

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v.

Case No. 09-49-GA

JOHN E. JOHNSON, JR., P29742

Respondent.

FILE
ATTORNEY DISCIPLINE BOARD
10 APR 30 AM 8:28

**REPORT OF TRI-COUNTY HEARING PANEL NO. 8
ON CHARGES OF MISCONDUCT**

Present: Chester E. Kasiborski, Jr.
Kenneth R. Chadwell
Margaret A. Costello

Introduction

The hearing in this matter was lengthy, and consumed nearly four full days. Much of the evidence presented did not relate specifically to the Respondent in this matter, John E. Johnson, Jr. (hereinafter "Mr. Johnson"). Apparently, the parties went to lengths to attempt to place the events that involved Mr. Johnson in context. Further, as noted by counsel for Petitioner in her opening statement, due to the admissions in Mr. Johnson's Answer to the allegations contained in the Formal Complaint, most of the facts were not in dispute. It is the duty of the Panel to decide whether Petitioner has proven by a preponderance of the evidence that the facts, most of which were undisputed, demonstrate that Mr. Johnson has committed professional misconduct.

The Formal Complaint contains two Counts. Count One involves Petitioner's claim that Mr. Johnson committed professional misconduct relative to the settlement of two Whistleblowers' Protection Act lawsuits brought against former Detroit Mayor Kwame Kilpatrick and the City of Detroit by former police officers. Count Two involves Petitioner's claim that Mr. Johnson committed professional misconduct relative to the handling of Freedom of Information Act ("FOIA") requests to the City of Detroit from the Detroit Free Press and a subsequent FOIA lawsuit commenced by the Detroit Free Press. Each Count of the Formal Complaint will be addressed separately in this Report.

I. COUNT ONE OF THE FORMAL COMPLAINT

A. Summary of Facts

It was undisputed that on September 11, 2007, a jury in the Wayne County Circuit Court entered a unanimous verdict in favor of plaintiffs Brown and Nelthrope and against Kwame Kilpatrick and the City of Detroit. The Petitioner alleges that: (1) Mr. Johnson and Valerie Colbert-Osamuede were requested to provide legal advice and/or opinions to the Detroit City Council subsequent to the jury's verdict in the Brown/Nelthrope matter; and (2) Mr. Johnson and Ms. Colbert-Osamuede appeared at a closed session of the Detroit City Council on September 19, 2007 and "specifically advised the Council not to settle the matter." Mr. Johnson admitted in his Answer that he attended the closed session, denied that he advised the Detroit City Council not to settle the Brown/Nelthrope matter, and further responded that he merely advised the Council that the law department had no plans to settle the Brown/Nelthrope matter. The transcript of the September 19, 2007 closed session (Petitioner's Exhibit 3) supports Mr. Johnson's version of what happened, and does not support Petitioner's version. However, that is not particularly consequential since

Mr. Johnson is not charged with professional misconduct on account of anything that was said or not said during his September 19, 2007 appearance at the closed session of the Detroit City Council.

As a result of admissions in Mr. Johnson's Answer, it is also undisputed that on October 17, 2007, Mr. Johnson knew that Ms. Colbert-Osamuede was attending a facilitation regarding attorneys' fees for the plaintiffs' lawyer in the Brown/Nelthrope matter, that Mr. Johnson received a request from Ms. Colbert-Osamuede that he join her at the facilitation, and that he did so. Petitioner alleges that, upon his arrival at the facilitation, Mr. Johnson was told by Ms. Colbert-Osamuede that the plaintiffs' attorney had offered to settle the Brown/Nelthrope matter for \$8 million and an unrelated matter, the Harris matter, for \$400,000, and was further advised by Ms. Colbert-Osamuede that attorney Stefani claimed "to have copies of embarrassing text messages between Mayor Kilpatrick and his then Chief of Staff, Christine Beatty, which he had excerpted in a motion to be filed with the court." Mr. Johnson denied those allegations in his Answer, but in his Post-Hearing Brief (at p. 3) admitted that he was advised by Ms. Colbert-Osamuede upon his arrival at the facilitation that the plaintiffs' attorney had offered a global settlement of the Brown/Nelthrope and Harris matters and claimed to have copies of the text messages. Mr. Johnson testified at the hearing that, after his arrival at the facilitation, he was told by Samuel McCargo, the attorney of record for Kwame Kilpatrick in the Brown/Nelthrope matter, that Mr. Stefani had given him a pleading which excerpted text messages which were "embarrassing" to the Mayor; however, Mr. McCargo did not state how they were embarrassing (Johnson, Tr. Vol. I, at 136-137).¹

¹ References to "Vol. __, p. __" are citations to pages of the transcript of the hearing.

The remaining allegations in Count One were all admitted by Mr. Johnson. They are as follows: Between approximately 2:00 p.m. and 5:00 p.m. on October 17, 2007, Mr. Johnson actively participated in the facilitation regarding the settlement of the Brown/Nelthrope and Harris matters. When Mr. Johnson left the facilitation at approximately 5:00 p.m. on October 17, 2007, he knew that the other participants involved in the facilitation were going to Mr. Stefani's office to reduce the terms of the settlement to writing. At approximately 5:00 p.m. on October 17, 2007, Mr. Johnson telephoned Detroit City Council Member Kwame Kenyatta and told him that a settlement had been reached in the Brown/Nelthrope and Harris matters. Council Member Kenyatta requested that Johnson have a memorandum regarding the settlements prepared for a meeting of the City Council's Internal Operations Committee scheduled for the next morning. Mr. Johnson then directed Ms. Colbert-Osamuede to prepare the memorandum requested by Council Member Kenyatta. The next morning, October 18, 2007, Mr. Johnson met with Ms. Colbert-Osamuede but did not ask to review any document or documents created the night before at Mr. Stefani's office. Instead, Mr. Johnson reviewed and approved a memorandum and a resolution for City Council that had been prepared by Ms. Colbert-Osamuede. Neither the memorandum nor the resolution prepared by Ms. Colbert-Osamuede, and reviewed and approved by Mr. Johnson, made any reference to the text messages that Mr. Stefani claimed to have in his possession or the motion that he had prepared that contained excerpts of those messages.

