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

In the Matter of:	:	
	:	
M. ADRIANA KOECK,	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2008-D260
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 439928)	:	
	:	
LYNNE BERNABEI,	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2012-D376
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 938936)	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION OF THE
AD HOC HEARING COMMITTEE

I. INTRODUCTION

On July 21, 2014, Disciplinary Counsel[1] filed a joint Specification of Charges against Respondents M. Adriana Koeck[2], G. Robert Blakey, and Lynne Bernabei. The charges resulted from Respondent Koeck's alleged disclosures of client confidences and/or secrets to which she

[1] The Petition Instituting Formal Disciplinary Proceedings and the Specification of Charges were filed by the Office of Bar Counsel. The District of Columbia Court of Appeals changed the title of Bar Counsel to Disciplinary Counsel, effective December 19, 2015. We use the current title herein. "BX" refers to Disciplinary Counsel's exhibits which were filed as "Bar Counsel's Exhibits." "RX" refers to Respondent Bernabei's exhibits. Respondent Koeck did not file any exhibits. "Stip." refers to the Stipulations Between Disciplinary Counsel and Respondents Lynne Bernabei and G. Robert Blakey, dated October 19, 2015. "Tr." refers to the transcript of the hearing on December 1, 2, and 3, 2015. "Prehearing Tr." refers to the transcript of a prehearing conference. Unless identified otherwise, all "Rules" refer to rules of the D.C. Rules of Professional Conduct (Amended 2007).

[2] Also known as Maria Adriana Koeck, Adriana Sanford, Adriana Fuenzalida, and Adriana Koeck-Fuenzalida.

became privy from her employment as in-house counsel with General Electric Company ("GE") and the alleged knowing assistance of Respondents Blakey and Bernabei in making those disclosures. Disciplinary Counsel further charges Respondent Bernabei with serious interference with the administration of justice in her threatening to make disclosures to the press if GE refused to mediate Koeck's employment claim.

On October 30, 2015, the Office of Disciplinary Counsel issued, and Respondent Blakey accepted, an Informal Admonition. On December 7, 2015, a Contact Member granted Disciplinary Counsel's motion to dismiss the Petition against Blakey.[3]

Disciplinary Counsel alleges that Respondent Koeck, prior to being fired by GE, made a copy of her computer hard drive which contained documents that contained client confidences and/or secrets within the meaning of Rule 1.6(b) of the Rules of Professional Conduct.[4] Prior to a November 29, 2006 meeting in which she was to be discharged, Respondent Koeck sent an email to the GE corporate Ombudsman and claimed that she was being retaliated against for reporting alleged tax fraud by GE in Brazil. As a result, GE conducted an internal investigation, but it concluded that Koeck's retaliation claim was without merit. Then, as originally planned, GE fired

[3] Accordingly, this Report does not include Factual Findings or Legal Conclusions related to the charge against Blakey.

[4] The D.C. Rules of Professional Conduct makes a distinction between confidences and secrets as defined below:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would likely be detrimental, to the client.

D.C. Rules of Prof'l Conduct R. 1.6(b).

her on January 24, 2007. On April 23, 2007, Koeck filed a Whistleblower Complaint[5] pursuant to the Sarbanes-Oxley Act of 2002 ("SOX Complaint") through her counsel at the time (not Blakey or Bernabei). On June 25, 2007, an Occupational Safety and Health Administration ("OSHA") Regional Administrator dismissed the SOX Complaint for failing to meet the 90-day statute of limitations, and two months later, Koeck's retained counsel withdrew from representation.

In late August 2007, Koeck contacted her former law professor, Respondent Blakey, who agreed to advise her on potential criminal liability related to her knowledge of GE's activities in Brazil. On November 27, 2007, Koeck additionally retained Respondent Bernabei and the law firm of Bernabei & Wachtel to represent her on any claims or counterclaims arising out of her employment at GE.

In the Specification of Charges, Disciplinary Counsel describes a series of improper disclosures by Koeck of GE confidences and/or secrets to (1) the United States Attorney's Office for the Northern District of Illinois; (2) Brazilian authorities; (3) members of the press; (4) representatives of the United States Securities and Exchange Commission ("SEC"); and (5) the Administrative Review Board ("ARB") of the Department of Labor.[6]

[5] Section (a) of 18 U.S.C. § 1514A provides for "Whistleblower Protection for Employees of Publicly Traded Companies."

[6] At the Hearing, Disciplinary Counsel stated that it was no longer proceeding on allegations made in the Specification of Charges concerning disclosures related to the lawsuit filed by GE in U.S. District Court for the Eastern District of Virginia. Tr. 15-16; *see* Specification of Charges, ¶ 30. The Hearing Committee finds that the record does not contain evidence that establishes these specific disclosures violated any rules. We note, nevertheless, that Disciplinary Counsel does not have the authority to decline to pursue charges that have been approved by a Contact Member. *See In re Reilly*, Bar Docket No. 102-94 at 4 (BPR July 17, 2003).

The Specification of Charges alleges the following violations of the District of Columbia Rules of Professional Conduct:

A. Respondent Adriana Koeck:

Rules 1.6(a) and (g), in that she knowingly revealed client confidences and/or secrets, in that she used client confidences and/or secrets to the disadvantage of GE, and in that she used GE confidences and/or secrets to her own advantage.

B. Respondents G. Robert Blakey and Lynne Bernabei:

Rule 8.4(a), in that they knowingly assisted Respondent Koeck in violating Rules 1.6(a) and (g);

C. Respondent Lynne Bernabei:

Rule 8.4(d), in that she threatened to make disclosures of Respondent Koeck's client confidences and secrets to the press if GE refused to engage in mediation.

Specification of Charges, p. 8 (emphasis added).

The matter is before an Ad Hoc Hearing Committee, consisting of Rudolph F. Pierce, Esquire, Chair; Marcia Carter, Public Member; and Bernadette Sargeant, Esquire, Attorney Member.

II. PROCEDURAL HISTORY

Disciplinary Counsel personally served Koeck with a Petition Instituting Formal Disciplinary Proceedings and the Specification of Charges. BX C. By agreement, Disciplinary Counsel served the Petition and Specification on Bernabei through her counsel. *Id.* On December 22, 2014, the Board issued a stay in the proceedings against Koeck because she claimed that she

suffered from Post-Traumatic Stress Disorder and was unable to assist in her own defense. Bernabei filed an amended answer on January 13, 2015. BX D. Koeck did not file an answer. On April 23, 2015, the D.C. Court of Appeals ordered that Koeck be suspended by consent, based on her assertion of disability, and it unsealed the disability proceedings. On April 27, 2015, the Hearing Committee Chair recommended the denial of Bernabei's request for a stay in which she argued that she should not have to defend against disciplinary charges without Koeck's participation. The Board Chair agreed with the recommendation and denied the motion to stay.[7]

Because Koeck claimed she was suffering from Post-Traumatic Stress Disorder, Disciplinary Counsel sought an order for an independent medical examination. Despite successive orders and extensions issued by the D.C. Court of Appeals, Koeck never appeared for an independent medical examination.[8] On October 5, 2015, the stay as to Koeck was lifted so that Disciplinary Counsel was able to proceed in its case against both Koeck and Bernabei. On November 5, 2015, the Court denied court-appointed Attorney Daniel Schumack's request for further extensions.[9] The Court also denied Disciplinary Counsel's request to vacate the temporary suspension of Respondent Koeck, and its order specified that no determination was made that Koeck was disabled or incapable for purposes of participating in the disciplinary proceedings.

[7] The Board Chair denied the motion without prejudice to reconsideration upon a proffer that Respondent Koeck was unavailable, a proffer of her expected testimony, and an explanation as to how proceeding would violate Bernabei's right to due process.

