THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
June 27, 2022

In the Matter of:	:	
	:	
DANA A. PAUL,	:	
	:	Board Docket No. 19-BD-063
Respondent.	:	Bar Docket No. 2019-D199
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 490142)	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This matter arises from disclosures Respondent, Dana A. Paul, made to Disciplinary Counsel in 2018 concerning a lawyer who previously filed a complaint against him, based on Respondent's representation of the lawyer and her husband. An Ad Hoc Hearing Committee found that Respondent violated D.C. Rules of Professional Conduct 1.6(a) (disclosing client confidences or secrets) and 8.4(d) (serious interference with the administration of justice) and recommended that the Court impose a ninety-day suspension.

Respondent filed an exception to the Hearing Committee Report, arguing that the Hearing Committee erred in rejecting his immunity argument and that the case should be dismissed accordingly. He does not dispute that he knowingly disclosed client confidences and secrets, which would otherwise violate Rule 1.6(a); rather, his defense to that charge rests on his argument that the disclosures were immune

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

under D.C. Bar Rule XI, § 19(a), which provides that complaints "shall be absolutely privileged" and that "no claim or action predicated thereon may be instituted and maintained," and Rule 1.6(e)(3), which permits limited disclosures necessary for a lawyer's defense to a disciplinary complaint. He also takes exception to the Committee's finding that his complaint rose to the level of a Rule 8.4(d) violation.

Regarding the sanction, Respondent disagrees with the Hearing Committee's characterization of his prior discipline as having also been based on retaliatory actions against others and contends that the recommended ninety-day suspension was "excessive." Disciplinary Counsel supports the Hearing Committee's findings and recommendations.

We agree with the Hearing Committee's analysis in rejecting Respondent's argument that he is immune from disciplinary action based on the complaint he filed with Disciplinary Counsel against his former client. We also agree that Respondent violated Rule 1.6 by disclosing client confidences and secrets in connection with the complaint against his former client. However, we determine that Respondent's conduct in submitting the complaint against his former client, although reprehensible in its wanton violation of Rule 1.6, did not seriously interfere with the administration of justice in violation of Rule 8.4(d).

II. FINDINGS OF FACT

We agree with the Hearing Committee's findings of fact and briefly restate pertinent points here with citations to the Hearing Committee's report. Respondent

represented a former client, N.E.[1], and her husband beginning in September 2017. Hearing Committee Finding of Fact ("FF") 3. Respondent withdrew from the representation in January 2018. FF 4. N.E. subsequently filed complaints against Respondent with the Maryland and D.C. disciplinary authorities, alleging that Respondent failed to follow her and her husband's instructions during the representation, took actions that prejudiced their lawsuit, and stopped communicating with them. FF 5-6. In his response to D.C. Disciplinary Counsel, Respondent argued that N.E. and her husband were not credible, that their allegations were not supported, and that the conduct was outside the jurisdiction of Disciplinary Counsel. FF 9; *see* Confidential Appendix, *infra*.

While Disciplinary Counsel was investigating N.E.'s complaint, Respondent filed his own complaint against N.E. FF 10-11. That complaint disclosed certain client confidences and secrets, as described in the Confidential Appendix, *infra*. Disciplinary Counsel opened a docketed investigation into N.E. based on Respondent's complaint.[2] FF 13. In Respondent's reply to N.E.'s response to the complaint he filed against her, he repeated his allegations that involved the disclosure of client confidences and secrets. FF 16. Respondent asserted that his complaint was part of his defense against N.E.'s allegations. FF 20.

[1] Pursuant to the Board's December 30, 2019 Protective Order, all references to client confidential and secret information are included in the Confidential Appendix, *infra*, and we refer to Respondent's former client by her initials, N.E.

[2] The Hearing Committee Report does not state the extent to which Disciplinary Counsel found Respondent's allegations credible or whether it considered filing charges against N.E.

III. DISCUSSION

The Board may make its own findings of fact, but it "must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record." *See In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see also In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient to support the conclusion reached"). We review *de novo* the Hearing Committee's legal conclusions and its determinations of ultimate fact. *See Klayman*, 228 A.3d at 717; *Bradley*, 70 A.3d at 1194 (Board owes "no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed de novo").