Finally, on October 23, 2007, the Detroit City Council approved the settlement of the Brown/Nelthrope and Harris matters. At no time prior to the approval of those settlements by the Detroit City Council did Mr. Johnson "advise any of the Council members of the

existence of the text messages and the effect they had on the parties' decision to negotiate a settlement of the Brown and Nelthrope and Harris matters.”

Other facts pertinent to Count One are as follows. The Charter of the City of Detroit provides, in Section 6-403, that: “No civil litigation of the city may be settled without the consent of the city council.” Yet, Mr. Johnson provided un-refuted evidence that the City’s Law Department sought City Council approval of settlements only where it was seeking the appropriation of money to pay a claimant.

Councilman Kwame Kenyatta was the only member of the Detroit City Council who testified. He testified that City Council typically does not review settlement documents. The City Council approves payouts and financial terms, but not other terms of settlements. Further, the City Council approves a global sum, not the allocation of that sum (Kenyatta, Tr. Vol. I, at 67, 107, 109).

Throughout the hearing, Mr. Johnson asserted that at the time of the settlement he did not have any knowledge that text messages between Kwame Kilpatrick and Christine Beatty were of a sexual nature or that they revealed a romantic relationship between the two of them. He testified that he had been advised generally, and believed, that the text messages were “embarrassing” in a political sense in that they contained frank or derogatory statements about others including other elected officials. The attorney for Petitioner readily acknowledged the absence of any proof that Mr. Johnson knew of the sexual nature of any of the text messages at the time that he recommended settlement of the Brown/Nelthrope and Harris cases (Tr. Vol. I, at 324-325).

Regarding the violations of Michigan’s Rules of Professional Conduct (MRPC) that are alleged in Count One, the Panel unanimously finds as follows.

B. Alleged Violation of MRPC 1.2(a)

First, the Panel concludes that Petitioner did not prove by a preponderance of the evidence that Mr. Johnson failed to seek the lawful objectives of a client through reasonably available means permitted by law in violation of MRPC 1.2(a). The Panel arrives at this conclusion even though it rejects Mr. Johnson's argument that MRPC 1.2(a) and other Rules of Professional Conduct addressed in Count One were inapplicable because the Detroit City Council was not a "client" and that only the City of Detroit was his client.

As the Panel found when it denied Respondent's Motion for Summary Disposition, during his appearance at the closed session of the Detroit City Council on September 19, 2007, Mr. Johnson made several statements in which he acknowledged that the City Council was his "client." See Petitioner's Exhibit 3 at pps. 40-42. Notably, each page of the of the "City Council Lawsuit Settlement Memorandum" prepared by Ms. Colbert-Osamuede and reviewed by Mr. Johnson (Petitioner's Exhibit 4) is prominently marked "Privileged and Confidential Attorney-Client Communication." Further, when the Detroit Free Press submitted its second FOIA request (Petitioner's Exhibit 10), the Law Department declined to produce that Settlement Memorandum, in part because it contended that "...memoranda to the Detroit City Council pertaining to the settlements... are exempt from disclosure under the attorney-client privilege." (Petitioner's Exhibit 11).

These Exhibits would support a finding by the Panel that with respect to receiving settlement recommendations from Mr. Johnson that involved a monetary payment, the Detroit City Council was his client. But the Panel does not have to make that finding to conclude that MRPC 1.2(a) applies. Mr. Johnson admitted during the hearing that neither

the Brown/Nelthrope nor the Harris matters could have been settled without the Detroit City Council approving the payment of money to those Plaintiffs. The comments to MRPC 1.13 make it clear that organizations, including governmental agencies, "can speak and decide only through agents." Since it was admitted by Mr. Johnson that City Council was the only office, agency or authority within the City of Detroit that could approve the payment of settlement funds, it is nonsensical for him to argue that the Detroit City Council was not owed the duties of a "client" with respect to approval of the settlements, including substantial payments, in the Brown/Nelthrope and Harris matters. If City Council was not owed the duties of MRPC 1.2(a) for a "client" then, for purposes of monetary settlements, Mr. Johnson did not owe those duties to anyone or any instrumentality of the City of Detroit, which is absurd.

However, Petitioner did not prove by a preponderance of the evidence that Mr. Johnson failed to seek the lawful objectives of the City of Detroit. There was evidence presented that in the Brown/Nelthrope matters the jury verdict against Kwame Kilpatrick and the City of Detroit, jointly and severally, was for \$6.5 million. With accrued interest, the total judgment was in the amount of \$7.9 million. Interest was continuing to accrue at the rate of approximately \$1,000 per day. Mr. Stefani was claiming the entitlement to approximately \$1 million in attorneys' fees in the Brown/Nelthrope case. Thus, at the time of settlement, absent a successful post-trial motion or appeal, the City's exposure in the Brown/Nelthrope case was nearly \$9 million. There was un-rebutted testimony from Ms. Colbert-Osamuede that the settlement of the Harris case for \$400,000 was, in effect, a bargain. Mr. Harris' claims were similar to those of Brown and Nelthrope. He had testified in the Brown/Nelthrope case and had caused Ms. Colbert-Osamuede to conclude that he

would have been an effective witness in his own case. He was also represented by Mr. Stefani. Additionally, the only witness to testify who was a member of the City of Detroit Council, Kwame Kenyatta, testified that he had been in favor of ending the Brown/Nelthrope matter from the time the jury verdict was rendered.

Petitioner contended in closing argument that the City had an interest in obtaining return of the text messages as part of the settlement and that the text messages should not have been returned by Mr. Stefani to an attorney designated by the Mayor. The Panel finds it significant that no such claim was included in the Formal Complaint. Thus, the argument appears to constitute no more than belated bootstrapping. Also, there was no evidence presented by Petitioner that the City of Detroit needed, or even wanted, the text messages returned to it. Further, the ultimate settlement documents provided that the City was entitled to obtain millions of dollars in liquidated damages if confidentiality terms regarding the text messages were violated (Petitioner's Exhibit 14). Therefore, even considering Petitioner's belated argument, Petitioner did not prove that Mr. Johnson failed to seek the lawful objectives of the City of Detroit.