[8] The D.C. Court of Appeals issued an order on January 27, 2015, directing Koeck to schedule an appointment with Dr. Legg of Phoenix, Arizona, but Koeck did not comply. On April 23, 2015, when the Court suspended Koeck from the practice of law, they also ordered her to show cause why she should not be held in contempt for failing to comply with the Court's prior order. On July 1, 2015, the Court issued an order directing Koeck to submit to an independent medical exam within 60 days or begin to defend the disciplinary proceedings on its merits.

[9] On September 12, 2014, Schumack was appointed to represent Koeck for purposes of responding to Disciplinary Counsel's motion for an order to submit to an independent medical examination.

Pre-hearing conferences were held on July 22, 2015 and September 11, 2015. At the first pre-hearing conference before the Hearing Committee Chair on July 22, Disciplinary Counsel was represented by Assistant Disciplinary Counsel, Hamilton P. Fox, III, Esquire; Respondent Bernabei was represented by Thomas B. Mason, Esquire, and Steven A. Fredley, Esquire; and Respondent Blakey was represented by Robert P. Trout, Esquire, and Jesse Winograd, Esquire. No counsel appeared on Koeck's behalf. Koeck, Bernabei, and Blakey did not attend. The parties informed the Chair that they intended to take Koeck's deposition prior to the hearing. At the second pre-hearing conference before the Chair on September 11, the same counsel were present except that Mr. Winograd was not present; Koeck, Bernabei, and Blakey were once again not present. The parties discussed having Koeck testify through a video-conference pursuant to a subpoena compelling either her deposition or remote testimony (Koeck lives in Arizona). Prehearing Tr. 68 (Sept. 11, 2015). Through counsel, Bernabei noted her continued objection in having to defend in a disciplinary hearing without Koeck's presence. *Id*. at 90-91. On August 20, 2015 and October 13, 2015, the Chair issued orders memorializing the two pre-hearing conferences.

On September 28, 2015, Bernabei filed a motion for the Committee to issue a subpoena *duces tecum* to GE to obtain documents related to communications between GE and Brazilian authorities. The Chair granted the motion by order on October 21, 2015. That same day, the Chair denied Disciplinary Counsel's motion for default against Koeck because the motion was not supported by sworn proof of the charges in the Specification, or proof of actual service or service by publication of the petition.

The hearing was held on December 1 through December 3, 2015. Blakey did not participate due to his acceptance of Disciplinary Counsel's issuance of an Informal Admonition.

Koeck had been served with a subpoena to appear through a video-conference arranged at an Arizona law office set up by Arizona Disciplinary Counsel, but she failed to appear. No counsel appeared on her behalf.

At the hearing, Disciplinary Counsel called three witnesses: Sarah Bouchard, Esquire, a partner at Morgan, Lewis, and Bockius, who was retained by GE as outside counsel to respond to Koeck's SOX Complaint; Mark Nordstrom, Esquire, in-house counsel for GE; and Roland Schroeder, Esquire, also in-house counsel for GE. Bernabei testified on her own behalf and called two other witnesses: David Cay Johnston, an investigative reporter formerly with the *New York Times*; and Richard Moberly, Esquire, an expert on Sarbanes-Oxley law and procedure before OSHA and the Department of Labor. At the end of hearing testimony on December 3, 2015, the Committee left the record open for Disciplinary Counsel to file a report on the feasibility of attaining Koeck's testimony. The Chair admitted Disciplinary Counsel exhibits (BX A-D and BX 1-88) and Respondent Bernabei's exhibits (RX 1-95). Tr. 343-44.

On December 9, 2015, Disciplinary Counsel filed a Memorandum indicating that the possibility of compelling testimony from Koeck was no longer practicable based on representations made by Arizona Bar Counsel.[10] Bernabei filed a Response that acknowledged Disciplinary Counsel's "diligent effort" in subpoenaing Koeck in Arizona but argued unfair prejudice resulting from not having Koeck's testimony as part of the record. On December 18,

[10] Disciplinary Counsel noted in its Memorandum that they had obtained multiple orders from the District of Columbia Court of Appeals in their effort to obtain Koeck's participation, yet she still refused to comply even when the temporary suspension was imposed. *See* Bar Counsel's Memorandum Concerning Compelling Testimony of Respondent Koeck at 3. The Memorandum also detailed Arizona Bar Counsel's position that under their local procedure, when a respondent does not comply with a subpoena, "their practice is to proceed without the respondent's participation" and the noncompliance is an aggravating factor when determining sanction. *Id*. at 1-2.

2015, the Chair issued an order stating that the record was closed with respect to the charged Rule violations, but it could be reopened without prejudice for the purpose of hearing Koeck's testimony if Bernabei was successful in compelling Koeck's testimony before issuance of the Hearing Committee's Report and Recommendation.[11]

On February 12, 2016, after consideration of the post-hearing briefs, the Hearing Committee issued an order stating that they had made a preliminary, non-binding determination that Disciplinary Counsel had proved rule violations by Respondents Koeck and Bernabei. The Hearing Committee then considered matters in aggravation and mitigation, as submitted by the parties in documentary form.[12] The Committee considered Bernabei's 28 additional exhibits in mitigation (RX 96-124) and her 11-page summary, as well as the parties' briefs on sanction.[13] On July 11, 2016, Bernabei filed a Motion and Notice of Supplemental Authority, to which Disciplinary Counsel had no objection aside from relevance. The Hearing Committee hereby grants Bernabei's motion and has considered the supplemental authority.

[11] Bernabei never notified the Hearing Committee that she had been successful in compelling Koeck's testimony.

[12] The Hearing Committee had offered the parties an opportunity to request a hearing, upon a showing of good cause, on sanction, but no party so requested.

[13] On April 21, 2016, the Chair denied Bernabei's request, which Disciplinary Counsel opposed, to submit supplemental mitigation evidence upon identification of the nature of Bernabei's specific rule violation.

III. FINDINGS OF FACT

1. Respondent M. Adriana Koeck is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on December 6, 1993, and subsequently assigned Bar number 439928.[14] BX B, ¶ 1.

2. Respondent Lynne Bernabei is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on December 14, 1977, and subsequently assigned Bar number 938936. BX A at 3; Stip. ¶ 1. Since 1987, Bernabei has operated her own law firm, specializing in representation of individuals in employment discrimination and retaliation matters. Tr. 346-47 (Bernabei).

A. Respondent Koeck's Employment with General Electric

3. Beginning on January 3, 2006, Koeck worked as an in-house attorney for the Consumer & Industrial Division (C&I) of General Electric (GE), located in Louisville, Kentucky. BX 1; Tr. 180. The Louisville office managed C&I's dealings in Latin America.

4. As a condition of her employment, Koeck signed an Employee Innovation and Proprietary Information agreement. BX 1. The agreement provided that Koeck would keep the company's information strictly confidential and, upon termination of employment with GE, she would return all materials of a secret or confidential nature relating to GE's business and not use or disclose these materials. *Id*. Koeck also signed an "ADR Policy Agreement," which generally required Koeck to arbitrate any claims against GE. BX 6 at 3. However, the ADR Policy Agreement permitted Koeck to pursue any employment-related charges with any applicable

[14] Although Disciplinary Counsel did not produce a copy of Koeck's registration statement, her Bar membership is not disputed.

federal, state, or local governmental agency, including the National Labor Relations Board. BX 4 at 7; Tr. 193 (Nordstrom).

5. In her position with GE, Koeck served "as the interface between legal issues happening in Latin America, Brazil, Argentina, Chile . . . and the broader businesses spread across the globe. [Koeck] had a regional responsibility for the basic C&I product overview." Tr. 169-70 (Nordstrom). Koeck's immediate supervisor was Raymond Burse, the General Counsel of C&I. *Id*. at 168-69.

