DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
M. ADRIANA KOECK,[1]	:	Board Docket No. 14-BD-061
	:	Bar Docket No. 2008-D260
An Administratively Suspended Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 439928)	:	
	:	
LYNNE BERNABEI, ESQUIRE	:	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)	:	

REPORT, RECOMMENDATION, AND ORDER OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

INTRODUCTION

Respondent M. Adriana Koeck disclosed confidences and secrets of her former client. Her lawyer, Respondent Lynne Bernabei, participated with her in some, but not all, of those revelations. Their conduct raises questions at the heart of what it means to be an attorney:

> The broad commitment of the lawyer to respect confidences . . . is [her] talisman. Touching the very soul of lawyering, . . . the privilege of clients to bind their lawyers to secrecy is universally honored and

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

> enforced as productive of social values more important than the search for truth.

In re Gonzalez, 773 A.2d 1026, 1030 (D.C. 2001) (quoting *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978)).

Professional rules that safeguard client confidences are "designed to preserve the trust of the client in his lawyer, without which the practice of law, whatever else it might become, would cease to be a profession." *Id*. (quoting *Fred Weber, Inc.*, 566 F.2d at 604). Confidentiality and privilege are indispensable to the attorney-client relationship. *See Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). A lawyer's advice is of questionable value if it is not based on all relevant, material facts. Without confidentiality, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Absent a strict duty of confidentiality, the role of an attorney could change from that of a client's representative and zealous advocate to "a combination of prosecutor, judge, and jury" who "gather[s] information about possible fraud, render[s] a decision, and then exact[s] a punishment – disclosure – as he [sees] fit in a context in which the client no longer has a legal representative or advocate." *Report of the Legal Ethics Committee of the American College of Trial Lawyers on Duties of Confidentiality* at 21 (March 2001).

In this case, we must determine whether Respondents' disclosures violated these core professional concerns. More particularly, we must assess whether Ms. Koeck violated Rule 1.6(a) of the D.C. Rules of Professional Conduct ("Rules") by

disclosing client information, and whether Ms. Bernabei violated Rule 8.4(a) by knowingly assisting her.

The Hearing Committee concluded that Ms. Koeck did violate Rule 1.6(a) on one occasion, when she disclosed confidences of her former client to a newspaper reporter. The Hearing Committee also found that Ms. Bernabei violated Rule 8.4(a) when she knowingly assisted Ms. Koeck in doing so. It recommended that Ms. Koeck be suspended for thirty days, with a requirement that she prove fitness before being readmitted. It recommended an informal admonition for Ms. Bernabei.

Disciplinary Counsel[2] filed exceptions to the Hearing Committee's refusal to find: (1) five Rule 1.6(a) violations by Ms. Koeck, arising from additional, discrete disclosures of her client's confidences; (2) one additional Rule 8.4(a) violation by Ms. Bernabei, based on her knowing assistance to Ms. Koeck in one of those disclosures; and (3) a Rule 8.4(d) violation by Ms. Bernabei, based on a litigation-related statement she made to opposing counsel. Disciplinary Counsel does not challenge the Hearing Committee's recommended sanction for Ms. Koeck, but argues that public censure is the appropriate sanction for Ms. Bernabei's misconduct.

Respondent Bernabei concedes the violation found by the Hearing Committee, accepts its sanction recommendation, and asks the Board to affirm its Report. *See* Respondent Lynne Bernabei's Brief in Opposition ("Bernabei Br.") at 3.

---

[2] The Specification of Charges was filed by the Office of Bar Counsel, whose title the Court of Appeals changed, effective December 19, 2015.

Respondent Koeck did not participate in the disciplinary proceeding and did not file any exceptions to the Report.

We adopt the Hearing Committee's findings of fact because they are supported by substantial evidence in the record as a whole, and we have made supplemental fact findings, citing directly to the record (*see* Board Rule 13.7). We have reviewed the Hearing Committee's conclusions of law and recommended sanction *de novo*. *See In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013) (per curiam).