C. Alleged Violation of MRPC 1.4(b)

The Panel also unanimously finds that Petitioner did not establish by a preponderance of the evidence that Mr. Johnson violated MRPC 1.4(b) by failing to explain the settlement of the Brown/Nelthrope and Harris matters "to the extent reasonably necessary" for the City to make an informed decision regarding settlement. From the evidence presented, the Panel concludes that the Detroit City Council was completely disinterested in details about the settlement. Ms. Colbert-Osamuede appeared at the Internal Operations Committee meeting on October 18, 2007 and was asked no questions

about the settlements that were being recommended. There was no evidence presented that any members of that Committee had even read her memorandum or the resolution. The Internal Operations Committee voted to refer the settlement of the Brown/Nelthrope and Harris matters to the entire City Council without making any recommendation.

Next, there is absolutely no proof that any member of the City Council received, read or relied upon the settlement memorandum. The settlement of the Brown/Nelthrope and Harris cases were considered by the City Council and approved *en masse* along with settlements of several other cases (Respondent's Exhibits D and E). The settlement was approved with no discussion by the City Council and with no questions from the City Council to the law department. Respondent's Exhibit E, a video recording of the City Council meeting of October 23, 2007, reveals that approval of the Brown/Nelthrope \$8 million settlement took less than one minute. Petitioner totally failed to prove that the Detroit City Council had any interest in the reasons that settlement was being recommended and Respondent's Exhibits demonstrate that City Council had not indicated any interest in those reasons.

There was also no evidence that the Detroit City Council would have voted any differently on settlement if it had been advised about settlement terms regarding keeping the text messages secret. Councilman Kenyatta testified that if he had known that the text messages were part of the consideration for the settlement, he "probably" would have asked for a closed session with the Law Department (Kenyatta, Tr. Vol. I, at 74). However, there was no indication from him that his vote would have changed. Nor was there any proof that the City of Detroit had to pay a higher dollar amount to settle the Brown/Nelthrope and Harris matters to obtain the agreement to keep the text messages

confidential.

The Panel also notes that Petitioner incorrectly treats the Internal Operations Committee as if it were the Detroit City Council. It is not. While Section 4-106 of the Detroit City Charter (Petitioner's Exhibit 1) permits the City Council to create committees, it does not permit the City Council to delegate to its committees any of the duties of the City Council. Section 6-403 of the City Charter states that "No civil litigation of the city may be settled without the consent of the city council." Section 6-403 assigns no settlement authority to the Internal Operations Committee of the Detroit City Council. Per Section 4-108 of the City Charter, "no action of the city council shall be effective unless adopted by at least a majority of city council members present."

Therefore, in considering whether Petitioner violated MRPC 1.4(b), the Panel must focus on what information was presented – or not presented – to the Detroit City Council, not to its Internal Operations Committee. Petitioner provided almost no evidence on that issue. All that the record reflects on that subject is that Ms. Colbert-Osamuede did not attend the October 23, 2007 City Council meeting at which the settlements of the Brown/Nelthrope and Harris matters were approved (Colbert-Osumuede, Tr. Vol. II, at 427) and Mr. Johnson's admission in his Answer to Paragraph 34 of the Formal Complaint that he personally did not "advise any of the Council members of the existence of the text messages and the effect that they had on the parties' decision to negotiate a settlement of the Brown and Nelthrope and Harris matters." That is insufficient to establish that Mr. Johnson violated MRPC 1.4(b) and the Panel finds that Petitioner failed to prove what information the City Council had when it approved the settlements on October 23, 2007.

Petitioner's Post-Hearing Brief argues (at p. 29) that: "Simply put, City Council was not given sufficient information from Respondent and his staff to permit them to make an informed decision about the settlement of both the Brown and Nelthrope and the Harris matters." However, Petitioner failed to prove that allegation by a preponderance of the evidence.

Also, as Respondent has observed in his Post-Hearing Brief (at p. 14), Mr. Johnson could not have informed the City about the romantic nature of some of the text messages or that they evidenced perjury by Kwame Kilpatrick or Christine Beatty because he did not possess that information when the settlement was approved on October 23, 2007. The Panel has noted above that the attorney for Petitioner conceded Mr. Johnson's lack of knowledge of the sexual nature of any of the text messages at that time (Tr. Vol. I, pps. 324-325). As Mr. Johnson also points out, the Preamble following MRPC 1.0 provides in part:

The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.

D. Alleged Violation of MRPC 1.7(a)

MRPC 1.7(a) provides that a "lawyer shall not represent a client if the representation of that client will be directly adverse to another client...." Regarding MRPC 1.7(a), Petitioner alleges that Mr. Johnson "knew that attorney Colbert-Osamuede's actions favored the personal interests of the former Mayor and were directly adverse to the interests of the City of Detroit and Detroit City Council...." At the outset, it appears to the Panel that MRPC 1.7(a) proscribes a lawyer from engaging in certain conduct, but does not

subject a lawyer to discipline if he/she merely “knew” that another lawyer’s actions violated MRPC 1.7(a). Further, even if MRPC 1.7(a) provides for derivative responsibility, the Panel unanimously finds that Petitioner failed to prove that Mr. Johnson knew that anything done by Ms. Colbert-Osamuede with respect to the settlement of the Brown/Nelthrope or Harris matters was “directly adverse” to the interests of the City of Detroit. While some aspects of the settlement may have favored Kwame Kilpatrick more than the City of Detroit, that does not make those aspects “directly adverse” to the City. Therefore, the Panel unanimously finds that Petitioner did not prove that Mr. Johnson violated MRPC 1.7(a).