6. At the time, C&I managed, among other things, the sale and distribution of electrical products in Latin America. Tr. 167-68 (Nordstrom). In Brazil, the sale and distribution process occurred as follows. First, GE delivered its electrical products to a central warehouse in Brazil. Next, the customer picked up the products it purchased. Within 120 to 180 days thereafter, the customer had to declare, in a writing delivered to GE, the region or state in which the product was to be used. *Id*. at 180-81, 277-78. The location of the "use" was significant, because the customer had to pay a value-added tax ("VAT") which varied from 7 to 19 percent, depending upon whether the product was used in a rural or populous state. *Id*. at 180.

7. While payment of the VAT was the customer's responsibility, payment could become GE's responsibility if it failed to use reasonable efforts to secure proper documentation of the location of the customer's use. In 2005, before Koeck began her employment at GE, the company learned "that there were some discrepancies . . . around land shipments into certain parts of Brazil"; that is, that customers reported that products were being used in a rural state (with a lower VAT) when, in fact, they were being used in a more populous one. Tr. 178-79 (Nordstrom).

8. Upon learning of these discrepancies in 2005, GE began an investigation to track the questionable shipments and to determine how these discrepancies occurred. Tr. 179-80

(Nordstrom). When Koeck joined the company in 2006, Koeck's supervisor, Raymond Burse, briefed her about the investigation and gave her the file concerning the matter. *Id*. at 182. Resolving these discrepancies became one of the "big issues" on Koeck's plate. *Id*. at 181-82. As described by GE Counsel Mark Nordstrom, Koeck "had a dual role" of figuring out how best to complete the documentation for the VAT "and at the same time pursue a collection with these customers." *Id*. at 182. Koeck "had the obligation of collecting receivables [money] from some of the same customers . . . these customers owed us money." *Id*.

9. In mid-November 2006, after eleven months of her working for GE, Jeff Barnes of Human Resources advised Koeck that Burse did not want her to either stay with the company or move to another GE business. BX 20 at 32, 101-14 (Koeck Letter Complaint to the Dept. of Labor).

10. Koeck was to be discharged at a November 29, 2006 meeting scheduled with a GE Human Resource employee, but immediately before that meeting, Koeck emailed the GE corporate Ombudsman (Eugene Mensching) claiming, among other things, that she was being retaliated against "for participating in and reporting illegal activity engaged in by [GE] personnel." BX 3 (November 29, 2006 e-mail from Koeck to Mensching), BX 4 (November 29, 2006 termination letter); Tr. 186-87 (Nordstrom). She alleged that, in the course of her compliance investigations, she had discovered tax fraud that GE had been perpetrating in Brazil. BX 3. She claimed that she was being terminated for raising concerns about the fraud to her supervisors. *Id*. Following her complaint to the GE Ombudsmen, Koeck made a copy of her work laptop's hard drive which, according to GE Counsel Sarah Bouchard, contained confidential and privileged documents. BX 76 at 18-19 (Koeck Decl., July 9, 2008); Tr. 94-95 (Bouchard).

11. GE postponed Koeck's discharge until it could investigate the allegations. Tr. 187-88 (Nordstrom). Following the receipt of Koeck's complaint, GE dispatched its senior labor employment counsel, Mark Nordstrom, to determine whether Koeck's allegation of a "retaliatory termination" was justified. *Id*. at 175-76.

12. Nordstrom investigated Koeck's allegations and found them to be without merit. Tr. 188-89 (Nordstrom). On January 18, 2007, Nordstrom informed Koeck that she was being terminated not because of retaliation but, rather, because she "lacked depth in commercial law, reliability, and follow-through, and [she was] unable to forge meaningful and constructive relationships or work well as part of the C&I Legal team." BX 5 at 3 (letter from GE to Koeck). On January 24, 2007, GE fired Koeck. BX 6 at 1 (letter from GE to Koeck).

B. Joseph W. Cotchett's Representation of Koeck Before OSHA

13. After her termination, Koeck retained Joseph W. Cotchett of the California firm Cotchett, Pitre & McCarthy LLP. Stip. ¶ 6. On April 23, 2007, Cotchett submitted a Whistleblower Complaint, pursuant to the provisions of the Sarbanes-Oxley Act of 2002 ("SOX") 18 USC § 1514A, with the United States Department of Labor, Atlanta Regional Office of the Occupational Safety and Health Administration ("OSHA"). *See* BX 8 (Complaint).

14. The 14-page Complaint detailed allegations of GE's tax fraud in Brazil, Koeck's actions in reporting the alleged fraud to supervisors, and their response. BX 8 at 13. Pursuant to Department of Labor regulations, OSHA notified GE of the Complaint and a copy was sent to the Securities and Exchange Commission ("SEC"). Tr. 382-83, 448-49 (Bernabei); 29 C.F.R.

§ 1980.104(a).[15] Neither Bernabei nor Blakey had any role in drafting or preparing the original SOX Complaint. Stip. ¶ 8.

15. The SOX Complaint alleged that the VAT fraud scheme by GE "entailed the use of fraudulent shipping invoices that falsely represented that GE products, such as lamps, were being shipped to duty-free or lower VAT-rate areas of Brazil, when in fact the products were being shipped to or picked up in higher tax areas." BX 8 at 4. The SOX Complaint also alleged efforts by GE to use Koeck's services to conceal and cover up the fraud. *Id*. at 4-6.

16. The SOX Complaint alleged that in March 2006, Koeck learned that GE representatives in Rio de Janeiro were blackmailing the company (GE) for additional commissions in exchange for their silence about the VAT fraud. BX 8 at 5. The Complaint alleged that representatives warned that if GE did not pay the additional commissions, they would disclose GE's conduct. *Id*. The Complaint further claimed that Koeck told her supervisors about this, and they instructed her to have the requested commissions paid but only after these representatives had agreed to sign a confidentiality agreement. *Id*.

17. Cotchett stated in the Complaint that GE would assert attorney-client privilege to prevent OSHA investigators from accessing relevant documents that were in GE's possession. BX 8 at 2 n.1. However, Cotchett maintained that "the privilege does not apply, since the documents reveal corporate counsel's complicity with others in corporate management in attempting to evade the disclosure obligations imposed by the Sarbanes-Oxley Act, *i.e.*, in commission of both fraud and crime." *Id*. Additionally, he asserted that "a number of the

[15] "Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and the substance of the evidence supporting the complaint . . . OSHA will provide an unredacted copy of these same materials . . . to the Securities and Exchange Commission." 29 C.F.R. § 1980.104(a).

documents also evidence corporate use of counsel to engage in ongoing violations of Brazilian tax laws and other fraud." *Id*.

18. On May 29, 2007, GE responded to the Complaint. *See* Stip. ¶ 9. On June 25, 2007, an OSHA Regional Administrator issued a decision finding that GE, Burse, and Earl Jones (C&I's General Counsel and Senior Compliance Counselor) were covered entities and individuals under SOX. BX 9 at 1-2 (Dept. of Labor Findings regarding Koeck's Complaint). The decision also found that Koeck was "an employee covered under 18 U.S.C. § 1514A," *i.e*, she had been an employee of a covered company. *Id*. at 2.[16] However, the OSHA Regional Administrator dismissed the Complaint for failure to meet the 90-day statute of limitations. *Id*. As a result, the OSHA Regional Administrator did not reach the merits of the retaliation claim. Stip. ¶ 10; BX 9 at 1-2. A copy of the decision was sent to the Deputy Director of the Division of Enforcement of the SEC. BX 9 at 3.