We conclude that Disciplinary Counsel proved that Ms. Koeck violated Rule 1.6(a) on four separate occasions, not merely the one found by the Hearing Committee. Her improper disclosures of GE's confidences and secrets were made to the U.S. Attorney's Office for the Northern District of Illinois, to the press, to Brazilian authorities, and to the SEC. We otherwise agree with the Hearing Committee's conclusions concerning the misconduct of Respondent Bernabei, although we disagree with some of its reasoning. Finally, we agree with the Hearing Committee's recommendation to issue an informal admonition for Ms. Bernabei, and we recommend a sixty-day suspension with fitness for Ms. Koeck.

I. PROCEDURAL HISTORY

On July 21, 2014, Disciplinary Counsel filed a Specification of Charges against Ms. Koeck, Ms. Bernabei, and G. Robert Blakey.[3] The Specification alleged multiple improper disclosures by Ms. Koeck of confidences and secrets of her

[3] On October 30, 2015, Mr. Blakey accepted an Informal Admonition, and on December 7, 2015, a Contact Member granted a motion to dismiss the petition against him.

former employer General Electric Corporation ("GE"), all in violation of Rules 1.6(a) and (g). The Specification also alleged that Respondents Bernabei and Blakey, in their capacity as attorneys for Ms. Koeck, violated Rule 8.4(a) by knowingly assisting those disclosures. Finally, the Specification charged that Ms. Bernabei seriously interfered with the administration of justice, and thus violated Rule 8.4(d), when she made an inappropriate statement to opposing counsel while representing Ms. Koeck in litigation adverse to GE.

Disciplinary Counsel personally served the Specification of Charges on Ms. Koeck, but she never answered it. On December 22, 2014, the Board stayed the proceedings against her after she claimed that a disability (Post-Traumatic Stress Disorder) prevented her from assisting in her own defense. She thereafter failed to comply with multiple orders of the Court of Appeals to submit to an independent medical examination. On April 23, 2015, the Court ordered her to show cause why she should not be held in contempt for her failure to comply with its prior orders, and ordered that she be suspended by consent. It also unsealed the disability proceedings. On July 1, 2015, the Court again ordered her to submit to a medical examination within sixty days, or respond substantively to the Specification of Charges. Again she failed to comply and, on October 5, 2015, the Board lifted the stay of the proceedings against her.

The hearing took place on December 1-3, 2015. Ms. Koeck, who lived in Arizona at the time, was subpoenaed to provide remote testimony from a site in that State, but defied the subpoena and failed to appear. The Hearing Committee, with

one member filing a separate concurring statement, issued its Report and Recommendation on January 11, 2017.

II. FINDINGS OF FACT

A. Ms. Koeck's Abbreviated Tenure as In-House Counsel

On January 3, 2006, Ms. Koeck began working as an in-house counsel for GE's Consumer & Industrial Division (C&I), located in Louisville, Kentucky. FF 3.[4] As a condition of her employment, she signed an agreement requiring her to keep the company's information strictly confidential and to return all secret or confidential materials to GE when her employment terminated. FF 4. GE thus timely insisted that she hold "inviolate" the information that she received during the course of her employment. *See* Rule 1.6(b).

The Louisville C&I office was responsible for managing the sale and distribution of electrical products in Latin America. FF 3. Ms. Koeck was principally assigned to deal with legal issues arising in Brazil, Argentina, and Chile. FF 5.

In Brazil, C&I distributed products through a centrally located warehouse. FF 6. Within 120 to 180 days of sale, its Brazilian customers were required to declare (in written reports delivered to C&I) the Brazilian region in which a product was to be used. *Id*. The location of "use" was significant, because the customer had

---

[4] The Hearing Committee's Findings of Fact are designated "FF __" and references to its Report and Recommendation are designated "HC Rpt. at __." Disciplinary Counsel's and Respondent's exhibits are designated "BX" and "RX" respectively. The hearing transcript is designated "Tr. __," and that of the oral argument before the Board is designated "OA Tr.__."