E. Alleged Violation of MRPC 8.4(a)

Mr. Johnson was also charged with violating MRPC 8.4(a), which is a type of catchall provision. It states that it is professional misconduct for a lawyer to “...violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” For the reasons set forth above, the Panel concludes that with respect to the settlement of the Brown/Nelthrope and Harris matters, Mr. Johnson did not violate or attempt to violate the Rules of Professional Conduct, did not knowingly assist or induce Ms. Colbert-Osamuede – or anyone else – to do so, and did not violate or attempt to violate the Rules of Professional Conduct through the acts of another.

F. Alleged Violations of MCR 9.104(A)(1) – (4)

The Panel concludes that if Petitioner had proven by a preponderance of the evidence that Mr. Johnson had violated the terms of MCR 9.104(A) (1) – (3), the Panel could find that Mr. Johnson committed professional misconduct even if it also concluded that Mr. Johnson did not violate any of the Rules of Professional Conduct. Although the Panel’s Chairperson asked the parties to address this issue in their post-hearing Briefs (Tr.

Vol. IV, at 1070-71), that was unnecessary because the answer to the question is contained within MCR 9.104(A) itself, which provides in part:

The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline... (emphasis added).

See also, *Grievance Administrator v Fried*, 456 Mich 234 (1997).

However, Petitioner did not argue during oral summation that the facts proven established violations of MCR 9.104(A) (1) – (3) and Petitioner's Post-Hearing Brief contains only one conclusory sentence on that subject that was devoid of any explanation or analysis. Therefore, the Panel concludes that Petitioner has abandoned the contention that Mr. Johnson's conduct violated MCR 9.104(A) (1) – (3). Alternatively, the Panel unanimously finds that Petitioner did not prove by a preponderance of the evidence that Mr. Johnson committed misconduct by violating MCR 9.104(A) (1) – (3).

The Panel unanimously concludes that Petitioner did not prove that Mr. Johnson, either by his acts or omissions, engaged in conduct prejudicial to the proper administration of justice in violation of MCR 9.104(A)(1). Nothing that Mr. Johnson did, or that he failed to do, adversely impacted the plaintiffs in the Brown/Nelthrope or Harris matters, or the Courts in those matters. Mr. Johnson did not violate his obligations to the City of Detroit under MCR 9.104(A)(1) by his actions or inaction during the settlement of those matters for reasons set forth above.

The Panel also unanimously finds and concludes that Petitioner did not prove by a preponderance of the evidence that Mr. Johnson engaged in conduct that exposes the legal profession or the courts to "obloquy, contempt, censure or reproach" in violation of MCR 9.104(A)(2), as alleged in Count One of the Formal Complaint. Likewise, the Panel

unanimously finds and concludes that Petitioner did not prove by a preponderance of the evidence that Mr. Johnson, by his acts or omissions, engaged in conduct that is “contrary to justice, ethics, honesty or good morals” in violation of MCR 9.104(A)(3) during the settlement of the Brown/Nelthrope and Harris cases. For the same reasons that Petitioner failed to prove that Mr. Johnson violated any of the Rules of Professional Conduct as alleged in Count One of the Formal Complaint, the Panel concludes that Petitioner also failed to prove violations of MCR 9.104(A)(2) or (3).²

G. Summary of Count One Rulings

To summarize, the Panel finds that Petitioner did not carry its burden of proof on Count One and finds that Petitioner did not prove by a preponderance of the evidence that Mr. Johnson committed the acts of professional misconduct with which he was charged. Petitioner’s Post-Hearing Brief contends (at p. 31) that Mr. Johnson did not discuss with other lawyers whether to advise the judge in the Brown/Nelthrope matter about attorney Stefani’s violation of a court order. However, Petitioner did not charge Mr. Johnson with professional misconduct on that ground in the Formal Complaint. Therefore, the Panel declines to address that argument in this matter and also finds that it would be prejudicial to Mr. Johnson if Petitioner were permitted to pursue that new argument after conclusion of the hearing. Accordingly, for all of the reasons set forth above, the Panel unanimously finds and concludes that Count One of the Formal Complaint should be dismissed with prejudice.

² MCR 9.104(A)(4) provides that conduct that “...violates the standards or rules of professional conduct adopted by the Supreme Court” constitutes misconduct and grounds for discipline. Since the Panel has found that Mr. Johnson did not violate the Michigan Court Rules or the Michigan Rules of Professional Conduct as alleged in Count One of the Formal Complaint, it necessarily follows that the Panel must conclude that he did not violate MCR 9.104(A)(4).

II. COUNT TWO OF THE FORMAL COMPLAINT

A. Summary of Relevant Facts

There is no dispute that Mr. Johnson had direct supervisory authority over Valerie Colbert-Osumuede's conduct relative to the City's responses to the Detroit Free Press' FOIA requests including all resulting litigation over those requests. In fact, beginning in August 2007 with the departure of Deputy Corporation Counsel Brenda Braceful, Mr. Johnson was Colbert-Osumuede's direct supervisor on all matters (Johnson, Tr. Vol. I, at 120).

During the settlement of the Brown/Nelthrope litigation, Mr. Johnson personally attended the settlement negotiations on October 17, 2007, approved the amount of the settlement, and assigned Ms. Colbert-Osumuede to attend a separate meeting without him where the settlement would be reduced to writing (Johnson, Tr. Vol. I, at 146-47). The settlement was in fact reduced to writing on October 17, 2007, in a document entitled "Settlement Agreement" (Petitioner's Exhibit 12), and signed by all parties including by Ms. Colbert-Osumuede on behalf of the City of Detroit. Ms. Colbert-Osumuede left the settlement meeting with the City of Detroit's copy of the Settlement Agreement (Colbert-Osumuede, Tr. Vol. II, at 401). The next day, Mr. Johnson reviewed and approved Ms. Colbert-Osumuede's memo regarding the settlement for presentation to the Detroit City Council (Petitioner's Exhibit 4), without reviewing or asking to review the signed Settlement Agreement (Johnson, Tr. Vol. I, at 151-52), although he believed that a written settlement agreement existed (*Id.* at 152).