19. On July 24, 2007, Koeck noted her objections to the OSHA decision and appealed the dismissal of her claim. Stip. ¶ 11. In August 2007, Cotchett's firm withdrew from the representation. Stip. ¶ 12.

20. On August 31, 2007, Koeck notified the Administrative Law Judge ("ALJ") by letter that Cotchett was no longer representing her and that she was requesting a summary decision on the issue of the statute of limitations. *See* BX 20 at 87-95 (Letter from Koeck to Judge Donald W. Mosser). In the letter, Koeck asserted that her complaint was timely filed with OSHA and

[16] To be an entity covered by SOX, GE had to be a company with a class of registered securities that is required to file reports under Sections 12 and 15(d) of the Securities and Exchange Act of 1934. The OSHA decision determined that GE C & I was not a separate entity but was an operating division of GE. To be a "covered individual," Burse and Jones needed only to be considered employees of the entity. *See* BX 9 at 1-2 (June 29, 2007 OSHA Regional Administrator Findings).

requested that "the information in this letter and supporting papers and documentation be included as evidence" for a summary decision that her date of termination was January 25, 2007. *Id*. at 88.[17] Koeck attached 18 exhibits to her written submission, including a copy of the original SOX Complaint.[18]

C. Professor G. Robert Blakey's Representation of Koeck[19]

21. In late August 2007, Koeck sought the legal advice of her former Notre Dame Law School professor, G. Robert Blakey. *See* BX 76 ¶ 92 (Koeck Decl., July 9, 2008). Koeck provided Blakey with some of the confidential documents that she had copied from her GE computer. BX 85 ¶ 10 (Blakey Aff., Oct. 17, 2008). Blakey advised Koeck, "that the documents and information she had were not covered by the attorney-client relationship, because they fell within the crime/fraud exception." *Id*. ¶ 22.

22. Blakey advised Koeck that GE probably violated the mail fraud statute. *See* RX 78 at 2 (Blakey letter to ODC). He recommended that Koeck present evidence of GE's activities in Brazil to an Assistant United States Attorney in the Northern District of Illinois,[20] which she did**.** BX 85 at 3 (Blakey Aff.); BX 76 ¶ 93 (Koeck Decl., July 9, 2008). On November 14, 2007, Blakey

[17] If the statute of limitations period were to start from the date of termination, rather than notification, Koeck's SOX complaint would have been timely.

[18] The 18 exhibits included: the OSHA Regional Administrator's June 25, 2007 Decision and Findings; the SOX Retaliation Complaint filed by Cotchett; over 14 of Koeck's internal email communications within GE; a reference letter; a document defining her scope of work at GE; a holiday greeting letter from Burse; Nordstrom's letter summarizing his investigation findings and conclusion; the GE Human Resources Manager's letter terminating Koeck on January 24, 2007; and a letter of commendation. BX 20 at 87-164.

[19] Neither party called Blakey to testify at the hearing, but his affidavit and supplemental letter to the Office of Disciplinary Counsel was made part of the record. *See* BX 85; RX 78.

[20] As to why the initial contact was with the Northern District of Illinois U.S. Attorney's Office, Blakey had a personal contact within that particular office. *See* BX 85 ¶ 13 (Blakey Aff.).

and Koeck learned that the U.S. Attorney's Office for the Northern District of Illinois had forwarded the confidential GE documents detailing possible fraud to the U.S. Department of Justice in Washington, D.C. BX 76 ¶ 28.

23. Koeck's first contact with Brazilian federal authorities was in November 2007. BX 70 at 1 (July 1, 2008 email from Koeck to Bernabei). She contacted officials of the Brazilian Public Federal Ministry (Ministerio Publico Federal) to determine "how and where to report" GE's illegal activities, and she subsequently engaged in telephone conversations with the Ministry over a period of months. BX 76 ¶ 99 (Koeck Decl., July 9, 2008). Thereafter, Koeck forwarded to the Ministry a copy of the SOX complaint and a 53-page narrative prepared by her for a reporter named David Hilzenrath at *The Washington Post*. BX 70.

24. Blakey confined his advice to Koeck to disclosures she should make to protect herself against potential criminal liability, and he recommended that she retain an additional attorney with expertise in employment law and whistleblower complaints. Stip. ¶ 14. Blakely gave Koeck the names of two firms, one of which was Bernabei & Wachtel, PLLC. *Id.*

D. Bernabei's Representation of Koeck on the SOX Complaint

25. At Koeck's first meeting at Bernabei & Wachtel PLLC on November 17, 2007, she met with Bernabei and Emily Read, Esquire, an associate. Tr. 360 (Bernabei). In an earlier correspondence between Koeck and Bernabei's office, Koeck was asked to bring to the meeting materials from prior legal proceedings and other documentation to support her claim. *Id*. at 359. Accordingly, Koeck brought the SOX Complaint and internal GE documents in her possession,

including legal memoranda prepared for GE by retained foreign counsel in Brazil. *Id*. at 361-64, 368-70.[21]

26. Bernabei testified that Koeck told her and Emily Read that she [Koeck] had been asked to collect certifications from customers purporting to show where the products were being used, but felt that the certifications were false so it made her feel "uncomfortable." Tr. 363 (Bernabei). As described by Bernabei, Koeck believed these agents or customers of GE were "blackmailing GE for hush money to quiet down the VAT tax fraud allegations and . . . [Koeck] had been asked to pay them off and sign confidentiality agreements." *Id*.

27. On November 27, 2007, Koeck formally retained Bernabei's firm to handle the SOX matter before the Department of Labor. Stip. ¶ 15; BX 10 at 1 (Retainer Agreement).

28. Based on agreement of counsel, on December 19, 2007, the case was transferred from the ALJ in Cincinnati, Ohio to an ALJ in Washington, D.C. RX 8 (Order).

29. On January 28, 2008, Bernabei filed a motion for partial summary judgment, arguing that Koeck's Complaint had been timely filed and that its dismissal was improper. *See* BX 20 (Complainant's Motion for Partial Summary Judgment and Supplemental Memorandum of Points and Authorities in Support Thereof). The motion was filed by Bernabei to supplement Koeck's earlier *pro se* motion for summary decision filed August 31, 2007.[22] *Id*. at 1. Bernabei included with her motion exhibits previously submitted by Koeck as well as a 20-page Declaration sworn to by Koeck. *See id*. at 19-39 (Koeck Decl., January 28, 2008). The Declaration restated,

[21] Bernabei testified that Koeck told her "she had several lawyers' letters from Brazilian lawyers that indicated that they thought that GE was maybe criminally liable for VAT tax fraud." Tr. 362.

[22] Koeck did not formally move for summary judgment, but she did request that the letter and its attachments be considered as evidence for the ALJ's summary decision on the statute of limitations issue.

but did not expand, the disclosures made in the original SOX Complaint filed by Cotchett. *Compare* BX 8 at 4-8, *with* BX 20 at 21-27 (VAT fraud, independent contractor classifications, and bribery scheme).

30. On March 13, 2008, the ALJ, like the OSHA Regional Administrator, determined that Koeck's SOX Complaint was untimely and ordered it dismissed. BX 24 (ALJ Findings of Fact and Conclusions of Law).

31. On March 24, 2008, Sarah Bouchard (a partner at Morgan, Lewis, & Bockius who acted as GE's outside counsel) sent a letter to Bernabei asserting that Koeck had failed to return all GE documents and had wrongfully disclosed privileged information to an outside party. BX 31 at 1. Bouchard demanded that Koeck immediately return all copies of confidential and privileged materials. *Id.* Bernabei refused to return the documents. *See* BX 37, 40, 46-49 (Letters exchanged between Bouchard and David Wachtel, Esquire). On April 30, 2008, David Wachtel, Bernabei's law partner, wrote to Bouchard that the documents Koeck had taken were "evidence of crimes or fraud committed by GE" and, therefore, she had a right to keep the documents. BX 47 ("As we stated previously, the right to retain copies of documents is implicit in the right to make disclosures.").