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 a populous area. *Id*.

In 2005, C&I learned of discrepancies in the VAT reports. FF 7. Some customers were reporting that GE products were being used in a rural state (with a low VAT) when they were actually utilized in a more populated area (with a high VAT). *Id.* GE undertook—prior to hiring Ms. Koeck—an investigation that sought to track questionable shipments and to determine why the discrepancies occurred. FF 8.

Ms. Koeck's immediate supervisor was the General Counsel of C&I, who briefed her about the investigation. FF 5, 8. Resolving the VAT reporting discrepancies became one of her principal assignments. FF 8. She was responsible for determining how properly to complete the documentation for the VAT, and to collect taxes owed by delinquent customers. *Id.* Ms. Koeck's relationship with C&I's General Counsel quickly deteriorated, however, and as early as June 26, 2006, she sought a transfer out of the division. BX 76 at 8.

B. Ms. Koeck's Termination and Sarbanes-Oxley Complaint

In mid-November 2006, eleven months into her employment at C&I, Ms. Koeck learned that the C&I General Counsel wanted to fire her. FF 9. On November 29, 2006, immediately before a scheduled meeting at which GE intended to do so, she sent an e-mail to the GE Corporate Ombudsman claiming retaliation "for participating in and reporting illegal activity engaged in by [GE] personnel." FF 10. She alleged that she had discovered that GE had perpetrated tax fraud in Brazil and

was terminating her because she raised concerns about the fraud with her supervisors. *Id*. At the time, she also made a personal copy of her work laptop's hard drive, downloading confidential and privileged GE documents. FF 10.

GE's senior employment counsel investigated Ms. Koeck's retaliatory termination claim and concluded that it was meritless. FF 12. On January 18, 2007, GE fired her 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." *Id.*

Following her termination, Ms. Koeck retained a California attorney who, on April 23, 2007, lodged a whistleblower retaliation complaint against GE, C&I, and her supervisors pursuant to Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 USC § 1514A. BX 8-9. The complaint was contained in a letter to the United States Department of Labor ("DOL"), Atlanta Regional Office of the Occupational Safety and Health Administration ("OSHA"). The DOL Secretary has delegated investigatory and initial adjudicatory responsibility over all SOX complaints to OSHA. OSHA's findings and orders can be appealed to an Administrative Law Judge, *see* 29 C.F.R. § 1980.107(b), and then to the Federal Administrative Review Board ("ARB"), *see* 29 C.F.R. § 1980.109(e). The ARB's decisions are reviewable in federal court. 29 C.F.R. § 1980.112(a); *see also* 29 C.F.R. § 1980.114(a).

Ms. Koeck's complaint, as did her complaint to the corporate ombudsman, alleged tax fraud by GE in Brazil, her reporting of the fraud to her supervisors, and GE's unsatisfactory response. FF 14. It claimed that GE's shipping invoices

fraudulently represented that GE products were being shipped to duty-free or low VAT-rate areas of Brazil, when in fact the products were destined for high-tax areas. FF 15. The complaint also alleged that GE had used Ms. Koeck's services to conceal the fraud, and had terminated her because she reported the fraud to her superiors. FF 15-17; BX 8. Pursuant to DOL regulations, OSHA notified GE of the filing and provided a copy of the complaint and supporting materials to the Securities and Exchange Commission. FF 14; *see* 29 C.F.R. § 1980.104(a).

Two months later, on June 25, 2007, the OSHA Regional Administrator dismissed the SOX complaint because it had not been timely filed. FF 18. Ms. Koeck appealed the dismissal, after which her California attorney withdrew from the case. FF 19. Appearing *pro se*, Ms. Koeck requested the Administrative Law Judge ("ALJ") handling the appeal to issue a summary decision on the statute of limitations issue; she supplied him with copies of the SOX complaint and a host of additional GE documents, including its internal e-mail communications. FF 20.