On October 19, 2007, the Detroit Free Press ("Free Press") sent a request via letter to the City of Detroit Law Department under the Freedom of Information Act ("FOIA"). The FOIA letter requested the following:

The entire settlement agreements in the two separate Wayne County Circuit Court lawsuits between [Brown & Nelthrope v. Kilpatrick and City of Detroit and Harris v. Kilpatrick and City of Detroit]. This request includes but is not limited to all documents, attachments, exhibits, notes or other information related to the settlements. (Petitioner's Exhibit 8).

The FOIA request was handled by Supervising Assistant Corporation Counsel Ellen Ha, who specialized in such matters. Although Mr. Johnson was not Ha's direct supervisor, he was aware of the FOIA request and became directly involved in responding to the FOIA request. Mr. Johnson testified that, per his procedure, he was to be notified of all FOIA requests from the media and that Ms. Ha forwarded the FOIA request to him (Johnson Vol. I, p. 162 and 164).

Ms. Ha spoke directly with Mr. Johnson about the FOIA request and he asked Ha whether settlement documents are subject to FOIA. Ha advised Mr. Johnson that settlement documents are subject to FOIA (Ha, Tr. Vol. III, at 583). Mr. Johnson also directed Ellen Ha to speak with Valerie Colbert-Osamuede about the FOIA request. When Ms. Ha told Ms. Colbert-Osamuede what the FOIA request was seeking, Ms. Colbert-Osamuede provided Ms. Ha with no documents but merely held up some sort of document and claimed that it was a "draft" (*Id.* at 584-85). At the time, Ms. Colbert-Osamuede knew, and Mr. Johnson assumed, that a settlement agreement, fully enforceable and signed by all parties, including Ms. Colbert-Osamuede, was created on October 17, 2007.

The evidence shows that when the first FOIA request arrived, Mr. Johnson believed

the terms of the settlement had been reduced to writing. First, he had left Ms. Colbert-Osumuede with the other attorneys to do just that on October 17, 2007 (Johnson, Tr. Vol. I, at 146). Second, when he spoke to Ms. Colbert-Osumuede the next day, he concluded that the settlement had been “placed in writing” because the goal had been to place it in writing and Ms. Colbert-Osumuede answered “fine” when he asked her how things went (*Id.* at 152). Third, his first reaction to the FOIA request was to ask whether settlement documents are subject to FOIA, further evincing that he believed a settlement document existed at the time of the FOIA request. His understanding was a correct one (See Petitioner’s Exhibit 12).

On October 29, 2007, Ellen Ha responded to the FOIA request stating that “[i]t is our understanding that, currently, there is no settlement agreement” (Petitioner’s Exhibit 9). Unknown to Ms. Ha at the time, this was a false statement. (Ha, Tr. Vol. III, at 633-35). Prior to sending her October 29 response to the Free Press, Ms. Ha forwarded it to Mr. Johnson for review. Mr. Johnson reviewed the proposed response and personally approved the language, including the falsehood that “there is no settlement agreement.” (Ha, Tr. Vol. III, at 588-89).

Two days earlier, on Saturday, October 27, 2007, Kwame Kilpatrick, then mayor of Detroit and a defendant in both the Brown/Nelthrope and Harris lawsuits, had executed a document (Petitioner’s Exhibit 13) purporting to “reject” the fully executed October 17, 2007 settlement agreement (i.e., Petitioner’s Exhibit 12). This fully captioned document was signed on a Saturday two days before the City’s FOIA response (Petitioner’s Exhibit 9) was due, notwithstanding that the Wayne County Circuit Court did not accept documents for filing on the weekend. Based upon the timing and nature of this document, it appears to

have been calculated to attempt to abrogate the October 17, 2007 Settlement Agreement and thereby make the Settlement Agreement not subject to disclosure under FOIA. The Panel finds that this document did not make the law department's October 29, 2007 FOIA response truthful. Further, Mr. Johnson, Ms. Colbert-Osumuede and Ms. Ha all disclaimed any knowledge of Kwame Kilpatrick's rejection of the settlement at the time the City's FOIA response was made. Therefore, that "rejection" could not have affected the City's FOIA response.

On November 13, 2007, the Free Press sent another FOIA request to the law department seeking the following:

The entire settlement agreements in the two separate Wayne County Circuit Court lawsuits [Brown & Nelthrope v. Kilpatrick and City of Detroit and Harris v. Kilpatrick and City of Detroit]. This request includes but is not limited to all documents, attachments, exhibits, notes, records or other information related to the conclusion of the cases. This request includes any and all documents that the City or its lawyers may consider or have labeled "confidential." It also includes but is not limited to all such documents or records produced by or for city officials, staff attorneys or lawyers contracted by the city. (Petitioner's Exhibit 10).

Upon receiving this second request, Ellen Ha forwarded a copy to the Mayor's office, to Mr. Johnson and to Ms. Colbert-Osamuede. She also spoke directly with Mr. Johnson about the request and he once again directed her to address the issue with Colbert-Osamuede (Ha, Tr. Vol. III, at 590-91). The Panel finds that upon seeing this request, as Mr. Johnson admittedly did, a reasonably diligent supervising attorney would have questioned his direct supervisee Ms. Colbert-Osamuede and outside counsel for the City in an attempt to determine what confidential documents the Free Press might be referencing. Also, as the head of the City's law department, one would expect Mr. Johnson to try to find out whether

confidential documents existed about which he had not been told. Certainly this was a high profile case involving the Mayor personally and resulting in a huge multi-million dollar settlement. Moreover, a second and more specific FOIA request within a month was being made by one of the City's two major newspapers. But the record reflects that Mr. Johnson did nothing except to again refer Ms. Ha to Ms. Colbert-Osamuede.