32. On May 9, 2008, Bernabei filed an appeal of the ALJ's decision with the Administrative Review Board ("ARB"). *See* BX 50 (Appellant's Initial Brief); RX 18 (same). In her briefing materials, Bernabei included the exhibits and Declaration that she previously filed with the ALJ. Tr. 416 (Bernabei); *see also* BX 50 at 3. Bernabei believed ". . . they [the ARB] don't have to limit themselves to the issue on which it was dismissed below." Tr. 425.

E. Disclosures to the Press As Strategy Aimed to Assist Appeal

33. After Koeck retained Bernabei on November 27, 2007, she and Blakey met and agreed that Koeck should inform the press about GE's activities in Brazil. BX 85 ¶ 22 (Blakey Aff.). Beginning in December 2007, Bernabei spoke with Koeck about having a press strategy and talking to the press. BX D (Bernabei's Amended Answer, ¶ 17).

34. Bernabei testified "[I] was eager for something to appear in the press . . . I was telling her [Koeck] that I think it would be a good thing for her DOL case." Tr. 558 (Bernabei); *see also* Tr. 556-62. Further evidence of Bernabei's support of the press strategy is documented in the following emails between Bernabei and Koeck. *See* BX 11, 14, 15, 19, 21, 23, 33, 53, and 54.

35. At some point in the fall of 2007, David Cay Johnston, a *New York Times* reporter at the time, received a telephone call from Blakey who asked if Johnston "might be interested in material about a long-running series of felonies committed by General Electric in another country." Tr. 604-05 (Johnston). Thereafter, Johnston received "hundreds of pages of documents" from Blakey or Koeck. *Id*. at 606. Subsequently in January 2008, Johnston interviewed Koeck about the alleged tax fraud in Brazil and she provided additional documents in her possession regarding GE's activities there. *Id*. at 607-08; Stip. ¶ 19; BX 76 at 26; BX 85 at 5 (Blakey Aff., Oct. 17, 2008).

36. Following Koeck's meeting with Johnston, she received a series of emails from Bernabei. *See* BX 19 ("Any news on the *New York Times* front? . . . any heads up you could give me would be great.); BX 21 at 1 ("Are you available for a telephone confidence call to talk about press on Friday? I'm increasingly worried that unless something appears quickly we will have a hard time if we get an adverse ruling from the DOL."); BX 23 ("What has happened to the *New*

York Times article? As you know I'm eager to have something printed before the DOL rules."); BX 29 ("We filed the appeal yesterday, hopefully things will burst open on Monday."); and BX 33 ("I'm beginning to think the *New York Times* will run the story in the Sunday edition. Do you think that's a possibility? Will it mention you. I continue to believe this is the best thing for your case.").

37. After the *New York Times* declined to publish Johnston's article, Bernabei asked Koeck to speak with a *Washington Post* reporter named David Hilzenrath, whom Bernabei had contacted previously, to see whether he would be interested in writing about a whistleblower at GE. Tr. 442-43 (Bernabei). Subsequently, at Bernabei's request, Koeck summarized the events regarding the VAT tax fraud and other allegedly fraudulent events in Brazil in a narrative outline for Hilzenrath's review. BX 55 at 1-4 (email communications between Bernabei and Koeck on June 2-4, 2008); BX 56 (email from Bernabei to Emily Read, directing her to speak to Koeck about finishing the outline and talking with the press); BX 57 at 1-3 (email communications by Bernabei asking Koeck which outline narrative of GE's VAT and other fraud she could send to Hilzenrath).

38. On June 30, 2008, Johnston's article, "Blame It on Rio, GE's Brazilian Headache," was published in *Tax Notes International*. RX 33 (copy of article). Johnston testified that the article relied on GE internal documents that Koeck had obtained and his interview of Koeck. Tr. 605-14.[23] Indeed, reference to the GE documents is made plain in the article:

> The tax schemes and subsequent events are detailed in hundreds of pages of internal GE e-mails, memos, and legal opinions . . . . A lawyer for a participant in some of the events provided the documents on the condition that the source not be identified. The internal documents offer a rare and candid look at how, behind closed doors,

[23] The article describes an internal GE PowerPoint on the VAT fraud and "lengthy opinion letters [in which] Brazilian lawyers warned of 'criminal tax implications,' 'untrue fiscal documentation,' and 'fraud'. . . [warranting] charges of tax evasion, labor tax fraud, collusion, and other crimes." RX 33 ("Blame It on Rio: GE's Brazilian Headache," by David Cay Johnston, *Tax Notes International*, p. 1068 (June 30, 2008)).

> GE executives, managers, and lawyers dealt with evidence of the systematic tax cheating that flourished over many years.

RX 33 at 1. Although the Committee was not shown these documents, the Committee heard testimony from Roland Schroeder, GE in-house counsel, that confirmed the existence of confidential legal opinion letters by Brazilian attorneys who had advised GE of its possible criminal liability for failure to pay the appropriate VATs. Tr. 275-77 (Schroeder).

F. Bernabei's and Koeck's Meeting with the SEC and the End of Disclosures

39. On April 21, 2008, Koeck emailed Bernabei to say she had set up a meeting with the SEC, and "they are very interested in the information [about GE]." BX 43 (email from Koeck to Bernabei). On April 23, 2008, Koeck and Bernabei met with SEC attorneys to discuss the substance of her complaint (Tr. 447) and provided copies of GE's confidential documents. BX 76 ¶ 103 (Koeck Decl.); BX 43.

40. On June 6, 2008, GE filed a complaint against Koeck, *General Electric Company v. Adriana Koeck*, in the U.S. District Court for the Eastern District of Virginia. BX 59 (Complaint). The complaint sought an injunction to restrain Koeck from further disclosing privileged and confidential material and to compel the return of all such material in her and her counsel's possession. *Id.* at 14. On July 28, 2008, Koeck's counsel (attorneys with Nealon & Associates, PC) stipulated that no further disclosures would be made and that Koeck would: (1) return copies of all documents she took from GE; (2) make available two copies of her computer hard drive for review by GE's forensic computer expert; and (3) make available for mirroring or copying any external media devices in her possession, custody, or control that she used to obtain GE documents. This agreement was codified into a court order. RX 63 at 1-2 (Stipulation and Order, *General Electric Company v. Adriana Koeck*, No. 08-591 (July 28, 2008)).

41. On August 8, 2008, Koeck discharged Bernabei and her firm. BX 83 (Letter from Koeck to Bernabei).

IV. PROPOSED CONCLUSIONS OF LAW

As described below, the Hearing Committee finds by clear and convincing evidence that Respondent Koeck violated Rule 1.6(a).[24] The Hearing Committee also finds by clear and convincing evidence that Respondent Bernabei violated Rule 8.4(a), but did not violate Rule 8.4(d).

A. Koeck was entitled to make a claim of retaliatory termination under the provisions of Sarbanes-Oxley (SOX).

(1) SOX Section 806 provides authority for employees to file claims against employers for retaliation. Section 806 of SOX, codified as 18 U.S.C. § 1514A, provides that publicly traded companies and their employees may not "discharge, demote, suspend, threaten, harass or in any other manner discriminate against" an employee because of any lawful act done by the employee to:

> Provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, or television fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . . .

