about all the different occasions that I didn't invite him or I don't care about him. He cares about me so much, he gives me so much love, everything." Tr. 121. Thereupon, at a red light, Ms. Sataki jumped out of the car and ran into the nearby Hotel Luxe. Tr. 122. When Respondent came after her, she ran into the ladies' room, and Respondent followed her. *Id.* She was rescued when a hotel receptionist told Respondent he had to leave and then helped Ms. Sataki get a taxi and leave by a back door to escape Respondent. Tr. 122-23; *see also* Tr. 1468-69. In a May 18, 2010 message to Ms. Sataki, Respondent joked about the event, saying "By the way, Hotel Luxe renamed the 'Women's Rest Room' in my honor; its [*sic*] now called 'The Klayman Room.' I can now use it for 'client meetings.'" SX 8; *see also* Tr. 1467. To Ms. Sataki, however, ". . . this was my life that he was playing with . . . [and] he was making a joke out of that." Tr. 184.

51. In a letter and email dated May 18, 2010, a VOA programming manager wrote Ms. Sataki and Respondent, "There is no position available in Los Angeles. I would like to reiterate to you . . . that you have been placed on Absence Without Leave (AWOL) effective Friday, May 14, 2010. . . . I am directing you to report to work in Washington, DC." HX 5. Respondent replied on the same day to this "provocative and disingenuous letter" and threatened the programming manager with "more personal liability." *Id.*

52. In emails to Ms. Sataki late in the evening May 19, 2010, Respondent wrote, "I have always told you what I mean and I make good on my commitments" and "I will wire $2,000, which is slightly more than what you net out each pay period." SX 9. In an email earlier that day to Ms. Sataki, Respondent had stated:

> I told you that we had to wait until your convalescence was over, since VOA said it would reevaluate your request to be in LA at that time. I told you that I would advance your pay to you so that you would not sink during this period, if we did not get VOA to reverse its position before.
>
> Persons who have told you otherwise don't know what they are talking about. Everybody is an expert, but the expert. Jewish people think they know everything. Thats [*sic*] why I don't generally "hang" around them.
>
> If you feel guilty about accepting the money, which I will get back, thats [*sic*] an issue you will have to deal with.

SX 10; *see also* Tr. 1198.

53. On May 20, 2010, in the *BBG* action, Respondent filed a Motion and Memorandum in Support of Temporary Restraining Order and/or Preliminary

Injunction and Request for Emergency Hearing if Deemed Necessary, along with a proposed Order. DX 5; RX 528-32, 551-52. In the motion Respondent argued that the court should order the defendants to allow Ms. Sataki to work from Los Angeles. *Id.* On May 24, 2010, in the *BBG* action, the United States file a Notice of Related Case, reporting that the *Falahati* action was "a related case pending in this district." RX 624. On May 27, 2010, the United States filed a Motion to Dismiss or in the Alternative for Partial Summary Judgment along with a Memorandum in Support of Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiff's Motion for a Temporary Restraining Order. HX 6; DX 8 at 1.

54. *WND* published another article written by Respondent on May 21, 2010, titled *A voice for Persian freedom* and sub-titled *Exclusive: Larry Klayman explains why Iran is "most important country in the world."* DX 23 at 30-32. In this article, Respondent refers briefly to "my client, Elham Sataki, the brave VOA pro-freedom Persian broadcaster and anchor who was sexually harassed and then destroyed by the pro-Islamic regime managers at VOA." *Id.* at 31-32.

55. A week later, on May 28, 2010, *WND* published another article by Respondent, titled *Man the barricades!* and sub-titled *Exclusive: Larry Klayman speaks out against 'evil' in gov[ernment] that has Americans fed up.* DX 23 at 27-29. The article discusses Ms. Sataki's sexual harassment claim at some length, including Ms. Sataki being "on the verge of a nervous breakdown" and becoming "medically disabled" and "literally bankrupt." *Id.* at 27-28. The article also contains a reference to Respondent's autobiography. *Id.* at 27; *cf.* FF 38. Respondent testified,

"I'm not an owner of WorldNetDaily. I don't benefit from them selling my books in any way." Tr. 1213.

56. During the meetings with Congressional personnel (*see* FF 48), Respondent provided copies of the articles that he had been writing about Ms. Sataki and the VOA. Tr. 455, 913.[18]

57. Respondent sent Ms. Sataki copies of at least some of the articles. Tr. 400. At some point in May, Ms. Sataki spoke with Respondent about the articles; she testified in that regard as follows:

> Q. How did it change? [*See* FF 27, 27 n.14.]
>
> A. He started writing articles, and so it came out in the internet regarding the case.
>
> Q. Did you ever have conversations with Mr. Klayman about publicizing your case?
>
> A. I did. I asked him not to do it, but then later I -- when he explained to me how much it's going to help my case -- because he was going back and forth with the people, the VOA management and the stuff that he said that, "It's going to take, say, no-brainer. It's very easy. It's only going to take two weeks," or whatever, and it's going to be easy, a task, like you said to me, he said how easy it's going to be to transfer me from DC to LA and work out of the LA office.
>
> All of those stuff that I listen to him because he's the attorney, he knows best, and none of that happened.

[18] The record is devoid of any further information as to when Ms. Sataki became aware of this. She testified at the hearing, under cross-examination by Respondent, that she was aware as of the time of the hearing that Respondent had distributed some of the articles during the Congressional meetings. Tr. 454-56. There is no other, more specific indication in the record of when she first became aware of this.

Tr. 91. Ms. Sataki later provided additional testimony in this regard as follows:

> Q. [by Mr. Klayman] At that time you did not tell me, "Don't write any more."
>
> A. I did.
>
> Q. There's nothing in writing that you presented to that effect at that time, did you?
>
> A. We talked to each other. I explained to you on the phone why I don't want articles out there.

Tr. 400; *see also* Tr. 400-03.

58. On May 30, 2010, Respondent and Ms. Sataki exchanged emails under the heading "No more arguments." Apparently reacting to a previous message, Respondent wrote:

> Get some other flunky to[] write ur emails. I don't need a course in the law from ur friend. He can do acupun[c]ture or dentistry something; whoever it might be.
>
> Don't communicate with me further. . . .
>
> As for help, ur the one who needs it most. In six months u have shown me nothing; not even as a friend. This "diva mentality" cannot be justified even by ur current mental state. I will not feel sorry for u and neither should Dr. Aviera. It does u no good.
>
> I wish u and ur friend well.

SX 11 at 1. Ms. Sataki responded by pointing out the difficulty of handling his accusations and the record of Respondent's unfulfilled promises for his litigation strategy. She concluded by suggesting that she discuss the case with Respondent's

associate, because of the nature of their recent communications. Ms. Sataki also reminded Respondent: "PLEASE always remember YOU WILL GET %40 [sic] WHEN YOU FINISH THE CASE." SX 11 at 2; *see also* Tr. 1499-1502.[19]

59. Respondent wrote back to Ms. Sataki the next day, May 31, 2010, in an email titled "Legal Representation Agreement." In the email, he described the time and expenses he had devoted to the representation: "I've put in about $250,[000]. . . . So at this point I think 50 percent of any recovery is fair and that is what I require." SX 12 at 1. He also promised to send her a written retainer agreement: "I will draw up the contract evidencing this 50 percent arrangement and email it. Then sign it so I know we are on the same page as I go forward." *Id.* at 2; *see also* Tr. 1056, 1503-11, 1513-14.[20] Respondent also expressed his disappointment that he could not develop a better personal relationship with her. SX 12 at 2.[21]

[19] Ms. Sataki also wrote, ". . . I'm done arguing with you about my private life and trying to prove myself to you. I'm also done listening to your crazy thoughts and I'm not going to let you play with my mind anymore, because as I said before, I have enough problems on my own." SX 11 at 2.

[20] Respondent testified that he did not provide a written agreement as discussed in his letter because "the relationship effectively ended." *See* Tr. 1512, 1513.

[21] Respondent testified regarding this email,

> . . . I was getting to the point where I didn't feel that I was being respected, as I said. It was a difficult relationship, and if I continued on, I'm suggesting 50 percent of any recovery of what's fair. But we never agreed, either 40 percent or 50 percent, previously.
>
> And, you know, it was around this time period that I was trying to get her other counsel, too, because I realized that she was just very difficult to deal with.

E. DEVELOPMENTS DURING JUNE AND JULY 2010

60. On June 1, 2010 Respondent wrote Ms. Sataki that he would have "no further financial involvement or liability on the lease" because "[y]ou told me that I am trying to control you with the apartment." SX 13; *see also* Tr. 1470-72.

61. That same day, Judge Colleen Kollar-Kotelly denied Plaintiff's motion for a temporary restraining order in the *BBG* action (FF 53), and held Plaintiff's request for a preliminary injunction in abeyance, in a 24-page Memorandum Opinion. DX 7. The Court accepted as true virtually all of the facts proffered by Respondent concerning sexual harassment and Ms. Sataki's medical status. *Id.* at 4-12. The Court's findings included the following:

> Since as early as August 2009 Plaintiff has requested to be assigned to Los Angeles, California, where she resided for nearly 10 years prior to accepting her current position with PNN. . . .
>
> PNN does *not* currently have any full time employees in Los Angeles nor does it perform any on-air work in Los Angeles. [emphasis in original]
>
> Plaintiff does not dispute, nor has she offered any evidence to contradict, Defendants' sworn assertion that PNN does not have any full time employment positions available at VOA's offices in Los Angeles. In addition, the Court notes that there is no evidence in the record to indicate that any full-time PNN employee assigned to PNN's Washington, D.C. office has ever been permitted to "telecommute" from VOA's Los Angeles office for extended periods of time.

So it was not that I was demanding 50 percent, because I was trying to get out of the case at that point. I was trying to make a point. . . . I've never asked her to pay me back."

Tr. 1056-57; *see generally* 1056-60, 1061-62.

DX 7 at 5-6. Based on this and other findings, the Court reasoned:

> Despite Plaintiff's attempts to phrase her requested relief as seeking only a passive injunction, it is readily apparent that Plaintiff in fact seeks a mandatory injunction requiring Defendants to affirmatively permit Plaintiff to work from the VOA Los Angeles office. Plaintiff asserts that such a request is a "reasonable medical accommodation" for Plaintiff's present disability and is therefore required under the Rehabilitation Act.
>
> . . . Plaintiff indicated through counsel that she wished to proceed directly to her request for a temporary restraining order.

Id. at 14.

In the ensuing 10½-page Legal Standards and Discussion section, the Court commenced its analysis as follows: "'The standard for issuance of "the extraordinary and drastic remedy" of a temporary order or preliminary injunction is very high, and by now very well established.'" *Id.* at 15 (citations omitted). The Court then set out the "four-factored standard" and the "sliding scale as to which a particularly strong showing in one area can compensate for weakness in another area" and also noted that nevertheless "'[i]t is particularly important for the [movant] to demonstrate a substantial likelihood of success on the merits.' If the movant fails to do so, inquiry into the remaining factors is unnecessary, for the injunctive relief must be denied on that ground alone." *Id.* at 15-16 (citations omitted). The Court also discussed the case that Respondent primarily relied upon in his motion, *Wagner v. Taylor*, *supra*, and noted that "Defendants appear not to directly contest" *Wagner*'s applicability. *Id.* at 15-20. The Court thereupon observed:

> . . . [H]owever, the authority [under *Wagner*] to issue such relief arises from the Court's "'limited judicial power to preserve [its]

> jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels'" [quoting from *Wagner* and other authority]. Here, Plaintiff seeks to *alter* the status quo.

Id. at 18 (emphasis in original).

Instead of denying the motion on that basis, the Court turned to the standard four factors test and concluded, with respect to the first factor, that Plaintiff could not demonstrate a substantial likelihood of success on the merits in her Rehabilitation Act claim, her reasonable medical accommodation request, or her constitutional claims for seven different reasons. *Id.* at 19-25. Consequently, the Court ruled:

> Because Plaintiff has failed to demonstrate a substantial likelihood of success on the merits, the Court's inquiry is at an end [citing controlling D.C. Circuit authority]. . . . Accordingly, although the Court understands Plaintiff's present health concerns, absent a showing that she is legally entitled to the particular injunctive relief she seeks, the Court must DENY Plaintiff's Motion for a Temporary Restraining Order.

Id. at 25 (citations omitted). Respondent moved for reconsideration on June 6, 2010, arguing primarily that the Court had not properly applied *Wagner v. Taylor* but not addressing the Court's emphasis on the nature of the relief being requested (i.e., alteration of the *status quo*). DX 9.

62. Eight days after Judge Kollar-Kotelly's June 1, 2010 Order denying the TRO in the *BBG* action, Respondent filed "Plaintiff, Elham Sataki's Motion and Memorandum to Chief Judge and Judge Kollar-Kotelly to Reassign and Remand Case, by Consent or Otherwise, to Prior Trial Judge Richard W. Roberts, or in the

Alternative, to Assign Sataki Cases to Another Trial Judge through Random Assignment System." DX 10. In his Motion, Respondent noted that the defendants had filed a Notice of Related Case requesting re-assignment of the case from Judge Roberts to Judge Kollar-Kotelly and stated:

> Defendants knew, based on reported decisions and otherwise, that Judge Kollar-Kotelly and counsel for Plaintiff, Larry Klayman, have had a running battle in a number of cases and that Judge Kollar-Kotelly harbors an intense antipathy, if not apparent hatred toward Mr. Klayman. As this Court knows very well, Mr. Klayman, during the years of the Clinton administration, brought many lawsuits against President Clinton, the First Lady Hillary Clinton and the executive branch and developed a reputation, undeservedly and falsely, as an extreme right wing conservative, hostile to the Democratic Party. On the other hand, Judge Kollar-Kotelly, who was nominated to the federal bench by President Clinton, and whose lawyer-husband reportedly helped defend the Clinton administration during the Monica Lewinsky scandal, is viewed by Mr. Klayman and others as a very partisan Democrat who has a hard time separating her politics from the impartiality required of a federal judge.
>
> In this context, in the last three cases which Mr. Klayman had before Judge Kollar-Kotelly she made certain decisions which show such an animus toward Mr. Klayman, such that his clients' rights were affected. It would appear, based on this pattern of behavior, that Judge Kollar-Kotelly harbors such an animus toward of [*sic*] Mr. Klayman, that it has been difficult for the judge to separate her feelings about Mr. Klayman from the legal rights of his clients. . . .
>
> [In one of the cases] Judge Kollar-Kotelly allowed for an outrageous and irrelevant and not legally justified fishing expedition into the personal family life of Mr. Klayman. . . . Importantly, Judge Kollar-Kotelly's actions, which were cruel, and vindictive and retal[i]atory, will someday affect how Mr. Klayman's young children will view their father (and how the innocent woman's children will view her) and serve as a dark

> reminder of the bridled [*sic*] and arrogant power of some on the federal bench who choose to use their power for improper ends. As Mr. Klayman interprets it, Judge Kollar-Kotelly, seeing an opportunity to harm Mr. Klayman to try to smear and perhaps hamper him from bringing future lawsuits against her Democratic party, seized the opportunity.

DX 10 at 1-4. On June 11, 2010, Respondent filed a sixty-six page "Supplemental Memorandum and Exhibits in support of [Sataki's] Motion for Preliminary Injunction." DX 11.

63. Also on June 11, 2010, *WND* published Respondent's article titled *Cockroaches and judges* and sub-titled: *Exclusive: Larry Klayman laments lack of judicial protection from 'evil government.'* DX 23 at 25-26. In this article, Respondent wrote that Ms. Sataki "had a nervous breakdown, with thoughts of suicide," that "[s]he is now under psychological and other medical care," (*Id.* at 25) and that she "is now bankrupt and on the verge of suicide." *Id.* at 26. Respondent also summarized the recent ruling in the *BBG* action as follows:

> The case was assigned regrettably to a Clinton appointee, Judge Colleen Kollar-Kotelly, with whom I have locked horns in the past. You see, Judge Kollar-Kotelly is a partisan Democrat – her lawyer husband helped defend President Clinton during the Monica Lewinsky scandal. Thanks to all of my lawsuits against Clinton during the 1990's, Kollar-Kotelly does not like me. Judges are supposed to put their politics aside when ruling on cases, but Judge Kollar-Kotelly has always had a problem doing this with me.

Id. at 26. *See also* Tr. 1207-08. The article also included the following advertisement for Respondent's autobiography: *Get Larry Klayman's fascinating account of his battle with the powers that be: "Whores: Why and How I Came to Fight the*

Establishment." Id. at 25 (italics in original). Respondent testified in this regard, "Again, I'm not selling my book. It's WorldNetDaily selling the books that they owned." Tr. 1208.

64. On June 15, 2010, Respondent asked Gloria Allred to accept Ms. Sataki as a client, claiming "she has very strong claims and the damages are large."[22] RSX 1. Tr. 1100. Ms. Allred's law firm declined to accept the case. Tr. 1102. On the same date, the United States filed a Motion to Dismiss and Motion for Summary Judgment. DX 3 at 12.

65. Throughout June, 2010, Respondent and Ms. Sataki's communications included at least the following: *See, e.g.*, DX D at 23 (June 10, 2010 Respondent's email suggesting that Ms. Sataki contact a Los Angeles reporter, a suggestion that Ms. Sataki did not follow-up on); SX 14 (June 16, 2010 exchange titled "One More Time!!"), *see also* Tr. 1472-78; SX 15 (June 21, 2010 exchange titled "New Information" in which Ms. Sataki updated Respondent on Mr. Falahati's status at work in case it would help successor counsel, and Respondent replied by saying, "I regret to inform you that Mr. Klayman died last week"), *see also* Tr. 1479-83; SX 16 and SX 17 (June 23, 2010 email messages to Ms. Sataki titled "Inspiration-More Thoughts" with personal entreaties like "Dear, why do you think I am with you and come back even when you push me away? I am not a masochist and I have pride . . ."), *see also* Tr. 1483-85; SX 18 (June 28, 2010 email to Ms. Sataki titled "How to

[22] Respondent testified that he did not anticipate earning much money from the case and that they would probably never recover damages. Tr. 1055-62; 1503-08.

Deal with Me – Read This/Its Mild" recounting why Respondent felt she treated him badly by not allowing him to spend time with her family and ending, "Thank God I love you, or I would have been gone long ago. Being around you, requires me to always swallow my pride and self respect"), *see also* Tr. 1486-90; SX 19 (June 29, 2010 email titled "Sweden," in which Respondent predicted that PNN would defend against Ms. Sataki's suit by depicting her as promiscuous, blamed legal setbacks in part on her unwillingness to seek work with "a major English network, like CNN," and concluded she should go back to her family in Sweden), *see also* Tr. 1490-94.

66. On July 2, 2010, *WND* published Respondent's article titled *JESUS: The ultimate freedom fighter* and sub-titled *Exclusive: Larry Klayman chronicles his transformation into Jewish follower of Christ*. DX 23 at 22-24. The article includes a reference to "all my 'trials and tribulations' and those of my clients like Elham Sataki. . . ." *Id*. at 23. The article also contained the same promotional blurb as in the preceding article. *Id*. at 22.

67. Judge Kollar-Kotelly issued a 53-page Memorandum Opinion on July 7, 2010, denying the motions for preliminary injunction and for reconsideration of the TRO in the *BBG* action. The court again accepted most of the facts proffered by plaintiff. (Indeed, Judge Kollar-Kotelly invited Respondent to file a motion for such discovery. But he did not do so. DX 12 at 27 n.18.) The Court found, as in its June 1, 2010 decision (FF 61), that Ms. Sataki was not entitled to affirmative injunctive relief as a matter of law. DX 12.

Specifically, in light of the plaintiff's "oft-repeated – although wholly

inaccurate – assertions that the Court has failed to consider all evidence relevant to the pending dispute" (DX 12 at 4), the Court devoted 20 pages to an exhaustive examination of the facts, *id.* at 5-24, in the course of which she repeatedly noted that "conclusionary assertions . . . are insufficient to create a dispute of material fact absent specific evidence" (*id.* at 6), that no disputed facts asserted by Plaintiff and/or Defendants have been relied upon (*id.*), that "Plaintiff's general assertion, made without specific evidentiary support . . . is insufficient to create a dispute of material fact. . . ." (*id.* at 7 n.4), that "Plaintiff has not proffered any evidence that any PNN employee assigned to the Washington, D.C. office has been permitted to work remotely from the VOA's Los Angeles office for an extended period of time" (*id.* at 8 n.5), that "[w]hile Plaintiff contends that Defendants' explanation for denying Plaintiff advanced sick leave is 'disingenuous and spurious,' Plaintiff has not offered any evidence contradicting [the explanation]" (*id.* at 13 n.7 (citation omitted)), that "[h]ad [Respondent] accurately quoted this section [in VOA's Manual of Operations and Administration] in full, however, it would have been clear that her reliance on this section is misplaced. . . ." (*id.* at 18), that "Plaintiff's own evidence on this point [regarding the degree of her fluency in English] is therefore contradictory" (*id.* at 20 n.11), and that "the exact nature of Plaintiff's requested accommodation has changed throughout the course of this litigation" (*id.* at 21 n.12).

Following a five-page review of the tortured procedural history of the case (*id.* at 25-29), the Court turned to a 23-page section titled Legal Standards and Discussion which, it noted, "has been hampered by the shifting nature of Plaintiff's

legal arguments. . . ." *Id.* at 30. Judge Kollar-Kotelly first addressed Respondent's *Wagner* contention and concluded that it did not support the preliminary injunction request because plaintiff sought not to preserve the *status quo*, as in *Wagner* but to alter it and that therefore "Plaintiff's Motion for a Preliminary Injunction fails for this reason alone." *Id.* at 31-34. Notwithstanding this conclusion, the Court nevertheless undertook the traditional sliding scale, four-factor preliminary injunction analysis in the course of a detailed, meticulous discussion over the next 18 pages, concluding that plaintiff had not satisfied any of the four factors. *Id.* at 34-52; *see also* FF 82.

68. On July 12, 2010, in the *Falahati* case, Judge Kollar-Kotelly granted without prejudice the defendants' motion to dismiss, which had been filed on June 3, 2010 (*see* FF 20), as conceded, because, despite an extension of time, Respondent had not filed an Opposition addressing the *Westfall* certification or the associated legal issues raised in the defendants' motion to dismiss. RX 442-44.

69. On July 26, 2010, Respondent wrote Ms. Sataki two emails admonishing her for speaking about her case with Kathleen (Katherine) Staunton, who worked in Congressman Rohrbacher's office. SX 20; *see also* Tr. 1085-88, 1495-98; *see also* FF 48.

70. Also on July 26, 2010, Respondent filed with the district court Plaintiffs' [*sic*] 28 U.S.C. 144 Motion to Disqualify and Memorandum in Support thereof and Certificate of Good Faith of Counsel. DX 13; RX 447-82. Respondent filed the motion in three cases -- the *BBG* action, the *Falahati* action and his 2006

action against his former organization, Judicial Watch. *Id.* Respondent did not communicate with Ms. Sataki about filing this motion, because, although "I needed to get instructions from her . . .", "at that point . . . [w]e didn't have any communication. I was trying to reach her the whole time, and she just went into hiding." Tr. 1178-79. In his 20-page affidavit accompanying the Motion, in which he described his litigation history involving the Clintons and noted that during the 1990's he had filed over eighty (80) cases against them, DX 13 at 5-24, Respondent stated, *inter alia*:

> 3. . . . I have never experienced a jurist more prone to wear her politics on her sleeve, so to speak, than Judge Colleen Kollar-Kotelly.
>
> 5. I am not the ordinary trial lawyer; far from it. During the 1990's, I filed over eighty cases against Bill and Hillary Clinton and their administration. . . . During this time, I developed a reputation, I feel undeservedly, of being anti-Democratic party; however, I was and am a fierce thorn in the side of the liberal political establishment and all establishments. . . .
>
> 6. . . . It is also a known fact that Judge Kollar-Kotelly's husband, himself a lawyer, played a role which was useful to President Clinton during the infamous Monica Lewinsky scandal, which resulted in the impeachment of Bill Clinton, only the second time in American history that impeachment had occurred. I not only worked with Congressman Bob Barr to introduce articles of impeachment against Bill Clinton, and assisted the House of Representatives in its subsequent impeachment proceedings, I was very active during the Monica Lewinsky scandal representing many of the women . . . who corroborated Bill Clinton's sexual predilections. . . . In short, there was no crime that was beneath the Clintons. . . . During this period, I was the only lawyer to have obtained a court ruling,

> which occurred in the Filegate case before this court, that Bill Clinton had committed a crime. . . . So for all of these reasons, I am not a typical trial lawyer, but a very controversial one who was said and is seen as a threat to Democrats and persons associated with Bill and Hillary Clinton. . . .
>
> 7. The Clinton era was a dark period in this nation's history. . . . I was and still am seen as a polarizing figure, because I challenge the legal and political establishment in court and in the media, and hold them accountable in other legal ways. Some judges, like Judge Kollar-Kotelly react to this and have a hard time dealing with me.

DX 13 at 6-9. Respondent's affidavit also included a fourteen-page side-by-side comparison of "Judge Kollar-Kotelly's Facts" and "Actual Facts." DX 13 at 25-38. Respondent testified that he filed the Motion because he ". . . believed honestly that Judge Kotelly did not rule honestly here, and that she tried to create facts to arrive at the conclusion that she wanted because she doesn't like me and doesn't like Ms. Sataki, in part based on my activism, which was against the person who appointed her and others, and, you know, other factors. She has a reputation for not liking conservatives." Tr. 1163-64. Respondent testified further that he, not Ms. Sataki, was the true "aggrieved party" in connection with the filing of the motion. Tr. 1178-79.

71. In an email to Respondent at approximately 1:00 p.m. PDT on July 30, 2010, Ms. Sataki stated, *inter alia*:

> For the past few months, I have asked you to concentrate on the sexual harassment I experienced as a VOA employee and for you not to make it a political affair.

* * * * *

> I want to withdraw all the pending lawsuits that are on my behalf and/or in my name. I want only to follow a sexual harassment case against Medhi Falahati as the main harasser and ONLY Ali Sajjadi and Susan Jackson as Falahati's supporters. . . .
>
> Why don't you work with the lawyer that Tim introduced to you and let him do the negotiations? Because after all the lawsuits against almost the whole place, I think the VOA people do not negotiate with you anymore.
>
> * * * * *
>
> I know that you wanted the best for me but I also believe that my case has become a more personal political fight that you have with VOA or that system in general.

DX 27 at 1-2; SX 23 at 3-4; Tr. 1271-73. Ms. Sataki explained her reasons for sending this email as follows:

> . . . [I]t became more of a political fight for Mr. Klayman . . . . I'm suing everybody up to Hillary Clinton, when I felt that -- I felt that this is me, little Elham Sataki. . . . [T]he case became too big and too huge and it didn't have to be that way.
>
> * * * * *
>
> . . . [It] was [also] because he couldn't stay professional. He couldn't stay only as my attorney, and he -- from end of April until this time, I was in a roller coaster with him. He [would say that he would] represent me and then he would say that he can't represent me.
>
> * * * * *
>
> So it was the whole time a roller coaster, emotional roller coaster, and psychologically I couldn't do it any more.
>
> * * * * *

> I had to put a stop on his abusive relationship, the weight of -- constantly the things he was saying, accusations that, or putting me down, or when he asked me to go find a job and I find a job, "Oh, that person wants to sleep with you. That's why he gives you a job."

Tr. 150-51, 172-73, 174-75; *see also* Tr. 196. *See generally* Tr. 145-54, 171-75.

72. Respondent and Ms. Sataki exchanged a number of other, increasingly bitter emails on July 30, 2010. SX 21; SX 22. Respondent sent Ms. Sataki a longer, accusatory and defensive email the following day, July 31, 2010, in which he stated, *inter alia*:

> So with all this baggage [discussed in preceding portions of the email] . . . I approached VOA in a friendly manner to try to settle. . . . By this time, I had fallen in love with you and the last thing I wanted to do was go on a political crusade for the person I loved.
>
> * * * * *
>
> The bottom line is that our relationship -- whatever it was and it cannot be defined -- was both personal and professional. . . . And, I was doing all of this for you for free, not to mention shelling out tens of thousands of dollars on your behalf.
>
> * * * * *
>
> But you came up against forces that are far more powerful and sinister than met the eye; the reality is that the Regime has "bought" control of PNN, much like it owns all of your friends' TV stations in LA. And, it is a reality that Obama likes it this way. He is a black muslim communist and sympathizes with the regime; why do you think he and his administration do not lift a hand to help the Iranian freedom movement, which is now almost all but crushed.

> IN SHORT, NOTHING WOULD HAVE MADE ME HAPPIER THAN TO SEE YOU HAPPY AT WORK IN THE CITY YOU LOVE LOS ANGELES. MY ENTIRE HEART AND SOUL WAS DEDICATED TO YOU. . . . I CAN ONLY SAY THAT I LOVED YOU MORE THAN ANY WOMAN I WAS EVER AROUND. I WOULD NOT HAVE PUT YOUR INTERESTS SECOND AND IN YOUR HEART YOU KNOW THIS.
>
> But when we hi[t] a brick wall, we had to try stronger medicine through court cases. I came up with creative causes of action, i.e., claims to try to bypass the agency's practice to get a court to rule to put you in LA. But we drew a very bad judge, one who hates anyone who is conservative politically. Judge Kollar-Kotelly has a very bad reputation generally.
>
> * * * * *
>
> For now, just get it into your thick skull that Larry – that's [*sic*] me – never sought to use your case for political purposes, but only to try to help you because I loved you.

SX 23.

F. DENOUEMENT: AUGUST 2010 – JANUARY 2011

73. On August 1, 2010, Respondent emailed Ms. Sataki under the subject "Top Ten Ways Not to Treat Someone Who Cared for You," recounting a litany of complaints about how she had treated him -- including her purported mistreatment of him in front of "the Persian community and otherwise," her "brother" and her "mother" and "treat[ing] him in a lesser way to your Persian friends." SX 24 at 1-2. DX 23 at 47-48 (uppercase format omitted).

74. The next day, Respondent again wrote Ms. Sataki, reporting that he had followed her instructions by dismissing "all of the case against VOA except the part

about having you work in LA." SX 25 at 1; *see also* DX 15 at 5 (October 22, 2010 Memorandum Order recounting that "Plaintiff voluntarily dismissed without prejudice five of the seven claims . . . leaving as open 'claims' in this action only Plaintiff's Privacy Act Claim (Count VI) and her request for *Wagner* Injunctive Relief (Count VII)"). Respondent justified the exception because "[t]his aspect of the case is not against anyone personally and I intend to appeal the judge's decision to a higher court." SX 25 at 1. Respondent then recounted other steps he had taken upon receiving her July 30 email and concluded, "I will continue to protect our legal interests and continue to pray for your well-being. You now need to help yourself too." *Id.* at 1-2. With respect to this last point, Respondent testified, "I don't believe that the instructions were coming from her. That's the thing, ok? So I didn't do anything that prejudiced her rights. I was protecting her rights." Tr. 1277. *See generally* Tr. 1273-90.

75. On August 4, 2010, Ms. Sataki emailed a letter to Mr. Danforth Austin, Acting Director of the VOA, advising that "I have instructed Larry Klayman to withdraw any and all civil actions that he may have filed in my name and that he is no longer representing me." DX 28; RX 26-27. Ms. Sataki sent a copy of the letter to Mr. Shamble but not to Respondent. *Id.*

76. The next day, Respondent wrote Ms. Sataki, complaining about "[t]he letter which you sent to Dan Austin and Tim Shamble (but not me). . . ." SX 26; *see also* Tr. 1071. He also stated:

> . . . [W]hile "giving away the store" and saying you are dismissing all actions you give away your bargaining power. . . .

> . . . [B]y giving up all totally in court, if this is what you intended, you for the most part eliminate any means to have VOA pay your costs. How then will you pay me back for rent, moving expenses, polygraphs, and other costs, as you offered and agreed to do. If you give up the suit, then you are personally responsible to pay these costs in theory.
>
> * * * * *
>
> What you have done is like Obama confessing to the Islamic regime for the wrongs that the United States has done to it, and that the U.S. now wants to make peace. And, you can see how effective this has been.

SX 26; *see also* Tr. 1071-73.

77. Thereafter, Respondent sent numerous and often hectoring, disparaging or threatening emails and text messages to Ms. Sataki and others concerning personal matters, the status of her legal claim, and his entitlement to proceeds from the case, should she receive them. DX 29 (August 8, 2010); SX 27 (August 19, 2010); *see also* Tr. 1292-94; SX 28 (August 22, 2010); SX 29 (September 2, 2010); SX 30 (September 4, 2010);[23] SX 31 (October 19 and 24, 2010); SX 32 (November

[23] The following exchange occurred during Respondent's cross-examination of Ms. Sataki regarding this exhibit, in which he had stated, "The costs expended on your behalf for legal and related matters . . . excluding of [*sic*] my time in working on the cases and settlement negotiations, comes to in excess of $30,000.00":

> Q. And then I wrote, "These monies I had hoped and still hope to collect from litigation concerning VOA and its managers." You see that?
>
> A. Yes.
>
> Q. And then I wrote, "Interference by third parties in my ability to collect these amounts, and in addition to that legal fees, will result in legal action against these third parties." You see that?
>
> A. Yes.

25, 2010); SX 33 (December 25, 2010); SX 34 (January 14, 2011) SX 35 (January 16, 2011) at 1 ("I . . . was working, in part, under a contingent fee arrangement, confirmed in writing."); SX 37 (January 26, 2011) at 2 (" . . . [W]e will need to settle up on the amount of legal fees and expenses that were expended on her behalf, as they would be due and owing. These fees and costs be paid from any eventual recovery. . . .In effect there is a lien on the case for this amount which any new counsel should . . . should be advised of.").

78. Beginning in early August 2010 -- Ms. Sataki did not respond to Respondent's communications.[24]

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* * * * *

> Q. What I'm saying is, I'm not going to ever ask you to pay me anything, whether its [*sic*] legal fees or costs, but if something comes back ultimately, if we ever pursue the damage claims, then I should be reimbursed. . . . That's what I was saying to you, correct?
>
> A. Correct.

Tr. 708-11

[24] Ms. Sataki explained as follows with respect to the communications addressed in FFs 73, 74, 76 and 77:

> Q. Can you tell the hearing committee why it was that you stopped opening up emails that you were receiving from Mr. Klayman that are referred to in Bar exhibits 24 through 37?
>
> A. Because I was receiving -- during a few months earlier, the emails I was receiving and text messages and calls from Mr. Klayman, most of them was not regarding my case, but it was regarding stuff that was really hurting me, and it got to a point that physically, mentally, psychologically I just couldn't deal with it any more. So I had to shut down. I couldn't.

79. In an email dated September 4, 2010, Respondent wrote to Ms. Sataki:

> The costs expended on your behalf for legal and related matters, including advance living expenses (rent), movers for furniture and car, travel expenses (plane tickets, etc. to and from LAX), court filing fees, polygraph examination cost, and process servers and other independent legal contractors, excluding of my time in working on the cases and settlement negotiations, comes to in excess of $30,000.00.
>
> These monies I had hoped and still hope to collect in the litigation

---

> I couldn't, because it was his wording was abusive and he wouldn't respect me or the people around me. He would disrespect me, and I had to prove myself often.
>
> So basically the conversations and everything was mostly non-case related. So therefore I just -- it got to a point that psychologically and mentally I couldn't deal with it any more.
>
> Q. When you say that he disrespected you, could you give the hearing committee as many examples as you can think of how you were disrespected.
>
> A. The people -- I "hang out with ghetto Persians" and "classless Persians," and I'm becoming one of them.
>
> He would accuse me of having relationships with this person and that person. Every person that I would interact with, he would accuse me that I have a relationship with that person and it got exhausting.
>
> It was -- I was dealing -- it was a vicious cycle and never ending and it felt like I'm in an abusive relationship instead of a client/attorney [relationship].

Tr. 786-87. In an affidavit admitted into evidence and confirmed in his testimony, Mr. Shamble recalled that ". . . communication became very difficult and nearly non-existent with Ms. Sataki – perhaps due to her health condition. When Mr. Klayman and I would try to contact her, we usually got no response, even for months. During these periods Mr. Klayman attempted to protect Ms. Sataki's rights so that they would not be forfeited." RX 1; Tr. 900; *see also* Tr. 924-27.

> concerning VOA and its managers. Interference by third parties in my ability to collect these amounts, and in addition to that the legal fees, will result in legal action against these third parties. I did a quick calculation this morning, and I just wanted you to be aware of the amounts and what is at issue.

SX 30.

80. In October, 2010, *WND* published three more articles written by Respondent that described his representation of Ms. Sataki, linked to his previous articles, and included promotions of his autobiography. *See* DX 23 at 19-21 (October 1, 2010, article titled *Sacha Baron Cohen does Voice of America* and sub-titled *Exclusive: Larry Klayman blasts broadcaster for 'making mockery of our nation'*); DX 23 at 16-18 (October 15, 2010, article titled *Evil Ground Zero mosque mania* and sub-titled *Exclusive: Larry Klayman jousts with Jewish lawyer of Iman Rauf*); DX 23 at 14-15 (October 29, 2010 article titled *The Republican establishment and revolution* and sub-titled *Exclusive: Larry Klayman sees GOP kingpins still in control despite tea-party victories*). All of the articles contain references to Ms. Sataki's dispute with PNN/VOA. *Id*. Respondent testified, with respect to the promotion, in some of these articles, of his autobiography, ". . . I was not trying to sell my book there. WorldNetDaily was trying to sell books that they had purchased and owned. And I'm not promoting my self-interest in any of these articles. I'm promoting the interests of Ms. Sataki and what I believe in terms of freedom in Iran, and she believed in that, too. . . ." Tr. 1204-05; *see also* Tr. 1205-06.