Ms. Colbert-Osamuede, in turn, provided Ms. Ha with two settlement agreements to disclose in response to the second FOIA request. The October 17, 2007 Settlement Agreement (Petitioner's Exhibit 12) was not provided to Ms. Ha, however. Each settlement agreement provided to Ms. Ha by Ms. Colbert-Osamuede contained a merger clause falsely stating that there were no other agreements (See attachments to Petitioner's Exhibit 11). Interestingly, these two settlement agreements were signed by lawyers representing the City and the Mayor on December 5, 2007. For some unknown reason, Ms. Colbert-Osamuede signed for the City and the Mayor in the Harris settlement agreement, but permitted outside counsel to sign for the City and the Mayor in the Brown/Nelthrope case – the matter involving embarrassing text messages and secret side agreements and obligating the City to pay \$8,000,000. On December 7, 2007, two days after these two settlement agreements were finalized, Ms. Ha responded to the second FOIA request by sending a letter accompanied by the two settlement agreements referenced above (Petitioner's Exhibit 11). In doing so, Ms. Ha falsely, but unknowingly to her, represented that the forwarded settlement agreements were the only agreements in existence. Both Mr. Johnson and Ms. Colbert-Osamuede, his direct supervisee, knew that Ha was representing the December 5, 2007 settlement agreements to be the only agreements in existence when she responded to the FOIA request on December 7, 2007 (Ha, Tr. III, at

647-48). Knowing the contents of the FOIA request, Mr. Johnson reviewed the response and authorized it before it went out (Ha, Tr. III, at 594-95).

However, Mr. Johnson failed to take reasonable measures to assure that the response did not contain false statements. He assumed that the Stefani agreement not to file a motion with text message excerpts would be in writing (Johnson, Tr. Vol. IV, at 987). Since there was no reference to that important term of the agreement in the December 5, 2007 settlement agreements, Mr. Johnson should have questioned Ms. Colbert-Osumuede whether the promise was in writing and, if so, in what document was that term expressed. Mr. Johnson also did not question the outside counsel for the City as to whether any other agreements or related documents existed (Id. at 940), and did not direct Ms. Ha to do so (Id. at 988).

On January 3, 2008, the Free Press filed a lawsuit against the City to enforce what it believed to be noncompliant responses to its FOIA requests. The attorneys assigned by Mr. Johnson to defend the City were Ellen Ha and his direct subordinate Valerie Colbert-Osamuede. Ms. Colbert-Osamuede was listed first on the City's pleadings in the FOIA case as lead counsel for the City.

On January 23, 2008, Mr. Johnson first learned that the embarrassing text messages which catalyzed the settlement of the lawsuits were messages between the Mayor and Christine Beatty of a sexual nature (Johnson, Tr. Vol. I, at 221, 255-58). At that point, having witnessed the Mayor's testimony at trial, Mr. Johnson knew or had substantial reason to suspect that the Mayor had committed perjury, that the Mayor's counsel and outside counsel for the City may not have been forthright with him about the true nature of the text messages, and that Colbert-Osamuede may have known about the perjury and/or

concealed the nature of the text messages from him.

The very next day, on January 24, 2008, Colbert-Osamuede and Ha submitted a document entitled Defendant's Affirmative and Special Defenses to the Wayne County Circuit Court (Petitioner's Exhibit 22). Paragraph eight of that document claimed as follows:

In regards to Plaintiff's assertion pertaining to "additional confidential documents," if such documents exist, they could only be documents signed by individuals in their private capacity and are not public records subject to disclosure under the Michigan Freedom of Information Act. The City of Detroit and its agents did not execute, participate, negotiate, possess, or was otherwise involved in any additional documents related to the settlement of the Brown and Nelthrope v City of Detroit, et al. and Harris v City of Detroit, et al.

(*Id.* at ¶ 8)(emphasis in original). Notably, Mr. Johnson had been directed by the Mayor's office to include the language about other confidential documents being private in the Affirmative Defenses and he in turn directed Ms. Ha to do so. (Ha, Tr. Vol. III, at 653-55; Johnson, Tr. Vol. IV, at 932-36, 939). Mr. Johnson did so without any apparent reservation even though he had learned only hours before that the Mayor had been lying all along and the text messages evidenced a sexual relationship between Kwame Kilpatrick and Christine Beatty. By the time he was hand delivering language for the Affirmative Defenses from the Mayor's office, Mr. Johnson knew or should have known that the name of the game was concealment of the Mayor's indiscretions.

Contrary to the averment in the Affirmative Defenses, the City (specifically Ms. Colbert-Osamuede) did "execute, participate, negotiate, possess [and was] otherwise involved in" additional documents related to those matters (Petitioner's Exhibit 12). Moreover, Ms. Colbert-Osamuede was aware of the above quoted false representations

being made to the court in the Affirmative Defenses (Ha, Tr. III, at 650-51). Mr. Johnson knew, or should have suspected, that there were other documents pertaining to the \$8,400,000 settlement that were being withheld from the Free Press. If he did not actually know that such documents existed, at a minimum he should have inquired specifically and aggressively about whether additional documents existed. But again, he took no action to protect the City's interest, to ensure that the City's FOIA responses were accurate, to confirm that the City's pleadings were true, or to ensure that those attorneys under his direct supervision, particularly Ms. Colbert-Osamuede, were complying with the rules of professional responsibility. Under the applicable Court Rules and Rules of Professional Conduct, he was responsible for doing so.

Also on January 24, 2008, the above quoted false statements were repeated verbatim when Ms. Colbert-Osamuede and Ms. Ha submitted a document entitled Defendant City of Detroit's Response to Plaintiff's Emergency Motion of Detroit Free Press to Expedite Discovery and Order Skytel to Produce Text Messages to the Wayne County Circuit Court (Petitioner's Exhibit 17 at p. 3). A Court hearing on the motion was held the following day, January 25, 2008. Prior to the January 25, 2008 hearing, Mr. Johnson read in the paper that Mr. Stefani claimed additional secret settlement documents existed (Johnson, Tr. Vol. IV, at 958) but he nevertheless accepted Ms. Colbert-Osumuede's self-serving explanation "nothing that I know of" (Id. at 960) without questioning her further or doing anything to investigate the truthfulness of her statement.