18 U.S.C. § 1514A(a)(1). The provision grants an employee the ability to file a SOX retaliation complaint. Section 1514A(b) directs the employee to file a complaint with the Secretary of Labor

[24] Disciplinary Counsel charged a violation of both Rule 1.6(a) and (g), but the latter is definitional and not a disciplinary rule so we make no findings on Rule 1.6(g) ("The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment.").

or, if the Secretary has not issued a final decision within 180 days, to bring suit for *de novo* review in U.S. district courts. 18 U.S.C. § 1514A(b).

(2) Koeck was an employee of GE and had been assigned responsibility, among other things, for resolving discrepancies in GE's investigation of a VAT reporting problem. FF 3, 8. [25] Koeck served "as the interface between legal issues happening in Latin America, Brazil, Argentina, Chile . . . and the broader businesses spread across the globe." FF 5. As a result, Koeck's duties involved investigating GE's Latin American operations for compliance issues. FF 5, 10. Despite dismissing Koeck's SOX Complaint on statute of limitations grounds, the OSHA Regional Administrator still found that Koeck was an employee covered by 18 U.S.C. § 1514A. FF 18. Accordingly, pursuant to 18 U.S.C. § 1514A(b), Koeck was entitled to file her SOX retaliation complaint with the Secretary of Labor.

B. Koeck was permitted to use client confidences to the extent reasonably necessary to advance her claim.

(1) In *Willy v. Admin. Review Bd.*, 423 F.3d 483, 499-500 (5th Cir. 2005), the court concluded that an attorney has the right, under federal common law, to affirmatively use privileged materials to establish a retaliatory discharge claim in a whistleblower action. Koeck's retaliatory termination claim against GE was such an action pursuant to 18 U.S.C. 1514A.

(2) Rule 8.5 of the Rules of Professional Conduct for the District of Columbia provides, as to choice of law, that "for conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits . . . ." *See* Rule 8.5(b)(1). If there is any doubt regarding the meaning of the Rule, Comment 4 to the Rule makes

[25] We cite to the preceding numbered Factual Findings as "FF #."

clear that a lawyer shall be subject only to the rules of the professional conduct of that tribunal. Rule 8.5, cmt. [4].[26] Administrative agencies of the Department of Labor (DOL) apply federal common law which looks to the American Bar Association ("ABA") Model Rules as the basis of its analysis of client confidences and attorney-client privilege. *See, e.g.*, *Willy*, *supra*, at 495 (applying federal common law and ABA Model Rules). Therefore, since Koeck's SOX claim was filed at the DOL, we consider the propriety of her disclosures under the ABA Model Rules of Professional Conduct.

In relevant part, ABA Model Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . .
>
> > (5) to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client . . . .

Model Rules of Prof'l Conduct R. 1.6.[27] Thus, no ethical violation was committed by Koeck in making disclosures of client confidences to advance her claim so long as the revelations were reasonably necessary.

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[26] Pursuant to Rule 1.0 (n) of the D.C. Rules of Professional Conduct:

> "Tribunal" denotes . . . [an] administrative agency or other body acting in an adjudicative capacity. A[n] . . . administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

[27] In contrast with the D.C. Rules of Professional Conduct, ABA Model Rule 1.6 (b)(5) allows an attorney to reveal confidences and/or secrets of a client to establish a claim in a controversy with the client, whereas the D.C. Rule only allows such disclosures when used by an attorney defensively. *See* Rule 1.6(e)(3) (disclosures permitted "to the extent reasonably necessary to

(3) Disciplinary Counsel contends that Koeck was required to satisfy the reporting provisions of 17 C.F.R. § 205.2(a)(1) of SOX. Indeed, Disciplinary Counsel maintained that before Koeck could properly file a retaliatory termination action, the internal reporting requirements of § 205 required her to report her concerns about GE actions in Brazil up to its Board of Directors. We have not been able to satisfy ourselves that Koeck qualifies as an attorney "appearing and practicing before the Commission" as defined in § 205.2(a)(1)(ii), (iii), and (iv). However, we are satisfied that if she was so qualified, she would qualify as a subordinate attorney as defined by § 205.5 ("An attorney who appears and practices before the Commission . . . under the supervision or direction of another attorney . . . is a subordinate attorney."), and her mandatory internal reporting requirements were satisfied when she reported her concerns to her supervisor. *See* § 205.5(c) (subordinate attorney complies by reporting to supervising attorney). In this case, it is undisputed that Koeck reported her concerns about GE activities in Brazil both to her immediate supervisor, Raymond Burse, and to the GE corporate ombudsman, Eugene Mensching. FF 8, 10, 18.

C. Koeck and Bernabei did not violate the "reasonable and necessary" constraint placed on an attorney using client confidences when they filed appellate papers with the ARB or when they appeared before the SEC.

(1) Initially a 14-page complaint detailing allegations of GE's fraudulent activities in Brazil was filed with the DOL by Joseph Cotchett whom Koeck had retained to file her SOX claim. FF 13-16. After OSHA dismissed the complaint on statute of limitations grounds, Koeck filed a letter for summary decision *pro se* to the ALJ. FF 20. Subsequently, Bernabei was retained and

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establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct 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").

supplemented Koeck's submission with a Motion for Partial Summary Judgment supported by a Declaration signed by Koeck. FF 29.[28] After the ALJ's denial of the motion, Bernabei filed an appeal to the ARB in which she included the Declaration which had been previously filed with the ALJ. FF 32. Disciplinary Counsel does not question the propriety of the material filed with the ALJ; rather, he limits his objection to the Declaration which Koeck and Bernabei included with the materials filed with the ARB. Disciplinary Counsel's objection is difficult to understand. Even though Disciplinary Counsel contends the ARB appeal related only to an ALJ's limited ruling on the statute of limitations, and therefore, Bernabei's appellate materials should have been limited, according to Disciplinary Counsel, to addressing that issue, we assume he agrees that the ARB was entitled to see some version of Koeck's Complaint. As we indicated in the Findings of Fact above, the difference between Koeck's 14-page Complaint and the Declaration attached to the Partial Motion for Summary Judgment filed with the ALJ is more a matter of form than substance.

Cosmetics aside, we have a more substantive disagreement with Disciplinary Counsel; namely, we do not accept the premise that the ARB was limited to ruling only on the issue determined by the ALJ. If the ARB had reversed the ALJ's ruling on the statute of limitations, we read the applicable law to say the ARB was free to consider broader issues. *See, e.g., In re Overall v. Tennessee Valley Authority*, 2001 Ad. Rev. Bd. LEXIS 87, ARB Nos. 98-111, 98-128 (April 30, 2001) at 28 (The ARB is "not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature"). Moreover, we are reluctant to second guess seasoned counsel when it comes to determining what information can best advance a litigant's

[28] In filing the Motion for Partial Summary Judgment, Bernabei appears to have followed the procedure prescribed in Federal Rules of Civil Procedure Rule 56(c)(1)(A) and (c)(4), which provide for a Declaration in support of the motion.

chances on appeal. We are comforted here by the fact that nothing presented to the ARB was seemingly outside the record compiled before the ALJ.

(2) Finally, since the SEC received the original 14-page complaint which contained references to GE's confidential information, *see* 29 C.F.R. § 1980.104(a) ("Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint,. . . [and] provide an unredacted copy of these . . . materials to the . . . Securities and Exchange Commission"), we find it difficult to conclude that Koeck and Bernabei were prohibited from discussing the matters contained in the complaint with representatives of the SEC. Moreover, the SEC is the regulatory agency with the greatest interest in GE's behavior not only with respect to "material violations" of the securities laws but also with respect to violations of 18 U.S.C. §§ 1341 (fraud and swindles), 1343 (wire fraud), 1344 (bank fraud), 1348 (securities and commodities fraud), and any other provision of Federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1)(A) (providing whistleblower protection to those who provide information to the SEC).