81. Judge Kotelly's Memorandum Opinion denying Respondent's Motion to Disqualify was issued on October 13, 2010. DX 14. *See also* DX 13, FF 70.

82. On October 22, 2010, in the *BBG* action, Judge Kollar-Kotelly granted the defendants' motion to dismiss Ms. Sataki's case without prejudice. DX 15.

83. On October 31, 2010, Respondent filed a Motion to Reconsider Court's Dismissal Order of October 22, 2010, and to Correct Manifest Intentional Errors. DX 16. In the Motion, Respondent stated, *inter alia*, "The errors of the court set forth above were obviously not inadvertent, but intentional, wanton and malicious and designed to further harm Plaintiff and her counsel." *Id.* at 2. The defendants filed their Opposition to the Motion to Reconsider on November 24, 2010. DX 17. The Court denied the Motion to Reconsider on December 21, 2010. DX 21.

84. On approximately November 2, 2010, Ms. Sataki filed a handwritten disciplinary complaint, reporting that she had terminated him as her attorney and wanted him to stop attempting to communicate with her. DX 1; Tr. 85-87, 157, 176-83.

85. On November 8, 2011, the District Court received from the Court of Appeals a Mandate ordering "that this case [*BBG*] be dismissed for lack of prosecution." DX 3 at 3.

86. Ms. Sataki mailed a letter dated November 15, 2010 to Respondent at two addresses -- "2000 Pennsylvania Avenue N.W., Suite 345, Washington, DC 20006" and "201 Massachusetts Avenue N.W., Washington DC 20001, Fax 310-651-3025." RX 974-75. In the letter Ms. Sataki stated: "Please be advised effective immediately your services are terminated forthwith; you are to provide no further legal services on my behalf in any cases what so ever." *Id.* at 974. The letter includes

a "cc: Office of Bar Counsel." *Id.* Respondent did not receive this letter but acknowledges that this circumstance ". . . was my fault . . ." because the 2000 Pennsylvania Avenue address (instead of 2020 Pennsylvania), which was a mail drop, had erroneously appeared at one time on his letterhead and because 201 Massachusetts Avenue "was not my office address either" and, instead, was "an office . . . where I was working out of" during "the period of time in my life that was very difficult" and "I was moving around. . . . I was moving around a lot. I was in very bad financial shape." Tr. 1042-51. Respondent observed in later testimony that ". . . she knew that I was in Los Angeles then. She knew where my office was. It was at 9701 Wilshire Boulevard. She could have certainly sent it there, and she knew that I wasn't in Washington." Tr. 1161.

87. On November 17, 2010, Respondent appeared at the National Press Club and discussed Ms. Sataki's case, using a blown-up photograph of Ms. Sataki to illustrate his talk. Tr. 776-77. Ms. Sataki learned about this event when she subsequently saw a video of it on YouTube. *Id.*

88. On December 9, 2010, in the *BBG* action, Respondent moved to extend his time to answer the government's opposition to his reconsideration motion. DX 18. The court denied this extension motion on the same day. DX 3 at 5. Respondent moved for reconsideration of that denial. DX 19. On December 17, 2010, Respondent replied to the government's opposition to his underlying reconsideration motion. DX 20. On December 20, 2010 Respondent filed a Supplemental Memorandum in support of his motion for reconsideration. DX 3 at 4-5.

89. The District Court denied Respondent's reconsideration motion in the *BBG* action on December 21, 2010. DX 21.

90. On December 25, 2010, *WND* published Respondent's article titled *Open your heart to Him this Christmas!* and sub-titled *Exclusive: Larry Klayman shares moment when he became a proud Jewish Christian*. DX 23 at 12-13. In the article Respondent referred to "the plight of one of my clients, Elham Sataki, a television anchor who had been destroyed by a pro-Iranian regime managing editor of the Persian News Network of Voice of America" and, in that context stated further:

> An ultra leftist, pro-Clinton and ethically federal corrupt judge -- Colleen Kol[l]ar-Kotelly -- had just dishonestly denied, without factual or legal bases, my request for Elham to be put back to work at the Los Angeles office of VOA, as she rehabilitated from the harm done to her.

Id. at 12. Respondent forwarded this article to Ms. Sataki in his Christmas Day email to her. SX 33; *see also* FF 77. At the hearing, Respondent recounted that Judge Kollar-Kotelly's ruling:

> . . . pretty much confirmed my impression of how she would react to me and react to Ms. Sataki. And also the fact that she's the type of judge that believes everything the government says. And obviously I don't. And she discounted all of our affidavits and ruled for the government without a hearing.
>
> That's the basis of why I wrote a column that said there is no basis in law or fact. Because there really wasn't. Without a hearing, how could you make a ruling? There is no basis to make factual findings or make a ruling like that. I thought it was heartless.

Tr. 1010; *see generally* Tr. 1009-12, 1033-34, 1164-65. Respondent later asserted with respect to this article, "It didn't reveal any confidential information . . . that was not already out there that she had [] approved." Tr. 1200. He also asserted, with respect to the references to his autobiography that appeared with some of his articles, "I wasn't t[r]ying to sell the book for my columns. It was WorldNetDaily who bought the books and inserted them. . . . So that was WorldNetDaily advertising it, not me." Tr. 1202-03.

91. Respondent received an email dated January 16, 2011, and showing a time of 18:35:24 PST from Ms. Sataki's email account stating, "Please just refer to the letter that I emailed you earlier that you are not representing me in any way or shape. . . ." SX 35 at 2. Respondent responded approximately three hours later as follows:

> To: Mehran Razavi alias Sam Razzazi, Sam Raz et al. [a friend of Ms. Sataki whom Respondent suspected of blocking his communication with her, advising her on the litigations and Respondent, and sending emails to him from her email account]:
>
> I asked you to ask Ms. Sataki to contact Tim Shamble and me immediately, as I cannot discuss matters with a person who is not my client. . . .
>
> Mr. Shamble and I and others have been trying to speak with and/or substantively communicate with Ms. Sataki so she can be fully and properly informed of her legal rights and obligations.
>
> We cannot allow her legal rights and obligations to be compromised or lost altogether, and misunderstood, based on your interference, as contained again in this email to which I am replying -- which you wrote and sent.

> In addition to Ms. Sataki's potential recovery, I have expended considerable legal time and costs on her behalf and was working, in part, under a contingent fee arrangement confirmed in writing. You have thus damaged me as well. And you have engaged in the unauthorized practice of law - which is a criminal offense. You also defamed me with third parties such as CBN, which also damaged me.

SX 35 at 1; *see also* SX 37.

92. Respondent filed a Notice of Appeal in the *BBG* action on January 19, 2011. DX 22; Tr. 1184. Mrs. Sataki filed a Notice of Appeal in the *BBG* action which is dated "This the 14th day of January, 2011" and has two notations: "Received Mail Room Jan 20, 2011, Angela D. Caesar, Clerk of Court, US District Court, District of Columbia" and "Let this be filed: Judge C Kollar-Kotelly, January 27, 2011." RSX 4; RX 1400; *see also* Tr. 1185-93.

93. Ms. Sataki's letter dated November 15, 2010 (FF 86) contains a stamp reading "RECEIVED Jan 24, 2011, Chambers of Judge Kotelly. DX 23 at 56; RX 975.

IV. RECOMMENDED CONCLUSIONS OF LAW

A. THE CONFLICT OF INTEREST CHARGE

Rule 1.7(b)(4) provides that, absent informed consent by the client, "a lawyer shall not represent a client with respect to a matter if . . . [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's . . . own financial, business, property, or personal interests."[25]

[25] There is no question here that Respondent represented Ms. Sataki and did so with respect to the matter of her employment dispute with PNN/VOA.

Disciplinary Counsel charges that Respondent's professional judgments in the course of the PNN/VOA dispute were adversely affected by his personal interests and by his financial interests.

We begin with a brief summary of what, in our view, Disciplinary Counsel must prove by clear and convincing evidence with respect to each of its theories regarding its Rule 1.7(b)(4) charge.[26] First, Disciplinary Counsel must prove by clear and convincing evidence that Respondent had a specific, identifiable personal or financial interest. Second, Disciplinary Counsel must prove by clear and convincing evidence that the specifically identified alleged interest materially affected or reasonably might have materially affected Respondent's professional judgment[27] with respect to some material aspect of his representation of his client.[28] Finally,

[26] There seems to be no definitive expostulation in the Board's reports and the Court of Appeals' decisions of the elements of a Rule 1.7(b)(4) violation.

[27] We proceed on the assumption that the term "professional judgment" includes any judgment made by the attorney -- a legal interpretation, a strategic measure, some other action even if not of a legal nature -- that arises in the course of and is made with respect to, in connection with or arising out of some aspect of the attorney-client relationship. *See* n. 26, *supra*.

[28] We are uncertain whether there is a third element -- proof by clear and convincing evidence that that the client was materially harmed or disadvantaged by the professional judgment in question. *See* n.26, *supra*. The text of Rule 1.7(b)(4) expressly addresses the lawyer's professional judgment being or reasonably being potentially "adversely affected by the lawyer's own . . . interests" but does not expressly include the client's interest being or reasonably potentially being adversely affected. On the other hand, Comment 7 to Rule 1.7(b)(4) emphasizes that the Rule is premised on the principle that "a client is entitled to wholehearted and zealous representation of its interests." (emphasis added). The Comment further stresses the pertinence of whether "a client might reasonably consider the representation of its interests to be adversely affected. . . ." (emphasis added). Thus we feel somewhat adrift on whether a material harm or disadvantage to or similar impact on the client is a third element of an alleged Rule 1.7(b)(4) violation. In light of what we understand to be the basic underlying principle of all the provisions in Rule 1.7 -- i.e., that the lawyer has a fiduciary duty to the client -- as well as the inclusion of potential adverse effect on the lawyer's professional judgment -- we conclude that a showing of actual harm to the client is not required. Our conclusion seems to be consistent with and supported

Disciplinary Counsel must prove by clear and convincing evidence that Ms. Sataki did not provide informed consent to Respondent's representation of her notwithstanding any conflict(s) of interest which Disciplinary Counsel may have proven.

We think that the various instances or circumstances relied upon by Disciplinary Counsel as establishing Respondent's alleged violation of Rule 1.7(b)(4) may fairly be divided into four groups. (We devote a fifth subsection to analysis of the informed consent issue.)

1. Disciplinary Counsel charges that Respondent's personal feelings for Ms. Sataki constitute the kind of personal interest that Rule 1.7(b)(4) addresses and that this personal interest adversely affected or might reasonably have adversely affected certain of his professional judgments in the course of the attorney-client relationship. Disciplinary Counsel relies on the plain language of the Rule and on certain Comments to the Rule. Disciplinary Counsel also relies on *In re Asher*, 772 A.2d 1161 (D.C. 2001), *In re Dailey*, Board Docket No. 16-BD-071 (BPR July 30, 2018), *In re Shay*, 749 A.2d 142 (D.C. 2000), *In re Pelkey*, 962 A.2d 268 (D.C. 2008) and *In re Goldsborough*, 654 A.2d 1285 (D.C. 1995). Respondent argues that he did not seek or engage in a sexual relationship with Ms. Sataki, that "all the record

by observations of the Court of Appeals in *In re Hager*, 812 A.2d 904, 913-14 (D.C. 2002) (Obtaining "full relief" for the client is "irrelevant in deciding whether respondent violated Rule 1.7(b)(4), or any other Rule of Professional Conduct. Obtaining the best possible outcome for one's client is never a viable defense to charges of ethical misconduct; the ends do not justify the means." (footnote omitted)). Nevertheless, we include in our discussions of the various alleged Rule 1.7(b)(4) violations consideration of whether the client incurred material harm from any violations that may be found to have occurred.

shows is that Mr. Klayman cared deeply for and loved Ms. Sataki on a personal level, which is not in violation of any ethical provisions," and that "[i]n any event, any personal feelings that Mr. Klayman may have had never impacted his representation of Ms. Sataki negatively." R. Brief at 18-20; R. Surreply at 5. In its Reply, Disciplinary Counsel argues that Rule 1.7(b)(4) "does not restrict the nature of a 'personal' conflict to those arising from a sexual relationship" and that "sexual relationships are not the only personal relationships that raise concerns." ODC Reply at 3.

There is simply no question that Respondent had a strong emotional attachment to Ms. Sataki. Respondent acknowledged that when he invited her to dinner in December 2009 or January 2010, even before he began to represent her, ". . . I hadn't really asked her there for a professional reason. I had no desire that I knew of at the time to represent her. I just wanted to get to know her. . . ." and "my heart went out to her." FF 8. In no later than early April 2010, approximately the fourth or fifth month of their acquaintanceship and approximately the third month of their working together on her case, he told Ms. Sataki that he had never loved anyone more in his life and would get upset when she did not ask him to join her on various social occasions. FF 31. In his first letter, dated April 7, 2010, to the psychologist he had retained for Ms. Sataki, Respondent stated that he loved Ms. Sataki and admitted that Ms. Sataki thought that he was "acting improperly like a 'jealous boyfriend;'" he also complained that Ms. Sataki "will not do anything with me on a personal basis" and had "shut the door to ever having a personal relationship with me." FF

33. Ms. Sataki was concerned about the effect of Respondent's emotions on his representation of her, FF 31, 37, but Respondent ignored her concerns and began a string of emails containing strongly worded feelings and hectoring admonitions. FF 35, 36, 38, 39. Respondent confirmed at the hearing, "I had really strong feelings, believed in her and loved her. . . ." FF 38. The passionate, agonized emails continued unabated over the next three months. FF 43, 44, 58, 59, 60, 65, 72. Indeed, Respondent acknowledges that ". . . the record shows . . . that Mr. Klayman cared deeply for and loved Ms. Sataki on a personal level. . . ." R. Brief at 20. The record also establishes that Respondent himself recognized the conflict of interest that his personal interest in Ms. Sataki was causing, at least in general terms. FF 33 ("Because I do care so much about Ellie, I too have trouble seeing the proverbial forest from the trees. Its [*sic*] very hard to be a lawyer and feel so much for your client. . . ."); FF 42 (recommending to Ms. Sataki in early May 2010 that she retain a new attorney, Tim Shea, because doing so would be "in your best interests"); FF 43 ("You will get better legal representation with someone else like Tim Shea, who does not have an emotional conflict and can keep his mind clear.")

We think it matters not whether Respondent's emotions constituted love or puerile infatuation or something in between, or whether -- as Respondent notes and as we agree -- "it is undisputed that Mr. Klayman never asked for, much more engaged in a sexual relationship with Ms. Sataki . . . ." R. Brief at 18. That is not the test of whether a personal interest raising potential ethical concerns existed, as emphasized in the Comments to Rule 1.7:

> [37] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, **combining a professional relationship with <u>any</u> intimate personal relationship may raise concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege.** These concerns may be particularly acute when a lawyer has a sexual relationship with a client. Such a relationship may create a conflict of interest under Rule 1.7(b)(4) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.
>
> [38] Especially when the client is an individual, the client's dependence on the lawyer's knowledge of the law is likely to make the relationship between lawyer and client unequal. A sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and thereby violate the lawyer's basic obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant risk that the lawyer's emotional involvement will impair the lawyer's independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client privilege, because client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. The client's own emotional involvement may make it impossible for the client to give informed consent to these risks.

Rule 1.7 Comments [37] & [38] (emphasis added).

In sum, Disciplinary Counsel has adduced an overwhelming amount of clear and convincing evidence that beginning no later than January 2010 Respondent had a personal interest that "raise[s] concerns about conflict of interest" because that interest might reasonably have interfered with his professional judgment in the

course of his representation of Ms. Sataki.

We turn next to the question whether Disciplinary Counsel has proved by clear and convincing evidence that Respondent's proven personal emotional interest in Ms. Sataki affected or might reasonably have affected certain judgments that he made in the case.[29] Disciplinary Counsel charges that, because of his personal feelings for (i.e., personal emotional interest in) Ms. Sataki, Respondent (a) induced Ms. Sataki to move to Los Angeles, (b) took retaliatory actions against her during the course of the representation, (c) "treat[ed] her obsessively and abusively after she rejected his affections," (d) "criticized his client for declining to invite him into her circle of friends," (e) acted inappropriately during and after the May 2010 awards event and (f) "harassed his client so severely that she became despondent and effectively abandoned the prosecution of her civil and administrative claims against the VOA."[30] Sp. Ch. at 1-3 (Count I); ODC Brief at 29-30; ODC Reply at 4. (We

[29] We note that Respondent acknowledged in general that his emotions were having such an effect. On May 8, 2010, Respondent sent Ms. Sataki two emotional emails which, *inter alia*, affected to recommend to Ms. Sataki that she retain a different attorney, Tim Shea. FF 42, 43. Ms. Sataki saw through Respondent's artifice, explaining "I'm just upset, hurt and angry that he can't concentrate on my case and instead of concentrating on my case and the fact that I'm jobless, career-less, and he's still concentrating on his feelings for me . . . . I begged him, I plead to him, I screamed, I cried, begging him, 'Please, please, stay my attorney and focus on my case, not me.'" FF 43. Like Ms. Sataki, we are convinced that Respondent's purported offers to withdraw from the representations were not sincere and, instead, were transparent machinations to threaten Ms. Sataki and/or to elicit sympathy for himself.

[30] Only the first of these alleged abuses arising out of Respondent's alleged personal emotional interest is asserted in the Specification of Charges. *See* Sp. Ch. ¶ 4 at 2. The other theories appear for the first time in Disciplinary Counsel's post-hearing papers. We think that this does not present a notice/due process issue because all of the alleged results of the alleged personal emotional interest fall well within the general allegations in the Specification of Charges, were litigated extensively at the evidentiary hearing and were the subjects of full briefing in the parties' post-hearing papers, including but not limited to Respondent's Surreply. *See In re Austin*, 858 A.2d

understand these different allegedly improper actions arising out of the alleged personal emotional interest to constitute only one alleged Rule 1.7(b)(4) violation. Disciplinary Counsel does not argue to the contrary in its post-hearing papers. *See* ODC Brief at 43 ¶ A, 44 ¶ D.)

(a) Ms. Sataki's Move to Los Angeles. Respondent disputes that he "coerced" Ms. Sataki into moving to Los Angeles. R. Brief at 21; R. Surreply at 6. (Respondent's use of the term "coerced" inaccurately characterizes Disciplinary Counsel's charge. *Cf.* ODC Brief at 2 ("convinced her"); 29 ("his insistence on undertaking the costly and uncertain Los Angeles strategy"); 30 ("induced her to move across the country").) In order to avoid the alleged harasser and for other personal reasons, Ms. Sataki had first tentatively surfaced the idea of a transfer to PNN/VOA's Los Angeles office in late August 2009, approximately three months before she met Respondent, although she acknowledged to her supervisor that the idea was unusual. FF 4, 8; *see also* Tr. 888, 892. Respondent and Mr. Shamble discussed this alternative with her and proposed the job re-location in their initial conferences with and written submissions to agency personnel. FF 11, 12, 14, 16. Respondent described the decision to pursue this alternative as follows: "I thought it was a good idea for any number of reasons. I suggested it to her and she said she always wanted to be in LA anyway and she didn't want to ever pass by Falahati

969, 976 (D.C. 2004); *Hager*, 812 A.2d at 917 n.14; *In re Slattery*, 767 A.2d 203, 208-09 (D.C. 2001). We also note that Disciplinary Counsel does not contend that Respondent violated Rule 1.7(b)(4) by initially undertaking the representation, notwithstanding his personal interest in Ms. Sataki from the time that they initially met on the Capitol grounds before the dinner engagement at which the question of representation first arose. *See* FF 6, 8.

again." FF 14 (emphasis added). Thus, even though Ms. Sataki had hesitantly raised the idea of a transfer to PNN/VOA's Los Angeles office in a preliminary manner shortly before meeting Respondent, it is also clear that Respondent agreed with, suggested, recommended and facilitated the move.

Upon receiving the agency's denial of the job transfer request in February 2010, Respondent continued to advise Ms. Sataki to move to Los Angeles, even though she would not have a job there. Ms. Sataki recalled, "And you said, 'I'm going to transfer you within two weeks to LA.' I remember the week -- exactly 'two weeks,' you said that." FF 19. Ms. Sataki expressed reservations about moving to Los Angeles without being employed, but Respondent insisted, saying that he knew what he was doing and assuring her that he would assist her financially. FF 19. Ms. Sataki recalled, "I told you that I can't afford moving to LA because I don't have money. You said, 'Ellie, I'll help you.'" FF 19. As Ms. Sataki feared, her pay was subsequently suspended and she was placed on AWOL status. FF 46, 51.

As Ms. Sataki summarized the situation, "I was still working there [in the PNN/VOA office in Washington]. It was a tough situation, but I was trying to handle it. I was still working there. . . . so then I started doing as my attorney tells me, as I'm not an attorney and my attorney knows best. But . . . choosing between a career and my job . . . if I have to just stay tough and take it and continue and hope for the better, I would have done it." FF 46 (emphasis added).

Failing to appear at work in Washington as ordered clearly weakened Ms. Sataki's claim before PNN/VOA. Living impecuniously in Los Angeles, even with

financial assistance from Respondent, was clearly an adverse development in Ms. Sataki's personal life. Living in Los Angeles also exposed her to other stress and more abuse by Respondent as described in ensuing sub-sections of this section of the Report.

We conclude that there is clear and convincing direct and circumstantial evidence that, in February 2010, Ms. Sataki agreed, despite her concerns (FF 17-19; *see also* FF 46), to move to Los Angeles in large part because of Respondent's advice/insistence, which overcame her reluctance to do so because of the practical concerns and difficulties. We also conclude by clear and convincing direct and circumstantial evidence that Respondent's advice/insistence with respect to the Los Angeles move resulted from his personal feelings for Ms. Sataki since November or December 2009 and his continuing personal interest in January and February 2010 in enhancing a personal relationship with Ms. Sataki of some nature, as described above. *Cf. In re Robbins*, 192 A.3d 558, 565 (D.C. 2018) (*per curiam*), (Rule 1.7(b)(4) violation established by respondent's financial "incentive" while representing client). Consequently, we believe that there is no question whatsoever that Respondent's advice/insistence was in fact "adversely affected" by his personal interest -- i.e., his emotional infatuation with Ms. Sataki.

Accordingly, we conclude and therefore recommend that the Board find that Disciplinary Counsel has established by clear and convincing evidence that Respondent's personal emotional interest in Ms. Sataki led him to aggressively advise her to move to Los Angeles.

(b) Respondent's Alleged Retaliatory Actions. Disciplinary Counsel alleges that, because Ms. Sataki rejected his advances, Respondent retaliated against her by attempting to increase his fee. ODC Brief at 29. In response to Ms. Sataki's May 30, 2010 email in which she vehemently expressed the distress Respondent was causing her and rejected his advances, FF 58 n.19, Respondent asserted that his fees and costs amounted to about $250,000 and stated that a 50% contingent fee, instead of the previously discussed 40% contingent fee, "is what I require." FF 59. Respondent also threatened to terminate any "further financial involvement or liability on the lease." FF 60. Respondent made similar threats as late as September 2010. FF 77 n.23. We conclude that Disciplinary Counsel has established by clear and convincing evidence that Respondent's personal emotional interest in Ms. Sataki led him to retaliate against her by changing and increasing the fees that he would seek from her.

(c) Respondent's Alleged Verbal Abuse of Ms. Sataki After She Rejected His Advances. Disciplinary Counsel alleges that Respondent treated Ms. Sataki "obsessively and abusively after she rejected his affections." ODC Brief at 29. Respondent asserts that he "did not intend to harass Ms. Sataki verbally" and that "[t]he reality is that, despite all that Mr. Klayman did for her, she became disrespectful and increasingly self-absorbed and abusive, to the point that she even accused him of taking bribes and then derisively mocked his Judeo-Christian beliefs and religion." R. Brief at 21 (emphasis added).

By April 2010, Respondent's pursuit of a personal relationship with Ms.

Sataki had become obvious. FF 31. Respondent's own letter to Ms. Sataki's psychologist and his conduct during their ensuing conference all too plainly confirm this development. FF 33, 34. When Ms. Sataki rebuffed Respondent's advances, Respondent began to criticize her social and familial milieu and to lament her perceived mistreatment of him. FF 35, 36, 38, 39, 43. Ms. Sataki was understandably devastated by Respondent's conduct. FF 43. Respondent, however, persisted in his remonstrations, accusations and condescending criticisms throughout May 2010 (FF 44, 49, 52, 58), June 2010 (FF 65) and thereafter (FF 69, 72, 73, 76, 77). These egregious communications, which included accusations of associating with "ghetto Persians" and "classless Persians" and having inappropriate personal relationships, inflicted such extreme distress on Ms. Sataki "physically, mentally, psychologically" that she came to feel that she was "in an abusive relationship instead of a client/attorney" relationship." FF 78 n.24; *see also* FF 71.

On the basis of the abundant evidence of Respondent's obsessive and unrelenting communications, we conclude that there is overwhelming evidence establishing that, after Ms. Sataki's rejection of his advances, Respondent incessantly abused his obviously vulnerable client verbally (*see* FF 8, 15, 16, 37) and that his personal interest in Ms. Sataki led him to this gross lack of judgment over the course of several months.

(d) Respondent's Alleged Criticism of Ms. Sataki for Avoiding Him Socially. Respondent's emails to Ms. Sataki contain numerous instances of his complaining to her about not including him in her circle of friends and avoiding or

separating herself from him in public. FF 31, 35, 36, 39, 73. These constant inappropriate accusations caused Ms. Sataki great distress. FF 31, 37, 43, 58; *see also* FF 78 n.24. We conclude that Disciplinary Counsel has proved by clear and convincing evidence that Respondent's relentless importunings arose from his personal emotional interest in her.

(e) Respondent's Conduct at and After the May 2010 Awards Event. The evidence regarding this incident is undisputed. Respondent has not denied the incident and, indeed, coarsely joked shortly afterwards about the "Klayman Room," even though his conduct was nerve-wracking for Ms. Sataki. FF 49, 50. We conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent's personal emotional interest in Ms. Sataki materially impaired his judgment and led to his frightening behavior on this occasion.

(f) Ms. Sataki's Abandonment of Her Claims Against PNN/VOA. Ms. Sataki recounted at the hearing that, by the time she emailed Respondent on July 30, 2010, Respondent's inability to "stay professional" and the resulting "weight of . . . the things he was saying" had left her on "a roller-coaster, [an] emotional roller-coaster" to the point that "psychologically I couldn't do it anymore" and "had to put a stop to the abusive relationship. . . ." FF 71. We have credited this testimony as inherently believable and also as consistent with our observations throughout the hearing of the personal effect that Respondent's very presence had on Ms. Sataki. In the July 30, 2010 email, Ms. Sataki notified Respondent that she wished for all the claims except those directly against Falahati and his supporters to be withdrawn. (FF

71). Ironically, those claims had already been dismissed 18 days previously because of Respondent's failure, despite an extension of time, to file a pleading challenging the *Westfall* certification and addressing related legal issues, FF 68, a development which Respondent had apparently not disclosed to Ms. Sataki and which she apparently subsequently learned of only from Mr. Shamble, the union representative. *See* SX 26 at 1.[31] In any event, it is plain beyond any question that Ms. Sataki forewent the claims that she wanted to pursue because of Respondent's verbal, obsessive and unrelenting abuse of her. Accordingly, we conclude that Disciplinary Counsel has proved by clear and convincing evidence that Respondent's personal emotional interest in Ms. Sataki affected his professional judgment so severely that his resulting conduct caused her to take the action that she did.

2. Disciplinary Counsel charges that Respondent's asserted "long history of litigation against the Clintons" and his "personal political crusade against the Clintons" constituted another personal interest -- one that led him to name Secretary Clinton as a defendant in the *BBG* action and to file the Motion to Re-assign in the *BBG* action (FF 62) and the Motion to Disqualify in both actions. (FF 70). Sp. Ch.

[31] Disciplinary Counsel appears not to charge that Respondent abandoned the *Falahati* case because the *BBG* action provided him with the opportunity to pursue his anti-Clinton crusade, despite evidence in the record that might support such a theory. Respondent did not offer any justification or explanation for his decision to suffer a consented dismissal of the *Falahati* action while he continued to litigate the *BBG* action. He had available a reasonable argument that Falahati's conduct was not within the scope of employment and thus not subject to Westfall Act certification. According to Restatement (2d) Agency §228(2) (1958), an employee's conduct (i.e., sexual harassment) "is not within the scope of employment if it is different in kind from that authorized . . . or too little actuated by a purpose to serve the [employer]." In any event, Respondent's decision to abandon the *Falahati* case was the fruit of the conflicts of interest the Committee has found.

at 3-4 (Count II); Sp. Ch. at 4-7 (Count III); ODC Brief at 30-31; ODC Reply at 4-5. (ODC does not appear to argue that this charge involves more than one alleged infraction of Rule 1.7(b)(4).)

Respondent argues that all his steps in connection with the *Falahati* and *BBG* actions were consistent with the strategy that Ms. Sataki, Mr. Shamble and he had agreed upon, comprised "a reasonable legal strategy," were not part of any kind of "political activism" or a "personal 'crusade,'" and that therefore ODC's charges are "[c]onjured up . . . in desperation [and] are almost laughable, were ODC's animus not so palpable toward Respondent." R. Brief at 22-23. He adds, with respect to naming Mrs. Clinton as a defendant in the *BBG* action, that all of the BBG Board members, including a friend of his, were named as defendants, that doing so is not unprecedented in *Bivens* actions,[32] that Disciplinary Counsel's expert witness acknowledged that "it is within a lawyer's reasonable judgment in a *Bivens*-type action to name agency employees or officials or defendants," and that "the inclusion of Ms. Clinton and the rest of the BBG was a reasonable legal strategy to achieve Ms. Sataki's desired outcome. . . ." R. Brief at 22-23. With respect to his re-assignment and disqualification filings, Respondent asserts that he "did not have a

[32] In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court recognized a federal cause of action for fourth amendment violations by federal officers, patterned on the cause of action against state officers established by 42 U.S.C. §1983. In later cases, the Court upheld the use of *Bivens* actions for violations of other constitutional provisions, including the first amendment. In *Navab-Safavi v. Broadcasting Board of Governors*, 650 F. Supp. 2d 40 (D.D.C. 2010), *aff'd sub nom. Navab-Safavi v, Glassman*, 637 F.3d 311 (D.C. Cir. 2011), Judge Huvelle sustained a *Bivens* complaint in a case alleging a wrongful termination that allegedly violated the employee's first amendment rights. *Navab-Safavi* is the case to which Respondent referred in his correspondence with VOA and at the hearing. FF 16; Tr. 56, 830.

problem with Judge Kollar-Kotelly, but she did apparently have a problem with him and his client" and further asserts that "a lawyer representing a client is entitled to discretion in doing what is believed to be in the client's interests, particularly with a client who is non-communicative at the point that the motion was filed," citing Rule 1.2(a) and Comment [1] thereto. R. Surreply at 6-7.

We turn first to Disciplinary Counsel's theory that Respondent's alleged animus toward the Clintons led him to name Mrs. Clinton as a defendant in the *BBG* action and that at the time of the filing of the *BBG* action on April 2, 2010 Respondent "couldn't resist" the opportunity to name Mrs. Clinton as a defendant in the *BBG* action. Tr. 1556. On balance, we find Respondent's explanation of his reasons for naming Secretary Clinton (as well as all the other BBG members) as defendants implausible. In his letter of February 21, 2010, RX 117, FF 16, to VOA officers, Respondent made reference to Judge Huvelle's decision in *Navab-Safavi v. Broadcasting Board of Governors*, Civ. 08-1225 (Sept. 3, 2009) and stated that he would name "individuals" in any litigation on Ms. Sataki's behalf. FF 16; *see also* FF 24, 24 n. 13. In *Navab-Safavi*, the complaint alleged, and Judge Huvelle found, that the BBG board members knew of the employment decision at issue and participated in it to a meaningful extent. Respondent's BBG complaint contained no such allegation, relying instead on generalized statements about alleged BBG political bias and employment practices. These allegations, and the inclusion of Secretary Clinton and the other individual BBG directors as defendants, plainly served no legitimate litigation purpose and, instead, served only Respondent's

political agenda rather than Ms. Sataki's desire and interests.

Thus we conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent's animus towards the Clintons adversely affected his decision to include Mrs. Clinton among the defendants in the *BBG* action.[33]

The evidence regarding the attacks on Judge Kollar-Kotelly (FF 62, 70) is also compelling. The June 9, 2010 re-assignment motion unleashed an extraordinarily ill-tempered and unrestrained stream of invective and vituperation based on Respondent's belief in and assertions of Judge Kollar-Kotelly's alleged bias against him because of his history of litigation against the Clintons, the Judge's nomination by President Clinton, her marriage to an attorney who allegedly had represented the Clintons, her alleged bias in favor of the Democratic Party, her purported "hatred" of and "antipathy" towards him, and her purported desire to deter him from bringing future litigation against "her Democratic party." FF 62. Two days later, in his June 11 *WND* article, *Cockroaches and judges*, Respondent characterized Judge Kollar-Kotelly again as "a partisan Democrat." FF 63. The same politically-charged rhetoric in Respondent's affidavit that accompanied his July 26, 2010 disqualification motion even more forcibly underscores Respondent's view that Judge Kollar-Kotelly is a Clinton and Democratic party ally and regards him as a political enemy and all too plainly reflects his own self-image as a hero and martyr of his anti-Clinton crusade.

[33] We return to the naming of Mrs. Clinton and certain other defendants in Section IV.B, *infra*.

FF 70. It was this filing that appears to have been the final straw in triggering Ms. Sataki's instruction, only four days later, that Respondent "withdraw all the pending lawsuits that are on my behalf and/or in my name" except the *Falahati* action, because she had been asking him "to concentrate on the sexual harassment I experienced as a VOA employee and . . . not to make it a political affair." FF 71. It is plain to us from the evidence summarized above -- as well as from Respondent's own correlative testimony in the hearing, his arguments during the hearing and in the summations stage, and his pleadings throughout the course of this matter (which are discussed hereinafter) -- that Disciplinary Counsel has proven by clear and convincing evidence that Respondent's seething, ongoing disdain for the Clintons and their perceived ally Judge Kollar-Kotelly adversely affected -- indeed, grossly distorted -- his professional judgment regarding what would best serve Ms. Sataki's interests when he filed the re-assignment and disqualification motions and made many of the assertions and accusations therein.

Accordingly, we conclude that Disciplinary Counsel has proved by clear and convincing evidence that Respondent's naming of Secretary Clinton as a defendant and filing and pursuing the re-assignment and disqualification motions, neither of which actions served Ms. Sataki's interests, arose from his deep-seated animus toward the Clintons, as embodied in his "long history of litigation against the Clintons" and his "personal political crusade against the Clintons."

3. Disciplinary Counsel charges that Respondent authored and published the articles about Ms. Sataki's dispute with and litigation against PNN/VOA in order

to further his financial interest in promoting sales of his autobiography. Sp. Ch. at 7-11 (Count IV); ODC Brief at 31-32; ODC Reply at 5-6.[34] (Disciplinary Counsel appears to treat the group of articles as one alleged violation.) Respondent contends that the factual record does not support Disciplinary Counsel's charge that he published the articles in *WND* in order to advance his own financial interests. R. Brief at 23.

Respondent plausibly explained at the hearing that he had received from the World Net Daily organization full payment for the rights to his autobiography prior to the time he began to represent Ms. Sataki and commenced the series of articles in *WND* that consisted in whole or in part of descriptions of her dispute with PNN/VOA. *See, e.g.*, FF 45, 55, 63, 80, 90. Disciplinary Counsel introduced no oral or documentary evidence demonstrating or even suggesting circumstantially that Respondent wrote and/or arranged for the publication of the articles for purposes of direct or indirect financial gain. We conclude that Disciplinary Counsel has not established by clear and convincing evidence that Respondent's professional judgment in writing the *WND* articles was affected by a personal financial interest.

4. Disciplinary Counsel charges that another personal interest,

[34] Disciplinary Counsel appears not to charge that Respondent published the articles in order to pursue his ideological agenda against Iran and BBG/VOA/PNN despite evidence in the record that might support such a theory. *See, e.g.*, FF 40, 41, 47, 54, 80. In its post-hearing papers, Disciplinary Counsel uses the term "political ideology" one time -- in its Reply -- but identifies in that discussion only Respondent's "long history of bringing actions against the Clintons" and cites as steps resulting from that alleged "political ideology" personal interest only allegedly improper steps (discussed elsewhere in this Report) not involving the *WND* articles. ODC Reply at 4-5. Respondent understandably addresses only the Clintons-related "political ideology" theory in his Surreply. R. Surreply at 6.

Respondent's "desire for publicity" and "notoriety," caused him to ignore Ms. Sataki's request that her case be pursued quietly and led him to write and obtain the publication of the articles in *WND* about Ms. Sataki's dispute with and litigation against PNN/VOA. Sp. Ch. at 7-11 (Count IV); ODC Brief at 29, 32; ODC Reply at 5-6. Respondent counters that the factual record does not support Disciplinary Counsel's charge that he published the articles in *WND* in order to advance his notoriety. R. Brief at 23.