At the January 25, 2008 hearing that was not attended by Mr. Johnson, his direct supervisee Ms. Colbert-Osamuede was present and remained mute when Ellen Ha told Wayne County Circuit Judge Robert Colombo the following:

The answer is, no, the City of Detroit did not enter into and sign agreements or understandings relating to the settlement of the lawsuits against it by Walter Harris, and by Gary Brown, and Harold Nelthrope, other than what was already provided to the Detroit Free Press and the City of Detroit's response letter dated December 7th , 2007. (Petitioner's Exhibit 18 at 13).

Unknown to Ms. Ha, but well known to Ms. Colbert-Osamuede, these representations to the Court were false. As Johnson believed to be true and Ms. Colbert-Osamuede knew, a settlement agreement had been negotiated and reduced to writing on October 17, 2007 which Colbert-Osamuede executed on behalf of the City (See Petitioner's Exhibit 12). Not only did Ms. Colbert-Osamuede fail to prevent or correct Ms. Ha's false statements to Judge Colombo, but she personally made the following additional false statements to the Court:

I did not participate in the drafting, executing of any private agreement between the Mayor, Mr. Stefani, Christine Beatty, or anyone on their behalf. So, I am unaware of any extra documents that may exist between Mr. Stefani, Mayor Kilpatrick or his private attorney, and Ms. Christine Beatty and her private attorney. The City of Detroit did not participate in any such documents. . . . I am not aware of any confidential agreements.

(Petitioner's Exhibit 18 at 19). Of course the truth was that Petitioner's Exhibit 12, the result of negotiations attended by Mr. Johnson and Colbert-Osamuede and signed by Ms. Colbert-Osamuede, which Ms. Colbert-Osamuede and Ms. Ha falsely told the Court did not exist, specifically discussed the "extra documents" which would be created to cover up the Mayor's indiscretions and which even provided liquidated damages that would be due the City if the confidentiality terms of said documents were violated. Once he learned of the true nature of the text messages, it was incumbent upon Mr. Johnson to inquire vigorously and thoroughly about the details of the settlement and the possible existence of

additional documents before he sent Ms. Colbert-Osamuede and Ms. Ha to represent the City at a hearing in the FOIA lawsuit.

B. Alleged Violation of MRPC 5.1(b)

In Count Two, Petitioner alleges that Mr. Johnson violated MRPC 5.1(b). Rule 5.1(b) provides:

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct

The Panel unanimously finds that Petitioner has proven by a preponderance of the evidence that Mr. Johnson, who had sufficient reason to suspect that the City's FOIA responses and pleadings were inaccurate, violated MRPC 5.1(b) by failing to make reasonable efforts to ensure that his direct subordinate, Valerie Colbert-Osamuede, conformed to the Rules of Professional Conduct. Specifically, while under Mr. Johnson's supervision, Ms. Colbert-Osumuede (1) caused false FOIA responses to be made by the City; and (2) lied to the court both orally and in writing. In so doing, Ms. Colbert-Osumuede violated MRPC 3.3(a)(1) (a lawyer "shall not knowingly make a false statement of material fact or law to a tribunal"); MRPC 3.3(a)(2) (a lawyer "shall not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client"); and MRPC 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.").³

³ While the Panel acknowledges that the question of whether or not Valerie Colbert-Osumuede committed professional misconduct will be decided by a different panel in a different matter, it makes this finding to obviate an argument by Mr. Johnson that he did not violate MRPC 5.1(b) because Ms. Colbert-Osumuede "conformed to the rules of professional conduct." The Panel also rejects Mr. Johnson's argument that he "did not fail to make reasonable efforts to ensure another lawyer complied with the MRPC because Ms. Colbert-Osumuede was unaware, until after January 30, 2008, that she may have made a false statement before the Court."

Given the size of the Brown/Nelthrope/Harris settlement (the largest of Mr. Johnson's tenure), his personal involvement in the negotiations, and his direct supervision of the person involved in drafting and signing the agreement on behalf of the City, one would expect Mr. Johnson to have questioned the events that were occurring, including: the language of the second FOIA request, the FOIA lawsuit, the revelation of the true reason that the text messages were "embarrassing," and the directive from the Mayor's office to insert specific language into the City's Affirmative Defenses in the FOIA case. These events, individually or cumulatively, should have alerted Mr. Johnson to the likelihood – or at least the strong possibility – that the concealment of information was taking place under his nose and by persons under his supervision. At the very minimum, Mr. Johnson should have demanded a copy of the Settlement Agreement of October 17, 2007 – to see for himself if it was a "draft" – and questioned Ms. Colbert-Osumuede thoroughly about what she had done and what she knew.

According to his own testimony, Mr. Johnson did not bother to read or even obtain a copy of the document obligating the City to pay \$8.4 million. He greeted with indifference Ms. Colbert-Osumuede's first explanation that all she had was a "draft" and her later contradictory explanation that she had lost her copy of the October 17, 2007 Settlement Agreement. As time went on, and as more events occurred that should have raised his suspicion, Mr. Johnson should have become more proactive to attempt to ascertain the truth regarding the existence and content of settlement agreements so that the City's responses to FOIA requests and its filings in the FOIA lawsuit did not

contain misrepresentations. His inactivity and total lack of curiosity at every stage smacks at best of laziness and at worst of willful ignorance.⁴

C. Alleged Violation of MRPC 5.1(c)(1)

Count Two also alleges that Mr. Johnson violated MRPC 5.1(c)(1).

Rule 5.1(c)(1) provides:

A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if: (1) the lawyer orders or, with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved.

The Panel unanimously concludes that Mr. Johnson did not violate MRPC 5.1(c)(1) by ordering Ms. Colbert-Osumuede to engage in her conduct that violated the rules of professional conduct. There is absolutely no evidence on the record that he so acted.