A. Respondent's Immunity Arguments and Motion to Dismiss

Respondent filed a Motion to Dismiss along with his Answer, contending that the charges should be dismissed because he had "absolute immunity" as a complainant pursuant to Rule XI, § 19(a), which provides:

> Complaints submitted to the Board or Disciplinary Counsel shall be absolutely privileged, and no claim or action predicated thereon may be instituted or maintained. Members of the Board, its employees, members of Hearing Committees, Disciplinary Counsel, and all assistants and employees of Disciplinary Counsel, all persons engaged in counseling, evaluating or monitoring other attorneys pursuant to a Board or Court order or a diversion agreement, and all assistants or employees of persons engaged in such counseling, evaluating or

> monitoring shall be immune from disciplinary complaint under this rule and from civil suit for any conduct in the course of their official duties.

Disciplinary Counsel opposed the motion, contending that the "privilege" afforded by Rule XI, § 19(a) only protects complainants from civil liability and does not give attorney complainants permission to violate the Rules of Professional Conduct through their complaints. The Hearing Committee agreed with Disciplinary Counsel and recommended that the Board deny Respondent's motion.

The Hearing Committee reasoned that Rule XI's language provides immunity from both civil and disciplinary action only to members of the Board, Board employees, Hearing Committees members, Disciplinary Counsel including "all assistants and employees of Disciplinary Counsel" and "all persons engaged in counseling, evaluating or monitoring other attorneys pursuant to a Board or Court order or a diversion agreement, and all assistants or employees of persons engaged in such counseling, evaluating or monitoring" and only for "conduct in the course of their official duties." In addition, the Hearing Committee noted, Rule 1.6 provides only a limited exception to an attorney's duty of confidentiality when it is necessary for an attorney to disclose client confidences or secrets in order to defend against accusations of wrongdoing in a disciplinary action, civil or criminal proceeding. Finally, the Hearing Committee reasoned that Rule 8.4(g)'s prohibition against seeking or threatening to bring disciplinary charges in order to gain an advantage in a civil matter is incompatible with Respondent's view of immunity.

We agree with the Hearing Committee's analysis. We see no support for a claim that Rule XI, § 19(a) confers immunity from disciplinary action to an attorney

complainant such as Respondent who does not fall within the categories of individuals granted "absolute privilege" under the rule. Respondent relies on *In re Spikes*, 881 A.2d 1118 (D.C. 2005) as support for his argument that "absolute privilege" should be read broadly to apply to all participants in the disciplinary system, including complainants who are not among the categories of individuals listed in Rule XI. However, *In re Spikes* involved civil defamation claims that had been brought against the complainants, who were attorneys. It did not involve disciplinary complaints. The holding in *In re Spikes* is therefore not inconsistent with the Hearing Committee's reading of Rule XI, § 19(a), which we adopt here.

In addition, Rule XI, § 19(a)'s language regarding absolute privilege has been part of Rule XI since its first version, effective April 1972. The language therefore pre-dates by 18 years subsequent current rules that explicitly address an attorney's professional obligations regarding client confidences and secrets in the context of disciplinary action. Rule 1.6(e)(3) allowing attorneys to disclose client confidences and secrets to the extent necessary to defend against disciplinary complaints arising from client representations became effective on January 1, 1991.[3] Rule 8.4(g)'s prohibition on threatening disciplinary action in order to gain an advantage in civil litigation was also effective on that date. Both 1.6(e)(3) and 8.4(g) contemplate disciplinary action to be taken against attorneys in connection with either making or

[3] A lawyer was allowed to disclose client confidences and secrets under various circumstances addressed by DR 4-101(C) in the original version of the code on professional responsibility. That rule was arguably broader than Rule 1.6(e)(3) but still allowed a lawyer to disclose confidences and secrets only "to defend himself or his employees or associates against an accusation of wrongful conduct." DR 4-101(C)(4).

defending against disciplinary complaints. Respondent's argument that Rule XI's absolute immunity from disciplinary action includes all attorney complainants is therefore further undermined.

Moreover, as noted, the limited exception to a lawyer's duty of confidentiality under Rule 1.6(e)(3) allows only such disclosure as needed for the lawyer to defend against claims of wrongdoing. It does not extend to the filing of an affirmative complaint based on client confidential and secret information. This would be so in any case but is certainly the case here where the Hearing Committee determined that Respondent filed the complaint against his former client in retaliation for the complaint she filed against him with Disciplinary Counsel. We also agree with the Hearing Committee's reasoning that Respondent's claim of absolute immunity is counter to Rule 8.4(g)'s prohibition against attorneys threatening to bring disciplinary actions in order to gain a litigation advantage in a civil action.

Accordingly, we find that Respondent is not immune from disciplinary action and therefore deny his motion to dismiss.