Respondent testified that he prompted the May 11, 2010 article by Bob Unruh, FF 45, and we think it likely that the same was true of the first in the series of articles, the April 23, 2010 *WND* article by Bob Unruh, since it was based on "an announcement by Klayman." FF 40. This article also included a photograph of Respondent and a substantial focus on him. The April 30, 2010 article included in its title, *Larry Klayman rips Obama for Carteresque appeasement of Iranian regime.* FF 41. Respondent's May 14, 2010 article was sub-titled *Larry Klayman goes to war for harassed broadcaster fighting for a free Iran.* FF 47. Similarly, Respondent's May 21, 2010 article included the sub-title *Larry Klayman explains why Iran is "most important country in the world,"* and Respondent's May 28, 2010 article includes the sub-title *Exclusive: Larry Klayman speaks out against 'evil' in gov[ernment] that has Americans fed up.* FF 54, 55; *see also* FF 63 (June 11, 2010 article sub-titled *Larry Klayman laments lack of judicial protection from 'evil government'*), FF 66 (July 2, 2010 article sub-titled *Exclusive: Larry Klayman chronicles his transformation into Jewish follower of Christ*), FF 80 ((October 1,

2010, article sub-titled *Exclusive: Larry Klayman blasts broadcaster for 'making mockery of our nation'*); October 15, 2010, article *sub-titled Exclusive: Larry Klayman jousts with Jewish lawyer of Iman Rauf*); October 29, 2010 article sub-titled *Exclusive: Larry Klayman sees GOP kingpins still in control despite tea-party victories*), FF 90 (December 25, 2010 article sub-titled *Exclusive: Larry Klayman shares moment when he became a proud Jewish Christian*).

We conclude that Disciplinary Counsel has proven by clear and convincing evidence that Respondent's decision to write the articles in question was affected by his personal interest in promoting his own reputation and notoriety.

5. Disciplinary Counsel contends that that Ms. Sataki did not provide informed consent to Respondent representing her despite the conflicts of interests which we have found to have been proven.

In its opening brief, Disciplinary Counsel asserts that "Respondent produced no evidence in this record from which it might be gleaned that Ms. Sataki gave her informed consent for Respondent's conflicts of interest in Counts I, II, III or IV. On the other hand, Ms. Sataki testified that Respondent had no conversations with her about [certain of] his conflicting interests. . . ." ODC Brief at 32-33. In its Reply, Disciplinary Counsel points out the demanding requirements for "informed consent" and concludes that "[n]othing in Respondent's testimony about his communications with Ms. Sataki conveyed the disclosures required to obtain her informed consent." ODC Reply at 6-7.

In his principal brief, Respondent asserts only, "Because there was no conflict

of interest, there was nothing that required obtaining Ms. Sataki's consent, despite his having done so in any event." Respondent does not cite to any evidence that might support his claim of "having done so in any event." R. Brief at 24. In his Surreply, Respondent charges that Disciplinary Counsel's statement in its Reply is "patently false" and claims that "Mr. Klayman did have Ms. Sataki's explicit or, at an absolute minimum, implied consent. . . .", citing a proposed finding of fact and the underlying transcript reference that in fact do not pertain to his assertion of Ms. Sataki's informed consent to his conflicts of interest. R. Surreply at 6.[35]

Rule 1.7(c) provides:

> (c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if
>
> (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

The "Disclosure and Consent" section of the Comments to Rule 1.7 provide *in pari materi*:

[35] Respondent's PFF 51 asserts "When settlement did not prove possible, Ms. Sataki authorized Mr. Klayman to file legal actions." R. Brief at 46. In and of itself, this assertion does not relate to the issue of whether Ms. Sataki consented to his representation of her after full disclosure of his numerous conflicts of interest. Moreover, in the testimony cited by Respondent, he claimed that "at that point, when we couldn't settle it, I then fashioned lawsuits . . . to put pressure on them, because the publicity was not producing exactly what we needed at that time." Tr. 91. This testimony plainly does not address the issue of express or implied consent by Ms. Sataki to Respondent's conflicts of interest.

> [27] Disclosure and informed consent are not mere formalities. Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation. . . . Full disclosure also requires that clients be made aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation. [emphasis added]
>
> [28] It is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent, although the rule does not require that disclosure be in writing or in any other particular form in all cases. Lawyers should also recognize that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. Moreover, under the District of Columbia substantive law, the lawyer bears the burden of proof that informed consent was secured.[36]
>
> [29] The term "informed consent" is defined in Rule 1.0(e).

Rule 1.0(e) and the related Comment provide:

> (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
>
> [2] . . . The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer

[36] We understand this unfortunately ambiguous statement to mean only that a respondent is expected to produce evidence of informed consent if it exists, that a hearing committee should take into consideration a respondent's failure to do so, but that the ultimate burden of proof of an unconsented-to conflict of interest in violation of Rule 1.7(b)(4) remains on Disciplinary Counsel. *See In re Dailey*, Board Docket No. 16-BD-071, at 8 (BPR July 30, 2018); *cf. In re Bedi*, 917 A.2d 659, 664-65 (D.C. 2007).

> must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. In all circumstances, the client's consent must be not only informed but also uncoerced by the lawyer or by any other person acting on the lawyer's behalf. [emphasis added]
>
> [3] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. [emphasis added]

The Court of Appeals has ruled that these Rules and Comments require that for a waiver of or consent to a representation despite the existence of a conflict to be effective, it "'must contemplate that particular conflict with sufficient clarity so that

the client's consent can reasonably be viewed as having been fully informed when it was given."' *Hager*, 812 A.2d at 915 (citation omitted).

We turn now to determining, under the foregoing guidance, whether Disciplinary Counsel has proven by clear and convincing evidence its allegation that Respondent failed to obtain Ms. Sataki's informed consent with respect to each of the three conflicting personal interests that we have found to have otherwise been proven -- i.e. Respondent's emotional interest in Ms. Sataki, his continuing animus toward the Clintons and Judge Kollar-Kotelly, and his appetite for publicity that the representation provided.

Ms. Sataki was clearly distressed at the time that Respondent first met her, and, as argued by Respondent in his pleadings and in his articles, her emotional state continued to worsen over the course of the representation, as his abusive conduct exacerbated her distress. FF 8, 15, 16, 21, 32, 33, 37, 41, 43, 45, 55, 58, 63, 65, 69, 71, 72, 73, 76, 78 n.24. It is hard to imagine a more confused, uncertain, vulnerable, stressed or pressured client, especially with her own lawyer increasing the pressure on her. *Id*. Respondent also knew and should have known that she was depending upon his skills, experience and judgment as an attorney to advise on how to proceed at various points and in various respects. FF 30, 46, 57. Respondent was clearly on notice from the pertinent Rules and associated Comments that he was required to disclose his conflicts and potential conflicts of interest to Ms. Sataki at various points in the representation. He was equally on notice from his observations of Ms. Sataki (clearly a legally "less sophisticated client" as emphasized by Comment [28], *supra*,

and as the Hearing Committee observed throughout her testimony) that he needed to explain to Ms. Sataki those conflicts and their possible consequences slowly, carefully, and fully -- after he himself had carefully and honestly identified and analyzed them.

As already discussed, the record is replete with Respondent's statements, with various degrees of intensity and aggressiveness, of his feelings for Ms. Sataki. FF 8, 31, 33, 35, 38, 39, 43, 44, 58, 59, 60, 65, 72. Ms. Sataki expressed, quite early in the representation, her concerns about the effect that those feelings were having on her and on his handling of her matter. FF 31, 32, 37, 43. Perhaps most tellingly, Respondent himself recognized and acknowledged his conflict -- also in the early stages of the representation. FF 33 ("Because I do care so much about Ellie, I too have trouble seeing the proverbial forest from the trees. Its [*sic*] very hard to be a lawyer and feel so much for your client. . . ."); FF 42 (recommending to Ms. Sataki that she retain a new attorney, Tim Shea, because doing so would "in your best interests"); FF 43 ("You will get better legal representation with someone else, like Tim Shea, who does not have an emotional conflict and can keep his mind clear.").

In contrast, two elements are glaringly absent from the record.

First, there is no evidence, written or verbal, that Respondent discussed with Ms. Sataki at any time in the representation -- in a calm, comprehensive, non-threatening, and non-vindictive manner -- the specific "possible extra expense, inconvenience, and other disadvantages" or ramifications being caused or potentially arising from his personal interest in her or "the material advantages and

disadvantages of [any given] proposed course of conduct," such as the move to Los Angeles, the filing of the re-assignment and disqualification motions, or his persistence in the twelve *WND* articles over nine months in 2010.[37] Indeed, Respondent admitted at the hearing that he did not consult with Ms. Sataki about the disqualification motion prior to its filing, despite the significance of taking such a step and even though he knew that ". . . I needed to get instructions from her." FF 70. Respondent would excuse this absence of notice and discussion because Ms. Sataki had ceased responding to his badgering communications, but there is no evidence in the record that he attempted to contact her with respect to this particular filing (or the earlier re-assignment motion, when they were still communicating) and, in any event, we have found no authority which even arguably condones taking such a step without consultation with the client. It goes without saying that Respondent did not advise Ms. Sataki of his forthcoming outrageous behavior at the Awards event and afterwards or of his obsessive, on-going verbal abuse, criticism and harassment of her or of his retaliatory increased contingent fee demands or that his harassment would leave her no alternative in her view than to seek the dismissal

[37] Ms. Sataki at least managed to have some discussion with Respondent regarding the *WND* articles. But, she testified, instead of making and sharing with Ms. Sataki a reasoned, balanced assessment of her concerns, Respondent, abusing his status in the attorney-client relationship (FF 57):

> said that "It's going to take, say, no-brainer. It's very easy. It's only going to take two weeks," or whatever, and it's going to be easy, a task, like you said to me, he said how easy it's going to be to transfer me from DC to LA and work out of the LA office.
>
> All of those stuff that I listen to him because he's the attorney, he knows best, and none of that happened.

of the *BBG* action and the cessation of the representation.

Second, there is no evidence, written or verbal, that Ms. Sataki consented, verbally or in writing, to the foregoing manifestations of Respondent's various conflicts. Early in the litigation phase of the matter, Ms. Sataki expressed various concerns with Respondent's actions at several points. FF 26 (concern upon the *BBG* filing that the case was "getting too big"), FF 27 (concern that Respondent's unspecific publicity strategy "could backfire on me and also everybody's going to find out"), FF 28 ("because it was a sexual harassment case, and because of the community and my background, I wanted it to be very quietly handled"), FF 46 (because "my attorney knows best," followed Respondent's advice to ignore the order to return to work in the Washington, D.C. office even though "choosing between a career and my job, and if I have to just stay tough and take it and continue and hope for the better, I would have done it [returned to the job in Washington]"), FF 57 (in May, as the articles started appearing, "I asked him not to do it"). The record is devoid of any "affirmative response by the client" clearly consenting to the conflict-ridden representation after -- and on the basis of -- full disclosure by Respondent of any of his conflicts of interest.

Finally, it is more than telling that Respondent's only defense to the charge that he did not have informed consent to the various actions that he took as a result of his adversely affected professional judgement are his assertions that he had obtained Ms. Sataki's consent "in any event" and that he had Ms. Sataki's "explicit or, at an absolute minimum, implied consent. . . ." As previously noted, Respondent

does not cite to any evidence that might support these claims. An attorney's unsupported assertions of fact without any citation to the record do not constitute evidence and do not advance his position in any respect. In the words of Comment [3], "a lawyer may not assume consent from a client's . . . silence." *See also* Section IV.B.3, *infra*.

On the basis of the foregoing authorities and findings of fact, we conclude that Disciplinary Counsel has plainly proved by clear and convincing evidence that Respondent did not fully disclose to and discuss with Ms. Sataki the existence and nature of his various conflicts of interest or their possible adverse consequences on the representation and consequently did not obtain her informed, affirmative consent to his representation of her despite his many conflicts of interest.

* * * * *

In sum, we recommend that the Board find as a matter of law that Respondent violated Rule 1.7(b)(4) in numerous respects in the course of representing Ms. Sataki in her matter.

B. THE CLIENT DECISIONS AND LAWYER-CLIENT CONSULTATION CHARGES

Disciplinary Counsel charges that Respondent violated Rules 1.2(a) and/or 1.4(b) in three instances – (1) when he filed the July 26, 2010 Motion to Disqualify in the *Falahati* and other actions (Sp. Ch. Count II at 3-4; *see also* FF 70); (2) when he named Secretary Clinton in the *BBG* action, filed the June 9, 2010 motion for reassignment, and failed to dismiss the entire action as she had allegedly requested (Sp. Ch. Count III at 4-7; *see also* FF 24, 26, 62, 71, 74-76); and (3) when he

published the *WND* articles (Sp. Ch. Count IV at 7-11; *see also* FF 40, 41, 45, 47, 55, 63, 66, 80, 90).

Rule 1.2(a) provides, in relevant part:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

Comment [1] to Rule 1.2 explains and counsels:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. . . . In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Rule 1.4(b) provides:

> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The requirements of consultation, and of obtaining the client's informed consent to non-technical or non-legal steps in the representation, are well-established. *See* Restatement (Third) of the Law Governing Lawyers §20 (same principles as expressed in Rule 1.2(a) and 1.4(b)). Restatement §22 makes clear that significant decisions in the representation "are reserved to the client." *See also In re Wright*, 885 A.2d 315 (D.C. 2005) (*per curiam*) (lawyer violated Rules 1.2(a) and

1.4 by settling case without authorization, failing to keep clients informed, and failing to abide by their decisions).

A lawyer's action or inaction can have disastrous consequences for the client. For example, in *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), the trial court dismissed a tort suit because plaintiff's counsel had been dilatory in pursuing the case and had failed to appear at a pretrial conference. The Supreme Court held that the plaintiff was bound by the lawyer's conduct. 370 U.S. at 633. *See also In re Fox*, 35 A.3d 441 (D.C. 2012) (*per curiam*) (expiration of statute of limitations); *In re Avery*, 926 A.2d 719 (D.C. 2007) (*per curiam*) (expiration of statute of limitations after attorney's lack of consultation with client); *In re Douglass*, 745 A.2d 307 (D.C. 2000) (*per curiam*) (failing to "defend a claim against the estate, forcing the estate to pay $4,500 on a claim that would have settled for $1,000").

In this case, the Committee considers the Rule 1.2(a) and 1.4(b) allegations in the context of our conclusion in Section IV.C, *infra*, that Respondent violated Rules 1.5(b) (written agreement) and 1.5(c) (contingent fee agreement) and that his communications with his client were affected by his Rule 1.7(b)(4) conflict of interest violation. A written agreement would have provided a context for consultation and client decision-making, and objective, dispassionate consultation leading to the client's informed consent is inevitably difficult when skewed by the lawyer's conflicting interests.

We analyze the two charged rule violations together because they address two closely-related aspects of the lawyer-client relationship. Rule 1.2(a) acknowledges

the client's power to control the relationship through informed consent and posits a basic principle of the lawyer-client relationship -- that the lawyer is the client's agent, and has no lawful power except to carry out the client's wishes. Rule 1.4(b), among its other purposes, specifies the means by which that consent is legitimately to be obtained -- through consultation and communication.

1. The July 26, 2010 Motion to Disqualify

In Count II of the Specification of Charges, Disciplinary Counsel charges that Respondent's filing of the July 26, 2010 motion to disqualify Judge Kollar-Kotelly in *Falahati* (FF 70) was "inconsistent with Ms. Sataki's request that Respondent pursue her case simply and quietly" and that "Ms. Sataki did not know Respondent would file a motion to disqualify and did not authorize Respondent to file it." Sp. Ch. at 4. The motion was filed not only in *Falahati* but also in *BBG* and *Klayman v. Judicial Watch*. FF 70. In its brief, Disciplinary Counsel argues that Respondent violated both Rule 1.2(a) and Rule 1.4(b) when he "undertook the most complex and public route to litigating her claims, by pursuing affirmative injunctive relief against high-profile defendants who need not have been parties to the action," "continued litigating high visibility motions that had no hope of success," and did not provide adequate information to Ms. Sataki about the steps he was taking. Disciplinary Counsel argues further that Respondent's failure to dismiss the litigation after being instructed to do so also violated Rule 1.2(a). ODC Brief at 34-36.

Respondent contends first that he did not violate 1.2(a):

> Mr. Klayman did have Ms. Sataki's explicit or, at an absolute minimum, implied consent to do this as well as try to negotiate a

> settlement and when not successful pursue litigation, as sworn hearing testimony confirms. PFF 51, Tr. 981. In addition, a lawyer representing a client is entitled to discretion in doing what is believed to be in the client's interests, particularly with a client who is non-communicative at the point that the motion was filed.

R. Surreply at 6-7. Respondent thus appears to concede that there was a lack of communication at the time the motion was filed. (Tr. 981, cited by Respondent, does not support Respondent's assertion in the quoted passage; at that page, he is simply testifying about steps in the representation. *See also* n.35.) With respect to Rule 1.4(b), Respondent interposes a general denial that there is "clear and convincing evidence" and adds that:

> . . . it is inconceivable how Mr. Klayman's filing of a motion to disqualify this biased jurist could have harmed Ms. Sataki's interests in any way. To the contrary, the motion was in furtherance of her interests . . . ."

R. Surreply at 8.

Respondent testified that he had discussed Judge Kollar-Kotelly's alleged views with Ms. Sataki. He did not claim that he had informed her of his intention to file the motion:

> Q. [by Mr. Klayman] And I also told you that, you know, there's a possibility she might not like you either, since you're conservative and to the right. Remember I told you that?
>
> A. No, I don't remember that.
>
> Q. Alright.
>
> A. Because I never announced -- I'm a reporter. I never announce my political views for anybody. So, I can't go in front of a judge and say, "I'm a conservative," "I'm a" -- I don't do that.

> Q. But you're aware that --
>
> A. That's --
>
> Q. You're aware from my background that I've always been nonpartisan. I've brought cases against Republicans --
>
> A. Yes, but I didn't think that your background was going to make -- be a problem for my case.

Tr. 409. That is, Ms. Sataki did not want to be identified with a political faction or cause, because that would harm her reputation as a journalist.

The July 26 Motion to Disqualify requested, *inter alia*, that Judge Kollar-Kotelly recuse herself. This motion, like the one discussed in the following sub-sections, was based on Respondent's claim that Judge Kollar-Kotelly harbored an adverse opinion of him due to her and her husband's relationship with President Clinton, and his assertion that her rulings were affected by dishonesty and corruption. Much of the argument consisted of detailed attacks on Judge Kollar-Kotelly's alleged bias against Respondent and her rulings in other cases before her in which he was counsel and/or party. FF 70.

Respondent testified:

> And it was at that time [when the *Falahati* and *BBG* lawsuits were being filed], and Mr. Shamble made reference to that and that I raised the issue with both him and Ms. Sataki, that this was a judge that was very problematic for us.
>
> * * * * *
>
> THE WITNESS [Respondent] I had prior discussions with her about Judge Kotelly and the need of her potentially having to

> disqualify herself. She knew about the motion for reassignment. She knew that ultimately I would have to ask the judge, if necessary, to disqualify herself. . . .
>
> CHAIRMAN FITCH: What is the basis for your saying that Ms. Sataki knew about the motion to disqualify?
>
> THE WITNESS: She knew that ultimately I may have to file a motion to disqualify her.
>
> CHAIRMAN FITCH: What's the basis of that comment?
>
> THE WITNESS: The conversations that we had, which Mr. Shamble also testified to in some manner yesterday that I raised up front, the difficulty being before this judge, and my prior experience with her in other case[s], and the fact that she disliked me and generally dislikes people that she perceives to be conservative.
>
> CHAIRMAN FITCH: Do you have any recollection of whether, in the approximately seven days before July 26th, 2010, you had any conferences or communications with Ms. Sataki --
>
> THE WITNESS: I don't have any recollection about that.
>
> CHAIRMAN FITCH: -- about filing for the motion to disqualify.
>
> THE WITNESS: I don't have any recollection of that.

Tr. 1000, 1165-67. This testimony does not support Respondent's blanket assertion, at Tr. 1011, that "Ms. Sataki knew every step of the way what I was doing."

The Committee has examined the many emails between Ms. Sataki and Respondent during this period and finds no evidence that Respondent consulted with his client about the Motion to Disqualify. In his post-hearing briefing, Respondent cites no evidence that Ms. Sataki was informed about, consulted about, or approved

of filing the Motion to Disqualify.

The Motion to Disqualify was of sufficient importance in the context of the *Falahati* litigation that Respondent had a duty to consult with his client and to obtain her informed consent. In *Jilting the Judge: How to Make and Survive a Motion to Disqualify*, Litigation, Vol. 34, No. 2, p. 48 (2008), Judge Jeffrey Cole notes that filing such a motion is "risky," and that to minimize the risks, the motion should be "nonaccusatory and impersonal," and "respectful, subdued, and a bit reluctant." Respondent's motion violated every one of these precepts and focused unduly on his personal grievance against Judge Kollar-Kotelly.

Judge Cole also advises, at p. 49, that "[t]he tone of the motion should be respectful, subdued, and a bit reluctant." Respondent's motions were intemperate in tone and meritless in content. Referring to Judge Kollar-Kotelly's discovery rulings in *Klayman v. Judicial Watch*, involving Respondent's alleged personal relationships, Respondent argued:

> Judge Kollar-Kotelly's actions, which were cruel, and vindictive and retaliatory, will . . . serve as a dark reminder of the bridled and arrogant power of some on the federal bench, like Judge Kollar-Kotelly, who choose to use their power for improper ends.

DX 13 at 13-14.

Insofar as the Motion to Disqualify was filed in the *Falahati* case, it was destined to fail because Judge Kollar-Kotelly had dismissed that case due to Respondent's failure to file an opposition to the government's motion to dismiss, even after Respondent had sought and obtained an extension of time within which

to file a response. FF 68.[38] The Motion to Disqualify served in *Falahati* only to air Respondent's personal grievances and was inconsistent with the client's wishes that the matter be handled "very quietly . . . as quiet as possible." FF 28.

The Motion to Disqualify, to the extent it sought recusal, was filed under 28 U.S.C. §144, which requires that a "*party*" file a "timely and sufficient affidavit" to obtain relief. Respondent testified:

> MR. TIGAR: Do you recall reaching out to her and asking her if she would make such an affidavit?
>
> THE WITNESS: Yes. I was calling out generally because I needed to get instructions from her by talking to her, not getting letters secondhand. Well, actually at that point we didn't get anything. We didn't have any communication. I was trying to reach her the whole time, and she just kind of went into hiding.

Tr. 1179. In short, Respondent essentially admits that he did not consult with or receive authorization from Ms. Sataki before filing the Motion to Disqualify.

We note also that Respondent's failure in *Falahati* to file an opposition to the government's dismissal motion abandoned a viable legal theory on which this narrowly-crafted lawsuit, which focused on the liability of his client's abuser, might go forward. The government's Westfall Act certification was based on a claim that

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[38] In an email dated September 2, 2010, after Ms. Sataki had apparently communicated concerns to Tim Shamble about missed deadlines, Respondent argued:

> Second, you told Tim that I missed deadlines.
>
> Answer: No deadlines have been missed. I did not contest the court's finding that VOA is responsible for Falahati's and the manager[']s actions, because it will help in the long run.

SX 29.

Falahati was acting within the scope of his employment. *See* Restatement (2d) Agency § 228(2). An employee's conduct (i.e., sexual harassment) "is not within the scope of employment if it is different in kind from that authorized . . . or too little actuated by a purpose to serve the [employer]."). *Id.* Respondent was likely entitled to take discovery on the scope of employment issue. *Stokes v. Cross*, 327 F.3d 1210 (D.C. Cir. 2003).

The Hearing Committee concludes by clear and convincing evidence that the tendentious and high-profile July 26, 2010 Motion to Disqualify was inconsistent with the client's wish to have the litigation conducted quietly, that Ms. Sataki did not know Respondent would file the motion because by his own admission he had not discussed with her this important step in the litigation, and that therefore Respondent violated Rule 1.2(a) and Rule 1.4(b) by filing the Motion to Disqualify.

2. Respondent's Steps in the *BBG* Action

In the *BBG* action, Respondent named Secretary Clinton as a defendant (FF 24), filed the June 9, 2010 Motion to Reassign the case away from Judge Kollar-Kotelly (FF 62) and the July 26, 2010 Motion to Disqualify requesting that she recuse herself (FF 70), and did not dismiss the entire case when allegedly directed by Ms. Sataki to do so (FF 71, 74, 75).

Disciplinary Counsel charges that naming Mrs. Clinton violated Rule 1.2(a) because naming Secretary Clinton and other "high profile defendants" was inconsistent with Ms. Sataki's desire that the matter be handled "simply and quietly" (ODC Brief at 34-35; ODC Reply at 7-8). Disciplinary Counsel argues that the

reassignment and recusal motions violated Rule 1.4(b) because "Ms. Sataki did not know that Respondent would file these motions attacking the presiding judge and did not authorize him to do so to reassign her case to another trial judge and did not authorize Respondent to file it." (ODC Brief at 36; ODC Reply Brief at 9-10; Sp. Ch. at 6 ¶22). Disciplinary Counsel argues that Respondent's failure to dismiss the *BBG* action in its entirety was on its face "a brazen violation" of Rule 1.2(a)'s mandate that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation. . . ." (ODC Brief at 33, 35; *see also* ODC Reply at 7-8).

Respondent counters that "Ms. Sataki expressly agreed to file court cases. . . .", that "it is inconceivable how Mr. Klayman's filing of a motion to disqualify this biased jurist could have harmed Ms. Sataki's interests in any way," and that the two claims that he did not dismiss coincided with Ms. Sataki's wishes on how to proceed. R. Brief at 24; R. Surreply at 8; R. Brief at 25.

The discussion with respect to Count II is relevant and incorporated here by reference. In addition, the Motion to Reassign represented an early, significant escalation of the conflict. It was intemperate, recounting Respondent's dissatisfaction with Judge Kollar-Kotelly's discovery rulings in *Klayman v. Judicial Watch* that apparently allowed discovery into Respondent's personal life. The motion stated:

> Importantly, Judge Kollar-Kotelly's actions, which were cruel, and vindictive and reta[l]iatory, will . . . serve as a dark reminder of the bridled [*sic*] and arrogant power of some on the federal bench who choose to use their power for improper ends. As Mr. Klayman interprets it, Judge Kollar-Kotelly, seeing an opportunity to harm Mr. Klayman, to try to smear and perhaps

> hamper him from bringing future lawsuits against her Democratic Party . . . .

FF 62. The Motion to Reassign also focused on Judge Kollar-Kotelly's and her husband's alleged ties to the Clintons. *Id.*

Respondent had a duty to consult with his client before filing the Motion to Reassign and a duty to obtain her informed consent. Yet, the record, including the emails between Respondent and Ms. Sataki, contains no evidence of consultation or consent. At the hearing, Respondent testified:

> CHAIRMAN FITCH: With respect to DX10 filed on 6/9/10, this was filed expeditiously eight days after the opinion and order. Were you still in communication with Ms. Sataki during that week, that eight-day period.
>
> THE WITNESS: I don't recollect whether I was or wasn't.

Tr. 1156. As with the disqualification motion discussed with respect to Count II, the Motion to Reassign in *BBG* was inconsistent with Ms. Sataki's wishes concerning her litigation.

The politically-charged rhetoric of the motion was adumbrated in the complaint, DX4, several paragraphs of which excoriated VOA management for alleged incompetence and bias. The complaint named individual members of the Broadcasting Board of Governors as defendants. Respondent testified, and ¶ 11 of DX4 alleges, that the individual defendants were included based on a district court decision, *Navab-Safavi v. Broadcasting Board of Governors*, 650 F. Supp. 2d 40 (D.D.C. 2009) In that decision, Judge Huvelle had denied a Fed. R. Civ. P. 12(b)(6) motion to dismiss a *Bivens* claim against individual BBG members. However, in

Navab-Safavi it was plausibly alleged, based on BBG records, that the Board had voted in a meeting to terminate the plaintiff's employment, thus triggering the claim of unlawful action. There was no such specific allegation in Respondent's complaint, and no alleged facts from which a plausible claim of Board member involvement could be made.

The Hearing Committee concludes that Disciplinary Counsel has proved by clear and convincing evidence that Respondent disobeyed his client's decision regarding the objective of the representation and the manner in which the matter should be handled and also did not adequately consult with her when he named Mrs. Clinton and other high-profile BBG members as defendants in the *BBG* action and when he filed the Motion to Reassign and the Motion to Disqualify. The Hearing Committee further concludes that Disciplinary Counsel has proved by clear and convincing evidence that Respondent disobeyed his client's directive when he did not dismiss the *BBG* action in its entirety after learning of them. Accordingly, the Hearing Committee recommends that the Board so find.

3. The *World Net Daily* Articles

The twelve *WND* articles authored by or attributed to Respondent appeared between April 23, 2010 and December 25, 2010. FF 40, 41, 45, 47, 54, 55, 63, 66, 80, 90. As to each such article, Disciplinary Counsel alleges that "Ms. Sataki did not consent to the publication of Respondent's article. Ms. Sataki was embarrassed by Respondent's disclosure of facts that he gained during the course of the representation." Sp. Ch. Count IV at 7-11. Publication of these articles is alleged to

violate Rule 1.2(a). Respondent counters, "The record is clear . . . that on multiple occasions Ms. Sataki, in the presence of Mr. Shamble, Mr. Dash, and Ms. Klayman, approved of the publicity generated to try to coax VOA and the BBG into settlement as well as to try to settle the lawsuits on favorable terms once litigation proved necessary." R. Brief at 29; *see also* R. Surreply at 7-8.

The Committee recognizes that lawyers and law firms have websites on which they discuss facts of their pending and concluded cases, often in self-laudatory terms. Lawyers have a first amendment right to represent clients "in the court of public opinion." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991) (opinion of Justice Kennedy).

Regardless of professional custom or constitutional doctrine, the lawyer is not excused from compliance with the Rules that require, among other duties, consultation, respect for the client's wishes, and client confidentiality. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 10-457 (August 5, 2010) discussed internet postings by lawyers and states: "Specific information that identifies current or former clients or the scope of their matters also may be disclosed, as long as the clients or former clients give informed consent . . . ." (emphasis added).

Our task here,[39] therefore, is to determine whether Ms. Sataki gave informed consent to the publication and distribution of these articles, singly and taken as a

[39] We re-visit the *WND* articles in Section IV.E of this Report, regarding Disciplinary Counsel Rule 1.6(a)(1) & (a)(3) confidentiality charges.

whole. In making that evaluation, we are guided by our preceding conclusion that Respondent's relationship with his client was affected by his conflict of interest. When a lawyer with such a conflict seeks informed consent to a course of action, the lawyer must take special care to ensure that the client's decision is not swayed by advice that is affected by the conflict. *See, e.g.*, *Hager*, 812 A.2d at 912-15; *In re Evans*, 902 A.2d 56, 58 (D.C. 2006) (*per curiam*).

The initial basis for the Count IV charges was a letter dated October 24, 2011, from Ms. Sataki to Disciplinary Counsel, enclosing additional material concerning her complaint, including the twelve articles mentioned in Count IV. The letter states, in relevant part:

> Instead of working on the merits of my case, Mr. Klayman focused his energy on obtaining publicity for his role as counsel in the case. He fully ignored my requests to keep the case as quiet as possible. Over my objections, Mr. Klayman used my identity, the facts of my case and my political views to promote his self interest in press conferences, press interviews, Facebook posts and in at least ten articles he wrote (Exhibit 2). As recently as Christmas of 2010, Mr. Klayman continued to refer to my case in articles he wrote. That article, like the others written by Mr. Klayman that I have attached to this complaint (Exhibit 2), are intended to promote Mr. Klayman's interests and did not help my case. His publication of my personal political views was in direct contravention of express instructions to keep my political views confidential because exposing them would harm my career. Mr. Klayman's publicity did not help my case at all. Instead, he destroyed my credibility as a journalist. I firmly believe Mr. Klayman ignored my requests to keep the case quiet in order to obtain notoriety for himself at my expense.

DX 23 at 5. The copies of the articles sent by Ms. Sataki were, according to the download dates they bear, recovered by her in September and October 2011. That

is, the fact that she produced these articles in her October 24, 2011 letter is no evidence as to date(s) on which she initially saw them or became aware of them.

We consider the articles by date of publication. Respondent did not have and could not have had his client's informed consent to the October 1, 2010, October 15, 2010, October 29, 2010, and December 25, 2010 publications (FF 80, 90). Ms. Sataki had terminated the lawyer-client relationship and had repeatedly objected to the conflicted litigation strategy that disregarded her desire that the case be handled quietly and that her journalistic integrity not be compromised by attributing political views to her.

The May 28, 2010, June 11, 2010, and July 2, 2010 publications (FF 55, 63, 66) occurred at a time when the lawyer-client relationship was eroding. On cross-examination by Respondent, Ms. Sataki testified:

> Q. You are aware that, and you testified to this yesterday, that I believed that you had agreed to that and I wrote articles that were very favorable to you. You're aware of that?
>
> A. Yes.
>
> Q. And I sent you copies of them at the time.
>
> A. Yes.
>
> Q. Emailed them to you.
>
> A. Yes, you did.
>
> Q. And there's nothing in writing that ever tells me at the time that you didn't want me to do that, correct?
>
> A. Not correct.

* * * * *

Q. At that time you did not tell me, "Don't write any more."

A. I did.

Q. There's nothing in writing that you presented to that effect at that time, did you?

A. We talked to each other. I explained to you on the phone why I don't want articles out there.

Tr. 398-400.

Whether or not Ms. Sataki objected "in writing" to the articles is irrelevant. The issue, to repeat, is whether the record establishes that Respondent did not obtain informed consent. The Committee finds by clear and convincing evidence that Respondent did not have meaningful consultation with his client and did not obtain her informed consent. Her testimony that she objected to the articles is corroborated by the fact that she did not accept Respondent's suggestion on June 10, 2010 that she contact a Los Angeles *Times* reporter, FF 65 (June 10, 2010 email; Tr. 770-73), and by the absence in all the e-mails between Respondent and Ms. Sataki of any instance of Ms. Sataki granting informed consent to publication of the *WND* articles.

It remains to consider the April 23, 2010, April 30, 2010, May 11, 2010, May 14, 2010 and May 21, 2010 articles (FF 40, 41, 45, 47, 54).

Ms. Sataki testified on direct examination:

Q. Did you ever have conversations with Mr. Klayman about publicizing your case?

A. I did. I asked him not to do it, but then later I -- when he

> explained to me how much it's going to help my case -- because he was going back and forth with the people, the VOA management and the stuff that he said that, "It's going to take, say, no-brainer. It's very easy. It's only going to take two weeks," or whatever, and it's going to be easy, a task, like you said to me, he said how easy it's going to be to transfer me from DC to LA and work out of the LA office. All of those stuff that I listen to him because he's the attorney, he knows best, and none of that happened.

Tr. 91.

On cross-examination, Ms. Sataki was asked about conversations with Tim Shamble concerning publicity:

> Q. And, in front of Mr. Shamble, you understood that we were going to use publicity to try to change the attitude of your managers and their approach towards you to try to get a settlement.
>
> A. Again, it was you saying that that's going to happen. I -- I was -- I did raise my concern that it could backfire on me and also everybody's going to find out about it.
>
> * * * * *
>
> Q. Yes, I never discussed with you or told you that I was going to use publicity concerning you and the other broadcasters to sell my book about my professional career. I never told you that.
>
> A. We talked about that, the fact that publicity always is going to help everybody. You always said that.

Tr. 758-59.

Respondent also inquired about Ms. Sataki's views concerning the content of publicity:

Q. And that you were performing a valuable role as a broadcaster in helping to change the regime in Iran some day by communicating with the people of Iran who were oppressed.

A. That was not my role. I couldn't say that. I could never say that.

Q. No, I didn't say that you would say that publicly, but we talked about that.

A. Again, as a broadcast journalist, I can't say that.

* * * * *

THE COURT REPORTER [reading question]: "So isn't it true that favorable articles on behalf of you and your other broadcasters, in the media, based on your experience, could be used to try to change the attitudes of your managers at Voice of America?"

THE WITNESS: Based on my experience now? No, it's not true.

BY MR. KLAYMAN: Q. But we believed that at the time, did we not?

A. No, I didn't. You said that.

Tr. 756-57.

Respondent's daughter, Joshua Ashley Klayman, testified to several meetings with Ms. Sataki and Respondent in the Spring of 2010:

Q. Did she make reference to using publicity to try to get a positive result for her?

MR. SMITH: Objection. It's a leading question.

BY MR. KLAYMAN:

Q. Ok, what did she say?

A. She was very interested in trying to get a positive result and to pressure people into, you know, giving her that result. She certainly was publicizing everything to my then boyfriend and me, but I don't recall her explicitly saying, like, "Yes, I," you know -- however she was actively publicizing it to me. And she seemed very onboard with whatever the strategy was.

* * * * *

Q. During the times that you met with her, I discussed publicizing her case?

A. Yes. I think you always discussed publicizing cases.

Q. And she didn't object?

A. No.

Tr. 1525-27.

Union representative Tim Shamble testified:

Q. Is it your experience, based upon being in Washington, that publicity sometimes coaxes people to do the right thing?

A. Sometimes, yes.

Q. And did there come a point in time when you actually went with her and distributed publicity?

A. I remember one time. The VOA was on the mall here in Washington, some kind of public -- it might have been a recruitment fair or something. But we had an article and both her and I were distributing it to people in the vicinity, tried to let people know and to let the agency know that, you know, we were going to publicize this.

* * * * *

> Q. Ok, great. Is that [showing witness the May 14, 2010 publication] the article that you distributed in Ms. Sataki's presence?
>
> A. Yes, I believe it is. Yes.
>
> Q. It's called: "Government War on a Freedom Loving Beauty. Exclusive, Larry Klayman Goes to Bat for Harassed Broadcaster Fighting for a Free Iran." That's it?
>
> A. Yes.
>
> Q. And she was there when she gave it out and she approved of that?
>
> A. Yes. We were both on the mall handing that out.

Tr. 893-94.