But this is not the end of the tale. On January 30, 2008, now knowing: (1) that the Mayor had committed perjury, (2) that his direct subordinate Ms. Colbert-Osumuede had been the lawyer examining the Mayor during the perjury, (3) that the City's FOIA responses to the Free Press were false, (4) that outside counsel hired by the City had concealed the sexual nature of the text messages from him and by extension from the City Council, (5) that his direct subordinate had signed an agreement obligating the City to pay \$8.4 million and helping to conceal the text messages but never showed him a copy of the agreement and claimed to have lost her only copy, (6) that the City's legal papers filed with the Court contained false statements, and (7) that the City had been

⁴ Because the Panel has found that Mr. Johnson violated MRPC 5.1(b), it necessarily follows that he has also violated MCR 9.104(A)(4), which is explained above in note 3, as well as MRPC 8.4(a), which is explained above at Section I.E.

unnecessarily sued under FOIA, Mr. Johnson impliedly blessed all of this in an e-mail to everyone in the law department. In the e-mail, Johnson stated: "The attorneys in this matter, Valerie Colbert-Osamuede, Sam McCargo and Wilson Copeland vigorously represented the City and the Mayor, and at all times exhibited integrity and competence. I . . . can assure you that we represented the City in a completely ethical and competent manner." (Petitioner's Exhibit 20). Mr. Johnson's e-mail illustrates that despite having knowledge of what had transpired, he apparently saw nothing wrong with his conduct, the conduct of his subordinates, or the conduct of outside counsel for the City.

In light of the information at his disposal on January 30, 2008, after the Stefani deposition in the FOIA case, including knowledge of several additional documents that clearly should have been given to the Free Press in response to its FOIA requests and lawsuit, it is very surprising to the Panel that Mr. Johnson did not reprimand or even confront Ms. Colbert-Osumuede or outside counsel for the City with outrage. Alternatively, he might at least have remained silent until he had conducted an investigation into how and why the deception had occurred and why Ms. Colbert-Osumuede had participated. Instead, only hours after the Stefani deposition and while he should have been aghast by virtue of the recent revelations, including those that came to light at the Stefani deposition, Mr. Johnson sent an e-mail defending the conduct of Valerie Colbert-Osumuede and outside counsel and characterizing it as "exhibiting integrity" and as "ethical." In drafting this e-mail, Mr. Johnson arguably ratified Ms. Colbert-Osamuede's professional misconduct in violation of MRPC 5.1(c)(1). Mr. Johnson continued to defend Colbert-Osamuede's misconduct through the date of the hearing (Johnson, Tr. Vol. I, at 300-310), and even in his post-hearing brief (p. 19). The Panel finds, however, that these acts of possible

ratification are beyond the parameters of this matter because the Formal Complaint does not allege any professional misconduct by Mr. Johnson after January 25, 2008 and because counsel for Petitioner acknowledged that Petitioner was not charging Mr. Johnson with anything that happened after the Stefani deposition (see Closing Argument, Tr. Vol. IV, at 1055), which is when Mr. Johnson composed the e-mail (Petitioner's Ex. 20). Accordingly, the Panel cannot find that Mr. Johnson violated MRPC 5.1(c)(1).

D. Alleged Violations of MCR 9.104(A)(1) and (2)

Petitioner also alleges in Count Two that Mr. Johnson violated Michigan Court Rules 9.104(A)(1) and (2). Those rules provide that the following acts or omissions by an attorney are misconduct and grounds for discipline:

- (1) conduct prejudicial to the proper administration of justice;
- (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

The unfortunate results of Mr. Johnson's inattention and failure to properly supervise Ms. Colbert-Osamuede were misleading and inaccurate FOIA responses, false statements being made in pleadings and papers filed with the Court by the City, false statements being made to a judge, an unnecessary FOIA lawsuit against the City, and unnecessary time and resources being required of Judge Colombo and the Wayne County Circuit Court, not to mention the lasting damage of putting the City of Detroit's Law Department into disrepute and exposing the City to a claim for legal fees by the Free Press. Therefore, the Panel unanimously finds that Petitioner has proven by a preponderance of the evidence that Mr. Johnson's previously described acts and omissions in supervising Ms. Colbert-Osumuede were "prejudicial to the proper administration of justice" in violation of MCR 9.104(A)(1) and

MRPC 8.4(c)⁵ and also exposed the legal profession to “obloquy, contempt, censure, or reproach” in violation of MCR 9.104(A)(2).

E. Alleged Violations of MRPC 1.7(a) and MCR 9.104(A)(3)

The Panel’s findings regarding the allegations in Count Two are essentially that Mr. Johnson was negligent and failed to make “reasonable efforts” to assure that his direct subordinate conformed to her ethical obligations. However, the Panel does not find the evidence sufficient to prove that Mr. Johnson violated MRPC 1.7(a) (representing a client whose interests are adverse to another client) or MCR 9.104(A)(3)(conduct contrary to justice, ethics, honesty or good morals) as alleged in the Formal Complaint. Therefore, the Panel unanimously concludes that Mr. Johnson did not violate those Rules.

F. Summary of Count Two Rulings

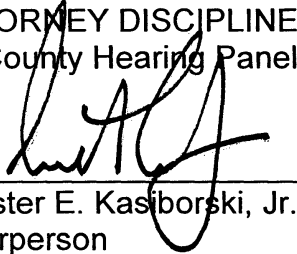
To summarize its rulings regarding Count Two of the Formal Complaint, for all of the reasons set forth above the Panel unanimously finds that Petitioner has proven by a preponderance of the evidence that Mr. Johnson has committed professional misconduct by violating MRPC 5.1(b), MRPC 8.4(a), MRPC 8.4(c), MCR 9.104(A)(1), MCR 9.104(A)(2) and MCR 9.104(A)(4). For all of the reasons set forth above, the Panel unanimously finds that Petitioner has failed to prove by a preponderance of the evidence that Respondent committed professional misconduct by violating MRPC 5.1(c)(1), MRPC 1.7(a), or MCR 9.104(A)(3)

⁵ The terms of MCR 9.104(A)(1) are re-stated in MRPC 8.4(c). Accordingly, a violation of one also violates the other.

III. FURTHER PROCEEDINGS

A hearing to determine the appropriate discipline will be scheduled pursuant to MCR 9.115(J)(2).

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel # 8



Chester E. Kasiborski, Jr.
Chairperson

Dated: April 30, 2010

#1203922 v1