B. Rule 1.6(a)

Rule 1.6(a)(1) prohibits a lawyer from knowingly revealing a client's confidence or secret. Knowingly is defined as having "actual knowledge of the fact in question. "Knowledge may be inferred from circumstances." Rule 1.0(f). Rule 1.6(b) defines a "confidence" as "information protected by the attorney-client privilege under applicable law" and a "secret" as "other information gained in the professional relationship that the client has requested be held inviolate, or the

disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." *See In re Gonzalez*, 773 A.2d 1026, 1030 (D.C. 2001).

Respondent takes no exception to the Hearing Committee's finding that he knowingly revealed client confidences and secrets. Rather, in addition to his argument that he was immune from disciplinary action, Respondent relies on the exception to Rule 1.6(a) in Rule 1.6(e)(3), which provides, in relevant part, that:

> A lawyer may use or reveal client confidences or secrets . . . to the extent reasonably necessary to establish a defense to a . . . disciplinary charge . . . formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client . . . .

Such a disclosure, however, should be "no greater than the lawyer reasonably believes is necessary to vindicate innocence," and should be made "in a manner that limits access to the information to the tribunal or other persons having a need to know it," including through protective orders where appropriate. Rule 1.6, cmt. [25]. The Hearing Committee agreed with Respondent that his first letter to Disciplinary Counsel responding to N.E.'s complaint fell within this exception to the confidentiality rule, but found that his complaint against N.E. and his reply to N.E.'s response did not.

We agree with the Hearing Committee's determination. Rule 1.6(e)(3) allowed Respondent to defend against N.E.'s disciplinary complaint by using, as needed, confidential and secret information gained during his representation. *See* Confidential Appendix, *infra*. Rule 1.6(e)(3) does not allow him to file an affirmative complaint or subsequent filings, such as a reply to the former client's

response to the disciplinary complaint, revealing client confidential or secret information. An attorney who proceeds with such a course of action does so with the consequence of having to face disciplinary repercussions for an impermissible disclosure of client confidences or secrets. To the extent that Respondent argues that filing a complaint against his former client was an extension of his defense against her complaint against him, this argument is rejected as wholly undermined by Rule 1.6(e)(3)'s limiting language quoted above. Rule 1.6(e)(3) leaves no room for filing a disciplinary complaint against the former client who happens to be an attorney as a method to defend against disciplinary charges.

Similarly, Rule 8.3's requirement that an attorney inform the appropriate professional authority if he or she "knows that another lawyer" has violated the Rules of Professional Conduct in a manner that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" is limited by the lawyer's obligation to keep information subject to Rule 1.6 confidential. We agree with the Hearing Committee's rejection of Respondent's argument that Rule 8.3(a) gave him the option of filing a disciplinary complaint against N.E. despite his obligations under 1.6 and 8.3(c). *See* D.C. Bar Ethics Op. 246 (Oct. 1994) ("We believe the exemption in Rule 8.3(c), read together with Rule 1.6 itself, means that a lawyer may not report misconduct where this would entail a disclosure of information protected by Rule 1.6.").[4]

[4] Ethics Opinion No. 246 included relevant citations and noted that a "similar conclusion respecting the interaction of Rules 1.6 and 8.3(a) has been reached in several other jurisdictions." *Id.* fn. 4.

C. Rule 8.4(d)

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 61 (D.C. 1996).

The Hearing Committee agreed with Disciplinary Counsel that Respondent's disciplinary complaint against N.E. satisfied the *Hopkins* criteria because (1) the disclosure of client secrets was inherently improper and was aggravated by his retaliatory purpose; (2) it was related to an identifiable case in the discipline system; and (3) it impacted the process by causing a new disciplinary action to be docketed and requiring N.E. to retain counsel to respond to it. The Hearing Committee found that the situation was analogous to *In re Green*, Board Docket No. 13-BD-020, at 18-20 (BPR Aug. 5, 2015), *recommendation adopted*, 136 A.3d 699 (D.C. 2016) (per curiam) and *In re Martin*, 67 A.3d 1032, 1051-52 (D.C. 2013), in which the respondents tried to restrict their former clients' ability to file disciplinary complaints against them. *See* HC Rpt. at 21.

Respondent contends that he filed his complaint in response to N.E.'s, but not in retaliation. Essentially, Respondent argues that he could not have disclosed client confidences and secrets until after N.E. filed her complaint against him, at which point he believed his disclosures were protected under Rule XI, § 19(a) and Rule 1.6(e)(3).