The record establishes Respondent's repeated insistence that publicity of the case, and specifically publicity that raised political contentions about VOA, was appropriate and necessary. The record also shows that Ms. Sataki repeatedly expressed concerns that publicity would give her case the kind of attention that she did not want it to have, and that politically-charged publicity harming her reputation as a journalist. The incident on the mall -- handing out leaflets -- shows at most an acquiescence in a single event, guided by her misplaced trust in Respondent's assurances.[40]

[40] The distinction between true consent and mere or passive acquiescence runs through many areas of law. *See, e.g.*, *Gebardi v. United States* 287 U.S. 117 (1932) (passive acquiescence does not make one a conspirator); *Bumpers v. North Carolina*, 391 U.S. 543, 548-49 (1968) (mere acquiescence in the face of lawful authority is not consent). Then-Judge Cardozo distinguished passive acquiescence from culpable adherence to an unlawful plan in *People v. Swersky*, 111 N.E.

Respondent also contacted members of Congress on Ms. Sataki's behalf, including Representative John Boehner and Sensators Tom Coburn and John McCain. At a restaurant in Washington, D.C., Respondent introduced Ms. Sataki to Representative Boehner. Respondent sought to establish by leading questions that Ms. Sataki had a fairly extensive discussion with Boehner about her case, but she testified that she did not recall any such detail. She also testified that she did not recall Boehner giving her "a kiss on the cheek." Tr. 449-52.

With respect to Congressional office visits, Mr. Shamble, the union representative testified:

> Q. During the time that we went up there, did we take some press materials to give them?
>
> A. Yes.
>
> Q. Did Ms. Sataki tell you not to do that?
>
> A. No.
>
> Q. She was aware we were going up there?
>
> A. Yeah, I assume, yeah.

Tr. 913-14.

In any event, none of the members of Congress provided meaningful assistance. In the *WND* article of Oct. 29, 2010 -- after having been discharged -- Respondent attacked Republican legislators for failing to help Ms. Sataki:

212, 214 (1916), and quoted the common law maxim "words that sound in bare permission make not an accessory."

> Not one Republican establishment leader – and I have approached many – has even given a hoot that the Persian News Network of our Voice of America is being run by the son of an Islamic Iranian mullah, Ali Sajjadi, and that VOA is broadcasting anti-American and pro-Islamic regime programming into Iran and the rest of the Middle East. And let me name some names: Minority Leader John Boehner who, while finding time to cordially kiss and then offer to help Elham Sataki at Morton's restaurant on Connecticut Avenue in Washington, D.C. - Ms. Sataki being that beautiful and brave VOA broadcaster who was destroyed by Sajjadi for her pro-freedom views (see my WND column "The government war on a freedom-loving beauty") – did nothing after that to save her.
>
> Nor did so-called conservative Republican Sen. Tom Coburn, whose staff I met with on several occasions to ask for help for Elham and the other courageous Persian television broadcasters at VOA who have been retaliated against by Sajjadi for their pro-freedom views. And, as for the general state of VOA, no one else in the Republican establishment has come forward to help reshape the network into the freedom-fighting force that, during the Reagan years, was instrumental in bringing down the communist Soviet empire - not even the Republicans who sit on VOA's Board of Governors who oversee the network.

DX 23 at 15.

Contacting legislative offices to discuss and seek assistance with a client's legal problems is an accepted and commonly-pursued avenue of legal representation. In this case, those contacts provided information to the legislator and his or her staff members; there is no indication that those contacts lead to public disclosure to which Ms. Sataki had not given informed consent and that were inconsistent with Ms. Sataki's desire that her matter be handled simply and quietly. FF 27-28. Respondent,

however, took it on himself, in violation of his client's wishes and after he had been discharged, to "go public" and to do so in writings that reflected his political agenda.

In light of the foregoing, the Committee concludes by clear and convincing evidence that the possible acquiescence at times of an ambivalent and vulnerable client to some of Respondent's settlement pressure measures did not countermand her fundamental wishes regarding the conduct of the litigation or provide informed authorization for the extensive *WND* campaign.

* * * * *

In sum, we conclude that Disciplinary Counsel has proved by clear and convincing evidence that Respondent violated Rule 1.2(a) when he failed to abide by Ms. Sataki's decisions concerning the objectives of representation, and failed to consult with her before he (i) filed the July 26, 2010 Motion to Disqualify in *Falahati* and the other actions, when in *BBG*, he (ii) named Secretary Clinton as a defendant, (iii) filed the re-assignment motion, and (iv) did not dismiss the entire case when allegedly directed by Ms. Sataki to do so, and when he (v) wrote and/or facilitated the string of *WND* articles. We further conclude the Respondent violated Rule 1.4(b) when he (i) filed the July 26, 2010 Motion to Disqualify in *Falahati* and the other actions and when in *BBG*, he (ii) named Secretary Clinton as a defendant and (iii) filed the re-assignment motion. We recommend that the Board so find as a matter of law.

C. THE FEE ARRANGEMENT CHARGES

Disciplinary Counsel charges that Respondent violated both Rule 1.5(b) and

Rule 1.5(c) in the course of his representation of Ms. Sataki. Rule 1.5(b) provides:

> When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

Rule 1.5(c) provides, *in pari materi*:

> A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal litigation, other expenses to be deducted from the recovery, whether such expenses are to be deducted before or after the contingent fee is calculated, and whether the client will be liable for expenses regardless of the outcome of the matter.

We have found by clear and convincing evidence that Respondent did not enter into a written fee agreement, standard or contingent, with Ms. Sataki before commencing the representation, within a reasonable time after commencing the representation, or at any other time. FF 9, 10. Respondent does not contest this finding and, in fact, admits it. R. Brief at 27 ("There is not a single shred of documentary or other evidence that Mr. Klayman or Ms. Sataki agreed on any type of fee structure, other than Mr. Klayman's *pro bono* representation." (emphasis in original)); R. Brief at 28 ("The fact of the matter is that there was no fee agreement memorialized in writing because there was no fee agreement to memorialize." (emphasis in original)); R. Surreply at 8 (stating, erroneously in part (*see* FF 59 regarding May 31, 2010 email), "Finally, the record is clear that only at the end of the representation did Mr. Klayman propose a contingent fee. . . ."); Tr. 1577 ("We

never entered into an agreement because I was pro bono up to that point in time.").

Even though the absence of a written fee agreement appears to be a *per* se violation of Rule 1.5(b), *see, e.g.*, *In re Szymkowicz*, 124 A.3d 1078, 1088 (D.C. 2015) (*per curiam*); *In re Fay*, 111 A.3d 1025, 1027-28 (D.C. 2015) (*per curiam*); *In re Verra*, 932 A.2d 503, 504 n.1 (D.C. 2007) (*per curiam*), Respondent nevertheless advances two defenses.

First, he contends that "Mr. Klayman represented Ms. Sataki solely on principle, and *pro bono*." R. Brief at 27; *see also* R. Surreply at 8. The problem with this defense is that Rule 1.5(b) plainly does not provide an exception for *pro bono* representation. *In re Long*, 902 A.2d 1168, 1172 (D.C. 2006) (*per curiam*) ("An attorney who undertakes to act in a legal capacity, albeit on a personal basis and even if entirely gratis, is not exempt from the ethical rules governing the legal profession.").

Respondent next contends that "there was no reason to enter into a contingent fee agreement." R. Brief at 27. This too is meritless. The two Rules do not include an exception for an attorney's unilateral and self-serving assessment that a written fee statement in not necessary or required in a given situation.

There is an additional problem with both of Respondent's defenses: His own statements throughout the representation and in this proceeding establish that he expected to be compensated for the time and expenses incurred in the representation and that he in fact did indeed come to recognize -- and assert -- a need for a contractually-binding fee agreement. FF 59 (May 31, 2010 email in which

Respondent stated, "So at this point I think 50 percent of any recovery is fair and that is what I require" and "I will draw up the contract evidencing this 50 percent arrangement and email it. Then sign it so I know we are on the same page as I go forward."), 77, 79, 91 (January 16, 2011 email in which Respondent stated, falsely in part, "I have expended considerable legal time and costs on [your] behalf and was working, in part, under a contingent fee arrangement confirmed in writing.").

Finally, as in *In re Elgin*, 918 A.2d 362, 368 (D.C. 2007), the absence of a written fee agreement led inevitably to additional discord between attorney and client and, here, recriminations, threats and false statements by the attorney -- exactly the kind of circumstances that the two Rules are intended to prevent. FF 59, 60, 76, 77, 79, 90.

In sum, we conclude that Disciplinary Counsel has proved by clear and convincing evidence that Respondent did not at any time proffer to Ms. Sataki a written statement of any nature setting forth the scope of the representation, the responsibility for expenses, or the basis of the fee, whether hourly, contingent, or *pro bono*. Consequently, we recommend that the Board find as a matter of law that Respondent violated Rule 1.5(b) and violated Rule 1.5(c) with respect to his representation of Ms. Sataki in her matter.

D. THE REPRESENTATION TERMINATION CHARGE

Disciplinary Counsel charges that Respondent violated Rule 1.16(a)(3) when, after he was allegedly discharged by Ms. Sataki "[i]n or about August, 2010" (Count III), he failed to withdraw from the representation and "filed multiple pleadings with

the court and a notice of appeal when they were unsuccessful." Sp. Ch. at 6-7 ¶¶ 24-33; ODC Brief at 38.

Rule 1.16(a)(3) provides *in pari materi*:

> . . . A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer is discharged.

Comment [9] advises:

> Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

Disciplinary Counsel argues that Ms. Sataki's July 30, 2010 email (FF 71) constituted a discharge of Respondent, that her August 4, 2010 email to a senior VOA executive confirmed and clarified the discharge (FF 75) and that Respondent became aware of Ms. Sataki's termination of his representation no later than August 5, 2010, as he acknowledged when he complained in his email that day to Ms. Sataki about "[t]he letter which you sent to Dan Austin and Tim Shamble (but not me). . . ." FF 76. We have found that Disciplinary Counsel has established these facts by clear and convincing evidence. FF 71, 75, 76. Respondent's complaint that her July 30 email (FF 71) "was clearly not written by her" (R. Brief at 28) and the arguable ambiguity in her instruction to "withdraw all the pending lawsuits that are on my behalf and/or in my name" except the *Falahati* action without expressly discharging him are obviated by his acknowledgement (FF 76) of being aware of her August 4, 2010 letter (FF 75) in which she expressly stated that "he is no longer representing

me."[41] We conclude, therefore, that Respondent knew of the termination of his services no later than August 5, 2010.

Instead of thereupon withdrawing from the representation as required by the Rule, Respondent made at least six post-termination filings. FF 83, 88, 92.[42] He contends that he did so only to protect Ms. Sataki's ability to appeal the trial court's dismissal of her actions while he attempted to re-establish communication with her. *Id.*; *see also* Tr. 1041-43; FF 77 (citing SX 29 at 2 ("You still have rights of appeal. . . .")), FF 91 (citing SX 35).[43] Respondent further contends that he "did not take

[41] Respondent also complains that he did not receive Ms. Sataki's letter dated November 15, 2010 (FF 86), in which she stated that ". . . your services are terminated forthwith; you are to provide no further legal services on my behalf in any cases what so ever." At the hearing, however, he acknowledged that this situation resulted from the erroneous address on his letterhead. FF 86. He also asserts that he was uncertain that the July 30, 2010 and subsequent emails (FF 71) had actually come from Ms. Sataki. FF 74. We find that contention unconvincing because the emails were sent from her computer (although Respondent believed that others had "control over [her] email and cell phone," SX 37 at 1).

[42] Five of the six post-termination pleadings are in the record of this matter and we have reviewed them. The first, the October 31, 2010 Motion to Reconsider Court's Dismissal Order of October 22, 2010, and to Correct Manifest Intentional Errors includes the same inflammatory language in earlier pleadings, concluding with the vitriolic accusation that the purported errors in Judge Kollar-Kotelly's preceding ruling "were obviously not inadvertent, but intentional, wanton and malicious and designed to further harm Plaintiff and her counsel," raising concern on our part that this filing was part and parcel of his continuing attack on the Judge. FF 83, 88, 92.

[43] There is substantial evidence raising concern that Respondent's actions and omissions in the August 2010-January 2011 period arose in significant part out of his own interests, not Ms. Sataki's. These meritless filings were not necessary to preserve Ms. Sataki's appeal rights with respect to her claims against VOA. They were also a continuation of the very litigation strategy with which Ms. Sataki had disagreed and which had been, in significant part, her reason for terminating Respondent's services. *E.g.*, FF 26, 28. They also appear in significant measure to be an effort to protect Respondent's own interests. *See* FF 77 & 79, citing, *inter alia*, SX 27 at 2 ("Please be careful not to harm my reputation or Tim's further."), SX 28 at 1 ("My legal interests are also at issue, particularly since I spent a lot of lot of money on your behalf and put in hundreds of thousands of dollars in time."), SX 29 at 2 ("I NEED TO BE REIMBURSED AT LEAST FOR THE MONEY I PUT OUT FOR YOU. . . . I WILL DO WHAT NEEDS TO BE DONE TO PROTECT ALL INTERESTS, INCLUDING MY OWN." [capitalization in original]), SX 30 at 1

steps to litigate the *BBG* case further after July 30, 2010 and only acted to preserve Ms. Sataki's appeal rights." R. Brief at 28. He also stresses that he "had a duty to confirm Ms. Sataki's purported 'desires' in the August 4, letter. . . ." R. Brief at 29. Respondent asserts finally that Disciplinary Counsel "recycles . . . the same shop worn 'facts'" that it relies upon in its Rule 1.2(a) discussion (*id.*) and that Disciplinary Counsel engages "[i]n yet another falsehood" in its assertion that he filed pleadings in the *BBG* action after the purported discharge. R. Surreply at 9.

Respondent's arguments are unpersuasive. The Rule plainly requires withdrawal upon termination. We are fully aware that Comment [9] counsels that even an unfairly discharged attorney must take steps to mitigate any adverse impact upon the client.[44] But nothing in the Rule or the Comment provides for an "either-or" choice of action, as Respondent seems to suggest. Instead, the Rule unequivocally requires withdrawal upon termination. Respondent's purported efforts to protect Ms. Sataki's interests do not provide a defense to a charge of not complying with Rule 1.16(a)(3).

In sum, we recommend that the Board find as a matter of law that Disciplinary

("The costs expended on your behalf . . . excluding of my time in working on the cases and settlement negotiations, comes to in excess of $30,000.00. These monies I had hoped and still hope to collect in the litigation concerning VOA and its managers."), SX 35 at 1 (". . . I have expended considerable legal time and costs on her behalf and was working, in part, under a contingent fee arrangement confirmed in writing. You have thus damaged me as well.").

[44] Moreover, Respondent did not take the obvious step of filing either a notice of withdrawal or a motion for leave to withdraw and explaining the circumstances. *See, e.g.*, Local Civil Rule 83.6(b) & (c) of the United States District Court for the District of Columbia; *In re Mudd*, BDN 458-02 (BPR Nov. 10, 2004).

Counsel has proved by clear and convincing evidence that Respondent violated Rule 1.16(a)(3) when he failed to withdraw from his representation of Ms. Sataki within a reasonable time after she terminated him as her attorney.

E. THE CONFIDENTIALITY CHARGES RELATED TO THE *WND* ARTICLES

In Count IV, Disciplinary Counsel charges that publication of the *WND* articles violated Rules 1.6(a)(1) and 1.6(a)(3) because each of the articles "revealed a confidence or secret of the client" and was issued "for his own advantage." The relevant Rules provide:

> 1.6(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 . . . .
>
> 1.6(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.

The definition of "secrets" is broad. Comment [8] to Rule 1.6 explains:

> [8] The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law; furthermore, it 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. [emphasis added]

The District of Columbia definitions of protected matter are in harmony with the generally-applicable law on this subject. *See* Restatement of the Law Governing Lawyers §59 and comments thereto.

Rule 1.6(a)(3) provides that a lawyer may not "use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person." Rule 1.8(c) is also relevant to this issue:

> Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Rules 1.6(a) and 1.8(c) treat "information" "relating to" or "gained in the course of" the representation as belonging to the client, a form of intangible property.[45] That is, the Rules recognize that the lawyer's duty to safeguard "secrets" is a special instance -- the inherently confidential lawyer-client relationship -- of a general tort law prohibition of "public disclosure of private facts." *See generally* W. Prosser, Privacy, 48 Calif. L. Rev. 383, 392 (1960). Dean Prosser's article discusses the origins and history of the right to privacy and its manifestations in tort law. He begins with the iconic 1890 article, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), by Louis Brandeis and Samuel Warren, the right of persons to control disclosures of their private information -- their secrets -- has been recognized and protected by the legal systems of every American state and around the world. For a discussion of the

[45] *See also* D.C. Bar Ethics Opinion 334 (January 2006), discussing lawyer negotiation of media rights.

importance and legal basis for protecting private information, see generally *United States Department of Justice v. Reporters' Committee for Freedom of the Press*, 489 U.S. 749 (1989) (Privacy Act shields disclosure of "rap sheets"; Court cites Brandeis & Warren and notes common law protection of private information). In litigation, private information may be shielded from disclosure by protective orders. For example, a discovery order requiring disclosure from one party to another does not automatically confer on the recipient the right to disclose the discovery materials to the press. *See generally Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) (disclosure of confidential information in pretrial discovery does not entitle recipient to publish the information).

Turning to the Rule 1.6(a)(1) charge, as to each of the *WND* articles Disciplinary Counsel alleges that "Ms. Sataki did not know that Respondent would author an article concerning her case that would be published." Sp. Ch. at 8, ¶ 37. In its post-hearing brief, Disciplinary Counsel provides more detail:

> At the outset of the representation, Ms. Sataki told Respondent that she wanted her case to be handled simply and quietly because of her Persian community's reaction to allegations of sexual harassment. Despite this, Respondent undertook a legal strategy in which he publicly exploited Ms. Sataki's secrets. Any discussions Respondent had with Ms. Sataki about how publicity might help her case took place when she was particularly vulnerable psychologically. Respondent did not discuss with her the perils of this course of conduct, e.g. what might happen if the VOA refused to settle notwithstanding the publicity campaign. Respondent did not explain to his client the material risks of and reasonably available alternatives to the publicity as is contemplated by Rule 1.6(e).
>
> Respondent also wrote ten articles and contributed to another that

appeared in the WND. These articles not only disclosed that Ms. Sataki had a pending sexual harassment claim, but also discussed her mental health and her financial difficulties.

ODC Brief at 39-40 (footnote omitted).

Respondent counters:

> Again without clear and convincing evidence, ODC seeks to mislead the Committee with more manufactured and personally offensive argument that Mr. Klayman "inveigled" Ms. Sataki "to permit him to publicize her case, but Respondent never discussed with her or obtained her permission to disclose the personal matters relating to her health and finances which he was eventually to publicize." ODC Reply at 12.
>
> This falsehood is not only unsupported on the contrived and unreliable record as "developed" by ODC, but belies Ms. Sataki's admission that she shared details of her state of affairs with all. PFF 104. " . . . I explained to you my problem with VOA. . . . So I don't know why this conversation was so intimate to you (about her alleged harassment, workplace retaliation, and mental state), because it was definitely not intimate to me. **Everybody knew. In that case, I had an intimate conversation with everybody.**" Tr. 329 (emphasis added). And notwithstanding that Ms. Sataki was provided contemporaneously with all of the publicity that was used to coax settlement with VOA and later the litigation, the full record developed by Respondent is replete with substantiated facts to the contrary - also showing that Ms. Sataki never complained at the time about the positive and glowing articles Mr. Klayman wrote on her behalf. PFF 50, 91, 128, 166-67, 170, 182. See also Resp. PFF 10 below.
>
> The "kicker" in ODC's dishonest argument is its representation that "(e)ven if Ms. Sataki consented generally to some publicity she never gave informed consent to reporting intimate particulars." *Id.* This misleading stretch turns the saying that "one cannot be a little bit pregnant" on its proverbial head.

R. Surreply at 9-10 (emphasis in original). In sum, we understand Respondent's argument to be that Ms. Sataki's disclosures and discussions with friends, colleagues and those from whom she may have been seeking support, understanding and assistance, removed the information from the category of "secrets" and constituted informed consent on her part to his string of disclosures.

The Committee is not persuaded by Respondent's contention. We have found that Ms. Sataki was aware of some of the contacts made by Respondent and Mr. Shamble on Capitol Hill. FF 48. But with respect to the *WND* articles, Ms. Sataki "asked him not to do it," Respondent, however, overrode Ms. Sataki's concerns and objections with blithe, unrealistic assurances. FF 57. Ms. Sataki testified without reservation or ambiguity that she told Respondent to discontinue the stream of articles and ". . . explained to [him] on the phone why I don't want articles out there." *Id.* Ms. Sataki was embarrassed by Respondent's disclosure of facts that he gained during the course of the representation. FF 28, 54, 55, 63.

The Committee has already concluded that Ms. Sataki did not give her informed consent to publication of the articles and has credited Ms. Sataki's testimony that she wished the litigation to be conducted "simply and quietly." Section IV.B.3, *supra*. The client, not the lawyer, has the unqualified right to choose the nature, timing, extent and frequency of disclosure. Ms. Sataki simply did not consent to the publication of Respondent's articles.

It remains, therefore, to determine whether the twelve articles at issue revealed "secrets," as that term is used in Rule 1.6(a), and if so whether these revelations were "for [his own] advantage." The Committee recognizes that a newspaper or television reporter might have uncovered and reported matters that, in the lawyer's hands, would constitute "secrets," and that the reporter might not incur civil liability by doing so. The reporter is not the client's agent, does not have a fiduciary duty to the client, and is not subject to the Rules of Professional Conduct.

Each of the articles dated April 23, 2010, April 30, 2010, May 11, 2010, May 14, 2010, May 21, 2010, May 28, 2010, June 11, 2010, July 2, 2010, October 1, 2010, October 15, 2010, October 29, 2010, and December 25, 2010 disclosed confidential information about Ms. Sataki's work experiences, alleged political views, personal appearance, physical health, mental health and/or financial condition.[46] FF 40, 41, 45, 47, 54, 55, 63, 66, 80, 90. The Committee concludes by clear and convincing evidence that each of these articles constituted a violation of Rule 1.6(a)(1).

Were the publications for Respondent's "advantage" in violation of Rule 1.6(a)(3)? We have concluded that Respondent has not been proven to have obtained any financial advantage from the articles. *See* Section IV.A.3. However,

[46] The articles dated June 11, 2010, and December 25, 2010, contained discussions of Ms. Sataki's matter that more nearly represented reportage of events in the litigation.

Disciplinary Counsel also alleges that "several of the articles promoted Respondent's autobiography." ODC Brief at 40; *see also id.* at 40, n.18. The term "advantage" sweeps more broadly than mere financial gain. Advantage can mean "a condition or circumstance that puts one in a favorable or superior position," as in "she had an advantage over her mother's generation." It can mean "A favorable or desirable circumstance or feature; a benefit," as in "the village's proximity to the town is an advantage." https://en.oxforddictionaries.com/definition/us/advantage.

The plethora of lawyer websites referring to matters handled shows that publicity confers reputational and professional advantage. Lawyers, including Respondent, regard participation in high-profile matters as a mark of professional distinction. Indeed, each of the articles focuses to a greater or lesser extent, on Respondent's actions and activism invariably in self-congratulatory terms. The Committee therefore concludes that these publications were for Respondent's "advantage" (with the caveat, as noted later, that, in the Committee's view, this sort of advantage does not bear the same weight as a financial motivation).

Accordingly, the Hearing Committee concludes that Disciplinary Counsel has proved by clear and convincing evidence that, in his *WND* articles, Respondent disclosed client secrets without his client's consent in violation of Rules 1.6(a)(1) and 1.6(e)(1) and did so for his own advantage in violation of Rule 1.6(a)(3). The Hearing Committee recommends that the Board so find.

F. THE DISHONESTY CHARGE ARISING OUT OF THE DECEMBER 25, 2010 *WND* ARTICLE

In his December 25, 2010 *WND* article Respondent asserted:

> An ultra-leftist, pro-Clinton and ethically corrupt judge -- Colleen Kollar-Kotel[l]y -- had just dishonestly denied, without factual or legal bases, my request for Elham to be put back to work at the Los Angeles office of VOA, as she rehabilitated from the harm done to her.

FF 90. Disciplinary Counsel charges in Count IV of the Specification of Charges that Respondent engaged in dishonesty and/or misrepresentation in violation of Rule 8.4(c) when he made this assertion. Sp. Ch. at 10-11, ¶¶ 47, 48.e.[47]

In support of its charges, Disciplinary Counsel argues that Respondent's statement constituted "knowing[ly] false pejorative claims" and was "knowingly and demonstrably false" because the judge's "orders in the Sataki matter rested upon the facts and law before her" and especially because "the presiding judge accepted as true virtually all of the facts sponsored in the Plaintiff's motion and thereafter described in detail the factual and legal basis for her decision." ODC Brief at 40-42; *see also* FF 61, 67. Respondent counters that he "had well-established grounds to make this statement of opinion," that his assertion was "supported by about 14 pages of her factual errors," that "this is a commonly used legal writing term" and thus that he "did not knowingly make an[y] demonstrably false statements concerning Judge Kotelly." R. Brief at 31-32. Both parties discuss *In re De Maio*, 893 A.2d 583 (D.C.

[47] Respondent's similar statements in his various court filings in the *BBG* action appear not to be included in this charge.

2006). Neither party addresses the issue further in its Reply or Surreply.

We turn first to the question whether Respondent's assertion was inaccurate. We have meticulously examined Judge Kollar-Kotelly's two substantive rulings that Respondent complained about -- the June 1, 2010 Memorandum Opinion denying the motion for a temporary restraining Order, FF 61, and the July 7, 2010 Memorandum Opinion denying the motion for preliminary injunction. FF 67. Based on that review, as reflected in FF 61 and 67, there is simply no question that both Memorandum Opinions were eminently well grounded in fact and in law. The court's legal analyses comprised a careful consideration of the legal authorities relied on by Respondent. Factually, the court even considered material that Respondent filed in violation of the local rules and emphasized that the essential, material facts were not disputed.[48] *Id.* Both opinions seem to us to be exemplary examples of judicial record review, legal research and legal analysis and reasoning. Respondent's statement to the contrary is flatly inaccurate.[49]

We turn, therefore, to the question of whether Disciplinary Counsel has proved that Respondent's inaccurate statement in the public *WND* forum, in contrast

[48] Moreover, when Respondent expressed a need for discovery in order to develop facts in support of the injunction, Judge Kollar-Kotelly invited him to file a motion for such discovery. Respondent did not file a motion and then claimed that he had been unfairly denied discovery. FF 67.

[49] We have also examined in detail the 14-page Appendix to Respondent's July 26, 2010 Motion to Disqualify, FF 70 and DX 13 at 25-38. It consists of a side-by-side comparison of "Judge Kollar-Kotelly's Facts" and "Actual Facts." Respondent claims that it demonstrates the accuracy of his contentions that Judge Kollar-Kotelly made innumerable mistakes in her factual analysis of the record. In fact, the comparison is riddled with the same defects that Judge Kollar-Kotelly had already pointed out in her analysis.

to the sort of hyperbolic characterization that lawyers and even judges sometimes use in their pleadings or orders in characterizing rulings or arguments, violated Rule 8.4(c)'s prohibition of misrepresentation and dishonesty. *In re De Maio*, discussed by both parties, is highly instructive. Unlike here, where Respondent made his assertion in a non-judicial public forum, De Maio made his "false, spurious and inflammatory representations and allegations" -- which were strikingly similar to the ones that Respondent made in his pleadings with respect to Judge Kollar-Kotelly -- "in various court filings." *In re De Maio*, 893 A.2d at 585. Our Court of Appeals observed:

> . . . [T]his jurisdiction has not adopted Model Rule of Professional Conduct 8.2, which provides in relevant part:
>
> > Rule 8.2. Judicial and Legal Officials.
> > (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
>
> This rule or a variation thereof would clearly cover the conduct of the respondent here. (Indeed, the Maryland court found that he had violated Rule 8.2.) The absence of such a provision in our Rules of Professional Conduct seems to evince more tolerance for comments such as those made by the respondent here, which certainly demonstrate (at least) "reckless disregard as to [their] truth or falsity." When this court was considering whether to adopt the Model Rules of Professional Conduct, the Board of Governors of the District of Columbia Bar recommended that Rule 8.2 be deleted in its entirety. It explained (in the so-called "Jordan Report") that much of Rule 8.2(a) was "viewed as unnecessary, since proposed Rule 8.4(c) would prohibit conduct by a lawyer involving dishonesty, fraud, deceit

or misrepresentation." Jordan Report at 243.

> The ban on misrepresentation would include any knowing falsehoods embodied in statements about potential appointees to public legal or adjudicatory positions. To the extend [*sic*] that the "reckless disregard" language is intended to encompass conduct which would not constitute misrepresentation under proposed Rule 8.4 the Committee was concerned about the possible chilling effect of such a broader rule upon candid comments regarding potential appointees. *Id*.
>
> Let us be clear. We condemn respondent's conduct and agree with the Board that he at a minimum violated Rules 1.1, 3.1, and 8.4(d) of our Rules of Professional Conduct. However, the fact that our jurisdiction has not adopted Rule 8.2's prohibition against such statements made with "reckless disregard" as to their truth or falsity is additional evidence of a substantial difference between the treatment of respondent's conduct by Maryland and the District of Columbia.

De Maio, 893 A.2d at 587-88.

Disciplinary Counsel has not cited any case that deals with a lawyer's public statement criticizing a judge or applies Rule 8.4(c) to such a situation. None of the lawyers in the cases cited in its Brief could claim any first amendment protection for their false statements to punish a lawyer for public statements about judicial officers. Moreover, the Court of Appeals' statement in *De Maio* about "chilling effect" based upon the "reckless disregard" scienter requirement in Rule 8.2 seems to us to apply with even greater force to Rule 8.4. Consequently, one must be concerned that Rule 8.4(c), if applied to published comments, would be unconstitutionally vague and overbroad.

Disciplinary Counsel has the burden of establishing by clear and convincing

evidence that Respondent's statement in the December 25, 2010 *WND* article was knowingly false. Disciplinary Counsel has not done so. First, when examining Respondent, Disciplinary Counsel did not ask a single question about the December 25, 2010 *WND* article. Second, Disciplinary Counsel has not directed our attention to any evidence in the record -- direct or circumstantial -- that might support its "knowing[ly] false dishonesty charge. Third, Disciplinary Counsel does not rebut Respondent's point that the statement was "a commonly used legal writing term." R. Brief at 32. In sum, Disciplinary Counsel has not proved by clear and convincing evidence that Respondent made a knowingly false statement, as distinct -- as Respondent asserts -- from a hyperbolic statement of the type sometimes used by lawyers and judges.

In light of (i) the Rules-adoption history and other considerations recounted in *In re De Maio*, (ii) the fact that Respondent's comments were made in a public forum as opposed to a judicial proceeding, (iii) our sense that Respondent is not incorrect in his observation that such rhetorical hyperbole is, if not "commonly used," at least not unheard of, and (iv) the potential constitutional implications, we think that we have no alternative, as a Hearing Committee, but to recommend that the Board find as a matter of law that Respondent did not violate Rule 8.4(c) when he made his false accusation in his December 25, 2010 *WND* article.[50]

[50] There is a final legal question on which the Hearing Committee is required to make a recommendation to the Board. Respondent has complained throughout this proceeding about the lapse of approximately seven years between the events underlying this matter and Disciplinary Counsel's filing of the Specification of Charges. *See, e.g.*, Respondent's Motion for Extension of Time [to File Answer] to Specification of Charges (October 11, 2017); Respondent's Motion to Compel and for Extension of Time and Other Relief (April 18, 2018) at ¶¶ 12-18, 22; Respondent

V. RECOMMENDATION AS TO SANCTION

A. THE FACTORS TO BE CONSIDERED

The Court of Appeals has instructed that, in determining the appropriate sanction for a disciplinary infraction, the factors to be considered include (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty,

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Larry Klayman's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law (October 30, 2018) at 1, 3, 16; Respondent's Motion to Recommend Dismissal to Board of Professional Responsibility and to Terminate this Disciplinary Proceeding (December 6, 2018) at 2-4.

We are guided here by *In re Williams*, 513 A.2d 793 (D.C. 1986). There the Court of Appeals held that "an undue delay in prosecution is not in itself a proper ground for dismissal of charges of attorney misconduct." 513 A.2d at 796. The Court of Appeals further explained, "We might hold differently if respondent had shown that the undue delay impaired his defense. A delay coupled with actual prejudice could result in a due process violation. . . ." 513 A.2d at 797. Accordingly, we have re-examined all of our Findings of Fact and Recommended Conclusions of Law to evaluate whether we were hindered in our factual determinations or legal analyses by any loss of memory by the witnesses or any unanswered questions raised by the documentary evidence that might have been elucidated by other documents. First, neither our factual nor legal determinations were affected in any manner whatsoever by the absence of Professor Ronald Rotunda, the one absent witness identified by Respondent. Professor Rotunda's views were set forth in a letter to Respondent that was admitted into evidence. In that letter, Professor Rotunda did not cite any District of Columbia authority in his discussion of the delay issue; he otherwise based his views on grossly incomplete alleged facts provided by Respondent and expressed opinions on ultimate legal issues beyond the scope of proper expert witness testimony in disciplinary proceedings without any consideration of applicable District of Columbia disciplinary jurisprudence. Second, Respondent did not identify or otherwise describe a single allegedly missing document or even type of document that we would have wanted to have in making our factual determinations or doing our legal analyses. Third, in his extensive cross-examination of Ms. Sataki, Respondent demonstrated an impressively detailed memory of the factual occurrences at issue in this matter. Fourth, neither Respondent, as a witness, nor Mrs. Sataki, nor any other witness had any even arguably marginally significant lapse of memory on material factual issues. Finally, it is hardly uncommon for litigation to involve events and issues arising a number of years previously. Accordingly, having identified no instances of reasonably possible "actual prejudice" from the lapse of time between the complainant's lodging of charges and the filing of the Specification of Charges, we recommend that the Board conclude that Respondent was not prejudiced in any respect by any delay in this proceeding and that the Board therefore reject his delay complaint, including but not limited to his Motion to Recommend Dismissal. *See also In re Saint-Louis*, 147 A.3d 1135, 1148 (D.C. 2016); *In re Howes*, 52 A.3d 1, 18 n.22 (D.C. 2012); *In re Morrell*, 684 A.2d 361, 368-70 (D.C. 1996).

(3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) mitigating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated (i.e. the total number of Rule violations), 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 Rule XI, § 9(h)(1).

B. ANALYSIS

1. Seriousness of the Misconduct

Respondent has not been charged with nor found to have engaged in misconduct such as misappropriation, flagrant incompetence, flagrant neglect, systemic or repeated dishonesty or the like. Nevertheless, the extreme nature of his misconduct and the extensiveness of it throughout the representation (*see* Section V.B.6, *infra*) undermine and strike at the heart of the attorney-client relationship, the fiduciary duty of the attorney toward the client, the right of the client to determine the objectives and purposes of the joint legal undertaking, and the duty of the

attorney to consult with the client regarding such matters and to abide by the client's decisions thereon. For the reasons that we discuss in detail in the remainder of this Section regarding our recommendation as to sanction, we have concluded that the ways in which Respondent violated Rule 1.2(a), Rule 1.4(b), Rule 1.5(b), Rule 1.5(c), Rule 1.6(a)(1), Rule 1.6(a)(3) and Rule 1.7(b)(4) (but not his violation of Rule 1.16(a)(3)) constitute -- individually and collectively -- especially egregious violations of those six Rules.

2. Misrepresentation or Dishonesty

We have not based any of our Rule violation recommendations on a conclusion that Respondent acted dishonestly in any given situation during his representation of Ms. Sataki or on a credibility determination adverse to Respondent with respect to one aspect or another of his testimony.

3. Respondent's Attitude Toward the Underlying Misconduct

Throughout the investigatory period of this matter, throughout the hearing, and throughout the post-hearing briefing, Respondent has been stridently obdurate in denying that he erred in any way whatsoever in his representation of Ms. Sataki.

With respect to the Rule 1.7(b)(4) conflict of interest charge, Respondent asserts that "ODC spins an entirely false, unsubstantiated, and frankly, offensive narrative that Mr. Klayman was a scorned lover." R. Brief at 19. He claims that "[i]n any event, any personal feelings that Mr. Klayman may have had never impacted his representation of Ms. Sataki negatively," R. Brief at 20, and that "ODC's claim that Ms. Sataki was coerced into moving to LA by Mr. Klayman is another falsehood."

R. Brief at 21. (As noted previously, *supra* at 71, Respondent's use of the term "coerced" inaccurately characterizes Disciplinary Counsel's charge.) The record demonstrates beyond cavil that both of these assertions are groundless. *See* Section IV.A. *supra*. In the same vein, he continues, "Mr. Klayman did not intend to harass Ms. Sataki verbally. The reality is that, despite all that Mr. Klayman did for her, she became disrespectful and increasingly self-absorbed. . . ." R. Brief at 21. He denies his notoriety motive and both denies the need for informed consent and also claims without citation to a single piece of evidence that he obtained Ms. Sataki's informed consent. R. Brief at 23, 24.

With respect to the Rule 1.2(a) and 1.4(b) charges, Respondent groundlessly claims that "ODC . . . disingenuously attempts to mischaracterize Mr. Klayman and Ms. Sataki's professional relationship" and that ". . . ODC simply makes another blanket statement that Mr. Klayman failed to provide Ms. Sataki with enough information for her to make informed decisions, without any support from the record or any facts or evidence." R. Brief at 24, 26.