D. The crime-fraud exception of Rule 1.6(d) permits the disclosures made to the Assistant U.S. Attorney and the Brazilian officials.

(1) While an argument can be made that Koeck's decision to report information concerning GE's activities to an Assistant U.S. Attorney in Illinois and to officials in Brazil is within the scope of SOX provisions, *see* 18 U.S.C. § 1514A(a)(1)(A), we are more comfortable concluding that they fall within the scope of Rule 1.6(d)(2) of the D.C. Rules of Professional

Conduct.[29] Rule 1.6(d) allows for a limited exception to the general rule of client confidentiality. It provides in its entirety that:

> (d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:
>
> (1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or
>
> (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

(2) The evidence indicates that questions arose at least as early as 2005 about the documentation GE's customers were providing concerning the location where purchased products were to be used.[30] FF 7, 8. Koeck maintained in her SOX claim that GE continued to sell products to these customers despite their questionable documentation and that GE required her to collect receivables from these customers and to do other things which involved her in GE's illegal activities. FF 14-16. Indeed, GE's in-house counsel Roland Schroeder confirmed that some of the opinion letters from Brazilian counsel retained by GE (among the documents removed by Koeck) stated that GE's failure to pay the taxes could result in criminality. FF 38.[31] No evidence was presented to rebut Koeck's assertions that her services were involved in an ongoing fraud.

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[29] Because Koeck is licensed to practice law only in this jurisdiction, the District of Columbia, her conduct in making disclosures to a U.S. Attorney's Office, Brazilian authorities, and the press is covered by the D.C. Rules of Professional Conduct. *See* Rule 8.5(b)(i).

[30] The implication was, apparently, that GE employees either knew or should have known that GE products were not being *used* in the locations indicated in the documents provided by the customer(s); thus, circumventing the premise of the Brazil VAT. FF 6-8, 38.

[31] The Hearing Committee was not shown the opinion letters or the confidential information which Koeck took from GE.

See, e.g., X Corp. v Doe, 805 F. Supp. 1298, 1310 (E.D. Va. 1992) (for invocation of crime-fraud exception, purported crime or fraud need not be conclusively proven, but respondent must demonstrate more than mere suspicion); *United States v. Jacobs*, 117 F.3d 82, 87-88 (2d Cir. 1997) (party wishing to invoke crime-fraud exception must demonstrate that a factual basis for showing a probable cause to believe a fraud or crime has been committed).

On this record, therefore, we cannot say that Koeck's assertions about the criminal activities of GE or her involvement in them are unreasonable. Surely the material which Koeck removed from GE to support her claim suggests more than mere suspicion. Accordingly, Koeck's reporting of her concerns about GE's activities in Brazil to law enforcement officials here in the United States and in Brazil seems to fall squarely within the language of the exception described in Rule 1.6(d)(2). The alleged tax fraud and bribery scheme if true were reasonably certain to result in injury to the financial interests of Brazil, to violate the laws of the United States, and to do damage to the reputation of GE as well as to the interests of its shareholders. *See* FF 6-8; 38.

E. Koeck violated Rule 1.6(a) with her disclosures to the press, and Bernabei violated Rule 8.4(a) by knowingly assisting her.

We find no basis, however, in SOX or in Rule 1.6(d) to justify Koeck's or Bernabei's disclosures of GE's confidences and/or secrets to the press. Those provisions expressly limit the circumstances in which client documents or confidences may be revealed. Rule 1.6(d)(2) provides that a lawyer "may reveal client confidences and secrets, to the extent reasonably necessary . . . to prevent, mitigate, or rectify substantial injury to the financial interests or property of another . . . ." That requirement was satisfied in our judgment when Koeck reported her concerns to law enforcement in the United States and in Brazil, but not so when it came to speaking to the press. Comment 19 to Rule 1.6 provides that: "Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would

harm the client." Rule 1.6, cmt. [19]. These limitations are consistent with the recognition of the duty of confidentiality as a bedrock legal principle that must be zealously protected. *See, e.g., In re Gonzalez*, 773 A.2d 1026, 1030 (D.C. 2001) ("'By turns both sacred and controversial, the principle of the confidentiality of client information is well-embedded in the traditional notion of the Anglo-American client-lawyer relationship.'") (quoting Charles W. Wolfram, *Modern Legal Ethics* § 6.1.1, at 242 (1986)). In this case, the record is clear that Koeck and Bernabei sought to use the press not to report crime or to protect financial interests, but rather, to gain leverage in the advancement of Koeck's SOX claim, nothing more. That purpose clearly was not within the limitations provided by SOX or Rule 1.6(d) of the D.C. Rules of Professional Conduct. Hence, Bernabei violated Rule 8.4(a) by knowingly assisting Koeck's violation of Rule 1.6(a). Bernabei's testimony and email exchanges with Koeck reveal that their principle purpose was to advantage the employment litigation. *See* FF 33, 34, 36, 37.

F. Bernabei did not violate Rule 8.4(d).

As to whether Bernabei interfered with the administration of justice, we conclude that Disciplinary Counsel has not proven by clear and convincing evidence that Bernabei's statement (about her "marching orders" to go to the press if GE counsel did not agree to mediation) constituted a violation of Rule 8.4(d). We find that if the statement affected the administration of justice, it did so in a *de minimis* manner. *See, e.g., In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

G. No due process violation

At the start of proceedings and before the Hearing Committee closed the record of evidence, Bernabei objected to having to defend the disciplinary charge without Koeck's participation. As to this claim, we find no prejudice and no violation of due process. The record is clear that Bernabei was not prejudiced by Koeck's absence. The basis upon which we found

that Bernabei violated Rule 8.4(a) rested almost entirely on Bernabei's own statements. Nothing that Koeck could have testified to would change the fact that Blakey and Bernabei were the architects of the press strategy and that its purpose was to enhance Koeck's chances for a favorable outcome in her SOX case.

V. RECOMMENDED SANCTION

The discipline imposed in a matter should serve to maintain the integrity of the legal profession, protect the public and the courts, and deter similar misconduct by the respondent-lawyer and other lawyers. *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). Further, the sanction imposed must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1).

A Hearing Committee should take into consideration the following factors when determining an appropriate sanction: (1) seriousness of the misconduct; (2) prejudice, if any, to the client; (3) whether the conduct involves dishonesty and/or misrepresentation; (4) violations of any other disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether the attorney acknowledges the wrongful conduct; and (7) circumstances in mitigation. *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013).

A. Sanction for Koeck

Disciplinary Counsel has recommended that Koeck be suspended for 30 days with a requirement that she prove fitness to practice before being readmitted. We adopt this recommendation.

For a lawyer who exceeds the limitations to a bedrock principle of the profession, who repeatedly ignores the orders of the court, who rejects every effort by Disciplinary Counsel to

arrange a convenient venue to enable her to participate in a proceeding resulting from her conduct, some sanction is to be expected. The only question, of course, is how severe. As to Koeck, "that lawyer," we think Disciplinary Counsel has recommended a temperate sanction. We accept it because of the factors enumerated in *In re Martin*, the sanction we recommend for Bernabei, *see infra*, the informal admonition given to Blakey, and the fact that this is Koeck's first offense.