Once again, we reject Respondent's arguments in this regard. We also adopt the Hearing Committee's finding that Respondent filed the complaint against N.E. in order to retaliate against her. The limited exception allowing him to use confidential information to defend against N.E.'s disciplinary complaint does not translate into a blanket waiver allowing Respondent to use client confidences in other contexts. To the extent Respondent argues that he is protected from discipline under Rule 8.4(d) by his subjective but erroneous belief that his disclosures were protected under Rule XI, we reject that argument as well.

We agree with the Hearing Committee's finding that Respondent's conduct in submitting a disciplinary complaint against N.E. violates the first two of the three criteria of a Rule 8.4(d) violation as set forth in *In re Hopkins*.[5] However, on the record available to us in this matter, we cannot find that the third criterion, that Respondent's conduct affected the judicial process in more than a *de minimis* way, has been established by clear and convincing evidence.

[5] As noted, the Hearing Committee found that the disclosure of client secrets was inherently improper and the impropriety was aggravated by Respondent's retaliatory motive. We do not determine here whether retaliatory complaints are inherently "improper" absent other Rule violations.

In determining that Respondent's conduct met the third requirement for finding a Rule 8.4(d) violation, the Hearing Committee was persuaded by Disciplinary Counsel's argument that Respondent's complaint against N.E. negatively impacted the judicial process because it led to the docketing of a complaint against her and required her to retain counsel to defend herself. There appears to be an implicit assumption here that the filing of the disciplinary complaint against N.E. had an impact similar to the filing of a frivolous action against a client. However, this record does not establish that the disciplinary complaint against N.E. was frivolous, even if it was dismissed or otherwise resolved in N.E.'s favor after she provided her response.[6]

Disciplinary Counsel docketed the complaint. Board Rule 2.3 provides that "[e]xcept as provided in Chapter 5," a complaint "shall" be docketed if it:

> (1) is not unfounded on its face; (2) contains allegations which, if true, would constitute a violation of the Attorney's Oath of Office or the rules of professional conduct that would merit discipline; and (3) is within the jurisdiction of the Board.

The conclusion to be made here is that Respondent's disciplinary complaint against N.E. was not unfounded on its face. Nor does Disciplinary Counsel contend that its investigation revealed that the complaint was frivolous. In *In re Spikes*, the Court of Appeals discussed the impact of frivolous lawsuits on the judicial system, noting that "a frivolous action" results in "more than a de minimis unnecessary burden" on

[6] The Hearing Committee also noted that the docketing of the complaint against her and the need to defend against it had a "tangible effect on N.E." (HC Rpt. at 23). However, the required determination under the third factor in *In re Hopkins* is that Respondent's action has had a more than *de minimis* impact on the judicial process, not on an individual party.

courts and on the disciplinary system. 881 A.2d 1118, 1127. In *Spikes*, the respondent filed legally unsupportable defamation suits against opposing counsel who had filed a disciplinary complaint against him in connection with his conduct during the litigation of claims against their client. It was the frivolous nature of the defamation suits that led the Court to conclude that the respondent seriously interfered with the administration of justice. That situation is distinguishable from the one presented here where the docketing of Respondent's complaint against N.E. supports the conclusion that the complaint was not unfounded on its face, and Disciplinary Counsel does not establish that it was otherwise frivolous.

Of course, there are myriad ways that a non-frivolous complaint or action could seriously interfere with the administration of justice. *See, e.g.*, *In re Yelverton*, 105 A.3d 413, 426 (D.C. 2014) ("We have found a broad range of conduct to violate Rule 8.4(d), but violations generally involve misleading the court or misusing or obstructing proceedings in a specific case or interfering with Bar Counsel's efforts to investigate attorney misconduct."). That is not the record before the Board in this case. *Cf. In re Askew*, 225 A.3d 388, 397 (D.C. 2020) ("repeated and unexplained failures to comply with court orders" delaying a resolution of client's case and requiring appointment of replacement counsel "is precisely the type of conduct that we have often held violated Rule 8.4."); *In re Cole*, 967 A.2d 1264, 1267 (D.C. 2009) (8.4(d) violation described as "causing parties and judicial tribunals to engage in unnecessary work because of one's failures").