Respondent asserts similarly vacuous and contradictory denials of the Rule 1.5(b) and Rule 1.5(c) violations. *Cf.* ". . .; [T]here was no fee agreement memorialized in writing because <u>there was no fee agreement</u> to memorialize" (emphasis in original) and ". . . a potential 50% contingency fee would only have been implemented if Mr. Klayman went forward on the cases. . . ." R. Brief at 28. Additionally, he cites no authority for his plainly groundless and factually inaccurate *pro bono* defense.

Regarding the Rule 1.6(a)(1) and Rule 1.6(a)(3) violations, Respondent reverts again to specious, blanket denials: "There is simply zero evidence that Mr. Klayman violated any confidentiality provisions of Rule 1.6. The record is clear to the contrary . . . . It is an outright falsehood . . . ." R. Brief at 29.

Respondent returns to the same invective in his discussions of the various violations in his Surreply: "strained, if not bizarre, argument;" "patently baseless assertion;" "an obviously flawed 'interpretation' of the comments to D.C. Rules of Professional Responsibility Rule 1.7 . . . ;" "ODC's bizarre allegation;" "the ex post facto manufactured claim;" "the twisted, misleading, frequently unsupported and often false counter-proposed findings of fact of ODC. . . . ;" "ODC . . . talking out of both sides of its mouth. . . . ;" "In yet another falsehood, ODC. . . . ;" "ODC seeks to mislead the Committee. . . ." R. Surreply at 5-10.

Respondent's recalcitrance is crystalized by his summation of his legal arguments at the end of his Brief:

> Mr. Klayman is sorry for what happened to Ms. Sataki and wishes her well moving forward, but <u>what happened to her is simply not his fault</u>.

R. Brief at 38 (emphasis added). In sum, Respondent's attitude toward this very serious matter strikes us as an even more extreme, more egregious embodiment of what the Court of Appeals condemned in *In re Yelverton*, 105 A.3d 413, 430. (D.C. 2014):

> There is no indication that respondent recognizes the seriousness of the misconduct or even that he recognizes it as misconduct at all.

* * * * *

Respondent's attitude toward this proceeding is also deeply troubling. Respondent has stridently and incessantly insisted that this matter was instituted and pursued solely because of his activities in the public sphere, Disciplinary Counsel's personal animus toward him and similar reasons:

> But that was during a time [eight years ago], when there was more rationality and fairness in the body politic of this nation. It was a time when men were given the same rights to defend themselves against allegations by the opposite sex as women were. . . . [I]t[']s clear that in today's world, men are presumed guilty until proven innocent beyond a reasonable doubt. [R. Brief at 1]
>
> This is undoubtedly because he is not just a male, but also a conservative activist. . . . [R. Brief at 2.]
>
> Mr. Klayman is aware that members of this AHC have a liberal, if not leftist, ideology. . . . [R. Brief at 18]
>
> ODC's allegations concerning Ms. Clinton and Mr. Klayman's political activism are entirely off-base. Conjured up as well in desperation, they are almost laughable, were ODC's animus not so palpable toward Respondent. [R. Brief at 22]
>
> Because there was no conflict of interest, there was nothing that required obtaining Ms. Sataki's consent, despite his having done so in any event. [R. Brief at 24]
>
> . . . ODC's claim that Mr. Klayman violated Rule 1.2 . . . is based on a false recitation of the facts. [R. Brief at 25]
>
> ODC is simply trying to re-write history in their desperate attempt to have Mr. Klayman disbarred. [R. Brief at 30]
>
> . . . . Klayman is not aware of any recent Bar complaints against

> Democrat senators who are lawyers on the Senate Judiciary Committee or other attorneys who trashed the Honorable Brett Kavanaugh. . . . [R. Brief at 32]
>
> Under ODC's new leadership following Wallace Schipp's time as its head, it has taken a partisan path to "persecute," rather than fairly attempt to "prosecute," persons like Respondent Larry Klayman . . . that it alone decides should be removed from the practice of law. . . . [R. Surreply at 1-2, footnote omitted]
>
> . . . ODC's own incendiary and frequently twisted and misleading words and recitation of alleged facts betray its motivation. . . . [R. Surreply at 2]
>
> . . . [H]ere are just two of ODC's vindictive *ad hominem* attacks venomously spewed forth in its Reply. . . . [R. Surreply at 3]
>
> This gender biased claims fails [*sic*] of its own weight. [R. Surreply at 5]
>
> ODC['s] [argument] highlights ODC leadership's own political allegiances and biases. [R. Surreply at 6]
>
> ODC seems to be fixated on its admiration of Mrs. Clinton and a jurist appointed by her husband. . . . [R. Surreply at 6]
>
> ODC wants Mr. Klayman's head on a pike and disbarred. . . . [R. Surreply at 10]

In short, Respondent has resorted in this proceeding to the same *ad hominem* attacks and incendiary claims of political, gender-based, religious and other biases against him that he instituted in the *Falahati* and *BBG* actions as soon as the tide in those cases first turned against him. *See* FF 61-63 (denial of temporary restraining order in *BBG*, Respondent's motion to re-asssign, and first *WND* article attacking Judge Kollar-Kotelly); 67, 68, 70 (denial of preliminary injunction in *BBG*, dismissal

of *Falahati*, and Respondent's motion to disqualify); 82-83 (dismissal of *BBG* and Respondent's motion to reconsider).

* * * * *

In light of the information set forth in this sub-section and elsewhere in our analysis, we have concluded without any reservation that Respondent willfully does not acknowledge and affirmatively denies that he violated eight different Rules of Professional Conduct in at least fourteen instances during his representation of Ms. Sataki. We conclude further that Respondent has no remorse whatsoever for his Rule violations, that he has no remorse for and seemingly not even any recognition of the impact of his words and actions on Ms. Sataki (as set forth in Section V.B.7, *infra*), and that his attitude toward his misconduct is unlikely to change.

4. Prior Discipline

Respondent was publicly reprimanded, by consent, in Florida for violating four Rules of the Florida Rules of Professional Conduct in approximately 2009-2011. *Florida Bar v. Klayman*, No. SC 11-247 (Fl. S. Ct. (before a Referee), July 14, 2011). DX 53. Having reviewed the Consent Judgment, and taking into consideration that the reprimand arose only out of Respondent's delinquency in making an agreed-upon payment, as Respondent points out (R. Brief at 36), and also taking into consideration that the Referee reported that "Respondent is remorseful for his delay in satisfying the terms of the Mediation Agreement," DX 53 at (unnumbered exhibit page 7), we give no weight to the Florida disciplinary matter in our sanctions analysis.

Respondent was found by the Board of Professional Responsibility to have violated Rule 1.9 of the District of Columbia Rules of Professional Conduct and Rule 4-1.9(a) of the Florida Rules of Professional Conduct. *See In re Klayman*, Board Docket No. 13-BD-084 (BPR Feb. 6, 2018). We recognize, as Respondent points out, that the Board's Report and Recommendation in that matter is presently pending before the Court of Appeals. R. Brief at 36; R. Surreply at 11. Thus, there is clearly a legal issue as to whether the Board's Recommendation in Respondent's other matter constitutes prior discipline. We think that a final determination by the Board should be binding on a subordinate Hearing Committee, and we note further that on appeal in the other matter Respondent is no longer challenging the violation finding and has taken exception only to the Board's recommended sanction. However, out of an abundance of caution, we will not take Respondent's other District of Columbia disciplinary matter into consideration in our sanction analysis.

5. Mitigating and Aggravating Circumstances

Respondent has devoted much of his professional career to litigation and other legal work that he considers to be in the public interest as he sees it. FF 8, 19.[51]

[51] Respondent recounted his personal background and professional history at substantial length at the beginning of his testimony in his case. Tr. 947-65. Disciplinary Counsel has not challenged the accuracy of Respondent's testimony in this regard and, indeed, has cited to portions of it. The information provided by Respondent includes the following:

> I graduated [from Duke University] with a degree in political science and French literature in 1973.
>
> I took a year off between law school and undergraduate school, and I worked for Senator Dick Schweiker from Pennsylvania on Capitol Hill.
>
> I started with a litigation law firm in Miami . . . and it was at that time the

biggest law firm in Florida. . . .

After two years my first love was to be in Washington. . . . I chose the Consumer Affairs [D]ivision [of the Antitrust Division of the U.S. Department of Justice]. Later, when I was in Consumer Affairs, I transferred to the AT&T [D]ivision. I helped break up the monopoly. I left in 1983. . . . I went with an international trade law firm . . . and I was with them for about two and a half years, and I started my own law firm. . . .

. . . [A]nd at some point I had had some experiences about the courts with what I thought were unjust judges that were discriminating against my clients based on their national origin, that they were not getting a fair shake.

And there came a point in time when I encountered a judge in California who made various remarks about my client that were very prejudicial, and mocking his Chinese -- his Taiwanese heritage. The judge was mocking my Jewish heritage and some of the witnesses, and also mocking a gay witness of theirs. I said to myself after that, "Some day I'm going to start a group to try to, in effect, be a type of Hamburger Helper to the Bar to promote integrity in the legal profession. . . ."

So I started Judicial Watch on July 29th, 1994. It became very prominent. It was nonpartisan. . . . Who was in office at the time? The Clintons were. And we tried to address some of the scandals that were there, such as China gate. I played a big role in triggering the campaign finance scandal. . . .

And at that point I was just an international trade lawyer. I did this as a hobby, Judicial Watch. . . .

Later there were cases involving Filegate, Chinagate, Travelgate, IRSgate, all kinds of gates. . . . And, you know, I brought cases against the Clinton administration.

Then later, when President George W. Bush won, people were surprised, because I always said I was nonpartisan, but a lot of people didn't believe me at that point. And I brought federal lawsuits against him and Vice President Dick Cheney. The one against the president himself was over what I perceived to be, through a client . . . the unconstitutional mass surveillance of the American people. . . .

I also sued Vice President Cheney with regard to what he did at Halliburton. . . . And then I also sued the vice president and his energy task force for not disclosing who he was meeting with in secret meetings. . . .

So, I've always been nonpartisan. . . .

We will treat this as a mitigating factor.

Unfortunately, there are numerous, serious aggravating factors.

First, Respondent's violations of six of the eight Rules at issue in this matter seem to us to be among the most extensive, protracted and/or extreme violations of those Rules that we have found in District of Columbia disciplinary jurisprudence, as pointed out in Section V.B.1, *supra*, and as detailed in Section V.C.1, *infra*.

Second, Respondent has been vehemently recalcitrant in his denial of, attitude toward and relentless but unconvincing denial of the misconduct underlying this proceeding, as discussed in Section V.B.3, *supra*.

Third, Respondent's attitude toward this disciplinary proceeding has been deplorable, as discussed also in Section V.B.3, *supra*.

Fourth, Respondent violated a substantial number of Rules in the course of his

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> And by the year 2003, I saw that Senator Graham in Florida, because Florida is my home state -- adopted home state. . . . So, I decided, when I saw that Senator Graham was retiring, that I would run for the U.S. Senate. . . . I lost that race.
>
> . . . [A]nd after that I started Freedom Watch, and I also continued on in my private practice. . . .
>
> And we still promote free trade. We still promote legal immigration. . . .
>
> . . . I tried to be someone who would improve the legal profession in my public interest capacity, make it more honest, and tried to address, particularly federal judges who frequently feel that they're not accountable because of their lifetime tenure and they can basically do whatever they want.

Tr. 948-62.

representation of Ms. Sataki, and those Rule violations involved more than a dozen different incidents, as set forth in Section V.B.6, *infra*.

Fifth, there has been substantial prejudice and tangible harm to the client, as set forth in Section V.B.7, *infra*.

6. Number of Violations

We have concluded that Respondent violated eight Rules of Professional Conduct in the course of his representation of Ms. Sataki in her dispute with PNN/VOA -- Rule 1.2(a), Rule 1.4(b), Rule 1.5(b), Rule 1.5(c), Rule 1.6(a)(1), Rule 1.6(a)(3), Rule 1.7(b)(4) and Rule 1.16(a)(3). Those Rule violations encompassed at least fourteen different instances or sets of circumstances (in roughly chronological order):

> Respondent's failure to provide a written statement of fees and expenses to Ms. Sataki (Rule 1.5(b));
>
> Respondent's failure to provide a written contingent fee statement to Ms. Sataki (Rule 1.5(c));
>
> Respondent's forceful encouragement of, abetment of and insistence on the move to Los Angeles (Rule 1.7(b)(4));
>
> Respondent's abusive haranguing of Ms. Sataki when she rebuffed his affections and demands (Rule 1.7(b)(4));
>
> Respondent's demeaning criticism of Ms. Sataki when she avoided him socially (Rule 1.7(b)(4));
>
> Respondent's conduct at and after the May 2010 Awards event in Los Angeles (Rule 1.7(b)(4));
>
> Respondent's naming of Hilary Clinton as a defendant in the *BBG* action despite his client's wishes (Rule 1.2(a); Rule

1.4(b));

Respondent's filing of the Motion to Re-Assign (Rule 1.7(b)(4); Rule 1.2(a); Rule 1.4(b)) despite his client's concern about such a step;

Respondent's filing of the Motion to Disqualify (Rule 1.7(b)(4); Rule 1.2(a); Rule 1.4(b)) despite his client's concern about such a step;

Respondent's fee-demand retaliation against Ms. Sataki when she rebuffed his affections and demands (Rule 1.7(b)(4));

Ms. Sataki's abandonment of her claim and actions because of Respondent's misconduct (Rule 1.7(b)(4));

Respondent's failure to dismiss the *BBG* action in its entirety when directed by Ms. Sataki to do so (Rule 1.2(a));

Respondent's improper actions after learning that Ms. Sataki had terminated his services (Rule 1.16(a)(3)); and

Respondent's promotion and authorship of the *WND* articles throughout much of the representation and after its termination (Rule 1.7(b)(4); Rule 1.2(a); Rule 1.6(a)(1); Rule 1.6(a)(3)).

7. Prejudice to the Client

The prejudice to Ms. Sataki from Respondent's professional misconduct cannot be overstated.

Respondent induced Ms. Sataki to move to Los Angeles and, subsequently, to abandon her job in Washington after she was directed by VOA to return to work in Washington, even though she was willing to remain at her work station in Washington, D.C. if the alternative was losing her job. In Los Angeles, Ms. Sataki

was completely dependent on Respondent for housing and living expenses, a stressful circumstance in and of itself. FF 17-19, 22, 46, 52, 60.

Respondent exploited Ms. Sataki's precarious financial position and his position as her attorney by pursuing a romantic relationship with her. In doing so, he ignored her concerns and risked, by his own admission, the impairment of his independent professional judgment that he owed her as his client. FF 19, 31, 33, 43.

Respondent fostered Ms. Sataki's consultation of a mental health professional, Dr. Irene Aviera, then intruded into that consultation in continued pursuit of a romantic relationship. FF 33, 34, 44.

When Ms. Sataki continued to rebuff Respondent's overtures, he unilaterally increased his contingent fee demand, FF 58, 59, and repeatedly asserted that if Ms. Sataki abandoned him as her lawyer she would owe him large sums for fees and out-of-pocket expenses. FF 77, 79, 91.

When Ms. Sataki sought assistance from friends and family members, Respondent warned her against relying on them. FF 69. Respondent, through Ms. Sataki, threatened to sue those whom he believed were advising her with respect to her concerns about his behavior. FF 77, 79, 91. In those threats, he falsely claimed to have a written fee agreement with Ms. Sataki. FF 76, 77, 79. The intended effect of these communications was to deter her from seeking independent advice and counsel about her concerns. FF 58, 69, 79, 91.

Respondent also berated Ms. Sataki about and sent her communications deriding her connection with the Persian community. FF 58, 73, 78 n.24.

Ms. Sataki suffered a dismissal of the *Falahati* lawsuit, which more nearly complied with Ms. Sataki's desire to have her matter conducted quietly, when Respondent, despite seeking an extension of time within which to file a response to the government's motion to dismiss, and despite having plausible legal arguments that he might have made, failed to file the response. At the same time, Respondent was pursuing his conflict-ridden strategy of suing all BBG board members on a flawed case theory and his high-profile publicity campaign. FF 20, 24, 53, 68, 70, 80.

Respondent's strident and relentless importunings and other unprofessional conduct plainly inflicted extreme stress and severe emotional pain on Ms. Sataki. FF 31 ("He would nonstop text or email, or phone calls" and "he would lecture me" and, "people are going to say . . . 'she has something going on with her attorney'"), 32, 34, 35, 36, 37 ("I wish we didn't have this unfortunate problem . . . I'm so tired and anxious"), 38, 39, 43 ("I'm . . . upset, hurt and angry that he can't concentrate on my case . . . and the fact that I'm jobless, career-less. . . . I begged him, I plead to him, I screamed, I cried, begging him, 'Please, please, stay my attorney and focus on my case, not me'"), 48 ("I was completely mentally destroyed because of the roller coaster he was putting me through, because it was for months . . . it was ongoing and ongoing and wouldn't stop. . . ."), 49-50 (at Los Angeles function, "[h]e couldn't control himself . . . . it was no stopping. He was going on and on and on, talking, talking, talking, about . . . I don't care about him," whereupon Ms. Sataki jumped out of the car, was pursued by Respondent into a hotel restroom and had to

use a rear door in order to escape Respondent), 71 (". . . psychologically I couldn't do it any more. . . . I had to put a stop on his abusive relationship, the weight of -- constantly the things he was saying, accusations . . . putting me down. . . ."), 78 n.24 ("It was -- I was dealing -- it was a vicious cycle and never ending and it felt like I was in an abusive relationship instead of a client/attorney relationship.").[52]

In sum, it is hard to imagine greater prejudice being caused to a client than that which Respondent inflicted on Ms. Sataki through his conduct during the representation and as a direct result of his associated Rule violations.

C. RECOMMENDED SANCTION

1. The Appropriate Sanction for Respondent's Rule Violations

We turn first to consideration of what sanction for each of Respondent's individual Rule violations might be most consistent with sanctions imposed in previous cases for each such Rule violation.

Many **Rule 1.2(a) and Rule 1.4(b)** cases involving devastating impact on the client's legal interests and/or other violations have resulted in a substantial suspension or disbarment. *See, e.g.*, *In re Thai*, 157 A.3d 760 (D.C. 2017) *(per curiam)* (disbarment for intentional failure to file an immigration petition coupled with misappropriation); *In re Baber*, 106 A.3d 1072 (D.C. 2015) (*per curiam*) (disbarment for persistent inadequate client communication together with numerous

[52] The Hearing Committee had ample opportunity to observe Ms. Sataki's demeanor and we credit her testimony about the harm inflicted by Respondent. Moreover, as explained above, her account of Respondent's conduct was amply corroborated by his written and oral communications to her.

incidents of dishonesty over protracted period, including in several instances for personal gain and with prejudice to client); *In re Frison*, 89 A.3d 516 (D.C. 2014) (*per curiam*) (disbarment for serial failures to communicate with client, and extensive and sustained dishonesty among multiple other Rule violations); *In re Samad*, 51 A.3d 486 (D.C. 2012) (*per curiam*) (three-year suspension with fitness requirement for multiple communication failures and numerous other Rules violations); *In re Omwenga*, 49 A.3d 1235 (D.C. 2012) (*per curiam*) (appended Board Report) (disbarment and restitution for multiple communication failures along with flagrant dishonesty, intentional misappropriation, prior admonitions, lack of remorse and lack of concern for effect on clients); *In re Silva*, 29 A.3d 924 (D.C. 2011) (appended Board Report) (three-year suspension with fitness requirement in part for deception of client re: status of matter, forgery of document, and deception of Disciplinary Counsel regarding a plea agreement in a criminal matter in another bar); *In re Kline*, 11 A.3d 261 (D.C. 2011) (three-year suspension for negligent misappropriation, and intentional forgery of settlement agreement despite client's decision not to settle, notwithstanding significant mitigating factors such as genuine remorse, cooperation with Bar Counsel, impact that was not "devastating monetarily or otherwise," no prior discipline, character witnesses, and institution of remedial measures in respondent's practice to prevent similar misconduct in the future); *In re Carter*, 11 A.3d 1219 (D.C. 2011) (*per curiam*) (18-month suspension with fitness requirement, restitution and cooperation with Disciplinary Counsel in two other pending matters for repeated failure to respond to client inquiries in one set of

circumstances along with prior discipline for similar misconduct); *In re Ukwu,* 980 A.2d 1227 (D.C. 2009) (*per curiam*) (disbarment for settling case without client's authorization exacerbated by forgery and intentional misappropriation); *In re Stewart*, Bar Docket Nos. 167-05 *et al.* (BPR March 11, 2008), appended HC Rpt. at 88, 90, 92, 99 (Oct. 12, 2007), *recommendation adopted, no exceptions filed*, 953 A.2d 1034 (D.C. 2008) (*per curiam*) (disbarment for failing to follow through on clients' directions in more than 100 instances to file tax sale complaints, dismissing client's action without consultation with or consent of client, and criminal fraud and theft along with intentional misappropriation); *In re Carlson*, 745 A.2d 257 (D.C. 2000) (*per curiam*) (disbarment and restitution for failure to inform client of settlement negotiations, failure to pursue client's interests, dishonest reports to client, and intentional misappropriation).

Rule 1.2(a) and 1.4(b) cases arising from less serious circumstances have resulted in less severe sanctions. *See, e.g.*, *In re Francis*, 137 A.3d 187 (D.C. 2016) (*per curiam*) (30-day stayed suspension for inadequate communication while serving as local counsel, aggravated by intentional damage to client and failure to take remedial steps to get the client's case reinstated); *In re Wyatt*, Board Docket No. 10-BD-123, at 16-17, 25-26 (BPR July 7, 2014), *recommendation adopted with no exceptions filed*, 111 A.3d 635 (D.C. 2015) (*per curiam*) (six-month suspension for negligent misappropriation involving a fee dispute, that catalyzed a client communication failure because client had a past-due balance from another matter, mitigated by cooperation with Disciplinary Counsel and acknowledgement of and

remorse over misconduct); *In re Fay*, Board Docket No. 10-BD-022, at 21-22, 29 (HC Rpt. Feb. 28, 2013), *recommendation adopted by Board*, 10-BD-022 (BPR Nov. 27, 2013), *recommendation adopted*, 111 A.3d 1025 (D.C. 2015) (*per curiam*) (informal admonition for failure to inform client of case filing and other developments, including dismissal and appeal option, mitigated by absence of financial prejudice to client, confused circumstances with other attorney for client, and overall professional career); *In re Fox*, 35 A.3d 441 (D.C. 2012) (*per curiam*) (45-day suspension for failure to inform client that claim was not being pursued); *In re Cole*, 967 A.2d 1264 (D.C. 2009) (30-day suspension for failure to adequately explain immigration matter to client, with significant mitigating factors including candor after initial dissembling, apology to client, return of fee and cooperation with successor counsel); *In re Avery*, Bar Docket No. 378-04, at 2, 15, (BPR Mar. 7, 2007), *recommendation adopted with no exceptions filed*, 926 A.2d 719 (D.C. 2007) (*per curiam*) (public censure and CLE ethics requirement for failure to consult adequately with client regarding limitation issue, with substantial mitigation including acknowledgment and cooperation, absence of bad faith, and positive character witness testimony); *Elgin*, 918 A.2d 362 (six-month suspension with restitution for negotiating settlement without disclosure to client of terms, aggravated by insufficient showing of remorse and mitigated by lack of prior disciplinary history and personal circumstances); *In re Wright*, 885 A.2d 315 (D.C. 2005) (*per curiam*) (one-year suspension with restitution and fitness requirement for displaying a pattern of dishonesty and settling claim without client knowledge or

input and other consultation deficiencies); *In re Steinberg*, Bar Docket No. 423-01 (BPR May 2, 2005), *recommendation adopted with no exceptions filed*, 878 A.2d 496 (D.C. 2005) (*per curiam*) (60-day suspension, concurrent with 30-day suspension in another matter and restitution for preparation of inadequate separation agreement delay and other inattention to matter, with aggravating and mitigating factors); *Hager*, 812 A.2d at 904 (one-year suspension and disgorgement of fees with fitness requirement for settling class action without consultation with client, mitigated by lack of prior disciplinary history, extensive *pro bono* work and voluminous positive character witness evidence); *In re Baron*, 808 A.2d 497 (D.C. 2002) (*per curiam*) (30-day stayed suspension with probation for inadequate communication throughout appeal with significant personal mitigating circumstance); *In re Vohra*, 762 A.2d 544 (D.C. 2000) (*per curiam*) (30-day stayed suspension for failing to complete tasks, misrepresenting to client that he had completed those tasks, and seeking reimbursement for fees that had not been incurred, with *Kersey* mitigation); *In re Douglass*, 745 A.2d 307 (D.C. 2000) (*per curiam*) (public censure for not notifying client of failure to defend a claim against the estate, mitigated by personal circumstances, partial reimbursement and client's overall satisfaction with the representation, aggravated by prior discipline); *In re Shelnutt*, 719 A.2d 96 (D.C. 1998) (*per curiam*) (public admonition for failure to communicate with client resulting in an extra four days of pre-trial incarceration); *In re Bland*, 714 A.2d 787 (D.C. 1998) (*per curiam*) (public censure for neglecting a client's matter -- leading to ten Rule violations including failing to communicate -

- coupled with lack of prior discipline and lack of disregard of his client's interest.); *In re Bernstein*, 707 A.2d 371 (D.C. 1998) (30-day suspension for failure to keep client informed of settlement negotiations, mitigated by personal circumstances).

Respondent's Rule 1.2(a) and Rule 1.4(b) violations that we have found were not accompanied by such other Rule violations as misappropriation, forgery, other dishonesty, serial repetition throughout the representation and/or prior similar misconduct that occurred in first group of Rule 1.2(a) and Rule 1.4(b) cases summarized above. Thus, we find no basis for a disbarment recommendation on the basis of these violations alone. Respondent was charged with – and we have found – violations of these two Rules in only three instances (as in a number of the "less serious" cases just discussed) – albeit three very important instances.

On the other hand, Respondent has stubbornly refused to acknowledge any responsibility on his part for failing to consult with Ms. Sataki and to respect her wishes with respect to the three missteps that we have concluded were taken in violation of Rule 1.2(a) and Rule 1.4(b). He also took other actions that hindered proper attorney-client consultation. In Section V.B.6, *supra*, regarding "Number of Violations," above, we enumerated fourteen instances of Rule violations. In Section V.B.7, *supra*, "Prejudice to the Client," we identified the serious harms Respondent's conduct caused. Almost every one of these instances created and fostered uncertainty and apprehension for Ms. Sataki, who saw her case moving out of her control in ways that harmed her life and career prospects because of conduct

by a lawyer who was making personal and financial demands and who sought to undermine her efforts to obtain independent advice.

Respondent's missteps also had a substantial, deleterious effect on Ms. Sataki's cause. Thus, we cannot consider Respondent's violation of Rules 1.2(a) and 1.4(b) as more or less *de minimis* -- i.e., as equivalent to any of the cases that we have grouped together as "less serious" and that resulted in less serious sanctions. And even among the "less serious" group, we note that not consulting with the client because of a fee dispute (*Wyatt*) and conducting settlement negotiations without proper consultation with the client (*Elgin*, *Wright* and *Hager*) resulted in suspensions of six months, six months, one year, and one year respectively, despite acknowledgement of misconduct and demonstrating genuine remorse (*Wyatt*), family illness mitigation (*Elgin*) or extensive positive character evidence (*Hager*). We note further that remorse, acknowledgment and cooperation -- or the lack thereof -- appear to have played a significant role in the sanction determinations in this group of cases.

Carter, which appears not to have involved other serious charges, is arguably quite comparable, with the consultative client communication violation arising out of one situation. *Carter* resulted in an 18-month suspension, perhaps in significant part because of prior similar misconduct. Respondent has not incurred any prior discipline for misconduct of this nature. Nevertheless, in light of the substantial sanctions in *Wyatt*, *Elgin*, *Wright*, and *Hager* and mindful of the important factors that we have just recounted -- the absence of any acknowledgment, remorse, or

cooperation on Respondent's part, the presence of other missteps on his part as discussed hereinafter, and the important impact of these two Rule violations on Ms. Sataki (we think other violations had even greater impact, as discussed below)-- we conclude that a suspension of approximately 15 months just for Respondent's Rule 1.2(a) and 1.4(b) violations would be consistent with sanctions in relatively similar client consultation cases, even before any consideration of appropriate sanctions for other of Respondent's Rules violations.

Respondent's **Rule 1.5(b) and Rule 1.5(c)** violations, in and of themselves, would apparently normally call for an informal admonition, public censure or a short, sometimes stayed suspension, even with a vulnerable client. *See, e.g.*, *In re Szymkowicz, et al.*, 124 A.3d 1078 (D.C. 2015) (*per curiam*); *Fay*, 111 A.3d 1025; *Avery*, 926 A.2d 719; *In re Boykins*, 748 A.2d 413 (D.C. 2000) (*per curiam*); *In re Sumner*, 665 A.2d 986 (D.C. 1995) (*per curiam*).

Here, however, Respondent assertively used his fee statement-related violations and his dissembling about those violations to pressure Ms. Sataki and others to act in accordance with his wishes. FF 58, 59, 60, 72, 77. We do not know of a more serious violation solely of Rule 1.5(b) and Rule 1.5(c), and we would be inclined, without anything else, to recommend -- solely on the basis of the circumstances of these two violations -- a significant sanction for them, such as a six-month suspension.

Respondent's **Rule 1.6(a)(1) and (a)(3)** violations differ from the Rule 1.5(b) and Rule 1.5(c) violations in that they involve, like the Rule 1.2(a), 1.4(b) and

1.7(b)(4) violations, another core aspect of the attorney-client relationship. *See* Rule 1.6 Comments [4], [7], [8], & [10]. We have found no instances in District of Columbia disciplinary jurisprudence comparable to Respondent's stream of *WND* articles disclosing, without "the client's informed consent to the use in question", "information relating to the client" and "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 be detrimental to the client (i.e., secrets) . . . without regard to the nature or source of the information or the fact that others share the knowledge. . . ." Rule 1.6 Comments [7], [8], [10]. In light of such rulings as *In re Wemhoff*, Board Docket No. 14-BD-056 (BPR Nov. 20, 2015), appended HC Rpt. at 19, 26 (Sept. 15, 2015), *recommendation adopted with no exceptions filed*, 142 A.3d 573 (D.C. 2016) (*per curiam*) (stayed 30-day suspension for disclosure of various client secrets in motion to withdraw, with significant mitigating factors), *In re Ponds*, 876 A.2d 636 (D.C. 2005) (*per curiam*) (public censure for revealing client secret in motion to withdraw), *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001) (informal admonition for revealing client secret in motion to withdraw), and especially *In re Koeck*, 178 A.3d 463 (D.C. 2018) (*per curiam*) (60-day suspension with fitness requirement for disclosing client secrets to newspaper reporter and government authorities) we think, even if there were no other Rules violations or aggravating factors, that we would recommend a suspension of approximately 30-60 days for the Rule 1.6(a)(1) and (a)(3) violations, without taking into account mitigating or aggravating factors.

Respondent's pervasive **Rule 1.7(b)(4)** violations raise the most serious concern of all in our view -- in and of themselves because of their number and sweep, and also because of their ramifications and their undergirding of most or all of Respondent's other Rules violations in the course of his professional relationship with Ms. Sataki.

Multiple instances of violating Rule 1.7(b)(4), along with other Rules violations and/or aggravating factors have been found by the Court of Appeals to require severe sanctions in order to serve the various purposes of the disciplinary process. *See, e.g.*, *In re Mardis*, 174 A.3d 868 (2017) (*per curiam*) (disbarment for fraud, theft, pursuit of own interest without disclosure to or consent of client); *Omwenga*, 49 A.3d 1235 (disbarment for flagrant dishonesty, intentional misappropriation, and failure to disclose to vulnerable clients conflicts of interest).

In situations not involving such extreme misconduct, suspensions appear to be the norm. *See, e.g.*, *Elgin*, 918 A.2d 362 (six-month suspension for not disclosing to client that attorney was likely a third-party defendant); *In re Evans*, 902 A.2d 56 (D.C. 2006) (*per curiam*) (six-month suspension for failure to disclose own interest in transaction); *Hager*, 812 A.2d at 921, 924 (one-year suspension and disgorgement of fees with fitness requirement for disclosure failure "strik[ing] at the heart of the attorney-client relationship" along with no showing of remorse).

This latter group of cases do not, in our view, even begin to approach the egregious nature, pervasive extent, consequences and impact of Respondent's violations of Rule 1.7(b)(4), as recounted throughout this Section V.C.

Consequently, we believe that we would recommend a suspension of approximately 12-18 months solely for Respondent's Rule 1.7(b)(4) violations, if there were no aggravating factors and no other Rule violations.

Respondent's **Rule 1.16(a)(3)** violations seem roughly analogous to the circumstances in *In re Roxborough*, 692 A.2d 1379 (D.C. 1997) (*per curiam*) (60-day suspension *nunc pro tunc* to completion date of earlier 30-day suspension, and to run consecutively to that 30-day suspension, plus fitness and Rules of Professional Responsibility course for violations of, among other Rules, Rule 1.16(a)(3)), and *In re Mance*, 869 A.2d 339 (D.C. 2005) (per curiam) (30-day suspension, stayed for one year probation for, in part, violating Rule 1.16(a)(3)). Also, Respondent's Rule 1.16(a)(3) violations stand in contrast to the extreme misconduct in such Rule 1.16(d) cases as *In re Nace*, 140 A.3d 459 (D.C. 2016) (*per curiam*), *In re Mayers*, 114 A.3d 1274 (D.C. 2015), *Baber*, 106 A.3d 1072, *Frison*, 89 A.3d 516, *In re Smith*, 70 A.3d 1213 (D.C. 2013) (*per curiam*), and *In re Shariati*, 31 A.3d 81 (D.C. 2011) (*per curiam*), all of which resulted in disbarment, or even the serious, willful misconduct in such recent cases as *In re Hargrove*, 155 A.3d 375 (D.C. 2017) (*per curiam*), *In re Fitzgerald*, 109 A.3d 619 (D.C. 2014) (*per curiam*), *In re Askew*, 96 A.3d 52 (D.C. 2014) (*per curiam*), and *Carter*, 11 A.3d 1219, all of which resulted in suspensions. We would not recommend more than a non-suspension sanction solely for Respondent's Rule 1.16(a) violation in light of all the circumstances that we have identified and reviewed, even taking into consideration that some of those difficulties were of Respondent's own making, and in light of the fact that

Respondent did not withhold any money, documents or other property from Ms. Sataki.

* * * * *

We address now the proper sanction for Respondent's overall misconduct, in light of our preceding review of prototypical sanctions in the District's disciplinary jurisprudence for individual Rules violations. In the course of that review, we have tentatively concluded, in light of discipline imposed in prior analogous cases primarily or solely for the conduct at issue in each Rule violation or groups of Rule violations, that a suspension of some duration would be appropriate for each of Respondent's most serious Rule violations or groups of Rule violations, including approximately 15 months solely for the Rule 1.2(a) and 1.4(b) violations (*supra* at 149-56) and 12-18 months for the Rule 1.7(b)(4) violations (*supra* at 158-59), six months solely for the Rule 1.15(b) & (c) violations, as well as perhaps perhaps an informal admonition for the Rule 1.16(a)(3) violation. We have also determined that there is only one arguably mitigating factor -- substantial litigation and related work on matters in the public, non-commercial realm. Finally, we have identified numerous, mostly very serious, and mostly very troubling aggravating factors, including (i) Respondent's recalcitrant refusal to acknowledge any of his missteps, (ii) Respondent's indisputable lack of remorse, (iii) the numerous and pervasive violations, (iv) Respondent's dismissive, self-pitying but groundless attitude toward this proceeding and abusive conduct herein and (v) the grave impact upon and prejudice to the client that resulted from Respondent's Rules violations. Thus we are

convinced that strong deterrent, preventive and remedial measures are necessary in this matter and conclude that a suspension of 36 months would be appropriate, would be consistent with prior dispositions in this jurisdiction for comparable overall misconduct, and would serve as a meaningful deterrent to others who might share Respondent's disregard for the Rules that govern the basic elements of the attorney-client relationship. However, in light of the significant weight which the Court of Appeals accorded in *Hager* and *Wemhoff* to substantial *pro bono* work throughout an attorney's career that is perhaps similar to Respondent's record of advocacy on public matters, we recommend a suspension of 33 months instead of 36 months.[53]

2. Whether There is a Need for a Fitness Requirement

We have rejected Disciplinary Counsel's contention that Respondent should be disbarred but have concluded and recommended that he should not be permitted to practice law under the aegis of the District of Columbia Bar for a substantial period of time. Disbarment includes a requirement that the disbarred attorney demonstrate by clear and convincing evidence "that the attorney has the moral qualifications, competency, and learning in law required for readmission; and [t]hat the resumption of the practice of law by the attorney will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest." D.C. Bar Rule XI, §§ 16 (d)(1)(a) & (b). Since Disciplinary Counsel has sought disbarment with its automatic requirement of a fitness showing

[53] In arriving at this recommendation, we have relied upon only the considerations identified up to this point in this Report and have not factored in any considerations identified and discussed in the remainder of the Report.

for reinstatement into the District of Columbia Bar, we think that we must consider whether Respondent, upon the completion of his suspension, should be required to establish his fitness to return to the practice of law as a member of the District of Columbia Bar. *See also* D.C. Bar Rule XI, § 3(a)(2) ("Any order of suspension may include a requirement that the attorney furnish proof of rehabilitation as a condition of reinstatement.")

a. The Court of Appeals' Guidance

In its seminal decision in *In re Cater*, 887 A.2d 1 (D.C. 2005), the Court of Appeals resolved the question of the standard by which or the "rationale" under which a respondent "should be required to show proof of her fitness to practice law as a further condition of reinstatement." *Id.* at 20. The Court began its analysis by setting forth the following considerations:

> . . . [T]he reason for conditioning reinstatement on proof of "rehabilitation," D.C. Bar R. XI, § 3(a)(2), is conceptually different from the reason for suspending a respondent for a period of time. The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the 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. at 22.