C. Mr. Blakey Represents Ms. Koeck, Who Discloses GE Information to the U.S. Attorney's Office and Brazilian authorities.

In late August 2007, Ms. Koeck sought legal advice from her former Notre Dame Law School professor, G. Robert Blakey. FF 21. She claimed to be concerned about her potential criminal liability in Brazil, and she provided Mr. Blakey with documents she had taken from GE. *Id.*; BX 85 ¶ 11.

Mr. Blakey advised Ms. Koeck "that the [GE] documents and information she had were not covered by the attorney-client relationship, because they fell within the

crime/fraud exception." FF 21. Mr. Blakey also concluded from the documents that GE had probably committed mail fraud. FF 22; RX 78 at 2.

Pursuant to Mr. Blakey's recommendation, Ms. Koeck reported the matter to a Blakey acquaintance in the U.S. Attorney's Office in Chicago. FF 22. She provided that office with copies of documents that she claimed "evidenced GE's fraud and tax evasion schemes." BX 76 ¶ 93. The U.S. Attorney's office later forwarded those materials to the Department of Justice in Washington, D.C. FF 22.

In November 2007, Ms. Koeck contacted Brazilian federal authorities to determine "how and where to report" GE's purported transgressions. FF 23. She subsequently talked about the matter with the Brazilian Ministry over a period of months and provided Brazilian authorities with a copy of her Sarbanes-Oxley complaint, supplemented by her fifty-three-page fact narrative. *Id.*; RX 78 at 7.

Her disclosures to the U.S. Attorney's Office and to Brazilian authorities underlie two of the Rule 1.6 charges against her.

D. Ms. Bernabei Represents Ms. Koeck, Who Discloses GE's Confidences and Secrets to the Press and the SEC.

Mr. Blakey also recommended that Ms. Koeck contact the law firm of Bernabei & Wachtel, PLLC, whose attorneys were experienced in employment and whistleblower law. FF 24. Ms. Koeck first met with Ms. Bernabei and her associate on November 17, 2007. FF 25. She related her story and provided them with the SOX complaint and other corroborative documents taken from GE, including legal memoranda prepared by GE's outside counsel in Brazil. *Id.* On November 27, 2007,

Ms. Bernabei agreed to represent Ms. Koeck and assumed principal responsibility for handling the DOL litigation. FF 27.

As part of the litigation plan for her new client, Ms. Bernabei determined to implement a "press strategy." FF 33. Mr. Blakey concurred in that approach. FF 33-34. In mid-December, 2007, within a month of being retained, Ms. Bernabei told the lawyer representing GE in the DOL matter "words to the effect of 'I have marching orders to go the press unless you . . . agree[] to mediate within the next week or so.'" Tr. 67; *see also* Tr. 400.

The Specification of Charges broadly interpreted that statement as a threat "to make disclosures of . . . confidences and secrets to the press if GE refused to engage in mediation," and alleged that by making it, Ms. Bernabei interfered with the administration of justice in violation of Rule 8.4(d). Specification, ¶ 34(C). GE's lawyers viewed the statement as an unprofessional remark that seemed to be a "shakedown" (Tr. 68, 239-40), but effectively disregarded it: GE did not agree to mediation, did not complain about the remark within the DOL proceedings, and never mentioned it in any subsequent correspondence with Ms. Bernabei. Tr. 69, 139-140, 239-240.

The attempt to invoke mediation having failed, on January 28, 2008, Ms. Bernabei filed a motion for partial summary judgment with the ALJ in the DOL matter, supplementing Ms. Koeck's earlier *pro se* filing. FF 29. The motion contained the same exhibits previously submitted by Ms. Koeck, to which was added

a new twenty-page sworn declaration by Ms. Koeck that restated, without expanding, the disclosures contained in the original unsworn SOX complaint. *Id.*

1. The Press Disclosure

Ms. Bernabei remained eager for something to appear in the press because she felt that a news article would be the "best thing" for the lawsuit. FF 33, 34, 36; *see* Tr. 550-51. Ms. Koeck agreed with that tactic, but felt that Mr. Blakey should contact the press. BX 15. He was not counsel of record in the DOL litigation and she felt he would appear more credible to a reporter because he would seem to be "an independent party." *Id.*