We are aware that sanctions for a single violation of Rule 1.6 of the Rules of Professional Conduct have ranged from informal admonition to public censure. *See, e.g.*, *In re Ponds*, 876 A.2d 636, 637 (D.C. 2005) (per curiam) (public censure for disclosure of confidential information in a motion to withdraw); *Gonzalez*, *supra*, 773 A.2d at 1032 (informal admonition). In *Gonzalez*, the respondent violated Rule 1.6 when he filed a motion to withdraw in which he disclosed client confidences and attached several letters containing confidential client information. *Gonzalez*, *supra*, 773 A.2d at 1027. We note too that other jurisdictions have imposed six-month and 12-month suspensions where disclosures to the press were made in violation of an attorney's ethical obligation of client confidentiality. *See, e.g.*, *In re Schafer*, 66 P.3d 1036, 1038 (Wash. 2003) (en banc) (six-month suspension for disclosure of client confidences to various individuals including the press); *In re Lackey*, 37 P.3d 172, 180 (Ore. 2002) (per curiam) (12-month suspension for disclosing secrets gained from prior employment to the press). However, for the reasons enumerated above, we are satisfied with the discipline we recommend.

Regarding the fitness requirement, the Court explained in *In re Cater*, 887 A.2d 1, 24 (D.C. 2005), that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. *Id.* at 22. "[T]he open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run . .

. ." *Id*. In situations where the respondent refused to participate in disciplinary proceedings, the Court stated that three factors are relevant in assessing whether a "serious doubt" exists concerning a respondent's fitness: "(1) the respondent's level of cooperation in the pending proceedings, (2) the repetitive nature of the respondent's lack of cooperation in disciplinary proceedings, and (3) 'other evidence that may reflect on fitness.'" *Cater*, *supra*, at 24. These factors weigh in favor of the imposition of a fitness requirement in this case. Bluntly stated, Koeck has thumbed her nose at the disciplinary process. *See In re Hallmark*, 831 A.2d 366, 377 (D.C. 2003) (respondent's failure to cooperate with Bar Counsel and Board and "persistent disregard for the disciplinary process" warrants a fitness requirement); *In re Lea*, 969 A.2d 881, 893-94 (D.C. 2009) (absence of respondent from the proceeding "was itself an evidentiary fact that the committee could properly consider"). Koeck's repeated failure to comply with orders of this Committee, the Board, and the D.C. Court of Appeals for an independent medical evaluation, manifest a blatant disregard for the disciplinary process. Indeed, the fact that Koeck has not even bothered to attempt to lift her temporary suspension for failing to comply with orders of the D.C. Court of Appeals is further evidence of her dismissive attitude.

B. Sanction for Bernabei

As to Bernabei, Disciplinary Counsel contends that a sanction of public censure is warranted. Bernabei contends that if she did commit a rule violation, she should suffer no sanction due to the unsettled area of law or, in the alternative, only an informal admonition.

After considering all the circumstances, we recommend a sanction of informal admonition. We simply do not see Bernabei's conduct in this case as being more egregious than that of Blakey. They both were architects of the press strategy followed by Koeck. Indeed, the evidence reveals that Johnston of the *New York Times* was Blakey's contact and that, following Blakey's telephone

conversation with Johnston, he received the large bulk of GE documents referred to in his article and testimony. We see no justification for treating Blakey and Bernabei differently. We are aware of Disciplinary Counsel's contention that a sanction of public censure is warranted because (1) a Rule 8.4(d) violation exists where Bernabei "exacerbated the situation by seriously interfering with the administration of justice . . . [and] abetted and even enlarged her client's misconduct"; and (2) she refused to acknowledge any wrongdoing. We disagree. Assisting Koeck's disclosures to the press was a violation of Rule 8.4(a) as we ruled, but we fail to see how Bernabei's statement – that she had "marching orders" to contact the press if GE did not agree to mediate the SOX appeal – seriously interfered with the administration of justice.

Furthermore, even Disciplinary Counsel acknowledges the extensive mitigation evidence presented by Bernabei that reveals a long and successful career attested to by many former clients and colleagues. *See* RX 97-121. Finally, while not acknowledging any misconduct, Bernabei fully cooperated with Disciplinary Counsel and the Committee in these proceedings and she has no prior record of discipline.

CONCLUSION AND RECOMMENDATION

For reasons set forth in this Report and Recommendation, the Hearing Committee recommends that Respondent Koeck be suspended for 30 days and that before being permitted to resume the practice of law, she be required to demonstrate fitness to do so pursuant to D.C. Bar Rule XI, § 3(a)(2). As to Respondent Bernabei, the Hearing Committee recommends that she be sanctioned with an informal admonition.

AD HOC HEARING COMMITTEE

By: /RFP/
Rudolph F. Pierce, Esquire
Chair

/MC/
Marcia Carter
Public Member

/BS/
Bernadette Sargeant, Esquire
Attorney Member

Dated: January 11, 2017

Ms. Sargeant has filed a separate concurring statement.

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

In the Matter of:	:	
	:	
M. ADRIANA KOECK,	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2008-D260
A Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 439928)	:	
	:	
LYNNE BERNABEI,	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2012-D376
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 938936)	:	
	:	
Respondents.	:	

SEPARATE STATEMENT OF BERNADETTE SARGEANT

Although I agree with the sanction imposed on Respondent Koeck, I do not believe that on the record before us, the Hearing Committee can conclude that Koeck was justified in disclosing client confidences to either the U.S. Attorney's Office in the Northern District of Illinois or to Brazilian officials.

The only information we have that Koeck acted in good faith and based on more than a mere suspicion of wrongdoing is Koeck's unproved assertion that she was asked to undertake actions that she perceived were in furtherance of GE's complicity with customers' apparent misrepresentations regarding their VAT obligations. *See* FF 26 (Bernabei recalling Koeck's assertions). At the time, Koeck was an inexperienced attorney whose judgment may have been questionable and, in my view, her unexamined opinion (flatly stated in self-serving documents drafted in support of her post-termination claims against GE) should not serve as the basis for a finding that she had sufficient justification to disclose client confidences under Rule 1.6(d). On

such a record, I do not believe that we can conclude that GE "used or [was] using a lawyer's services to further a crime or fraud" so as to permit the disclosure of GE's confidences and secrets under the crime-fraud exception. *See* Rule 1.6(d); *see also In re Public Defender Service*, 831 A.2d 890, 903 (D.C. 2003) ("'sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney'" not sufficient to invoke crime-fraud exception to attorney-client privilege) (quoting *In re Grand Jury Proceedings (Corporation)*, 87 F.3d 377, 381 (9th Cir. 1996)); *In re Omnicom Group, Inc.*, 233 F.R.D. 400, 405 (S.D.N.Y 2006) ("court findings [relating to crime-fraud exception] that would deprive the client['s confidences] of protection should be based on an adequate record and bear some assurance of reliability").

Koeck's judgment is further called into question by her disturbing and persistent failure to cooperate with this Hearing Committee, including her repeated failure to comply with court orders. As is detailed in this Report and Recommendation at Part V. A., *supra*, Koeck has demonstrated a stunning lack of respect for her obligations as a member of the Bar, and, for that reason alone, her mere assertions should not serve as the basis for a finding that the exception provided in Rule 1.6(d) permitted the disclosing of client confidences and secrets to law enforcement.

I agree that Bernabei violated Rule 8.4(a) in knowingly assisting Koeck's rule violation and encouraging her disclosures to the press. Even if the crime-fraud exception was properly invoked, I would not consider Koeck's disclosures to the press to be "reasonably necessary," and the record shows that Bernabei knowingly assisted and encouraged this clear rule violation. *See* Rules 8.4(a), 1.6; *see also* Rule 1.6, cmt. [21] ("[A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."); Rule 1.6, cmt. [19] ("Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would harm the client.").

With regard to information in the record that Blakey advised Koeck that her disclosure to law enforcement authorities would be justified under the crime-fraud exception, I note that Blakey relied on Koeck's characterization of relevant events – a characterization which we are unable to assess for the reasons described above including Koeck's repeated and deliberate failures to cooperate with this Committee.

Respectfully submitted,

/BS/
Bernadette Sargeant, Esquire
Attorney Member

Dated: January 11, 2017