> Thus, while the decision to suspend an attorney for misconduct turns largely on the determination of historical facts, the decision to impose a fitness requirement turns on a partly subjective, predictive evaluation of the attorney's character and ability. (This is the reason hearing committees, the Board and this Court often have found it difficult to decide whether to recommend or impose

> a fitness requirement.) In practice, to be sure, the clear and convincing evidence that establishes the predicate violation of professional norms is usually much the same evidence that evokes doubts about the respondent's future fitness to adhere to those norms. That, of course, is why the question of fitness frequently arises in disciplinary proceedings. Nonetheless, proof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement, while evidence of circumstances surrounding and contributing to the misconduct may be what tips the balance in favor of the condition.

Id.

The Court of Appeals also identified and emphasized two other considerations:

> The standard also must be designed so as not to vitiate one of the most valuable tools in the disciplinary armamentarium. The length of a period of suspension reflects the gravity of the attorney's misconduct and is fixed with the aim of individual correction as well as general deterrence. Nonetheless, the period of suspension that may be justified in a given case of misconduct may not be enough by itself to protect the public, the courts and the integrity of the legal profession. The more unlikely it is that the attorney will be rehabilitated by the end of the predetermined suspension term, the more the need for additional protection. In such cases, the chief, if not the only, means at our disposal is to require proof of fitness as a condition of reinstatement. We must take care not to erect unnecessary impediments to our resort to this remedy.
>
> There is a countervailing consideration, however, that we cannot ignore. In fashioning the test for conditioning reinstatement on proof of rehabilitation, we must take into account the consequences for respondent attorneys. The fitness requirement can be a tail that wags the disciplinary dog. We are "reluctant" to impose it if the need is not amply demonstrated, "as that requirement may have the practical effect of greatly prolonging

-- even tripling or quadrupling -- a respondent's period of suspension."

Id. at 23 (citation omitted).

The Court of Appeals resolved these factors as follows:

> . . . [F]irst . . . imposition of a fitness requirement must be justified by evidence in the record of the disciplinary proceeding that calls the respondent's fitness into question. The burden of proof, in other words, belongs to the proponent of the sanction, i.e., [Disciplinary] Counsel. Second . . . [Disciplinary] Counsel should be required to establish a "serious doubt" as to the respondent's fitness to practice law in order to justify conditioning the respondent's reinstatement on proof of rehabilitation. . . . Requiring any greater showing would be impractical and would be insufficiently protective of the public, the courts and the legal profession. But if no serious doubt exists about an attorney's fitness, it would be unnecessary and unfair to augment the sanction of a limited period of suspension with such an onerous obligation. Any incremental benefits from a more unrestrained resort to the imposition of fitness conditions would be speculative at best.
>
> Finally . . . the requisite "serious doubt" must be generated by evidence that is "clear and convincing." When we speak of clear and convincing evidence, we mean more than a preponderance of the evidence; we mean "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." *Dortch*, 860 A.2d at 358 (quoting *In re T.J.*, 666 A.2d 1, 16 n. 17 (D.C.1995)). "A firm belief in a serious doubt" may sound like an oxymoron, but in fact there is nothing illogical or unusual about insisting on it. In most cases, it is the attorney's misconduct, which does have to be proved by clear and convincing evidence, *see Anderson*, 778 A.2d at 335, that casts the requisite serious doubt on the attorney's fitness. If the misconduct that is established by clear and convincing evidence is not grave enough by itself to evoke such doubt, and Bar Counsel relies on other, aggravating facts to justify enhancing the sanction of suspension with a fitness

> requirement, we think the same standard of proof should apply to those aggravating facts as a matter of logic and fairness.

Id. at 24-25.

The Court of Appeals instructed, finally, that the so-called *Roundtree* factors that are applied when an attorney is being considered for reinstatement should also be considered in determining whether to impose a fitness requirement. *Id.* at 21, 25; *see also In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985). We turn therefore to application of the *Roundtree* factors to determine whether the facts in this matter establish by clear and convincing evidence that there is a substantial doubt as to Respondent's fitness to practice law after his completion of the period of suspension that we have recommended.

b. Analysis of the *Roundtree* Factors

(i) The nature and circumstances of the misconduct for which Respondent was disciplined. We reiterate here our conclusion that Respondent's multiple violations of Rules 1.2(a), 1.4(b), 1.5(b), 1.5(c), 1.6(a)(1) and (3) and 1.7(b)(4) were especially egregious, and we incorporate by reference the assessments underlying that conclusion. *See supra*, at 149-59.

(ii) Whether Respondent recognizes the seriousness of the misconduct. We reiterate our conclusion that Respondent does not acknowledge or even recognize the extreme seriousness of his conduct and that he blames others rather than himself for his incurrence of disciplinary charges and the harm caused by his Rules violations, and we incorporate by reference the assessment underlying that conclusion. *See supra*, at 136-41.

(iii) Respondent's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones. Respondent does not appear to have taken any steps in the eight years since the representation to remedy his past misconduct, to ameliorate the harm he caused to Ms. Sataki, or to prevent such misconduct in the future. *See also infra,* at 166-82. (discussion of fifth *Roundtree* factor -- Respondent's present qualifications and competence).

(iv) Respondent's present character. The troubling aspects of Respondent's character that led in significant part to his derogation of his professional responsibilities during his representation of Ms. Sataki and to the litigation tactics to which he resorted in *Falahati* and *BBG* and in this proceeding appear at the present time to remain unchanged. Our concern arises, of course, from several of the circumstances already discussed in this Report -- i.e. the extreme nature of several of his Rules violations, especially his disregard of Ms. Sataki's wishes, his pursuit of his own agenda and his verbal abuse of her; his obdurate refusal to recognize or acknowledge his missteps; his insistence on blaming others for his missteps and the ensuing consequences; and his attitude toward this proceeding. Our concern is deepened further by the considerations discussed in the next, final sub-section of our *Roundtree* analysis.

(v) Respondent's present qualifications and competence to practice law. We have several, very worrisome concerns with respect to Respondent's present qualifications and competence to practice law for the following reasons.

(a) Respondent's litigation tactics. Respondent has employed in this matter the same groundless and abusive tactic of alleging bias and seeking disqualification or other remedies that he resorted to in *Falahati* and *BBG*. *See, e.g.*,:

> Respondent's Motion to Compel and for Extension of Time and Other Relief (April 18, 2018) (Disciplinary Counsel filed "bogus and newly trumped up charges" "for improper and unethical purposes and motivations" and because of the "animus" of a supervisor and the "hypocrisy and frankly dishonesty" of Disciplinary Counsel, because the supervisor "'politically' supports and/or has donated to candidates and government officials, such as former President Obama, who [*sic*] Mr. Klayman has [*sic*] was very critical of and has sued" and because the supervisor sees Respondent as "being a 'male offender,'" ¶¶ 15, 1, 10, 29, 30; *see also* ¶¶ 3, 4, 25, 26, 30, 31, 32, 33, 34, 36);
>
> Respondent's Motion for Leave to File and Reply to Disciplinary Counsel's Response to Respondent's Motion to Compel and For Extension of Time and Other Relief (April 26, 2018) (¶¶ 1, 2, 3 (supervisors "abhor Mr. Klayman's conservative politics"), 5, 9, 11, 12 ("this politically and 'gender-based' anti-conservative and anti-male 'vendetta'), 18;
>
> Respondent Larry Klayman's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law (October 30, 2018) at 1-3, 15 ("ODC . . . would like to have the activist conservative Larry Klayman removed from the practice of law for this and other contrived reasons"), 17-18, 18 ("Mr. Klayman is aware that members of this AHC have a liberal, if not leftist, ideology."); (*see* last part of V.B.3 at 139-41);
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> Respondent's Surreply to Disciplinary Counsel's Reply to Respondent's Post Hearing Brief and Proposed Findings of Fact and Conclusions of Law (November 20, 2018) at 1-2;
>
> Respondent's Motion to Recommend Dismissal to Board of Professional Responsibility and to Terminate this Disciplinary

> Proceeding (December 6, 2018) at 2 ("ODC [was] not . . . politically satisfied" with result of prior disciplinary proceeding);
>
> Respondent's Motion to Follow-Up on Inquiry Regarding Ethics Complaints Filed Against Kellyanne Conway and Justice Brett Kavanaugh (January 10, 2019) at 1 (reiterating Respondent's spurious and unsubstantiated accusations of bias against him on the part of Disciplinary Counsel as evidenced by its "selective prosecution" and renewing his insinuations of bias against him as a "conservative activist" on the part of one or more members of the Hearing Committee).

The dangers of such tactics are evident. As Justice Scalia emphasized:

> A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive.
>
> * * * * *
>
> While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

Cheney v. United States District Court for the District of Columbia, 541 U.S. 913, 916, 928 (2004) (Memorandum of Scalia, J.). Respondent was counsel for a party in this case and supported Justice Scalia's view.

Circuit Judge Reinhardt reached the same conclusion in a similar situation:

> Proponents' contention that I should recuse myself due to my wife's opinions is based upon an outmoded conception of the relationship between spouses. . . .
>
> * * * * *
>
> It is, indeed, important that judges be and appear to be impartial. It is also important, however, that judges not recuse themselves unless required to do so, or it would be too easy for those who seek judges favorable to their case to disqualify those that they perceive to be unsympathetic merely by publicly questioning their impartiality. See H.R.Rep. No. 93–1453, 1974 U.S.C.C.A.N. 6351 (1974) (providing legislative history of federal recusal statute) ("At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision.").

Perry v. Schwarzenegger, 630 F.3d 909, 912, 916 (9th Cir. 2011).

The analyses of Justice Scalia and Circuit Judge Reinhardt demonstrate beyond any doubt that Respondent's views and resulting judicial disqualification tactics as reflected in his conduct in this matter are "outmoded" (Circuit Judge Reinhardt) and that the standards resulting from those views that he would impose on the judiciary would be "utterly disabling" (Justice Scalia).

(b) Respondent's vexatious pleadings. Respondent filed in this matter numerous pleadings that were exceedingly verbose, repetitive, tendentious, frivolous, and/or otherwise vexatious. This calculated practice unduly burdened the Hearing Committee.

Respondent pursued throughout this entire proceeding his groundless argument that depositions and other discovery were needed in this matter and his

associated complaint that his request had been denied. This campaign commenced with Respondent's Motion to Notice and Have Issued Subpoenas Duces Tecum to Take the Depositions of Elham Sataki and Arlene Aviera (February 15, 2018) and Respondent's Supplement to Motion to Notice and Have Issued Subpoenas Duces Tecum to Take the Depositions of Elham Sataki and Arlene Aviera (February 21, 2018). The Hearing Committee denied this request without prejudice in its Order of March 9, 2018. Respondent next filed his unpaginated, single-spaced, nine-page Motion to Compel and for Extension of Time and Other Relief (April 18, 2018), which contained the same accusations in previous filings, (¶ 1-15, 23-30), which renewed the request for depositions, as well as other purportedly needed discovery (¶¶ 6-22) and which also included 48 pages of exhibits (all of which the Hearing Committee examined) which mostly did not pertain to the gravamen of the Motion and did little to advance Respondent's request. He followed up with an unpaginated, single-spaced, six-page Motion for Leave to File and Reply to Disciplinary Counsel's Response to Respondent's Motion to Compel and For Extension of Time and Other Relief (April 26, 2018) which rehashed his bias and other such arguments but barely touched upon the discovery request. In its Order of April 30, 2018, the Hearing Committee found that Respondent had "no evidentiary support" for an accusation in his papers that Disciplinary Counsel had lied in its papers, pointed out that many of Respondent's accusations "are beyond the purview of the Hearing Committee," pointed out the repetitiveness of and other deficiencies in his filings, and ordered Respondent to comply thenceforth with Board Rule 19.8(a).

Following the first three days of the evidentiary hearing, Respondent resumed his groundless campaign for additional discovery, filing Respondent's Motion to Compel Production of Documents (June 11, 2018), Respondent's Supplement to Motion to Compel Production of Documents (June 13, 2018) and Respondent's Motion for Leave to File Supplement and Reply to Petitioner's Response of June 12, 2018 to Respondent's Motion to Compel (June 14, 2018). In its Order of June 15, 2018, the Hearing Committee found "that Respondent has not made even a minimal showing of the relevance or significance of the documents being sought, let alone a showing of compelling need for discovery." In response to Respondent's assertion that "'there must be many other relevant emails' (Motion [to Compel] at 1)" and that "'[t]hese communications undoubtedly will contain evidence helpful and relevant to Mr. Klayman's defense' (Motion [to Compel] at 2)", the Hearing Committee concluded, "This speculation and this conclusory assertion do not individually or jointly constitute a showing of compelling need," as required by Board Rule 3.2. The Hearing Committee also found other of Respondent's requests to be "patently overbroad." Respondent thereupon filed his Respondent's Renewed Motion to Have the Hearing Committee Order Production of Documents by Office of Bar Counsel and Complainant Sataki (June 20, 2018). In its Order of June 21, 2018 denying Respondent's regurgitated requests, the Hearing Committee found that "[t]his motion repeats the requests and contentions made in prior motions. . . ." and concluded that "[n]othing in the present motion adds any informative detail, nor any additional reasoning or authority, in support of the requested discovery."

In its Order of July 2, 2018, the Hearing Committee authorized Respondent to file a three-page memorandum of points and authorities regarding one argument made by Disciplinary Counsel in support of its tender of a non-final sanctions recommendation in another disciplinary matter involving Respondent. Respondent thereupon filed Respondent Larry Klayman's Memorandum of Points and Authorities Pursuant to the Hearing Chair and Committee's Order of July 2, 2018 And Motion to Slightly Exceed Page Limit (July 9, 2018); the "slightly" longer filing consisted of eight pages of substantive points and authorities. In its Order of July 11, 2018, the Hearing Committee found that "[n]othing in those eight pages addresses the specific issue that the Hearing Committee offered Respondent an opportunity to address" and that "[i]nstead Respondent has adduced repetitive and extraneous matter which is beyond the purview of the Hearing Committee, as the Hearing Committee has stressed to Respondent on numerous occasions." Six days later, Respondent filed Respondent's Motion for Reconsideration of the Chair and Ad Hoc Hearing Committee's Order of July 10, 2018 (July 17, 2018). In its July 19, 2018 Order denying the Motion for Reconsideration, the Hearing Committee found that Respondent's first two points "adduce no new points or authorities and, instead, merely reiterate Respondent's repetitive and often irrelevant arguments in prior pleadings" and found that the premise of Respondent's last two points reflected a total misunderstanding of the issue at hand and was "plainly mistaken."

Toward the end of the post-hearing briefing period in this matter, Respondent filed Respondent's Notice of Intent to Move for Leave to File Surreply (November

15, 2018) and Respondent's Reply to Office of Bar [*sic*] Disciplinary Counsel's Response to Motion for Leave to File Surreply (November 26, 2018). In its Order of November 28, 2018, the Hearing Committee reported that "Respondent has not adduced any cognizable grounds in the Notice or the Motion that support his Motion." The Hearing Committee further stated, "As the Hearing Committee has repeatedly observed, the allegations and accusations that Respondent makes regarding the initiation and processing of this disciplinary proceeding are not within the Hearing Committee's ken. . . . Significant portions of the Surreply itself -- specifically the first four pages of the Surreply and numerous instances in the remaining eight pages of legal argument of similarly excessive rhetoric ranging from accusatory phrases to full paragraphs -- are also not cognizable before the Hearing Committee for the same reason. Additionally, the eight pages in the Surreply, which has now been reviewed, appear to present not a single point not already made by Respondent in his initial brief."

Without seeking prior leave, Respondent included with his Surreply (which the Hearing Committee permitted), and subsequently presented argument in the November 26, 2018 Reply about, a document not previously part of the evidentiary record. In its Order of November 28, 2018, the Hearing Committee found that "Respondent has not adduced in his Reply, even belatedly, any convincing grounds for addition of the document to the record in this matter: The discovery request was resolved long ago in this matter. . . ." Predictably, Respondent filed Respondent Larry Klayman's Motion for Reconsideration in Part of Ad Hoc Hearing

Committee's Order of November 28, 2018 (November 30, 2018) and, in its Order of December 11, 2018, the Hearing Committee found yet again that "Respondent has adduced no new grounds not previously adduced by Respondent or, to the extent cognizable by the Hearing Committee, not previously considered by the Hearing Committee."

Respondent also during this time filed Respondent's Motion to Recommend Dismissal to Board of Professional Responsibility and to Terminate this Disciplinary Proceeding (December 6, 2018) arguing, *inter alia*, the issue of the nine-year delay in formally initiating this proceeding. In its Order of December 13, 2018, the Hearing Committee told Respondent, "The Hearing Committee is fully aware of its duty to make a recommendation to the Board with respect to Respondent's claim that he has been prejudiced by delay in this matter, as repeatedly argued in his post-hearing papers and preceding filings and oral arguments." The Hearing Committee added:

> Respondent is reminded, once again, that the other grounds asserted and relief sought in his Motion to Recommend Dismissal are not cognizable before this Hearing Committee. Finally, repetitive submissions and repetitive non-cognizable arguments unduly burden the Hearing Committee and delay it in its consideration of the evidentiary record and associated legal issues and its resolution of the charges, defenses, contentions and analyses in this matter.

In the same December 13, 2018 Order, the Hearing Committee ordered, in light of Respondent's abusive pleading tactics throughout this matter, that neither party was permitted to make any more filings without first submitting a motion for leave to file a proposed pleading that "shall be strictly limited to one page of substantive points (i.e. plus heading, signatures and service information) . . . and

shall NOT be accompanied by the proposed new pleading" (emphasis in original). Respondent flouted this Order by filing, as noted at the end of the preceding sub-section of this Report, on January 10, 2019 Respondent Larry Klayman's Motion to Follow-up on Inquiry Regarding Ethics Complaints Filed Against Kellyanne Conway and Justice Brett Kavanaugh. In its Order of January 18, 2019, the Hearing Committee, as a professional courtesy to Respondent, treated the apparently carelessly titled motion as a motion for leave to file. However, even with that accommodation, the Hearing Committee found the filing violated the December 13, 2018 Order because of Respondent's transparent tactic of including eight pages of exhibits.

(c) Respondent's abusive delaying tactics. Respondent began in early May 2018 to seek to delay the hearing in this matter. In the course of that campaign, he resorted to inordinate tactics. Even more seriously, a number of Respondent's filings in support of his persistent attempts at delay raise questions of dissembling and dishonesty.

As the date of the hearing approached, Respondent filed his Motion for Modest Continuance and to Reschedule Hearing (May 2, 2018). In that motion, Respondent reiterated the same grounds that he had asserted for other extension requests and also claimed that "Respondent recently learned that his wife must undergo medical care during the currently scheduled hearing schedule. . . . [that] is scheduled to last some weeks." Despite his representation that he would be requesting a "Modest Continuance," Respondent sought a continuance until "late

July or early August, 2018, or mutually convenient dates thereafter." In its Order of May 3, 2018, the Hearing Committee -- noting the assertion of the same generalized grounds that Respondent had relied upon in previous such requests, including his wife's purported medical condition which he had first mentioned in passing a week previously (Motion for Leave to File and Reply to Disciplinary Counsel's Response to Respondent's Motion to Compel and For Extension of Time and Other Relief (April 26, 2018), ¶ 19) -- followed the Board's directive in *In re Malyszek*, Board Docket Nos. 13-BD-102 & 14-BD-098, at 5 (B.P.R. June 16, 2017), *recommendation adopted*, 182 A.3d 1232 (D.C. 2018) (*per curiam*) and ordered Respondent to "file evidence supporting each ground that he relies on." In his Affidavit (May 10, 2018), Respondent rehashed his previously-asserted grounds without adding anything new but declined to provide any information regarding his wife's medical treatment because "[t]he treatment is of a female nature," even though he had filed physician affidavits earlier in the case and even though such affidavit could be filed under seal. The Hearing Committee thereupon ordered in its Order of May 11, 2018 that the parties provide more specific information about their availability.

Respondent also filed Larry Klayman's Second Supplement to Motion for Short Continuance of the Hearing and Response to the Chair's Order of May 11, 2018 (May 14, 2018), as required by the May 3, 2018 Order, Respondent Larry Klayman's Third Supplement to Motion for Short Continuance of the Hearing and Response to the Chair's Order of May 11, 2018 (May 14, 2018) and Respondent

Larry Klayman's Fourth Supplement to Motion for Short Continuance of the Hearing and Response to the Chair's Order of May 11, 2018 (May 15, 2018), none of which provided any additional information about his wife's purported treatment needs, the need for him to be present for them, or their timing or duration. All of these submissions were riddled with the same repetitive and groundless claims and accusations that did nothing to advance Respondent's requests but burdened the Hearing Committee needlessly.

In its Order of May 15, 2018, the Hearing Committee found that "eight of the nine grounds and considerations analyzed above weigh against a re-scheduling of the present hearing date" but nevertheless deferred ruling on Respondent's continuance request in order to provide the parties an opportunity to "submit . . . additional evidence, such as a treating physician's statement and an employer's statement, respectively, providing more specific information that may inform resolution of the continuance issue." Disciplinary Counsel provided a physician's statement regarding its complainant (May 22, 2018), but in his May 21, 2018 Respondent's Supplement to Request for Continuance Respondent declined to provide additional information regarding his wife's purportedly impending medical treatment, even the schedule of that treatment, because "[f]iling a letter under seal, as the Chairman posited could be done, will not shield an intrusion into Mr. Klayman's wife's female health issues." During a telephonic hearing on May 23, 2018, Respondent escalated his continuance request to September 2018 at the "earliest" or October. Transcript of Telephonic Conference of May 23, 2018 at 6,

10, 27; *see also* Order of May 24, 2018 at 2-3. As reported in Section II, *supra*, the evidentiary hearing commenced on May 30, 2018, continued on May 31 and June 1, 2018, and then was adjourned as an accommodation to Respondent until being resumed and completed on June 25, 26, and 27, 2018.

During the immediate pre-hearing period, Respondent also filed his Motion for Extension of Time to File Hearing Exhibits (May 18, 2018) and his Supplement to Request for Continuance (May 21, 2018), which he acknowledged was "[t]his fifth supplement" to his motion for continuance of the evidentiary hearing. This six-page pleading reiterated yet again many of Respondent's allegations and complaints. (In its Order on May 24, 2018, out of an abundance of caution and in order to assure that Respondent's purported concerns, albeit not convincing, could be addressed if really necessary, the Hearing Committee observed that "the evidentiary hearing can be adjourned . . . after Disciplinary Counsel completes its case-in-chief" and so ordered, and this course was indeed adopted.)

In the post-hearing briefing period, continuances of both parties' briefing deadlines were granted upon the request of the parties in the Order of August 2, 2018. In its Supplemental Order Regarding Post-Hearing Briefing Schedule (September 27, 2018), the Hearing Committee advised the parties that no further extensions of the post-hearing briefing schedule could be granted "except upon a compelling showing of exceptional cause." Four days later, on October 1, 2018, Respondent filed and served Respondent Larry Klayman's Motion for Reciprocal Brief Extension of Time to File Post-Hearing Brief and Proposed Findings of Fact

and Conclusions of Law (file-stamped October 2, 2018). He cited, as grounds for the motion, "the press of a heavy and onerous litigation schedule, which became extremely pronounced in the intervening period after the Committee granted an extension to ODC, as well as a new client. . . .", preparation for and attendance at an FBI interview of another client, and ten other matters. He also represented that he would file no additional requests for additional time. Respondent filed a Supplement to Respondent Larry Klayman's Motion for Reciprocal Brief Extension of Time to File Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law on October 2, 2018, disclosing that he had just accepted representation of another client who had been served with a grand jury subpoena with a return date of October 5, 2018. The following day, Respondent filed Larry Klayman's Reply to Opposition to Motion for Reciprocal Brief Extension of Time to File Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law (October 3, 2018).

As the new deadline for Respondent's briefing approached, he resorted to one more tactic to obtain more time in which to file his papers, despite his prior representation that he would not seek any further extensions of time. In his October 23, 2018 Motion to Send and Serve By Fedex Post Hearing [Brief] for Delivery to Board Office and Office of Disciplinary Counsel by Opening of Business at 9:00 a.m. this Monday, Respondent argued that he should have the additional time because he was in California and therefore would not have a full day of working on the brief on Friday October 26, 2018 because he could not file and serve his brief by delivery at the end of that day. In its Order of the same date (October 23, 2018), the

Hearing Committee pointed out that Respondent could file and serve his post-hearing papers by e-mail late on Friday, that the Hearing Committee members had re-arranged their weekend schedules in order to begin their review of his submissions, that they had done so in order to accommodate his request for additional time in which to file his brief and that they had also done so to again accommodate his request in his August 22, 2018 *Praecipe* that the Hearing Committee "defer its review, deliberations and the drafting of its recommendation until it receives Respondent's brief on October 12, 2018 so as to avoid any prejudice to Respondent [a premise for which the Hearing Committee finds no basis whatsoever]."

(d) Respondent's disingenuous pleadings. Several of Respondent's assertions in these three post-hearing pleadings raised within the Hearing Committee the gravest of concerns about their truthfulness:

> Respondent falsely stated that the August 2, 2018 Order had granted him an extension of only 10 days when in fact it granted him an extension of 32 days (two more than he had requested and 13 more days than Disciplinary Counsel received).
>
> Respondent asserted that he had an arbitration on October 1, 2018 in a case in the United States District Court for the Southern District of Florida, *Robinson v. NBC Universal, et al.*, 9-17-cv-81324 (S.D. Fl.) The docket in that case showed that the case was dismissed by order dated April 18, 2018, that the Motion for Reconsideration was denied on April 27, 2018, that the appeal from the aforesaid orders was withdrawn on July 2, 2018 and that the appeal was dismissed by the appellate court on July 3, 2018. In addition, the purported arbitration date of October 1, 2018 was the same date on which Respondent filed his Motion and therefore no longer constituted a matter by which he could be

"pressed."

Respondent asserted that he had an amended complaint due on October 5, 2018 in a case in the United States District Court for the Northern District of California, *Robles v. The Regents of the University of California, et al.*, No. 4:17-cv-04864-CW. The docket in that case shows that Respondent's *pro hac vice* admission was revoked in an Order dated August 31, 2018. *Id.*, Docket Entry 86 Respondent did not bring the August 31, 2018 Order to the attention of the Hearing Committee and did not explain how he could be filing an amended complaint in a case in which his *pro hac vice* admission was terminated. On September 13, 2018, Respondent filed a motion for reconsideration and a 28 U.S.C. §144 application to disqualify Judge Claudia Wilken. In that filing, he asserted that Judge Wilken had exhibited bias and prejudice and had intentionally made false factual findings. He attached to the Motion an affidavit signed by his client, in which she alleged that she would not be able to proceed in her case without Mr. Klayman's participation as her counsel. *Id.*, Docket Entry 87. On October 2, 2018, the same day as his filing in this matter, Respondent signed a renewed motion in the Robles matter, alleging that the case "cannot proceed without Mr. Klayman." *Id.*, Docket Entry 92. Thus, Respondent was telling the Committee that he needed to file an amended complaint in *Robles*, while complaining to the judge that she had rendered him unable to do so.[54]

[54] In addition to these concerns, the Hearing Committee further pointed out in its October 4, 2018 Order that Respondent had not shown that he had taken any steps to obtain extensions of time in any of the other matters that he cited, that he had taken on new clients and/or initiated new matters when he knew of his briefing deadline in this matter, that some of the other deadlines in other matters that he cites fell well before or well after the due date of his post-hearing papers, that he had not filed his appearance in one of the matters that he cited as an obligation and that he failed to cite any deadlines in some instances. In light of "the pervasive inadequacy" of Respondent's asserted grounds, the Hearing Committee found that Respondent had not adduced a compelling showing of extraordinary cause for his requested extension of time and that he had not adduced "even a marginally cognizable basis for the requested extension of time." Nevertheless, as a professional courtesy to Respondent, and despite the impact on the Members' deliberations in this proceeding and on their other obligations, the Hearing Committee granted Respondent the additional time that he had requested and more, to and including October 26, 2018.

* * * * *

In sum, with respect to the fifth *Roundtree* factor -- Respondent's present qualifications and competence -- we are convinced -- not to mention, dismayed -- that Respondent's disgraceful utilization of abusive litigation tactics in *Falahati* and *BBG* and in this proceeding reflects a long-standing and continuing set of personal animuses, biases, bitterness, and vindictiveness that he has not candidly recognized, acknowledged or remedied and that at the present time render him unqualified and not competent to remain a member of the Bar of the District of Columbia. We are equally convinced that these deficiencies in Respondent's qualifications and competence would likely persist upon his readmission to the Bar upon completion of his suspension unless he can make a substantial showing to the contrary.

c. Recommendation as to Imposition of Fitness Requirement.

In light of the foregoing appraisal of the five *Roundtree* factors, we have a firm belief on the basis of each and every one of them that there is an indisputable need for a fitness requirement in this matter to assure that Respondent will not again inflict the manifestations of his professional shortcomings on future clients or on the judicial system. We therefore recommend that the Board find as a matter of law that there is clear and convincing evidence that Respondent must be required to establish his rehabilitation and his fitness to practice law again before being re-admitted to the Bar of the District of Columbia.

VI. CONCLUSION

For the reasons set forth above, the Hearing Committee recommends that the

Board find that Respondent violated Rules 1.2(a), 1.4(b), 1.5(b), 1.5(c), 1.6(a)(1), 1.6(a)(3), 1.7(b)(4), and 1.16(a)(3). The Committee further recommends that Respondent be suspended for 33 months and be required to prove his fitness to practice as a condition of reinstatement. Finally, the Committee recommends that the Court direct Respondent's attention to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

Respectfully submitted,

Warren Anthony Fitch

Warren Anthony Fitch, Chair

Mary C. Larkin

Mary C. Larkin, Public Member

Michael E. Tigar

Michael E. Tigar, Attorney Member

MACDRAW, INC., Plaintiff,

v.

THE CIT GROUP EQUIPMENT FINANCING, INC. and Richard Johnston, Defendants.

No. 91 Civ. 5153(DC).

United States District Court, S.D. New York.

Feb. 5, 1997.

Seller of industrial equipment sued buyer's lender for failure to pay final balance. Order was issued against attorneys for seller, who has been admitted pro hac vice, to show cause why they should not be disciplined for violation of disciplinary rules. The District Court, Chin, J., held that attorneys engaged in "undignified and discourteous" conduct in violation of disciplinary rules, warranting revocation of their admissions pro hac vice.

Discipline ordered.

1. Attorney and Client ⇐36(2)

District court's inherent power to discipline attorneys appearing before it extends as well to out-of-state attorneys who are granted privilege of appearing pro hac vice.

2. Attorney and Client ⇐42

Attorneys engaged in "undignified and discourteous" conduct that was "prejudicial to the administration of justice" and that was "degrading to a tribunal" in violation of disciplinary rules of Code of Professional Responsibility, by commenting that "we hope in the future this court functions better because frankly it has not functioned well," and by asking whether judge knew certain Asian-American individuals involved in recent campaign finance controversy, and whether judge had had any business, political, or personal dealings with them or any other persons related in any way to the *Clinton* Administration. ABA Code of Prof.Resp., DR 1–102(A)(5), DR 7–106(C)(6).

3. Attorney and Client ⇐58

Attorney's actions in engaging in "undignified and discourteous" conduct in violation of disciplinary rules, together with history of accusing judges of bias or prejudging cases, warranted revocation of his admission pro hac vice.

Ramsey Clark, Lawrence W. Schilling, New York City, for Respondents Larry Klayman and Paul J. Orfanedes.

Larry Klayman, Paul J. Orfanedes, Klayman & Associates, P.C., Washington, DC, for Plaintiff.

Susan G. Rosenthal, Jeffrey H. Weinberger, Winick & Rich, P.C., New York City, for Defendants.

OPINION & ORDER

CHIN, District Judge.

In this case, I find myself in the position of having my fairness and impartiality as a judge called into question because of my race. After I ruled against their client at trial, respondents Larry Klayman, Esq. and Paul J. Orfanedes, Esq. directed a series of questions to me inquiring (1) whether I knew John Huang and Melinda Yee, individuals involved in the recent campaign finance controversy, and (2) whether I had had any "business, political or personal dealings" with them or any other "persons related in any way to the Clinton Administration." Respondents have since conceded on the record in open court that the questions were asked of me in part because of my race:

> THE COURT: You are standing there and you are telling me that you did not ask these questions of me because I am Asian-American, is that what you are telling me?
>
> MR. KLAYMAN: I'm saying that is part of it.
>
> THE COURT: You are conceding that that is part of it?
>
> MR. KLAYMAN: Part of it, yes. And I'm also asking the questions—
>
> THE COURT: You are conceding that you asked questions of the court, at least in part, because of my race?

MR. KLAYMAN: In part....

(12/19/96 Tr. at 8).

Respondents had absolutely no basis for posing such questions to the Court. Moreover, Mr. Klayman has engaged in other conduct disrespectful of the Court. For example, in the same hearing, after purporting to advise me of my obligations under the canons of judicial ethics, Mr. Klayman suggested that I "search [my] own soul." (12/19/96 Tr. at 14, 16).

Messrs. Klayman and Orfanedes are not members of the Bar of this Court. Rather, they were both granted the privilege of appearing pro hac vice.[1] Because of their conduct in this case, I issued an order directing them to show cause why they should not be sanctioned or disciplined for violating Disciplinary Rules 1–102(A)(5) and 7–106(C)(6). They retained counsel, who filed a written response on their behalf.

Having reviewed the response as well as all the relevant parts of the record, and for the reasons set forth below, I find that respondents Larry Klayman, Esq. and Paul J. Orfanedes, Esq. have violated Disciplinary Rules 1–102(A)(5) and 7–106(C)(6). Consequently, they are disciplined as follows: (1) their admissions pro hac vice are hereby revoked; (2) any future applications by Messrs. Klayman and Orfanedes to appear before me on a pro hac vice basis will be denied; and (3) Messrs. Klayman and Orfanedes are hereby ordered to provide a copy of this opinion to any other judge in this District to whom they may make an application for admission pro hac vice in the future.

STATEMENT OF THE CASE

A. *The Underlying Facts*

Plaintiff Macdraw, Inc. ("Macdraw")[2] imports and sells wire-drawing equipment. In 1989, it agreed to sell certain equipment to Laribee Wire Manufacturing Company, Inc. ("Laribee") for a purchase price of approximately $7.1 million, to be paid in four installments. Because of the size of the transaction, Laribee approached defendant CIT Group Equipment Financing, Inc. ("CIT") for financing. CIT agreed to provide financing in return for a security interest in the equipment. Laribee was required, under the terms of the agreement, to meet certain conditions on a continuing basis. One such condition was that Laribee not be in default on any loans with other financial institutions.

Eventually, all of the equipment was delivered by Macdraw to Laribee. Consequently, CIT made the first three of the four payments under the financing agreement directly to Macdraw, as instructed by Laribee, leaving only the fourth and final installment—some $711,000—to be paid. In November 1990, Laribee acknowledged to CIT that it had "accepted" the equipment, clearing the way, from Macdraw's point of view, for the final payment. As CIT began processing the fourth installment, however, it learned that Laribee had defaulted on a loan with Bankers Trust. As a consequence, Laribee was in default under the financing agreement with CIT and CIT refused to release the final $711,000 to Macdraw. Laribee was not able to make the final payment itself. Hence, Macdraw was never paid the final $711,000.

B. *Prior Proceedings*

Macdraw commenced this action against CIT in August 1991, asserting five causes of action. Laribee was not named because it had filed for bankruptcy. Notwithstanding Laribee's inability to comply with the terms of its financing agreement with CIT, Macdraw contends that CIT was required to make the final $711,000 payment on Laribee's behalf because (1) defendant Richard Johnston purportedly made certain promises on CIT's behalf, and (2) CIT purportedly failed to disclose to Macdraw that Laribee was in default and encountering financial problems. CIT denied the allegations.

In the fall of 1991, respondent Klayman advised the Court (Kram, D.J.) of his inten-

1. Mr. Klayman was admitted pro hac vice in November 1991 by Judge Kram and Mr. Orfanedes was admitted pro hac vice by me in November 1996.

2. Macdraw is now known as Samp U.S.A (Trial Tr. at 23), but for ease of reference I will simply refer to it as Macdraw.

tion to move, on behalf of Macdraw, for summary judgment. Judge Kram sought to discourage Mr. Klayman from filing such a motion, to no avail, for in March 1992 Macdraw moved for partial summary judgment. On April 14, 1992, having failed to demand a jury trial on a timely basis, Macdraw also filed a motion for an order granting it a jury trial. Defendants thereafter cross-moved for summary judgment dismissing the complaint and seeking sanctions for Macdraw's purportedly frivolous motion practice.

By Memorandum Opinion and Order docketed January 18, 1994, Judge Kram: (1) denied plaintiff's motion for partial summary judgment; (2) denied plaintiff's request for a jury trial; (3) granted defendants' cross-motion to dismiss with respect to three of the five counts (leaving only the fraud and promissory estoppel claims for trial); and (4) granted defendants' cross-motion for sanctions. *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 1994 WL 17952 (S.D.N.Y. Jan.18, 1994). Among other things, Judge Kram concluded "[i]t is apparent that 'plaintiff's counsel engaged in little or no preliminary factual and legal investigation' before bringing its motion." *Id.* at *20 (quoting *Wrenn v. New York City Health & Hospitals Corp.*, 104 F.R.D. 553, 559 (S.D.N.Y.1985)). The Court imposed sanctions under Rule 11, which Macdraw's attorneys were ordered to pay.