Mr. Blakey accordingly contacted a reporter and asked if he "might be interested in material about a long-running series of felonies committed by General Electric in another country." FF 35. The reporter clearly was interested. Ms. Koeck thereafter met and discussed her story with him, and provided him with hundreds of pages of internal GE documents. *Id*. The reporter eventually authored an article that appeared in *Tax Notes International* on June 30, 2008, titled "Blame It on Rio, GE's Brazilian Headache." FF 38. The article detailed GE's VAT-related issues, relying heavily on the internal GE documents that Ms. Koeck—not named in the article—had supplied. *See id.*; RX 33 at 1 ("A lawyer for a participant in some of the events provided the documents on the condition that the source not be identified.").[5]

---

[5] Evidently frustrated with the delay in press coverage, in May 2008 Ms. Bernabei contacted a reporter at a second newspaper to gauge his interest in writing about what she described to him as a "whistleblower at GE." Tr. 443-44. She urged Ms. Koeck to send information to that reporter

Ms. Koeck's disclosures to the reporter underpin the Hearing Committee's finding of the Rule 1.6 violation by her, and Ms. Bernabei's knowing assistance with those disclosures supports the finding of a Rule 8.4(a) violation by her. No exceptions to those findings have been filed.

2. The SEC Disclosure

On March 13, 2008, the ALJ agreed with the OSHA determination that the whistleblower complaint had been untimely filed and dismissed it. FF 30.

During that same time frame, Ms. Koeck arranged with her neighbor—an SEC attorney—to meet with other SEC officials to discuss GE. Tr. 445. She asked Ms. Bernabei to accompany her to that meeting. *Id.*; FF 39. Ms. Bernabei agreed, believing that her client had the right to disclose evidence of crime and fraud to the SEC, particularly since it had already received Ms. Koeck's SOX filings directly from DOL. Tr. 445-49. The meeting took place on April 23, 2008. FF 39. Ms. Koeck discussed the substance of her complaint and provided copies of GE's confidential documents to the SEC staff. *Id.* In a follow-up letter, Ms. Bernabei—at the SEC's request—provided Ms. Koeck's estimate of the dollar amounts of GE's allegedly fraudulent activity, and also sent the SEC additional SOX litigation filings. Tr. 449-450.

"to get the process started." BX 53; Tr. 570. Ms. Koeck, however, was reluctant to do so. BX 53-54; Tr. 570-72. Although Ms. Koeck did prepare a narrative outline, it was not sent to the reporter because he had no interest in pursuing the matter. FF 37-38; Tr. 444-45, 573.

The disclosures to the SEC underpin another Rule 1.6 charge against Ms. Koeck, and a second Rule 8.4(a) charge against Ms. Bernabei.

On May 9, 2008, Ms. Bernabei appealed the ALJ's dismissal to the Administrative Review Board. FF 32. She included with the appeal the entire record before the ALJ because the scope of review was not limited to the statute of limitations issue. *Id.*[6]

E. GE's Counter-offensive

While working on his story, the reporter sought comments from GE and, although he did not identify his source, asked GE detailed questions about documents that GE knew Ms. Koeck had been able to access. Tr. 235-36. Since GE's dispute with her was "brewing" at the time, GE "put two and two together" and concluded that she had disclosed its confidences to the reporter. *Id.*; BX 59 at ¶¶ 28-29. Thus, on March 24, 2008, GE's lawyer wrote to Ms. Bernabei asserting that it had "reason to believe" that Ms. Koeck had wrongfully failed to return GE's confidential documents and had disclosed privileged information to an outside party. FF 31; BX 31 at 1. GE demanded that Ms. Koeck immediately return all copies of confidential and privileged materials. FF 31. Ms. Bernabei's law partner refused to

