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Board on Professional Responsibility

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of	:	
	:	
Theodore C. Marcus, Esquire,	:	**Disciplinary Docket No. 2021-D050**
	:	
Respondent.	:	
	:	
Member of the Bar of the District of Columbia Court of Appeals	:	
Bar Number: 439950	:	
Date of Admission: Dec. 6, 1993	:	

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 Rule X and D.C. Bar Rule XI, § 2(b).

1. Respondent Theodore C. Marcus is a member of the Bar of the District of Columbia, admitted on December 6, 1993, and assigned Bar No. 439950. Marcus has also been licensed to practice in Maryland since 1991.

The conduct and standards that Marcus has violated are as follows:

2. In 2000, Marcus began working as Senior Compliance Counsel for Bell South Corporation. In 2006, Bell South merged with AT&T, Inc., and Marcus

became in-house counsel for AT&T.[1] Marcus principally practiced at an AT&T office located in the District of Columbia.

3. AT&T participates in the Federal Communications Commission's Education Rate program ("E-Rate"), which provides discounts to eligible schools and libraries to obtain affordable broadband internet access. The program requires those participating providers to charge the eligible school or library the lowest price that a provider charges to similarly situated customers for similar services; this is known as the E-Rate's "Lowest Corresponding Price" requirement. The FCC administers the subsidies (via a third party) by collecting "universal service fees" from telecommunication companies and paying out reimbursements to chosen participants. After delivering services, providers may then seek reimbursement. But to do so, providers must submit periodic invoices and annually certify, under penalty of perjury, compliance with the E-Rate rules.

4. Marcus was chair of AT&T's E-Rate Legal/Regulatory Committee. A significant part of Marcus's job was to provide the company legal advice on E-Rate related matters. His duties included educating the company and its employees about how to comply with E-Rate. AT&T and its employees turned to Marcus for legal

[1] AT&T is a holding company comprised of many local companies, such as Wisconsin Bell, LLC and Indiana Bell Telephone Company, Inc. For ease of reading, the Specification of Charges collectively refers to these companies, past and present, as AT&T, unless otherwise needed for precision.

opinions and guidance on E-Rate issues, including those relating to Lowest Corresponding Price requirements.

AT&T Sued and Investigated;
Marcus Tasked to Handle Allegations

5. In 2008, Todd Heath filed a *qui tam* action against an AT&T affiliate, Wisconsin Bell, in a Wisconsin federal court under the False Claims Act. The FCA authorizes private citizens to bring a *qui tam* action on behalf of the United States government as a "relator" in exchange for typically 15 to 30 percent of the proceeds recovered in the action, plus fees and expenses. Heath alleged that AT&T violated the E-Rate rules and caused false or fraudulent claims to be paid by the government.

6. Around this same time, the U.S. Department of Justice initiated an investigation into allegations against another AT&T company in Indiana involving non-competitive bidding practices for E-Rate contracts, overbilling, and other claims. In February 2009, the DOJ and AT&T reached a civil settlement. As part of the deal, and without admitting liability, AT&T agreed to document and submit data demonstrating its Lowest Corresponding Price compliance for three years, which it did. The government reserved the right to extend the reporting period if it uncovered any issues with AT&T's compliance; the government did not exercise that option.

7. Separately, the FCC and DOJ opened investigations into AT&T in connection with Heath's claims in the Wisconsin case. In July 2009, the government

issued a subpoena *duces tecum* to AT&T seeking documents related to the company's E-Rate and LCP compliance.

8. In response to the lawsuit and government investigations, AT&T's in-house regulatory group, which provided advocacy and support to AT&T for its E-Rate matters, conducted an internal investigation of AT&T's participation in E-Rate and its LCP compliance, in part due to the Indiana investigation and Heath's allegations in the Wisconsin case. AT&T had appointed Marcus as co-chair of the group in or around 2007.

9. In March 2010, AT&T moved Marcus to a litigation group, where he was assigned to handle E-Rate litigation matters, including the Wisconsin case. AT&T also tasked Marcus to lead efforts to investigate and respond to the FCC subpoena, which related to the Wisconsin case.