At an earlier point in the proceedings, Mr. Klayman wrote the Court a letter requesting leave to file a motion for voluntary recusal, pursuant to 28 U.S.C. § 455(a), on the ground that "the Court 'has prejudged the case against the plaintiff.'" *Id.* at *20 (quoting Letter to Hon. Shirley Wohl Kram from Larry Klayman of 5/14/92). Judge Kram reminded the parties that the Court had the power to impose sanctions for bad faith, vexatious, wanton, or oppressive conduct and directed the parties to submit proposed briefing schedule for a recusal motion. *Id.* at *20. No such motion, however, was ever filed.

On January 5, 1995, Macdraw, Klayman, and Klayman's firm (Klayman & Associates) appealed the imposition of sanctions to the Second Circuit. In an opinion dated January 3, 1996, the Second Circuit reversed the award of sanctions. *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 73 F.3d 1253 (2d Cir.1996). In doing so, however, the Second Circuit noted:

> Our discussion should not be taken to suggest that we find the conduct of plaintiff's counsel throughout this litigation to be acceptable. Indeed, we note our sympathy with the district court's frustration; in pursuing this appeal, plaintiff's counsel submitted briefs that included inaccurate characterizations of the record and comments that we consider entirely inappropriate. There is no question that our rules permit sanctions where an attorney's conduct degrades the legal profession and disserves justice. In the face of significant abuse, a district court need not hesitate to impose penalties for unreasonable conduct and acts of bad faith. Nevertheless, it must do so with care, specificity, and attention to the sources of its power....

Id. at 1262.

While the appeal of the sanctions award was pending in the Second Circuit, Macdraw filed a "renewed motion" for a jury trial in the District Court. In the motion papers, signed by respondents Klayman and Orfanedes, respondents wrote:

> Macdraw respectfully submits that the Court has demonstrated perhaps an unintentional, yet readily apparent, predisposition against its claims. As set forth below, the record in this matter raises legitimate cause for concern. In order to alleviate any such concern, and avoid even the appearance of judicial predisposition, Macdraw respectfully requests that the Court allow a jury trial so as to safeguard Macdraw's rights....

(Pl. Mem. in Support of Renewed Motion for Jury Trial at 1). That motion was denied by Judge Kram on July 31, 1995. Thereafter, Macdraw filed with the Second Circuit a petition for a writ of mandamus directing the District Court to grant Macdraw a jury trial, which the Second Circuit denied on October 3, 1995.

By letter to Judge Kram dated October 30, 1995, Macdraw requested a stay of the case pending the filing of a petition for a writ of

certiorari to the Supreme Court on the issue of Macdraw's right to a jury trial. On November 2, 1995, Judge Kram granted the application and the case was stayed pending the filing by Macdraw of a petition for certiorari.

On November 6, 1995, the case was reassigned to me. Although it is not clear from the record whether Macdraw ever filed a petition for a writ of certiorari with the Supreme Court, in the summer of 1996 Macdraw advised the Court that it was prepared to proceed to trial without a jury. I conferenced the case on September 3, 1996, at which time I directed the parties to be ready for trial in November 1996.

C. *The Trial*

After the submission of detailed trial briefs, the case was tried to the Court without a jury on November 6, 7, 12, and 13, 1996. Macdraw's principal witness was its president, Massimo Colella. After Macdraw rested, defendants moved for judgment as a matter of law and I reserved decision. (Trial Tr. at 302). Defendants proceeded to call two witnesses, including defendant Richard Johnston. At that point defendants renewed their motion for judgment as a matter of law, without resting. (Trial Tr. at 416). On November 12, 1996, I adjourned the trial so that I could complete my reading of the depositions before ruling on defendants' motion. (*Id.* at 425–33).

On November 13, 1996, I granted defendants' motion for judgment as a matter of law. Pursuant to Rule 52(c), I made findings of fact and conclusions of law. (Trial Tr. at 436–45). My decision turned largely on my credibility findings. Having heard both Johnston and Colella testify, and having reviewed all the evidence in the case, I found Johnston to be more credible than Colella. I accepted Johnston's testimony that he never made the alleged oral promises and I rejected Colella's testimony to the contrary. (*Id.* at 439–42). I also found that Macdraw could not have reasonably believed that CIT would commit to disbursing $711,000 in additional financing without assuring itself that Laribee was still in sound financial condition. (*Id.* at 444).

D. *Respondents' Conduct*

Three aspects of respondents' conduct, taken together, led me to issue the order to show cause. They are: (1) comments made by Mr. Klayman at the conclusion of trial on November 13, 1996; (2) the questions contained in a letter dated December 9, 1996, signed by both Messrs. Klayman and Orfanedes; and (3) comments made by Mr. Klayman at a conference I held on December 13, 1996, after receiving the December 9th letter. I will review each in detail.

1. *The November 13, 1996 Comments*

After I stated my findings and conclusions at the conclusion of the trial on November 13, 1996, Mr. Klayman expressed a desire to make post-trial motions. A colloquy with the Court ensued (Trial Tr. at 445–52), concluding with the following:

> [THE COURT TO MR. KLAYMAN:] I am not going to debate this with you. I have ruled....
>
> I really don't think any additional motions are really going to help. All I am suggesting to you is that I think your view of the evidence is very different from my view of the evidence and that's fine. You have to do your job. If you want to make any motions, go ahead and make your motions, but I am not going to require any responses from CIT until I look at the motions first.
>
> MR. KLAYMAN: Your Honor, I understand your position and I understand you have denied the motions. We will simply file a notice of appeal. But I had to say that for the record. We are not here 6 years later because we wanted to be. You are newly appointed to the bench, we are aware of the fact that you did speed this case to trial. *We hope in the future this court functions better because frankly it has not functioned well—*
>
> THE COURT: Mr. Klayman, that is totally out of line. I don't know what you are doing now. I have no history with you.
>
> MR. KLAYMAN: What I am telling you is, you criticized us for being 6 years later into this case and I am pointing out that

we would have liked to have tried this case a lot sooner, period. I'm not trying to embarrass you or anybody else.

THE COURT: Believe me, you are not embarrassing me. This case is five or six years old for whatever the reason. When it came to me I moved it very quickly. Your client got his day in court. That's it. For you to stand there and criticize the court gets you nowhere. I just don't understand why you are doing that. How does it help you to stand there and criticize the court?

MR. KLAYMAN: Because I am an officer of the court and I take it seriously. And criticism goes both ways. There is a First Amendment, your Honor.

THE COURT: Mr. Klayman, is there anything else you want to say?

MR. KLAYMAN: No.

THE COURT: Then this case is over.

(Trial Tr. at 451–52) (emphasis added).

2. ***The December 9, 1996 Letter***

Unfortunately, however, the case was not over. Some four weeks later, I received a letter, dated December 9, 1996 (the "December 9th Letter"), addressed to me and signed by both Messrs. Klayman and Orfanedes, which stated in part:

> Finally, as you may know, Mr. Orfanedes and I have been involved in very highly publicized and significant public interest litigation, *Judicial Watch, Inc. v. U.S. Department of Commerce*, Case No. 95-0133(RCL) (D.D.C.), which involves a Mr. John Huang, Ms. Melinda Yee and other persons in the Asian and Asian-American communities. *See* Exhibit 1. Recently, we came upon a document in this case which mentions your name in the context of other prominent Asian-American appointees of the Clinton Administration. *See* Exhibit 2. Accordingly, could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts, and/or business, political or personal dealings, if any, you have had with them, or persons related in any way to the Clinton Administration. Please also advise us if you had seen the enclosed or similar newspaper articles or press accounts before this case was tried on November 6, 7, 12 and 13, 1996.

Attached as Exhibit 1 to the December 9th Letter were eight articles from magazines and newspapers reporting on the recent controversy regarding John Huang, the Democratic National Committee, and campaign contributions. Mr. Klayman is mentioned in some of the articles. Exhibit 2 to the December 9th Letter is a computer-generated print-out of a newspaper or magazine article that appeared on November 4, 1994, more than two years ago, in which certain presidential appointments of Asian–Americans are listed, including John Huang and myself.

3. ***The December 19, 1996 Comments***

After receiving the December 9th Letter, I directed counsel to appear for a conference at which I asked respondents to explain the basis on which they felt it was appropriate to ask me the questions contained in their Letter. Mr. Klayman spoke on their behalf and articulated the view that they asked the questions because: (1) they felt I had made some comments directed toward them that were critical and "in some way personal"; (2) they were involved in a case against the Commerce Department and the Clinton Administration in which they had been accused of being biased against the Asian–American community; and (3) I was a recent appointee of the Clinton Administration and had been actively involved, prior to taking the bench, with the Asian American Legal Defense and Education Fund and the Asian American Bar Association of New York. (12/19/96 Tr. at 4–9). Mr. Klayman then said the following to me:

> I frankly felt, and Mr. Orfanedes frankly felt, that the remarks in some way were personal, and we are concerned, as advocates on behalf of our client, given the unusual nature of this case concerning Mr. Huang, that somehow subjectively this did not in any way influence you or perhaps have you view me negatively or Mr. Orfanedes.

(12/19/96 Tr. at 6).

To the extent there was any doubt that the questions in respondents' December 9th Letter were asked of me in part because of my

race, that doubt was eliminated by Mr. Klayman's responses to my questions:

> THE COURT: . . .
>
> What I hear is that you are asking questions of me because you have some questions about my fairness and impartiality because of my race. Is that not so?
>
> MR. KLAYMAN: No, that's not so, your Honor.
>
> THE COURT: Would you have asked me these questions if I were not Asian–American?
>
> MR. KLAYMAN: I might have.
>
> . . .
>
> THE COURT: You would have asked me these questions if I were Caucasian or African–American?
>
> MR. KLAYMAN: Let me tell you why I might have. And I don't see any harm in asking these questions because I have a duty to a client.
>
> THE COURT: Did your client ask you to ask these questions of me?
>
> MR. KLAYMAN: My client is aware of the general issues. They did not ask me to ask these questions of you.
>
> Frankly, your Honor, given whatever your response may be, I don't know that there's any issue here at all, but I felt that asking the question was something that would be prudent and wise and part of my responsibility to represent our client zealously within the balance of the law.
>
> It's not your race. I myself am a minority. I myself have been subject to discrimination. I am sensitive to that.
>
> THE COURT: You are standing there and you are telling me that you did not ask these questions of me because I am Asian–American, is that what you are telling me?
>
> MR. KLAYMAN: I'm saying that is part of it.
>
> THE COURT: You are conceding that that is part of it?
>
> MR. KLAYMAN: Part of it, yes. And I'm also asking the questions—
>
> THE COURT: You are conceding that you asked questions of the court, at least in part, because of my race?
>
> MR. KLAYMAN: In part. And let me tell you why. And I would [have] asked questions because you're also a recent appointee of the Clinton Administration. Has nothing to do with it. But you have been active, your Honor, for instance, in these kinds of efforts. And I commend you for your activity on behalf of Asian–Americans, with regard to the Asian–American Legal Defense Fund and being a president of the Asian–American Bar Association. I myself have been active in similar types of things and am fully supportive of those activities.
>
> But we are all human, and sometimes, sometimes subjective criteria can unwittingly, no matter how ethical, no matter how decent, no matter how honest someone is—and we believe you to be that—they can subjectively influence our decision-making. I, for instance, would not sit as a Jewish American on a case that involved a Palestinian. I wouldn't do it if I was a judicial officer just because of a lot of things which enter into the subjectivity of all our thinking.
>
> I'm not making any accusations, but I felt that I had a right, given what—
>
> THE COURT: Based on what? Based on what did you have that right?
>
> MR. KLAYMAN: Representing the client. We live in the real world, your Honor. People are influenced by subjective criteria.

(12/19/96 Tr. at 7–9).

Mr. Klayman articulated the view that he was simply asking questions of the Court, that he was not making accusations, and that there was no harm in asking the questions. (12/19/96 Tr. at 9–12). Mr. Orfanedes spoke briefly and stated that he did not "see this as necessarily race-based." (*Id.* at 12). Mr. Klayman then purported to advise me on the canons of judicial ethics (*id.* at 14) and eventually suggested that I "search [my] own soul":

> [MR. KLAYMAN:] Now, I believe your Honor has to search his own soul to a large extent. There may be independent legal requirements here on whether or not you wish to advise this court of some of the questions which we asked, which are be-

nign, which were posed in a very respectful way. We ask that this letter [the December 9th letter] be made part of the court record.

THE COURT: The letter has already been docketed. I am not going to search my soul. I do not need to do any soul searching at all. The letter is offensive. I find the letter to be offensive. I do not think it is benign nor do I think it is respectful. Not at all.

MR. KLAYMAN: I take it your Honor is not going to respond to the questions.

THE COURT: I am not going to respond to your questions. I have heard no basis that would give me any reason to answer your questions.

(12/19/96 Tr. at 16).

E. *The Order To Show Cause*

On January 10, 1997, in accordance with General Rule 4 of the Court, and in particular paragraphs (f), (g), and (k) thereof, I ordered Messrs. Klayman and Orfanedes to show cause why they should not be sanctioned or disciplined for violating Disciplinary Rules 1–102(A)(5) and 7–106(C)(6) by their conduct in this case on November 13, 1996 and December 19, 1996 and their December 9th Letter.

Respondents retained counsel, who submitted a letter brief dated January 24, 1997 (the "Letter Brief") on respondents' behalf. In the Letter Brief, respondents essentially argue that their conduct could not prejudice the administration of justice or degrade a tribunal. In addition, respondents contend that they acted reasonably in sending the December 9th Letter because of the "notoriety" surrounding their lawsuit against the Department of Commerce, which focused on "a prominent Presidential appointee, John Huang, who is Asian–American," their involvement in the lawsuit, and what they believed to be my hostility toward them personally. (Letter Br. at 5–6). The Letter Brief further states:

> Mr. Klayman and Mr. Orfanedes became concerned that because the Court was a recent appointee of President Clinton and Mr. Huang was a principle [sic] advisor on Asian–American appointments and fund raising and Mr. Klayman had been prominently mentioned in the media for his role in the Commerce Department case, which focused in part on the White House, the Democratic National Committee, John Huang, Melinda Yee, and other persons in the Asian and Asian–American communities, and because the lawsuit had elicited such angry responses from the White House, Democrats and the Asian–American community, *that the Court might be angry at them and unable to be fair and impartial in a case in which they were counsel* . . . .

(Letter Br. at 8–9) (emphasis added). Respondents also contend in the letter that they did not ask the questions because of any concern that I was biased because of my race, and state that they "strive to be free of racial prejudice and believe they are." (Letter Br. at 10–11).

Finally, respondents contend in the Letter Brief that no further action is required, but that if the Court believes otherwise, "further identification of the issues, facts and law involved would be necessary." In that event, they request that the matter be referred to another judge of this Court. (Letter Br. at 12–13).

DISCUSSION

A. *Procedural Issues*

Rule 4 of the General Rules of this Court governs the discipline of attorneys. Attorneys are entitled to notice and an opportunity to be heard. Gen. Rule 4(f). If, after such notice and opportunity, they are found guilty by clear and convincing evidence of violating the Code of Professional Responsibility, they may be disciplined. *Id.* In the case of an attorney admitted pro hac vice, discipline may include censure, suspension, or an order "precluding the attorney from again appearing at the bar of this court." Gen. Rule 4(g). In addition, "[u]pon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order, and of the court's opinion, if any." *Id.*

Where misconduct occurs in the presence of a judge of this Court or "in respect to any matter pending in this [C]ourt," the matter "may be dealt with directly by the judge in charge of the matter or at said judge's option referred to the committee on grievances, or both." Gen. Rule 4(k).

Here, respondents raise three procedural issues: (1) whether further action is required; (2) if so, whether the proceedings should be delayed for "further identification of the issues, facts and law"; and (3) whether the matter should be referred to another Judge of the Court. (Letter Br. at 12–13).

As to the first procedural issue, for the reasons stated herein, I believe further action is required.

As to the second procedural issue, respondents have been provided with notice and an opportunity to be heard. Indeed, they were given two opportunities to explain why they asked the questions contained in the December 9th Letter. Moreover, my order to show cause specified that I was concerned about their conduct on November 13 and December 19, 1996 and their December 9th Letter, and it further specified the two Disciplinary Rules that I believed were implicated. Hence, there is no need for "further identification of the issues, facts and law involved."

Finally, as to the third procedural issue, respondents request that the matter be referred to another Judge of this Court. The misconduct, however, occurred both in my presence and "in respect to" a matter pending before me. Thus, I have the option of dealing with the matter "directly." I choose to do so.

B. *The Applicable Disciplinary Rules*

Two Disciplinary Rules of the Code of Professional Responsibility (*see* Appendix to N.Y. Judiciary Law (McKinney 1992 & Supp. 1997)) must be considered. They are DR 1–102(A)(5) and DR 7–106(C)(6).

DR 1–102(A)(5) provides that:

> A lawyer shall not ... [e]ngage in conduct that is prejudicial to the administration of justice.

Disciplinary Rule 7–106(C)(6) provides that:

> In appearing as a lawyer before a tribunal, a lawyer shall not ... [e]ngage in undignified or discourteous conduct which is degrading to a tribunal.

Hence, the issue presented is whether the record shows, by clear and convincing evidence, that respondents engaged in conduct that was "prejudicial to the administration of justice" or that was "undignified or discourteous" and "degrading to a tribunal."

Fortunately, the case law on the subject of whether attorneys violated their ethical obligations by their conduct toward courts is sparse. It is clear, however, that attorneys who engage in disrespectful conduct against courts are subject to discipline.

For example, in *In re Evans*, 801 F.2d 703 (4th Cir.1986), *cert. denied*, 480 U.S. 906, 107 S.Ct. 1349, 94 L.Ed.2d 520 (1987), an attorney was disbarred by the district court for accusing a magistrate judge of either being incompetent or having a "Jewish bias" in favor of an adversary. *Id.* at 704. The district court found that the attorney had, by his conduct, violated DR 1–102(A)(5), 7–106(C)(6), and 8–102(B).[3] *Id.* at 705.

The attorney appealed, and the Fourth Circuit affirmed, concluding, among other things, that the attorneys' accusations against the magistrate of incompetence and religious and racial bias were "unquestionably undignified, discourteous, and degrading." *Id.* at 706. Moreover, the Fourth Circuit found that because the accusations were made while the underlying case was on appeal, the district court properly viewed the accusations as "an attempt to prejudice the administration of justice in the course of the litigation." *Id.*

In *People ex rel. Chicago Bar Ass'n v. Metzen*, 291 Ill. 55, 125 N.E. 734 (1919), an attorney was disbarred for writing a letter to a judge stating that the attorney "was usual-

3. DR 8–102(B) prohibits a lawyer from making false accusations against a judge. Respondents have disavowed that they were making any accusations against me. Although the point is debatable, I have chosen not to invoke DR 8–102(B).

ly engaged in dealing with men and not irresponsible political manikins or appearances of men." *Id.* at 735. The Illinois Supreme Court wrote:

> Judges are not exempt from just criticism, and whenever there is proper ground for serious complaint against a judge, it is the right and duty of a lawyer to submit his grievances to the proper authorities, but the public interest and the administration of the law demand that the courts should have the confidence and respect of the people. Unjust criticism, insulting language, and offensive conduct toward the judges personally by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity, cannot be permitted.

Id. at 735. *See also In re Greenfield,* 24 A.D.2d 651, 262 N.Y.S.2d 349, 350 (2d Dep't 1965) (suspending one attorney and disbarring another for writing a letter to a judge falsely accusing the judge of misconduct in office); *Kentucky Bar Ass'n v. Williams,* 682 S.W.2d 784, 786 (Ky.1984) (suspending attorney for three months for deliberately failing to appear for court appearance and for writing disrespectful letter to the trial judge and holding "[d]eliberately disrespectful actions toward the judiciary cannot help but tend to bring Bench and Bar into disrepute").

[1] The source of a court's power to discipline an attorney for misconduct is clear. As the Supreme Court has held,

> Courts have long recognized an inherent authority to suspend or disbar lawyers.... This inherent power derives from the lawyer's role as an officer of the court which granted admission.

In re Snyder, 472 U.S. 634, 643, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985); *accord In re Jacobs,* 44 F.3d 84, 87 (2d Cir.1994) ("A district court's authority to discipline attorneys admitted to appear before it is a well-recognized inherent power of the court."), *cert. denied,* 516 U.S. 817, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995); *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 470–71, 162 N.E. 487 (1928) (" 'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.") (citations omitted). This power extends as well to out-of-state attorneys who are granted the privilege of appearing pro hac vice: "Just as with a regularly admitted attorney, one seeking admission pro hac vice is subject to the ethical standards and supervision of the court." *In re Rappaport,* 558 F.2d 87, 89 (2d Cir.1977); *see also Leis v. Flynt,* 439 U.S. 438, 441–42, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) (ability of an out-of-state attorney to appear *pro hac vice* is a "privilege" and "not a right granted either by statute or the Constitution").

C. *Respondents' Conduct*

[2] I find, by clear and convincing evidence, that respondents, and in particular Mr. Klayman, engaged in undignified and discourteous conduct that was both degrading to the Court and prejudicial to the administration of justice. That conduct includes the following:

1. *The November 13, 1996 Comment*

Mr. Klayman stated on November 13, 1996 that "[w]e hope in the future this court functions better because frankly it has not functioned well ...." (Trial Tr. at 451). This comment was undignified, discourteous, and degrading to the Court. Although respondents now contend that this comment "was not referring to the period after the case was reassigned," nonetheless, the comment was not made in a constructive manner and was degrading to the Court as a whole. (Letter Br. at 3).

In fact, a review of the court file shows that whatever delay there was in the case was largely attributable to Macdraw and its counsel. For example, Macdraw did not make a timely jury demand; as a consequence, it filed a motion for a jury trial, a renewed motion for a jury trial, a petition for a writ of mandamus requiring the district court to grant a jury trial, and a petition for rehearing en banc—all of which were unsuccessful. Ultimately, Macdraw requested and was granted a stay of the proceedings so that it could file a petition for certiorari to the

Supreme Court. In addition, although it had no realistic chance of winning a summary judgment motion as the plaintiff in a case that turned on a disputed oral promise, it nonetheless filed such a motion, which led to a cross motion for sanctions and further litigation, including appellate litigation. All of these actions—as well as others by Macdraw and its attorneys—served to prolong the proceedings.

2. *The December 9th Letter*

The questions contained in the December 9th Letter were inappropriate and were asked in an undignified and disrespectful manner. They were asked, as respondents concede, in part because I am Asian–American. They were asked because respondents were concerned that because I had been active with the Asian American Legal Defense and Education Fund and the Asian American Bar Association of New York before I took the bench and they had been involved in litigation that involved some individuals who happened to be Asian–American, I "might be angry at them and unable to be fair and impartial in a case in which they were counsel." (Letter Br. at 8–9).

In essence, respondents were suggesting that a judge might be "angry" at them and therefore unable to treat them fairly merely because (1) the judge was Asian–American and (2) they were involved in what some apparently have perceived to be "anti-Asian" litigation. This sentiment is absurd and demeans me individually and the Court as a whole. In fact, I was not aware, until it was brought to my attention in the December 9th Letter, that Mr. Klayman and Mr. Orfanedes had any connection to any litigation involving the John Huang fund-raising controversy.

Mr. Klayman's comment that if he were a "judicial officer" he "would not sit as a Jewish American on a case that involved a Palestinian" (12/19/96 Tr. at 9) is most telling. Judges cannot recuse themselves solely on the basis of their race or religion or the race or religion of the attorneys or parties who come before them. As Judge Motley wrote more than 20 years ago in denying a motion for her recusal in a sex discrimination case brought by a female attorney against a law firm:

> It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, ipso facto, indicate or even suggest the personal bias or prejudice required [for recusal]. The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal. Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.

Blank v. Sullivan & Cromwell, 418 F.Supp. 1, 4 (S.D.N.Y.1975). *See also Commonwealth of Pennsylvania v. Local Union 542, IUE*, 388 F.Supp. 155, 163 (E.D.Pa.), *aff'd*, 478 F.2d 1398 (3d Cir.1973), *cert. denied*, 421 U.S. 999, 95 S.Ct. 2395, 44 L.Ed.2d 665 (1975) (Higginbotham, J.) (denying defendant's motion to disqualify judge from hearing race discrimination claim, on basis of his race and comments he made in speech to "group composed of black historians," and holding "that one is black does not mean, ipso facto, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant").

3. *The December 19, 1996 Comments*

Mr. Klayman's lack of respect for the Court continued on December 19, 1996. After he admitted that the questions in the December 9th Letter were asked of me in part because of my race (12/19/96 Tr. at 7–9), he presumed to advise me on my ethical obligations under the canons of judicial ethics. (*Id.* at 14, 16–17). He took it upon himself to suggest that "your Honor has to search his own soul to a large extent." (*Id.*

at 16). These comments went beyond mere arrogance and foolishness and were undignified, discourteous, and degrading to the Court.

D. *Respondents' Claim of Hostility*

In an effort to rationalize their behavior, respondents contend that they were concerned about my fairness and impartiality because comments that I made led them to believe that I "had become hostile to them personally." (Letter Br. at 6). They cite to a number of specific instances, including my reference to their "abusive and onerous [sic] questioning in the depositions" (Letter Br. at 6 (citing Trial Tr. at 444)); my characterization of one of plaintiff's theories as "preposterous" (*id.*); my reliance on the failure of Macdraw to have made a demand on CIT before bringing suit (*id.*); my reaction to plaintiff's stated intention to file post-trial motions and my reference to plaintiff's attorneys' fees (*id.* at 448). To the extent I expressed any impatience, it was not due to any personal bias against respondents; rather, it was the result of a bias against questionable lawyering, the taking of specious positions, and the wasting of resources of the parties and the Court.

1. *The Depositions*

Respondents complain that "the Court spoke of 'very abusive and onerous questioning in the depositions' by plaintiff's counsel without identifying it." (Letter Br. at 6 (citing Trial Tr. at 444)). Not only is my statement misquoted, it is also taken out of context. The complete and accurate statement was as follows:

> I also note, by the way, that having read the depositions I am convinced that there was no effort on the part of CIT to defraud Macdraw or even to take advantage of Macdraw. *To the contrary, I found the CIT witnesses to be frank and forthright in the face of some very abusive and obnoxious questioning in the depositions.*

(Trial Tr. at 444) (emphasis added). Moreover, Mr. Klayman's questioning at the depositions was indeed "abusive and obnoxious" at times. For example, at the deposition of John Zakoworotny, he stated to the witness: "It [the question] calls for a yes or no. Don't play around with the questions. Give me a yes or no.... Tell me yes or no. This is not an exercise in your evading my question." (Zakoworotny Dep. at 67–68). When the witness later stated that he could not answer a question about a document based on his "initial review," Mr. Klayman responded: "You want to review it more thoroughly? Read it five times." (*Id.* at 78). When the witness tried to answer another question by providing an explanation, Mr. Klayman chastised him as follows:

> Just answer the question. I think you've had too much preparation. Just answer the question. And I put "preparation" in quotes. You're tied like a pretzel. Just answer the question.

(*Id.* at 81–82). There are numerous other examples. (*See, e.g.*, Zakoworotny Dep. at 44–45, 56–57, 60–61, 67–68, 71, 83, 86, 90–91, 97; Swallwell Dep. at 21–22, 40–41).

2. *Plaintiff's "Preposterous" Claim*

I did describe one of Macdraw's theories as being "preposterous" (Trial Tr. at 444), and indeed it was. Macdraw was contending that a relatively low-level employee, who had been employed by CIT at that point for only five months, was conspiring with others at CIT to cheat Macdraw by lulling it into providing services to Laribee to enhance the value of equipment that CIT could later seize as security and re-sell at a higher price when Laribee defaulted. The only motive that Macdraw could offer for why Johnston would engage in this conspiracy to defraud was that he hoped to improve his chances of being promoted. The notion that a low level employee would see perpetuating a fraud as a means to obtain a promotion is indeed preposterous.

3. *The Absence of a Demand*

In my findings of fact and conclusions of law, I observed that "[i]t is also significant that Macdraw never, prior to this lawsuit, ever made a demand on CIT or communicated its belief that CIT had made a promise or guarantee that it refused to honor." (Trial Tr. at 444). Respondents claim that this observation further demonstrates my hostili-

ty toward them because my observation (1) was purportedly based on "an error of fact," citing PX 133, and (2) in any event was "irrelevant." (Letter Br. at 6). Respondents are wrong in both respects.

First, PX 133 hardly constitutes a "demand" letter or a communication from Macdraw to CIT setting forth a claim that CIT had made a promise or guarantee that it refused to honor. Rather, the January 29, 1991 letter from counsel for Macdraw simply asks Mr. Zakoworotny of CIT to "contact [the attorney] regarding certain issues that [Macdraw] needs to address promptly re[g]arding the balance due." (PX 133). In contrast, Mr. Colella, the President of Macdraw, testified in response to the Court's questions that Macdraw had not communicated to CIT, before bringing the lawsuit, its belief that CIT had made and failed to honor such a promise. (Trial Tr. at 145–46; *see also id.* at 142–43). Hence, the record shows that no demand was made prior to suit being filed.

Second, the issue of whether Macdraw had made its view known to CIT before the filing of suit was relevant. Macdraw's failure to make such a demand supports CIT's contention that the claim lacks any merit and that, as a factual matter, Macdraw did not actually believe that any promise had been made by CIT to Macdraw. Significantly, when CIT's counsel commenced this line of inquiry on cross-examination of Mr. Colella, Macdraw's counsel did not object. (Trial Tr. at 142–46).

4. ***Post-Trial Motions and Attorneys' Fees***

Respondents also find evidence of my "hostility" toward them in my response to their stated desire to make post-trial motions and my comments on what they describe as "irrelevant issues like the reasonableness of their attorneys fees." (Letter Br. at 6). Apparently to show the reasonableness of their fees, respondents point to the fact that defendants incurred some $355,654 in legal fees. (*Id.* at 7).

My comments, however, reflect no bias. First, the issue of Macdraw's attorneys' fees was raised on cross-examination of Mr. Colella. Again, there was no objection to this line of inquiry. (Trial Tr. at 173–74). Second, my concern was not with whether the fees that Macdraw had already paid were reasonable for the services rendered or whether services were actually rendered. Rather, I was concerned that Macdraw had already spent more than $300,000 on a claim that, in my view, never had much chance of succeeding. I was also concerned that $300,000 in fees had been spent on a claim based on CIT's refusal to provide $711,000 in financing. Furthermore, I was concerned that Macdraw would be billed even more fees for post-trial motions that had little, if any chance of success—indeed, post-trial motions in a non-jury case in which detailed pre-trial briefs had been filed (*see* Trial Tr. at 8–9) and where the outcome had turned almost entirely on issues of credibility. Indeed, my comments were made in the following context:

> MR. KLAYMAN: I understand your Honor's decision, and I'm not going to use that forum as an opportunity to re-argue that. We will be moving with post-trial motions accordingly. We feel that your Honor will have an open mind once you have had a chance [t]o look at this in a full perspective.
>
> THE COURT: What post-trial motions are we talking about? This case has gone on for 5 years. This [is] not a jury case where I have to consider if there was evidence to support the jury's verdict. I'm not going to grant any post-trial motions.
>
> I granted the defendants' motion for judgment as a matter of law. What motions do you propose to make? One of the things that troubles me, frankly, is Mr. Colella testified that he spent $300,000 in legal fees on this case. Frankly, I don't understand it....

(Trial Tr. at 447–48).

The fact that CIT also spent some $355,000 in fees certainly does not help respondents. If anything, by the time this case is completed, the parties together would have spent more in legal fees than the $711,000 in financing in question.

E. *The Administration of Justice*

In determining whether respondents have engaged in improper conduct, it is important to consider two issues that are raised by their arguments: First, to what extent do lawyers have an obligation to question the impartiality of judges? Second, what harm is there in asking?

Lawyers do have an obligation to inquire when they have a reasonable basis for believing that a judge might not be fair and impartial. But there must be a reasonable basis. *In re Evans*, 801 F.2d 703, 705–06 (4th Cir. 1986), *cert. denied*, 480 U.S. 906, 107 S.Ct. 1349, 94 L.Ed.2d 520 (1987); *People ex rel. Chicago Bar Ass'n v. Metzen*, 291 Ill. 55, 125 N.E. 734, 735 (1919). And where there is a reasonable basis for doing so, there is no harm in asking—as long as the "asking" is done in a discreet, dignified, and respectful way. If a lawyer has a reasonable basis for inquiring about a judge's ability to be impartial, the attorney might, for example, request a pretrial conference to explain the circumstances and to ask the Court whether the Court believes there is any reason it ought not to hear the particular case. But where there is no reasonable basis for questioning a judge's impartiality, or where the questioning is done in an undignified and disrespectful manner, there is harm in asking, for the integrity of the Court is challenged, the administration of justice is prejudiced, and both the bar and the bench are degraded.

Here, respondents had no reasonable or good faith basis to question my fairness and impartiality. Rather than acknowledge that fact and apologize for their actions, they instead have resorted to mischaracterizing and misrepresenting the record in an effort to justify their actions. The record does not, however, provide the justification they seek.

Moreover, instead of raising the issue discreetly and respectfully, they confronted me with what was tantamount to a series of written interrogatories, including: "could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts and/or business, political or personal dealings, if any, you have had with them, or persons related in any way to the Clinton Administration." They asked for my "immediate attention to this matter," and noted that a deadline was approaching for any post-trial motions. This was followed by further disrespectful conduct, including urging me to "search [my] own soul."

[3] Significantly, Mr. Klayman has a history of accusing judges of bias or prejudging cases. In this case, although he claims they are not accusations, he has raised questions about my ability to be fair. He accused Judge Kram of prejudging the case against plaintiff and of having "perhaps an unintentional, yet readily apparent, predisposition against its claims." And in 1992, in a case in the United States District Court for the Central District of California, Mr. Klayman accused a judge of being anti-Asian and anti-semitic and having "prejudged" the case. *See Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550, 555 (Fed.Cir.), *cert. denied*, —— U.S. ——, 117 S.Ct. 360, 136 L.Ed.2d 251 (1996). Mr. Klayman's repeated efforts to find fault with the judges before whom he appears certainly interferes with the administration of justice. *Cf. In re Snyder*, 472 U.S. 634, 647, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985) ("a single incident of rudeness or lack of professional courtesy . . . does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is 'not presently fit to practice law in the federal courts' ").

Mr. Klayman has also been sanctioned on prior occasions, including by Judge Kram in this case. Although the Second Circuit reversed the award of sanctions (largely on procedural grounds), it noted in its opinion that "in pursuing this appeal, plaintiff's counsel submitted briefs that included inaccurate characterizations of the record and comments that we consider entirely inappropriate." 73 F.3d at 1262.

Mr. Klayman was also sanctioned in the *Baldwin* case in 1992. The trial judge, because of his belief that Mr. Klayman had acted in bad faith and made certain misrepresentations, permanently and prospectively barred Mr. Klayman from appearing before him again pro hac vice and required him to attach a copy of the court's order to any future pro hac vice application in that court.

78 F.3d at 561–62. In particular, the trial judge found that Mr. Klayman had represented to the court, when he applied for admission pro hac vice, that he had never been sanctioned before when, in fact, his former firm, Klayman & Gurley, P.C., had been sanctioned in a matter handled by Mr. Klayman and two other attorneys at the firm. *Id.* at 562. The Federal Circuit affirmed, holding, among other things, that the trial judge had not abused his discretion in finding misconduct on the part of Mr. Klayman and his firm. *Id.*

Mr. Klayman and his current firm were also sanctioned $1,500 in *Wire Rope Importers' Ass'n v. United States,* 1994 WL 235620, 18 C.I.T. 478 (CIT 1994), for making a "frivolous" filing and for raising arguments that "stood no chance of success." *Id.* at *6–7.

Mr. Orfanedes is certainly less culpable than Mr. Klayman. The comments about which I am concerned were made not by him but by Mr. Klayman. Moreover, Mr. Orfanedes does not appear to have a history of this type of conduct as does Mr. Klayman. Nonetheless, Mr. Orfanedes signed the letter, was present when Mr. Klayman made the comments, and effectively joined in them. Hence, he must be held accountable as well.

CONCLUSION

As noted above, in reversing the prior award of sanctions against plaintiffs' counsel in this case, the Second Circuit wrote:

> There is no question that our rules permit sanctions where an attorney's conduct degrades the legal profession and disserves justice. In the face of significant abuse, a district court need not hesitate to impose penalties for unreasonable conduct and acts of bad faith.

73 F.3d at 1262. Respondents have engaged in significant abuse, unreasonable conduct, and acts of bad faith. Their conduct has degraded the legal profession and disserved justice.

Accordingly, it is hereby ORDERED as follows:

(1) the admissions of Larry Klayman, Esq. and Paul J. Orfanedes, Esq. pro hac vice are hereby revoked; hence, if there are any further proceedings in this case in this Court, Macdraw will be required to retain new counsel;

(2) any future applications by Messrs. Klayman and Orfanedes to appear before me on a pro hac vice basis will be denied;

(3) Messrs. Klayman and Orfanedes shall provide a copy of this opinion to any other judge in this District to whom they may make a future application for admission pro hac vice; and

(4) The Clerk of the Court shall transmit to the courts where Messrs. Klayman and Orfanedes are admitted (as set forth in their applications for admission pro hac vice) a certified copy of this Opinion and Order.

SO ORDERED.

Michael AZIZ ZARIF SHABAZZ a/k/a Michael Hurley, Plaintiff,

v.