---

[6] In its briefing to the Board, Disciplinary Counsel does not take exception to the Hearing Committee's conclusion that Ms. Bernabei did not knowingly assist improper disclosures of GE's confidences and secrets in the appellate brief filed with the ARB. *See* HC Rpt. at 25-27. Disciplinary Counsel apparently no longer challenges the disclosures made by Ms. Koeck in either her *pro se* filing or the pleadings filed before ARB. Disciplinary Counsel, however, contends that Ms. Koeck was required to report up to the GE Board of Directors before filing her Sarbanes-Oxley complaint with the Department of Labor. *See* ODC Br. at 13-20. Disciplinary Counsel contends that by not doing so, Koeck violated Rule 1.6(a) in filing her whistleblower complaint. *See id*. at 17-21.

accede to the demand, contending that the documents were "evidence of crimes or fraud committed by GE" that Ms. Koeck had a right to retain and disclose. *Id.*

On June 6, 2008, GE filed a civil action against Ms. Koeck in the U.S. District Court for the Eastern District of Virginia, seeking to prevent further disclosures and to compel the return of all GE documents in her and Ms. Bernabei's possession. FF 40. The court later entered a stipulated order mandating that Ms. Koeck make no further disclosures, that she return the GE documents she had taken, and that she permit GE's forensic examination of her computer devices. *Id.*

On August 8, 2008, Ms. Koeck discharged Ms. Bernabei and her firm. FF 41. In or around January 2009, GE and Ms. Koeck entered into a settlement of their mutual claims and filed a stipulation of dismissal of the civil action brought by GE. *See* RX 73; Tr. 128-136, 155-56.

III. CONCLUSIONS OF LAW

A. Ms. Koeck Violated Rule 1.6(a) on Four Occasions.

Rule 1.6(a) states that a lawyer "shall not knowingly reveal" a confidence or secret of her client unless excused by one of the limited exceptions to the Rule. The Rule 1.6 prohibition encompasses client "confidences" (that is, information protected by the attorney-client privilege) as well as client "secrets" (which comprehensively include "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* Rule 1.6(b). Here, there is no dispute that Ms. Koeck disclosed GE's confidences and secrets (1)

to a reporter; (2) to the United States Attorney's Office for the Northern District of Illinois; (3) to Brazilian authorities; (4) to the SEC; and (5) to the Department of Labor.

The Hearing Committee analyzed in detail the circumstances of the first four disclosures in order to assess whether they fell within an exception designated by Rule 1.6. In particular, relying on "Koeck's assertions that her services were involved in an ongoing fraud," it parsed the record and concluded that Ms. Koeck violated Rule 1.6 only in connection with her disclosure to the press. HC Rpt. at 28-29. The Committee found that disclosures to the U.S. Attorney and Brazilian authorities were appropriate under the "crime-fraud" exception in Rule 1.6(d), and that disclosures to the SEC were appropriate under federal securities laws. HC Rpt. at 25-29.[7]

The Hearing Committee undertook its detailed examination despite the fact that Ms. Koeck utterly disdained participation in the disciplinary process. She did not answer the charges against her, did not attend the disciplinary hearing, did not offer any exhibits, and did not testify on her own behalf. As a result of her intransigence, the Hearing Committee could only seek to determine the propriety of

---

[7] The Committee also concluded, without analysis, that since the SEC had already received the SOX complaint, Respondents could discuss the matters contained within it. We do not accept that abstract premise. A disclosure may be inappropriate even if the information at issue has otherwise become public. Comment 19 to Rule 1.6 provides, "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."

her actions by turning to second-hand, historical evidence of her contentions, a considerable amount of which was self-serving, unsworn hearsay that she generated in a litigation context.[8]

Disciplinary Counsel argues that the Hearing Committee overreached in this respect because Disciplinary Counsel "should not be required to disprove every exception to Rule 1.6 when a respondent fails to participate in the proceedings." ODC Br. at 23. We agree.