10. Marcus's various roles within AT&T provided him with significant access to AT&T's confidential and secret information, particularly with respect to E-Rate, LCP, and Heath's lawsuit.

11. By late 2010, AT&T had expressed concerns to Marcus about his performance in the company's litigation group, specifically his ability to manage his cases and adequately communicate with his supervisors and clients. Based on those concerns, AT&T began to monitor his work and presence in the office more closely.

12. On or about March 14, 2011, AT&T issued Marcus an unfavorable

performance review, finding that Marcus was not meeting expectations. The company also denied Marcus a position that he sought at the organization.

13. A few days after receiving the performance review, Marcus reported to his superiors concerns that he had allegedly developed during his group's internal investigation. Marcus alleged that during the Indiana investigation, AT&T made false statements—through other AT&T lawyers—to the U.S. Attorney's Office about the company's LCP compliance.

14. In response to his stated concerns, AT&T hired an outside law firm to conduct an investigation. Marcus prepared an approximately 45-page "Chronological Narrative in Aid of Investigation" that detailed his allegations.

Marcus Secretly Contacts Opposing Counsel, Attempts to Join in an Action Against AT&T, and Discloses Client Confidences and Secrets

15. In April 2011, while the outside investigation remained pending and without AT&T's knowledge or consent, Marcus began to secretly communicate with Heath's lawyers in the Wisconsin case about Heath's E-Rate and LCP allegations. Marcus sought to become a "silent" co-relator in the Wisconsin case or in a new case, and to share in any proceeds from the action.

16. Marcus called Heath's lawyer, Douglas Dehler. He introduced himself as "Mr. X," stated that he was familiar with the LCP issues, and said that Heath's lawyers were "on the right track."

17. Soon thereafter, Marcus anonymously sent a package to Dehler's law

firm containing confidential documents from AT&T. The package included: (1) unredacted "E-Rate Compliance Training" materials from a meeting that Marcus attended, labeled "AT&T Proprietary (Internal Use Only): Not for use or disclosure outside of the AT&T companies except under written agreement"; (2) additional training materials from a March 2008 "E-rate Conference"; (3) a report relating to a Detroit Public Schools audit of AT&T's E-Rate billing, marked "Confidential"; and (4) legal memoranda from AT&T's outside counsel to AT&T, which were marked "privileged."

18. Marcus also contacted Heath's other lawyer at the same firm, Scott Shepherd. Marcus wanted to arrange a meeting with Shepherd. He sought to have Shepherd represent him, and he presented Shepherd with a confidential "acknowledgment" of the proposed arrangement dated April 28, 2011.

19. In his efforts to assist Heath's case, Marcus used AT&T's confidential and secret information to the disadvantage of AT&T and for his own advantage.

20. Marcus did not obtain AT&T's informed consent to consult with AT&T's opposing counsel and to disclose to the opposing party confidential and secret information that was related to the subject of the lawsuit.

21. On May 30, 2011, an AT&T senior vice president advised Marcus that the company's outside law firm had completed its investigation and found no illegal or unethical conduct. Marcus was further advised that AT&T did "not waive the

attorney client privilege as to any aspect of the e-rate investigation or any other matter in which [Marcus had] provided legal advice and counseling to AT&T" and expected Marcus to preserve the privilege. Marcus was given the option of remaining in his current position, returning to a prior position in another group, or pursuing other options.

22. After Marcus was informed of AT&T's decision, he did not refer the matter to a higher authority within AT&T, such as the board of directors or audit committee.

23. In late June 2011, Marcus resigned from AT&T. In an email to his colleagues, Marcus stated that he enjoyed their "collaboration on the LCP project" and wished them "all the best on [their] continued defense against those patently absurd claims."

24. Marcus did not disclose his anonymous communications with opposing counsel and his secret efforts to assist their case.

25. After resigning from AT&T, Marcus continued to contact Shepherd about AT&T, the E-rate program, and Heath's lawsuits. Marcus offered to help Shepherd, and on at least three occasions they met.