Jose PICO, Hearing Supervisor; Bobbie Jo LaBoy, Sergeant; Daniel Mack, Charles McCormick, Patrick Brady, E. Doyle, O'Gorman, Suber, Prison Guards; Donald Selsky, Director of the Box/Punitive Segregation, et al., individually and in their official capacities, Defendants.

No. 93 CIV. 1424(SS).

United States District Court,
S.D. New York.

Feb. 11, 1998.

Prison inmate brought § 1983 action against prison officials and employees, alleging that his constitutional rights had been violated. Defendants moved for summary judgment. The District Court, Sotomayor, J., held that: (1) inmate failed to allege facts sufficient to support conspiracy claim; (2) no showing was made that officials had acted in

18 C.I.T. 478
United States Court of International Trade.

WIRE ROPE IMPORTERS' ASSOCIATION, Plaintiff,
v.
UNITED STATES, Defendant.
GRUPO INDUSTRIAL CAMESA, et al., Plaintiffs,
Wire Rope Importers' Association, Plaintiff–Intervenor,
v.
UNITED STATES, Defendant,
The Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers, Defendant–Intervenor.

Slip Op. 94–86.
|
Court Nos. 93–04–00221, 93–04–00236.
|
May 26, 1994.

Attorneys and Law Firms

*478 Klayman & Associates, P.C., Larry Klayman, Washington, DC, for Wire Rope Importers' Assn.

Lyn M. Schlitt, Gen. Counsel, James A. Toupin, Asst. Gen. Counsel, U.S. Intern. Trade Com'n, Lyle B. Vander Schaaf, Washington, DC, for U.S.

Harris & Ellsworth, Herbert E. Harris, II, Cheryl Ellsworth, Jeffrey S. Levin and Jennifer A. Fedor, Washington, DC, for Committee of Domestic Steel Wire Rope and Specialty Cable Mfrs.

MEMORANDUM OPINION

DiCARLO, Chief Judge:

**1 Pursuant to USCIT R. 11, defendant United States in these actions moves for sanctions against counsel for the Wire *479 Rope Importers' Association (WRIA), alleging counsel violated Rule 11 in filing WRIA's complaint and its opposition to defendant's motion to dismiss such complaint in *Wire Rope Importers' Ass'n v. United States,* Ct. No. 93–04–00221, and in filing WRIA's motions for intervention in *Grupo Indus. Camesa v. United States,* Ct. No. 93–04–00236. Defendant-intervenor in the latter action also moves for sanctions against counsel for WRIA, alleging his filing of WRIA's motions for intervention violated Rule 11. The court denies defendant-intervenor's motion and grants defendant's motion in part.

Background

The first of these actions, *Wire Rope Importers' Ass'n v. United States,* was brought by WRIA to contest the final determination of the International Trade Commission (ITC) in the antidumping investigation of *Steel Wire Rope from the Republic of Korea and Mexico,* 58 Fed.Reg. 16,206 (1993). WRIA did not file a complaint within 30 days of the filing of the summons as required by 19 U.S.C. § 1516a(a)(2) (1988). Defendant United States moved to dismiss based on the untimeliness of the complaint. WRIA filed an opposition to defendant's motion to dismiss, contending that the filing of a complaint was not necessary because its summons already contained sufficient notice required of a complaint or, in the alternative, that the filing of a complaint is not jurisdictionally necessary under the current statutory scheme.

The court granted the motion to dismiss, holding that under the decision of *Georgetown Steel Corp. v. United States,* 4 Fed.Cir. (T) 143, 801 F.2d 1308 (1986), the court lacks jurisdiction when the complaint in an action under 19 U.S.C. § 1516a(a)(2) is filed more than 30 days after the filing of the summons, and that WRIA presented no valid argument distinguishing its case from the established case law. *Wire Rope Importers' Ass'n v. United States,* 17 CIT ——, Slip Op. 93–193 (Sept. 27, 1993). WRIA appealed the court's decision on October 1, 1993. The appeal, however, was dismissed by the Federal Circuit for failure to prosecute. *Wire Rope Importers' Ass'n v. United States,* No. 94–1010 (Fed.Cir. Dec. 28, 1993) (order of dismissal).

After defendant moved to dismiss WRIA's action, WRIA filed a motion to intervene as of right or alternatively by permission in the second of these actions, *Grupo*

Indus. Camesa v. United States, which was brought by plaintiff Grupo Industrial Camesa to contest the same ITC determination. Defendant and defendant-intervenor in that case opposed WRIA's motion to intervene, alleging intervention was untimely under USCIT R. 24. The court granted WRIA's motion to intervene as of right, based on a finding that, under the unusual circumstances of the case, WRIA had shown good cause for the late filing of its motion to intervene under Rule 24(a). Opinion and Order dated October 7, 1993, Ct. No. 93–04–00236. The court held, however, that WRIA's intervention must be confined to the claims set forth in the complaint of ***480** plaintiff Grupo Industrial Camesa because any new claim raised by WRIA would be time-barred under 19 U.S.C. § 1516a(a)(2). *Id.*

****2** Prior to the court's decisions to dismiss WRIA's action and to grant WRIA's intervention in *Grupo Indus. Camesa,* defendant moved for Rule 11 sanctions against counsel for WRIA, alleging counsel's filings of WRIA's complaint and its opposition to defendant's motion to dismiss in WRIA's action, and his filing of WRIA's consolidated motions to intervene in *Grupo Indus. Camesa,* violated Rule 11. Defendant requested sanctions in the amount of $6,454.35, reflecting its attorney's billable time and charges for Westlaw database research. Defendant-intervenor in *Grupo Indus. Camesa* moved for Rule 11 sanctions against counsel for WRIA based on his filing of WRIA's motions to intervene, requesting sanctions in the amount of $2,070.00 to cover the cost of its counsel's billable time.

On March 7, 1994, the court held an oral argument, at which all the parties involved presented their arguments.

On May 18, 1994, the court dismissed *Grupo Indus. Camesa* upon a decision on merits. *Grupo Indus. Camesa v. United States,* 18 CIT —, Slip Op. 94–82 (May 18, 1994).

Discussion

The question before the court is whether counsel for WRIA violated USCIT R. 11 in filing the above-mentioned pleading and motions. The court's dismissals of these actions do not affect its jurisdiction over Rule 11 proceedings arising out of them. *See Willy v. Coastal Corp.,* 503 U.S. 131, 112 S.Ct. 1076 (1992).

Rule 11 of the Rules of this court provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated.... *The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....* If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

USCIT R. 11 (emphasis added).

***481** This rule contains essentially the same provision as Rule 11 of the Federal Rules of Civil Procedure prior to

December 1, 1993. [1] "[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus ... streamline the administration and procedure of the federal courts." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 393 (1990) (citation omitted). Rule 11 imposes an affirmative duty on attorneys to certify that they have conducted a reasonable inquiry and determined that any papers filed with the court are well-grounded in fact, legally tenable and not interposed for any improper purpose. *Id.*

**3 Since the court granted WRIA's motion to intervene as of right in *Grupo Indus. Camesa v. United States,* Ct. No. 93–04–00236, the court must deny defendant-intervenor's motion and the portion of defendant's motion challenging counsel's filing of WRIA's motions to intervene in that action. What remain in question are the filings of WRIA's complaint and its opposition to defendant's motion to dismiss in *Wire Rope Importers' Ass'n v. United States,* Ct. No. 93–04–00221.

1. Application of Rule 11

Rule 11 requires an attorney to make reasonable inquiry into the law before filing a pleading, motion or other paper with the court. In determining whether reasonable inquiry was made, "the applicable standard is one of reasonableness under the circumstances." *Business Guides, Inc. v. Chromatic Communications Enters.,* 498 U.S. 533, 551 (1991). Under the objective standard of reasonableness, a showing of subjective bad faith is not required to trigger the sanctions under the rule. *Eastway Constr. Corp. v. City of New York,* 762 F.2d 243, 253–54 (2d Cir.1985). "Rather, sanctions shall be imposed against an attorney ... where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Id.* at 254.

Defendant contends that counsel for WRIA violated Rule 11 by knowingly filing an untimely complaint and subsequently raising frivolous legal arguments to justify that untimely filing. Defendant maintains that the papers filed by counsel are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, as required by USCIT R. 11.

Counsel for WRIA admits that due to a flaw in his associate's research he missed the deadline for filing WRIA's complaint. Counsel claims, however, that he reasonably relied on the advice of his associate who reassured him that the filing of a complaint was unnecessary for the action, and that his subsequent decision to file a complaint despite its untimeliness was made "after a reasonable inquiry into whether [the late filing] was warranted by existing law or a good faith argument for the modification of existing law." Opp'n to Defs.' Rule 11 Motions, at 10. *482 According to counsel, he was aware of the holding in *Georgetown Steel,* but believed in good faith that his case was distinguishable. Counsel further reasoned that the late filing was necessary to prevent the action from being dismissed for lack of the filing of a complaint.

Under the circumstances, it may not be unreasonable for counsel to decide to proceed with a late filing in order to preserve WRIA's action in court. The question, however, is whether counsel's arguments justifying his non-compliance with the statutory filing requirement are "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." USCIT R. 11.

(a) Argument under existing law

**4 It is well established under *Georgetown Steel* that a civil action under 19 U.S.C. § 1516a(a)(2) must be commenced by two steps specified in that section: the filing of a summons within 30 days of the date of publication of the determination in the Federal Register; and the filing of a complaint within 30 days thereafter. *Georgetown Steel,* 4 Fed.Cir. (T) at 146–49, 801 F.2d at 1311–13 (holding that the court lacks jurisdiction where a complaint was filed more than 30 days after the filing of the summons); *Pistachio Group of Ass'n of Food Indus., Inc. v. United States,* 11 CIT 537, 667 F.Supp. 886 (1987) (dismissing action where plaintiffs filed a complaint 32 days after the filing of the summons); *Bearings Importers Group of Aerospace Indus. Ass'n of Am., Inc. v. United States,* 13 CIT 688 (1989) (dismissing

action where plaintiffs failed to file complaints after the filings of summonses). "Since section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions." *Georgetown Steel,* 4 Fed.Cir. (T) at 147, 801 F.2d at 1312 (citing *Lehman v. Nakshian,* 453 U.S. 156 (1981)); *accord NEC Corp. v. United States,* 5 Fed.Cir. (T) 49, 51, 806 F.2d 247, 249 (1986).

Counsel argued that WRIA's case is distinguishable from *Georgetown Steel* because the Federal Circuit in that case did not reach the question of whether a summons setting forth the grounds for an action could, in effect, serve as a complaint. Counsel claimed that WRIA's summons gave explicit notice of the grounds for its action and thus, it in effect constituted a complaint.

Counsel's argument has no merit. WRIA's summons did not contain any claim for relief or demand for judgment; as such, it did not meet the basic requirements of a complaint. *See* USCIT R. 8(a), and Practice Comment thereunder. The paragraph in the summons that allegedly gave explicit notice of the grounds for the action merely stated the following:

> The United States International Trade Commission ("ITC"), after a 3–3 vote, made affirmative final determinations that an industry in the United States is materially injured by reason of imports of *483 steel wire rope from the Republic of Korea and Mexico that are sold in the United States at less than fair value.

WRIA's Summons, ¶2. This statement contained no more than a brief description of the fact that the ITC made an injury determination after a 3–3 vote. In contrast, WRIA alleged in its untimely filed complaint that the ITC's determination, based on a 3–3 vote, violated its constitutional rights under the due process and equal protection clauses of the United States Constitution. Compl. ¶ 14. Nowhere in WRIA's summons, however, could defendant be expected to find such constitutional claims.

(b) Argument for modification of existing law

**5 Counsel for WRIA contended, in the alternative, that there exists a good faith argument for the modification of existing law, namely, the filing of a complaint is not a jurisdictional prerequisite under the current statutory scheme because 28 U.S.C. § 2636(c), not 19 U.S.C. § 1516a(a)(2), governs jurisdiction. WRIA's Opp'n to Def.'s Motion to Dismiss, at 3. Counsel failed to mention, however, that this argument had already been rejected by the Federal Circuit. *See Georgetown Steel,* 4 Fed.Cir. (T) at 147–48, 801 F.2d at 1312–13 (holding that 28 U.S.C. § 2636(c) did not modify the filing requirement in 19 U.S.C. § 1516a(a)(2)(A)). Counsel subsequently advised the court that he decided to raise this argument again because the holding of *Georgetown Steel* has never been reviewed by the Supreme Court and because the composition of the Federal Circuit has changed since that decision. Opp'n to Defs.' Rule 11 Motions, at 11.

Again, counsel's arguments are without merit. First, judicial precedents need not be Supreme Court decisions to fall within the meaning of "existing law" under Rule 11. *See e.g., DeSisto College, Inc. v. Line,* 888 F.2d 755, 764–65 (11th Cir.1989) (binding precedent in the circuit showed that unwarranted filing by party justified Rule 11 sanctions), *cert. denied,* 495 U.S. 952 (1990). Few decisions of this court have ever reached the Supreme Court, and it strains credulity to believe that the Supreme Court would grant a writ of certiorari to hear the issue of whether a complaint is jurisdictionally required under 28 U.S.C. § 1581(c) for an action commenced pursuant to 19 U.S.C. § 1516a. Furthermore, contrary to counsel's claim that he intended to have the Federal Circuit reconsider the holding in *Georgetown Steel,* counsel has failed to pursue his appeal of the court's decision dismissing WRIA's complaint. *See Wire Rope Importers' Ass'n v. United States,* No. 94–1010 (Fed.Cir. Dec. 28, 1993) (order of dismissal for failure to prosecute).

More importantly, counsel's underlying argument for the modification of existing law has lost ground since the 1984 amendment of 28 U.S.C. § 2636(c). Prior to the amendment, the statute provided that an action under 19 U.S.C. § 1516a "is barred unless commenced in accordance with the rules of the Court of International Trade *within thirty days after the date of the publication of such final determination in the Federal Register.*" 28 U.S.C. § 2636(c) (1982) (emphasis added). It ***484** was based on this provision that Georgetown Steel argued (unsuccessfully) that the only prerequisite for invoking the jurisdiction of this court was the filing of a summons within 30 days after the publication of the determination in the Federal Register.[2] The statute, however, was amended by the Trade and Tariff Act of 1984, Pub.L. 98–573, § 623(b)(1)(A), 98 Stat. 3041, to read:

> A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a] is barred unless commenced in accordance with the rules of the Court of International Trade *within the time specified in such section.*

****6** 28 U.S.C. § 2636(c) (1988) (emphasis added). Although the amendment was made for purposes unrelated to this issue, it has the effect of practically removing the foundation of counsel's argument, that is, 28 U.S.C. § 2636(c) contains different jurisdictional requirements from 19 U.S.C. § 1516a and the former, rather than the latter, controls. The plain language of amended § 2636(c) makes it clear that a party commencing an action pursuant to 19 U.S.C. § 1516a must comply with "the time specified in that section," which requires, for an action under § 1516a(a)(2), both the filing of a summons within 30 days of publication of the determination and the filing of a complaint within 30 days thereafter.

The court notes that counsel did quote § 2636(c) in its amended form, but went on to assert that, when 19 U.S.C. § 1516a "is read in connection with 28 U.S.C. § 2636(c) above, it becomes clear that 28 U.S.C. § 2636(c)—and not 19 U.S.C. § 1516a(a)(2)(A)—governs jurisdiction." WRIA's Opp'n to Def.'s Motion to Dismiss, at 3. Beyond this assertion, however, counsel has offered no explanation for his position.

The court further notes that, in presenting his argument based on § 2636(c), counsel failed to mention that the same argument had already been rejected by the Federal Circuit in *Georgetown Steel.* It was not until after defendant pointed out this omission that counsel advised the court of his intention to argue for modification of the holding in *Georgetown Steel.* Failure to cite controlling law can also be the basis for Rule 11 sanctions. *See* Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1335 (Supp.1993), and cases cited in n. 30.

Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," and the court "should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." Notes of Advisory Committee on Rules, Fed.R.Civ.P. 11, 1983 Amendment. Thus, in determining what constitutes a reasonable inquiry, the court is directed to take into consideration such factors as how much time for investigation was available to the signer, whether he depended on another member of the bar, or whether the paper was based on a plausible view of the ***485** law. *Id.* In this case, the applicable statutes and existing precedents are limited in number, and counsel had sufficient time for investigation.[3] Although counsel missed the deadline for filing WRIA's complaint as a result of relying on the advice of his associate,[4] counsel admits that he was fully aware of the existing law before deciding to file the complaint beyond the statutory time limit. As previously discussed, counsel has failed to present a plausible view of the law.

Counsel's untimely filing of WRIA's complaint and WRIA's opposition to defendant's motion to dismiss the complaint are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, as required by USCIT R. 11. Even if counsel's initial decision to file WRIA's complaint out of time could be explained by his concern for preserving WRIA's action in court, after reasonable inquiry, counsel

should have come to the conclusion that the untimely filing stood no chance of success under the existing law and that he had no reasonable argument for the modification of the existing law. At that point, counsel could have withdrawn the complaint or, at least, should not have opposed defendant's motion to dismiss the complaint. By raising frivolous arguments to justify his non-compliance with the statutory filing requirements in WRIA's action, counsel has violated his affirmative duty under USCIT R. 11.

2. The Appropriate Sanction

**7 Rule 11 requires the court to impose upon a person in violation of the Rule an "appropriate sanction." While the court must find violations of the Rule by an objective standard, it has discretion to tailor sanctions to the particular facts of the case. Notes of Advisory Committee on Rules, Fed.R.Civ.P. 11, 1983 Amendment. The sanction may be monetary—in an amount based on the attorney's fees, reasonable expenses, or in the nature of fines or penalties—or nonmonetary, in the form ranging from an oral reprimand to suspension or disbarment from practice. *See* Wright & Miller, *supra* § 1336, and cases cited in nn. 74–81, 87–90.

A monetary sanction is appropriate in this situation. Counsel's frivolous filings have wasted time and resources of defendant as well as of the court. Defendant submitted a bill showing the expenses it incurred in relation to WRIA's filings. *See* Def.'s R. 11 Motion, Attach. 4. Upon reviewing the bill and considering the circumstances of this case, the court directs counsel to pay to defendant United States the amount of one thousand five hundred dollars.

*486 Conclusion

The court holds that counsel for WRIA signed WRIA's complaint and WRIA's opposition to defendant's motion to dismiss the complaint in *Wire Rope Importers' Ass'n v. United States,* Ct. No. 93–04–00221, in violation of USCIT R. 11. Consequently, counsel for WRIA is required to pay the amount of one thousand five hundred dollars to defendant United States.

ORDER

Upon consideration of the motions and other papers filed in these actions under USCIT R. 11, and after oral argument, it is hereby

ORDERED that the motion for Rule 11 sanctions against counsel for WRIA by defendant-intervenor in *Grupo Indus. Camesa v. United States,* Ct. No. 93–04–00236, is denied; and it is further

ORDERED that defendant's motion for Rule 11 sanctions against counsel for WRIA is granted in the part relating to *Wire Rope Importers' Ass'n v. United States,* Ct. No. 93–04–00221, and denied in the part relating to *Grupo Indus. Camesa v. United States,* Ct. No. 93–04–00236; and it is further

ORDERED that counsel for WRIA, Larry Klayman, shall pay to defendant United States one thousand five hundred dollars ($1,500.00) for violation of USCIT R. 11.

All Citations

Not Reported in F.Supp., 18 C.I.T. 478, 1994 WL 235620, 16 ITRD 1658

Footnotes

1 Rule 11 of the Federal Rules of Civil Procedure was amended in 1993 and the amended Rule became effective as of December 1, 1993. Fed.R.Civ.P. 11 (1994).

2 Although *Georgetown Steel* was decided in 1986, the court there applied the 1982 version of the statute, which was in effect when Georgetown Steel filed its summons. *See* *Georgetown Steel,* 4 Fed.Cir. (T) at 147, 801 F.2d at 1312.

3 Defendant's motion to dismiss was filed on June 16, 1993; WRIA's opposition to defendant's motion to dismiss was dated July 21, 1993.

18 C.I.T. 478, 16 ITRD 1658

4 The court recognizes that the language of USCIT R. 3(a) may have contributed to his associate's confusion about the filing requirements. Rule 3(a) provides that an action contesting a determination under 19 U.S.C. § 1516a(a)(2) or (3) is "commenced by filing a summons only." However, Practice Comment to Rule 3 cites *Georgetown Steel* and states: "As provided in [19 U.S.C. § 1516a(a)(2) and (3)], a complaint shall be filed within 30 days after the filing of the summons." Since counsel claims that he was fully aware of the existing law before the filing, whether Rule 3(a) originally misled his associate is irrelevant to this decision.

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-12731
Non-Argument Calendar

D.C. Docket No. 5:13-cv-00143-ACC-PRL

LARRY KLAYMAN,

Plaintiff-Appellant,

versus

CITY PAGES,
KEN WEINER,
a.k.a. Ken Avidor,
AARON RUPAR,
PHOENIX NEW TIMES,
MATHEW HENDLEY,
VOICE MEDIA GROUP,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 27, 2016)

Before WILLIAM PRYOR, JORDAN, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Larry Klayman sued six defendants—Ken Avidor, Aaron Rupar, Matthew Hendley, City Pages, Phoenix New Times, and Voice Media Group—for defamation and defamation by implication under Florida law. The district court granted summary judgment in favor of all the defendants and denied Mr. Klayman's motions to disqualify the court and to amend his third amended complaint. Mr. Klayman now appeals. After review of the record and the parties' briefs, we affirm.

I

Because we write for the parties, we assume their familiarity with the underlying record and set out only what is necessary to resolve this appeal.

Mr. Klayman sought over $15 million in his defamation suit, which was based on three internet articles. The complaint was styled in six counts: three counts for defamation and three counts for defamation by implication. The articles themselves reported on two separate civil proceedings involving Mr. Klayman.

In June of 2009, Mr. Klayman and Stephanie Luck, his former wife, were engaged in an acrimonious child custody and support dispute in Ohio, during which Ms. Luck accused Mr. Klayman of sexually abusing their children. The magistrate judge in that case made the following findings of fact:

> [O]n more than one occasion the Plaintiff act [sic] in a grossly inappropriately [sic] manner with the children. His conduct may not have been sexual in the sense that he intended to or did derive any sexual pleasure from it or that he intended that the children would. That, however, does not mean that he didn't engage in those acts or that his behavior was proper.
>
> And for all his protestations of innocence . . . he repeatedly invoked his Fifth Amendment right against self-incrimination . . . [Because this is a civil proceeding,] the Court may draw an adverse inference from a party's decision not to respond to legitimate questions . . . .

D.E. 95-2 at 22. Mr. Klayman filed an objection to the magistrate judge's order, but the Ohio trial court overruled the objection. Mr. Klayman appealed, but the Court of Appeals of Ohio found that the trial court did not abuse its discretion when it overruled Mr. Klayman's objections to "the magistrate's finding that Klayman inappropriately touched the children." D.E. 95-6 at 11–14.

In November of 2007, Natalia Humm, Mr. Klayman's former client, filed a Florida Bar grievance against him for failing to work on her case after she had paid him a $25,000 retainer. Mr. Klayman and Ms. Humm submitted the matter to the Florida Bar Grievance Mediation Program. The parties settled, and Mr. Klayman agreed to pay Ms. Humm $5,000 within 90 days from the date of the mediation agreement. Mr. Klayman failed to make timely payments, however, and the Florida Bar filed a formal complaint with the Florida Supreme Court. Mr. Klayman eventually agreed to pay the outstanding amount, admitted to violating

several Rules Regulating the Florida Bar, and consented to a public reprimand by the Florida Supreme Court. In August of 2011, the Florida Supreme Court publicly reprimanded Mr. Klayman for failing to comply with the settlement terms.

Counts I and IV—the defamation and defamation by implication claims against Mr. Avidor, Mr. Rupar, City Pages, and Voice Media Group—are based on an article authored by Mr. Rupar and published in City Pages on September 28, 2012. The article, titled "Bradlee Dean's Attorney, Larry Klayman, Allegedly Sexually Abused His Own Children," discusses Mr. Klayman's previous comments linking homosexuality to child abuse and then quotes the Ohio Court of Appeals decision upholding the magistrate's factual findings about Mr. Klayman's conduct.

Counts II and V—the defamation and defamation by implication claims against Mr. Hendley, Phoenix New Times, and Voice Media Group—are based on an article authored by Mr. Hendley and published in the Phoenix New Times on February 22, 2013. The article is titled "Birther Lawyer Fighting Joe Arpaio Recall Was Found to Have 'Inappropriately Touched' Kids," and quotes roughly the same section of the Ohio Court of Appeals decision that was quoted in the City Pages article. This February 22, 2013, article reported that "[Mr. Klayman] was found by a court to have 'inappropriately touched' children . . . ." D.E. 52-2 at 1.

Counts III and VI—the defamation and defamation by implication claims against Mr. Hendley, Phoenix New Times, and Voice Media Group—are based on another article authored by Mr. Hendley. This article, published in the Phoenix New Times on June 18, 2013, and titled, "Larry Klayman Under Investigation by Arizona Bar," discussed an investigation by the Arizona Bar into Mr. Klayman's efforts to prevent the recall of Sheriff Joe Arpaio. The article provided a link to a Miami New Times story that discussed Ms. Humm's Florida Bar grievance. That Miami New Times story itself included a link; it directed those that clicked it to a Florida Bar web page that contained several publically available documents relating to the resolution of Ms. Humm's grievance against Mr. Klayman, including the formal complaint, the consent judgment, the report of the referee, and the Florida Supreme Court reprimand.

The defendants filed two motions to dismiss the complaint for failure to state a claim. Both times, the district court granted the motions to dismiss without prejudice and gave Mr. Klayman leave to amend his complaint.

On October 20, 2014, the defendants moved for summary judgment. They argued, in part, that Voice Media Group did not publish any newspapers, that Mr. Avidor did not write the September 28 article published by City Pages, that the evidence of actual malice was insufficient to meet a clear and convincing evidence

standard, and that the articles' statements were true. Mr. Klayman filed an opposition to the defendants' motion for summary judgment.

Before the district court ruled on the motion for summary judgment, Mr. Klayman filed a motion to perfect a prayer for punitive damages. The district court denied the motion because it was filed 11 months after the deadline to amend pleadings and because Mr. Klayman had not shown good cause to excuse the delay as required by Rule 16(b) of the Federal Rules of Civil Procedure. Mr. Klayman then filed a motion for reconsideration and in the alternative motion to certify as controlling question of law to the Eleventh Circuit for interlocutory appeal, which the district court denied.

In April of 2015, the district court granted the defendants' motion for summary judgment. In its order, the district court found that Voice Media Group and Mr. Avidor did not publish any of the articles, that Mr. Klayman had failed to establish a genuine issue of material fact as to the existence of actual malice, and that the statements in one of the articles—the February 22 article in the Phoenix New Times discussing the allegations of inappropriate touching—were true. Afterward, Mr. Klayman filed a motion to disqualify, under 28 U.S.C. §§ 144 and 455(a), which the district court also denied.

II

We review for abuse of discretion a district court's decision as to whether to disqualify. *See Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1319–20 (11th Cir. 2002).

Judges must recuse themselves when they are personally biased or prejudiced against a party or in favor of an adverse party. *See* 28 U.S.C. § 144. "To warrant recusal under § 144, the moving party must allege facts that would convince a reasonable person that bias actually exists." *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000). Judges must also recuse themselves when their "impartiality might reasonably be questioned," or when they have "a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a) and (b)(1). A court must conduct the inquiry using an objective standard. *See Christo*, 223 F.3d at 1333.

For bias to be sufficient to disqualify a judge, it generally must arise from extrajudicial sources. *See In re Walker*, 532 F.3d 1304, 1310–11 (11th Cir. 2008). If instead, the alleged bias arises from the judge's remarks or opinions during the course of judicial proceedings (and not from extrajudicial sources), the party moving for disqualification must clear a much higher hurdle. The opinions formed by a judge on the basis of facts introduced or events occurring during judicial proceedings are not a basis for a bias or partiality challenge unless they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). "Mere friction between the

court and counsel . . . is not enough to demonstrate pervasive bias." *Id.* (internal citations omitted).

Mr. Klayman argues that the district court's quoting of *Alice in Wonderland*, admonitions for his behavior, and the threat of sanctions revealed the court's bias. Because Mr. Klayman has produced no evidence that the district court formed any opinions from extrajudicial sources, he must demonstrate that the district court's remarks display such bias that a fair judgment is impossible.

Many sections of the district court's order begin with quotes from or allusions to *Alice in Wonderland.* For example, the court used the following quotation as a subheading in the section discussing actual malice: "I've been considering words that start with the letter M. Moron. Mutiny. Murder. Mmm—malice." D.E. 124 at 22. Mr. Klayman alleges that the quote implied that *he* was the moron and thus demonstrated bias. But the use of a literary device to enliven a summary judgment order does not evidence the kind of "deep seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

With respect to the district court's admonitions, Mr. Klayman primarily takes exception to the district court's following comments:

> [T]he Court learned early on in this case that this approach to litigation is the norm and not the exception for Plaintiff.
>
> While the Court would not ordinarily conclude with an admonition . . . when Plaintiff receives unfavorable

> rulings, he often plunges into a tirade against whomever he feels has wronged him . . . This is all to say that the Court will review any motion for reconsideration of this Order with a very sharp lens. Should Plaintiff file a motion to reconsider, the Court forewarns Plaintiff that any such motion must at least arguably meet the stringent standard for reconsideration of an Order, at the risk of facing sanctions from the Court.

D.E. 124 at 14 n.7 and 32. He forgets to mention, however, that the district court also reproved the defendants for possible "sandbagging" and "negligence." D.E. 124 at 13-14 n.6.

It is not uncommon for judges to quote literature or admonish parties for their behavior. *See, e.g., Mobile Logistics, LLC v. Old Dominion Freight Line, Inc.*, Docket No. 4:12-cv-02297 (S.D. Tex. filed Nov. 7, 2012) (admonishing attorneys, "1. Motions to the court must be filed with a caption. / 2. E-mails will not be read and will be deleted. The court is not your ex-girlfriend's Facebook wall."). Mr. Klayman contends that the comments were unnecessary, mocking, and unbecoming of a federal judge. What Mr. Klayman fails to do is produce evidence or convincingly show that these statements made a "fair judgment impossible." We therefore hold that the district court did not abuse its discretion in denying Mr. Klayman's motion to disqualify.

III

A

In Florida, defamation is composed of the following elements: (1) publication, (2) a defamatory statement, (3) falsity, and (4) actual damages. *See Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). Additionally, the First Amendment requires that a plaintiff who is a public person (as stipulated by the parties here) prove that the defendant acted with actual malice—knowledge or reckless disregard as to the falsity of the statement. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). This constitutional requirement is examined under a subjective standard, and a plaintiff must produce evidence that the defendants "actually entertained serious doubts as to the veracity of the published account, or [were] highly aware that the account was probably false." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016) (remanding the case to allow the plaintiffs to plead facts sufficiently alleging actual malice).

The elements of defamation by implication are (1) a juxtaposition of a series of facts so as to imply a defamatory connection between them, or (2) the creation of a defamatory implication by omitting facts. *See Rapp*, 997 So. 2d at 1106. Defamation of a public figure by implication also requires proof of actual malice because it "is subsumed within the tort of defamation . . . [so] all of the protections of defamation law . . . [are] extended to the tort of defamation by implication." *Id.* at 1108. *See also Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 90 (3d Cir. 2013) ("We agree with the First, Sixth, Seventh, and Ninth Circuits: plaintiffs in

defamation-by-implication cases must show something beyond knowledge of, or recklessness in regard to, the falsity of the statement's defamatory meaning.") (emphasis omitted).

B

We review *de novo* a district court's grant of summary judgment and apply the same legal standards governing the district court's decision. *See Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 911 (11th Cir. 2007). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ave. CLO Fund, Ltd. v. Bank of Am., N.A.*, 723 F.3d 1287, 1294 (11th Cir. 2013). Because a public figure must prove actual malice by clear and convincing evidence, the appropriate question at summary judgment is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986).

C

With respect to the City Pages article—discussing the child custody proceedings—Mr. Klayman asserts that the article gives the false impression that

he committed and was convicted of child sexual abuse. He specifically points to the sentence, "Turns out, gays aren't the only ones capable of disturbing criminal sexual behavior — apparently even conservative straight guys tight with Bradlee Dean turn out to be total creeps." Additionally, Mr. Klayman claims that the article omitted the fact that no criminal trial took place and that the Cleveland Department of Children Families, the Cuyahoga County Sheriff, and the District Attorney "cleared" him of sexual misconduct allegations. Mr. Rupar defends the use of the word "criminal," claiming that he understood the conduct described by the Ohio Court of Appeals to be "criminal" conduct. Moreover, because the Ohio Court of Appeals upheld the trial court's ruling, he believed the statement was true.

Mr. Klayman argues that the June 18 Phoenix New Times article—which described the pending Arizona Bar investigation and the prior Florida Bar grievance—is defamatory. The article stated, "Klayman's been in trouble with a Bar association before, as he was publicly reprimanded by the Florida Bar in 2011 for taking money from a client, and never doing any work." According to Mr. Klayman, this excerpt represents and gives the false impression that he was reprimanded for taking client money and never doing any work, but he was actually reprimanded for failing to pay Ms. Humm completely as required by the settlement. Mr. Hendley responds that he used the public filings related to the Florida Bar disciplinary proceedings and the Miami New Times story as the basis

for his article and that he believed the statements were true at the time of publication.

Mr. Klayman asserts that he presented circumstantial evidence to meet the clear and convincing standard and allow a reasonable jury to find actual malice. First, he says the defendants' lack of editorial or verification processes and the authors' failure to contact him for comment before publication is evidence of ill will and a reckless disregard for the truth. Second, he argues that Mr. Hendley's prior criminal convictions reveal a man "who had nothing to lose to take risks and defame others for a living," and by hiring him, City Pages demonstrated that it was "not interested in the truth." Mr. Klayman argues that this compounds the circumstantial evidence of actual malice. The final piece of evidence, according to Mr. Klayman, is the defendants' refusal to correct the statements after receiving his letter demanding correction.

Mr. Klayman's characterizations of the defendants are immaterial as to whether they actually had doubts about the veracity of the statements or alleged implications. Furthermore, on this record, the defendants' failure to investigate and poor journalistic standards are insufficient to establish actual malice. *See Michel*, 816 F.3d at 703 (explaining that "[a]ctual malice requires more than a departure from reasonable journalistic standards" and that "a failure to investigate, standing on its own, does not indicate the presence of actual malice"). To show

actual malice, a plaintiff must produce evidence "showing that the defendant purposely avoided further investigation with the intent to avoid the truth." *Id.* Mr. Klayman has not produced any such evidence, and a mere refusal to correct a publication falls short. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 286 (1964).

Evidence that an article contains information that readers can use to verify its content tends to undermine claims of actual malice. "Where a publisher gives readers sufficient information to weigh for themselves the likelihood of an article's veracity, it reduces the risk that readers will reach unfair (or simply incorrect) conclusions, even if the publisher itself has." *Michel*, 816 F.3d at 703. In this case, the September 28 article quotes the Ohio Court of Appeals' opinion: "The magistrate stated that he could draw an adverse inference from Klayman's decision not to testify to these matters because *it was a civil proceeding, not criminal.*" D.E. 52-1 at 2 (emphasis added). Likewise, the June 18 article links to the Miami New Times story that (1) discussed the Florida Bar disciplinary proceedings and (2) provided a link to the Florida Bar's public documents. These facts undercut Mr. Klayman's case; if the defendants actually had been highly aware of the publications' falsity, it is unlikely they would have included source information that refuted any defamatory claims or implications.

D

The district court entered summary judgment in favor of Voice Media Group and Mr. Avidor on every pertinent count, holding that neither published any articles. As to Count II, which was based on the February 22 article, Mr. Klayman argued that (1) the statements made by Mr. Hendley in the article were defamatory and (2) Mr. Hendley was also liable for statements he "republished" by linking to the September 28 article in his February 22 article. The district court entered summary judgment in favor of the defendants after finding that (1) the statements at issue were not false, a required element of defamation, *see Rapp*, 997 So. 2d at 1106, and (2) Mr. Hendley was not liable for statements in the September 28 article because linking to content that is already publicly available on the internet does not constitute republication. Mr. Klayman does not challenge these rulings on appeal and also fails to contest the district court's grant of summary judgment on Count V, his corresponding defamation by implication claim based on the February 22 article. Consequently, we will not consider them, and we affirm these rulings by the district court. *See Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1296–97 (11th Cir. 2010) (holding that parties waive all legal claims and arguments not briefed before the court on appeal). *See also Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("A party fails to adequately brief a claim when he does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to those claims.") (internal citation omitted).

Mr. Klayman argues that a blog post authored by Mr. Avidor—later linked to in Mr. Rupar's September 28 article that discussed the child custody case—provides sufficient evidence of defamation by implication to survive summary judgment. But Mr. Klayman did not raise this argument with the district court. In his opposition to the motion for summary judgment, Mr. Klayman mentioned the blog post as circumstantial evidence of actual malice. Only on appeal does he argue a claim for defamation by implication based on the blog post. We therefore decline to consider it. *See Norelus*, 628 F.3d at 1296 (stating that issues not raised by a party in the district court are not considered on appeal).

Considering all the evidence, and drawing all reasonable inferences in favor of Mr. Klayman, we hold that a reasonable jury could not find the existence of actual malice on the part of the defendants by clear and convincing evidence. The district court did not err in granting summary judgment in favor of the defendants. As a result, Mr. Klayman's claim that the district court erred in denying his motion to perfect a prayer for punitive damages is rendered moot.

IV

For the foregoing reasons, we affirm the district court's grant of summary judgment on all counts, the denial of Mr. Klayman's motion to disqualify, and the denial of his motion to perfect a prayer for punitive damages.

AFFIRMED.