The Board recently addressed a similar issue, albeit after the Hearing Committee in this case completed its work. In *In re Szymkowicz*, Bar Docket Nos. 2005-D179 *et al.* (BPR May 19, 2017), a conflict of interest case, we concluded that although Disciplinary Counsel always carries the burden to prove a Rule violation by clear and convincing evidence, a respondent must produce evidence (or explain why evidence is unavailable) to support a defense or exception to a charge before Disciplinary Counsel is required to disprove that defense or exception. That is, although Disciplinary Counsel always shoulders the *persuasion* burden of proof, the *production* burden—the obligation to come forward with some evidence—may shift to a respondent in a disciplinary case:

> [O]nce Disciplinary Counsel presents evidence of a conflict of interest . . . a respondent may offer evidence showing that he or she obtained

---

[8] As one Hearing Committee member appropriately observed, Ms. Koeck's "unexamined opinion . . . should not serve as the basis for a finding that she had sufficient justification to disclose client confidences under Rule 1.6(d)." Separate Statement of Bernadette Sargeant at 1. We agree, particularly in light of her "disturbing and persistent failure to cooperate with [the] Hearing Committee," her "repeated failure to comply with court orders," and her "stunning lack of respect for her obligations as a member of the Bar." *See id.* at 2.

> informed consent. . . . Disciplinary Counsel retains the ultimate burden to prove a violation of a Rule by clear and convincing evidence, and therefore *must rebut any evidence of informed consent*. If a respondent fails to raise informed consent as a defense (or to explain adequately why such evidence is unavailable), Disciplinary Counsel need not prove the absence of informed consent.

Szymkowicz, Bar Docket Nos. 2005-D179 *et al.*, at 6 (emphasis added).

The rationale of *Szymkowicz* applies squarely to the facts of this case. We conclude that Disciplinary Counsel retains the ultimate burden to prove a violation of Rule 1.6(a) by clear and convincing evidence. If a respondent produces evidence showing that a disclosure falls within an exception to Rule 1.6(a), Disciplinary Counsel must prove that the exception does not apply. However, if a Respondent fails to come forward with evidence of an exception to Rule 1.6(a), or to explain adequately why such evidence is unavailable, Disciplinary Counsel need not disprove the exception's application. *See In re Burton*, 472 A.2d 831, 846 (D.C. 1984) (per curiam) (appended Board Report) ("Once [Disciplinary] Counsel had presented a *prima facie* case, Respondent was free to present any evidence or arguments he wished. While Respondent was not obligated to present any defense, neither was [Disciplinary] Counsel obligated . . . to rebut all conceivable defenses and arguments that Respondent theoretically might have made, but in fact did not present, to the hearing committee.").

This principle applies with particular force here, where a respondent did not participate in the disciplinary process and Disciplinary Counsel consequently had no opportunity to test her claims under oath. A respondent cannot sit idly by and force the disciplinary system to scour an inadequate record to identify and resolve all

possible arguments, issues, and defenses that the respondent chose not to assert on her own behalf. *See In re Shannon*, Board Docket No. 09-BD-094, at 25-26 (BPR Nov. 27, 2012) (where Disciplinary Counsel has offered evidence that the respondent engaged in a conflicted representation, "the respondent cannot sit on his hands . . . and require [Disciplinary] Counsel to prove the negative"), *recommendation adopted where no exceptions filed*, 70 A.3d 1212 (D.C. 2013) (per curiam). The disclosure of a client's confidences and secrets may not be excused by such a deficient showing.

For these reasons, we conclude that Ms. Koeck violated Rule 1.6(a) when she disclosed GE's confidences and secrets, not only to the press, but to the U.S. Attorney's Office, to Brazilian authorities, and to representatives of the SEC.