26. After one meeting, Marcus emailed Shepherd and provided advice about the E-rate program. Marcus offered "further assistance" and said that he looked to hear from Shepherd "after next steps are taken."

27. At a later meeting, Marcus revealed his identity to Shepherd and disclosed that he was a former lawyer for AT&T. Marcus proposed assisting in an action against AT&T, including using his knowledge of AT&T and its companies to help with discovery and to "streamline" the issues in the case.

28. Marcus provided Shepherd a proposed agreement that would make Marcus a "silent co-relator" against AT&T in return for half of the recovery from the action, for which damages were alleged to be in the millions of dollars. Both Marcus and Shepherd signed the agreement.

Heath Files Another *Qui Tam* Action that Includes AT&T's Confidential and Secret Information

29. In October 2011, Heath filed a second, broader *qui tam* lawsuit under the False Claims Act against AT&T in a D.C. federal court. He alleged that AT&T fraudulently caused claims to be paid by the government and concealed the conduct. Attorneys Shepherd and Dehler represented Heath and signed the complaint.

30. Marcus was not a named co-relator in the D.C. case.

31. However, the complaint incorporated information that Marcus anonymously provided to Heath's attorneys, including AT&T's internal training materials, which were attached as exhibits to the complaint. Heath referenced the Detroit Public Schools report in the complaint. Heath also attached as exhibits the training materials Marcus had provided and referenced them within the complaint.

32. A few months later, Heath filed an amended complaint in the Wisconsin

case, with added allegations including that AT&T "had not trained its sales force to offer, or even calculate, LCP." Dehler and Shepherd signed the amended complaint as counsel for Heath.

33. At the time, AT&T was unaware how Heath and/or his lawyers had obtained the information.

34. By mid-2012, Shepherd and Marcus stopped communicating. Around this time, Shepherd left his law firm. However, the firm would continue to represent Heath until withdrawing representation in December 2016. Dehler continues to represent Heath to this day with a new law firm.

Marcus Goes to the Press

35. In 2012, having already revealed AT&T's confidential and secret information to AT&T's opposing counsel, Marcus began communicating with Jeff Gerth, a reporter at ProPublica. Marcus knew that Gerth was "working on something, and he'd want to talk to [him]." Marcus, Heath, and Heath's counsel worked with Gerth to garner greater public attention to Heath's claims.

36. During their communications, Marcus disclosed to Gerth confidential or secret information about AT&T to which he had become privy as a result of his employment as a lawyer for AT&T.

37. On May 1, 2012, ProPublica published Gerth's article, titled "AT&T, Feds Neglect Low-Price Mandate Designed to Help Schools." The article referenced

the "E-Rate Compliance Training" materials and the Detroit Public Schools report that Marcus had secretly sent to Heath's lawyers that they had used in Heath's D.C. complaint.

38. Marcus continued to communicate with Gerth about issues related to AT&T for at least another eight years, through September 2020.

Marcus Renews Efforts to Contact Shepherd

39. In the years that followed, Heath suffered setbacks in the Wisconsin and D.C. cases. Marcus, who continued to follow the cases, renewed his efforts to contact Shepherd and convey his willingness to help. Marcus had since been hired by the FCC as an attorney advisor in the Investigations and Hearing Division.

40. In September 2012, the Wisconsin case was dismissed. However, Heath successfully appealed the dismissal.

41. In June 2014, Heath's D.C. case was dismissed. Heath again filed an appeal.

42. While the appeal in the D.C. case was pending, Marcus began to contact Heath directly. On June 27, 2015, Marcus called Heath, offered to help, and asked to have Shepherd contact him. Heath recorded the phone conversation. Marcus stated that he could help Shepherd with the "growing fight," as he "would not necessarily know the different things, and I need to make sure [I] let him know." Marcus acknowledged that he had already "done a lot" and that he needed to "report

that confidentially." He stated that there was a "lot of cash involved, and… there's a fight that goes with that." Marcus assured Heath that if he could put Shepherd in touch with him that "all of us – you, me, and him" would "greatly appreciate it." Marcus followed up by email asking Heath if he had "success in making contact."