The Hearing Committee also found that Respondent's retaliatory filing of a disciplinary complaint against N.E. "impeded [her] ability to complain about Respondent's conduct as her lawyer because it imposed a cost on her for doing so." (HC Rpt. at 21). The holding in *Spikes* was based on the frivolous nature of the respondent's lawsuit against complainants in the disciplinary action.[7] In *In re Martin*, also relied on by the Hearing Committee, the Court of Appeals held that the respondent violated Rule 8.4(d) by requiring his client to withdraw a previously filed disciplinary complaint against him as part of a settlement agreement. *In re Martin*, 67 A.3d 1032, 1051-52 (D.C. 2013). The Court cited District of Columbia Bar Legal Ethics Opinion 260 which states that an agreement "whereby 'the client agrees not to file a complaint with [Disciplinary] Counsel against the lawyer constitutes conduct that 'seriously interferes with the administration of justice'" in violation of Rule 8.4(d). *See id.*, 67 A.3d at 1051(quoting D.C. Bar Ethics Op. 260 (Oct. 1995)). The *Martin* Court also cited decisions from courts in various jurisdictions, noting that "[i]t is well-settled that an attorney who enters into an agreement with a client which requires the client either to refrain from filing or to seek dismissal of a bar complaint violates Rule 8.4(d)." *Id.* at 1051.

That is not the situation presented here. N.E. filed a disciplinary complaint which proceeded and resulted in the instant case with Respondent taking exception

[7] In *In re Spikes*, the Court noted that the Board had considered several factors in assessing the degree of harm to the judicial process caused by the respondent's frivolous defamation claim. Among those factors was the fact that it impeded Disciplinary Counsel's ongoing investigation of respondent's conduct. However, that factor and others were cited as the impact overall of a frivolous lawsuit. It was not cited as support for a finding that there had been an other than *de minimis* impact on the judicial process. 881 A.2d 1118, 1126.

to an adverse outcome. Respondent filed a disciplinary complaint against N.E. which the record indicates was not frivolous on its face and was resolved, it appears, short of extended proceedings. Based on the record before us, and in the absence of either an Ethics Opinion or case law on the question of whether a potential chilling effect on attorney complainants' willingness to file disciplinary complaints impacts the judicial process in a more than *de minimis* way, there is insufficient basis to determine that Respondent's conduct seriously interfered with the administration of justice.

IV. SANCTION

The sanction imposed in an attorney disciplinary matter must protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, *supra,* 67 A.3d at 1053; *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994). The sanction must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

The Hearing Committee found that the sanctions imposed in comparable cases ranged from informal admonition, *e.g.*, *In re Ellis*, Bar Docket No. 2010-D469 (Letter of Informal Admonition June 28, 2011) (informal admonition for a single violation of Rule 1.6(a), aggravated by unrelated prior discipline), to a six-month suspension, *see*, *e.g.*, *In re Rosen*, 470 A.2d 292 (D.C. 1983) (six-month suspension for disclosing client confidences and secrets, among other serious violations including intentional neglect). Though no case was directly on point, the Hearing Committee concluded that this case was slightly more serious than *In re Koeck*, 178 A.3d 463 (D.C. 2018) (per curiam), in which the respondent received a sixty-day suspension with a fitness requirement for improperly disclosing confidences and secrets of her former employer to a newspaper reporter.

Disciplinary Counsel supports the Hearing Committee's recommendation. Respondent argues that the case should be dismissed or, in the alternative, he should receive a "formal admonition."[8] He principally relies on *In re Tamm*, 145 A.3d 1022 (D.C. 2016) (per curiam), a negotiated discipline case resulting in a public censure. Pursuant to D.C. Bar Rule XI, § 12.1(d), however, negotiated discipline cases may not be cited as precedent in contested disciplinary proceedings. *See also In re Mensah*, 262 A.3d 1100, 1101 (D.C. 2021) (per curiam).

[8] It is unclear whether Respondent is still arguing that he should receive an informal admonition, which was his position before the Hearing Committee, or whether he should receive a public censure, which the Court imposed in *In re Tamm*. Respondent's brief erroneously states that the respondent in *Tamm* received a "formal admonition."

We largely agree with the Hearing Committee's reasoning on sanction and recommend Respondent receive a ninety-day suspension for violations of Rule 1.6 as detailed above. Our determination that a Rule 8.4(d) violation has not been established does not warrant a reduction in the Hearing Committee's recommended sanction because Respondent's underlying conduct, filing a disciplinary complaint against his former client disclosing client confidences and secrets in retaliation for the former client's filing of a disciplinary complaint against him, is particularly egregious.

V. CONCLUSION

For the reasons discussed above, we find that Respondent violated Rule 1.6(a) and recommend that he be suspended for ninety days.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Bernadette C. Sargeant

Bernadette Sargeant

All members of the Board concur in this Report and Recommendation except for Mr. Kaiser, who is recused.