43. Shepherd did not contact Marcus.

44. A year later, in May 2016, Marcus began to communicate with Dehler. Marcus offered his help and was looking for Dehler to represent him in a lawsuit in which Marcus would be a relator or "co-relator" against AT&T. Marcus proposed terms to Dehler, stating that among the things he needed was an "equally solid affirmation of comp terms in relation to recovery […]."

45. But after several communications and multiple attempts to arrange the meeting, Marcus postponed meeting with Dehler so he could learn what happened to Shepherd. Marcus insisted that Dehler first convince Shepherd to reach out and "affirm what's been agreed and re-establish trust." Marcus stated: "I would then be happy to do all I can for both of you within whatever appropriate limits there are."

46. However, Dehler did not arrange for Marcus and Shepherd to meet, and he and Marcus stopped communicating.

47. In September 2017, six years after first receiving AT&T's confidential information from Marcus, Dehler notified AT&T of the existence of Marcus's 2011 package. Dehler sent AT&T's outside counsel a letter with two sealed envelopes

containing the documents.

48. AT&T then learned for the first time about Marcus's disclosure of AT&T's confidences and secrets. At the parties' request, the court lifted a stay on the D.C. case for the limited purpose of permitting discovery on the issue.

49. During discovery, AT&T deposed Marcus. Marcus testified that around the time that he resigned from AT&T, Marcus attempted to contact the DOJ and disclose AT&T's alleged wrongdoing, but the department refused to receive the information, citing concerns about the attorney-client privilege. According to Marcus, he made no other efforts to report AT&T's alleged wrongdoing to the DOJ, the FCC, or any other government agency.

50. On September 15, 2020, AT&T filed in the D.C. case a motion for sanctions seeking to have the suit dismissed with prejudice and to disqualify Heath's counsel based on the "ill-gotten," privileged and confidential documents and other information that Marcus provided to Heath's counsel. The court later denied the motion, finding dismissal and disqualification of counsel to be too drastic, in part because although Heath was aware that his attorneys "had obtained internal AT&T documents," he "did not even know that Shepherd and Dehler received confidential information from an in-house attorney" until years later.

Marcus Goes to the Press Again

51. Upset by AT&T's allegations against him in its Motion for Sanctions

and hoping to "shine a light on AT&T and how it has gone unpunished," Marcus contacted the Washington Post and provided the paper with confidential or secret information about AT&T to which he had become privy as a result of his employment as a lawyer for the company.

52. During multiple interviews, Marcus provided the Washington Post with "stacks" of internal AT&T notes, internal emails, Marcus's accounts of company's internal workings, and a version of his detailed "Chronological Narrative in Aid of Internal Investigation," in which he had detailed his allegations related to AT&T's E-Rate program and LCP practices up to 2011.

53. On March 18, 2021, the Washington Post published an article titled "'There has to be an accounting': Former AT&T lawyer says company systemically overcharged neediest schools." The article cited portions of Marcus's narrative in its article, as well as Marcus's accounts of AT&T's internal workings.

54. The Washington Post article described Marcus's alleged effort to contact the DOJ. According to the article, Marcus communicated with someone at the DOJ and "was told that the department could not accept the information because of attorney-client privilege."

55. AT&T never provided Marcus informed consent to reveal its confidences or secrets to Heath, Heath's counsel, to the government, or to the press. Nor did Marcus have reasonable grounds for believing AT&T impliedly authorized

disclosure of its confidences or secrets.

56. The FCC and DOJ ended their investigations without intervening in the Wisconsin or D.C. cases or bringing separate claims against AT&T or its affiliates.

57. The Wisconsin and D.C. cases remain ongoing.

THE CHARGES

58. Respondent Theodore Marcus violated the following Rules of Professional Conduct:[2]

a. **Rule 8.4(a)** in that Marcus violated or attempted to violate the Rules of Professional Conduct;

b. **Rule 1.3(b)** in that Marcus intentionally prejudiced or damaged AT&T while serving as in-house counsel for AT&T by secretly disclosing AT&T's confidential or secret client information and assisting the opposing party against AT&T;

c. **Rule 1.6(a) and (g)** in that Marcus knowingly revealed client confidences and/or secrets, in that he used client confidences and/or secrets to the disadvantage of AT&T, and in that he used AT&T's confidences and/or secrets to his own advantage and/or to the advantage of Heath and others; and

d. **Rule 1.7** in that Marcus engaged in a conflict of interest by serving as

[2] To the extent Marcus's conduct is found to be in connection with a matter pending before a tribunal in Wisconsin per Rule 8.5(b)(1), the correlating Wisconsin Rules of Professional Conduct for Attorneys may be applicable.

AT&T's in-house lawyer while his professional judgment on behalf of AT&T was or could reasonably have been adversely affected by Marcus's responsibilities to or interests in a third party or his own financial and personal interests, and in that Marcus failed to obtain AT&T's informed consent to the conflict of interest.

Respectfully submitted,

Hamilton P. Fox, III

Hamilton P. Fox, III
Disciplinary Counsel

Ebtehaj "Eby" Kalantar

Ebtehaj "Eby" Kalantar
Assistant Disciplinary Counsel

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VERIFICATION

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

Ebtehaj "Eby" Kalantar

Ebtehaj "Eby" Kalantar
Assistant Disciplinary Counsel

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Board on Professional Responsibility

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of	:
THEODORE C. MARCUS, ESQUIRE,	: **Disciplinary Docket No. 2021-D050**
Respondent,	:

PETITION INSTITUTING FORMAL DISCIPLINARY PROCEEDINGS

A. This Petition (including the attached Specification of Charges which is made part of this Petition) notifies Respondent that disciplinary proceedings are hereby instituted pursuant to Rule XI, § 8(c), of the District of Columbia Court of Appeals' Rules Governing the Bar (D.C. Bar R.).

B. Respondent is an attorney admitted to practice before the District of Columbia Court of Appeals on the date stated in the caption of the Specification of Charges.

C. A lawyer member of a Hearing Committee assigned by the Board on Professional Responsibility (Board) pursuant to D.C. Bar R. XI, § 4(e)(5), has approved the institution of these disciplinary proceedings.

D. ***Procedures***

(1) **Referral to Hearing Committee** − When the Board receives the Petition Instituting Formal Disciplinary Proceedings, the Board shall refer it to a Hearing Committee.

(2) **Filing Answer** − Respondent must respond to the Specification of Charges by filing an answer with the Board and by serving a copy on the Office of Disciplinary Counsel within 20 days of the date of service of this Petition, unless the time is extended by the Chair of the Hearing Committee. Permission to file an answer after the 20-day period may be granted by the Chair of the Hearing Committee if the failure to file an answer was attributable to mistake, inadvertence, surprise, or excusable neglect. If a limiting date occurs on a Saturday, Sunday, or official holiday in the District of Columbia, the time for submission will be extended to the next business day. Any motion to extend the time to file an answer, and/or any other motion filed with the Board or Hearing Committee Chair, must be served on the Office of Disciplinary Counsel at the address shown on the last page of this petition.

(3) **Content of Answer** − The answer may be a denial, a statement in exculpation, or a statement in mitigation of the alleged misconduct. Any charges not answered by Respondent may be deemed established as provided in Board Rule 7.7.

(4) **<u>Mitigation</u>** − Respondent has the right to present evidence in mitigation to the Hearing Committee regardless of whether the substantive allegations of the Specification of Charges are admitted or denied.

(5) **<u>Process</u>** − Respondent is entitled to fifteen days' notice of the time and place of hearing, to be represented by counsel, to cross-examine witnesses, and to present evidence.

E. In addition to the procedures contained in D.C. Bar R. XI, the Board has promulgated Board Rules relating to procedures and the admission of evidence which are applicable to these procedures. A copy of these rules is being provided to Respondent with a copy of this Petition.

WHEREFORE, the Office of Disciplinary Counsel requests that the Board consider whether the conduct of Respondent violated the District of Columbia Rules of Professional Conduct, and, if so, that it impose/recommend appropriate discipline.

/s/ Hamilton P. Fox, III
Hamilton P. Fox, III
Disciplinary Counsel

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