B. Ms. Koeck's Sarbanes-Oxley Complaint Did Not Violate Model Rule 1.6.[9]

Disciplinary Counsel also accused Ms. Koeck of violating Rule 1.6(a) when she filed her retaliation complaint and supporting documents with OSHA.[10] This

---

[9] Disciplinary Counsel charged Ms. Koeck with violating D.C. Rule 1.6 in regard to the disclosures made before the Department of Labor, rather than Model Rule 1.6. As explained in this section, however, we find that the Model Rules are applicable to those disclosures. We recognize that amending charges during the course of disciplinary proceedings may raise questions of due process. *See In re Ruffalo*, 390 U.S. 544, 552 (1968) (finding that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process"). However, because Ms. Koeck did not appear in this case, did not claim prejudice, and was not in fact prejudiced, but rather benefits from our finding that D.C. Rule 1.6 does not apply under our choice of law analysis, we do not find it necessary to address any due process implications arising from our application of Model Rule 1.6.

[10] Disciplinary Counsel did not except to the Hearing Committee's finding that Ms. Bernabei did not violate Rule 8.4(a) in connection with the DOL filings she supervised. HC Rpt. 25-27.

charge stands on a different footing: unlike her other disclosures, our assessment of Ms. Koeck's culpability for disclosures in the retaliation complaint does not invoke any exception to Rule 1.6. Rather, we must assess whether her filing of the complaint violated Rule 1.6 in the first instance.

Under D.C. Rule 1.6, an in-house counsel:

> may not reveal or use employer/client secrets or confidences offensively in making a claim for employment discrimination or retaliatory discharge—unless, of course, such disclosures are authorized by another exception to D.C. Rule 1.6 (*e.g.*, the crime/fraud exceptions in subsection (d)).

D.C. Bar Ethics Op. 363 (Oct. 2012). This is so because D.C. Rule 1.6 principally contemplates *defensive* disclosure of client confidences or secrets. *See* Rule 1.6(e)(3) (disclosure of information defensively permitted "to the extent reasonably necessary" to respond to allegations by the client or in defending a civil claim). *Offensive* disclosure is permitted only in a fee collection action, and then only "to the minimum extent necessary." Rule 1.6(e)(5).

The ABA Model Rule of Professional Conduct, on the other hand, more generously permits offensive use of client confidences or secrets. In relevant part, Model Rule 1.6 provides:

> (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 . . . . (emphasis added).

Thus, under the Model Rules, an in-house lawyer may reveal client information in a wrongful discharge case against her former employer. Model Rule 1.6(b)(5); *see*

ABA Formal Op. 01-424, at 4 (Sept. 22, 2001) ("We conclude that a retaliatory discharge or similar claim by an in-house lawyer against her employer is a 'claim'" on behalf of a lawyer that can be asserted under this exception).

Ms. Koeck's SOX complaint was filed with the DOL, a "tribunal" within the meaning of the disciplinary rules.[11] The D.C. Rules have a specific choice of law provision relating to "tribunals." Rule 8.5(b)(1) provides:

> 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, unless the rules of the tribunal provide otherwise . . . .

The Hearing Committee determined that administrative agencies of the Department of Labor "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." HC Rpt. at 24 (citing *Willy v. Admin. Review Bd.*, 423 F.3d 483, 496, 499-500 (5th Cir. 2005) (applying federal common law and ABA Model Rules when examining ARB decision)). It thus considered the propriety of Ms. Koeck's disclosures under the ABA Model Rule 1.6, and concluded that she was authorized to disclose client confidences in her retaliation complaint. HC Rpt. at 23-24. Indeed, this principle seems well established. *See Tides v. Boeing Co.*, 644 F.3d 809, 810-11 (9th Cir. 2011) (disclosures to SEC in whistleblower cases permitted); *Van*

---

[11] "'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." Rule 1.0(n); Model Rule 1.0(m).

Asdale v. Int'l Game Tech., 577 F.3d 989, 994-96 (9th Cir. 2009) (rejecting argument that state ethics rules barred use of confidential information in litigating an attorney's SOX whistleblower retaliation claim); *Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d 829, 850-54 (N.D. Cal. 2016) (allowing in-house counsel to bring SOX claims even though it would require disclosure of his former employer's privileged information); *Jordan v. Sprint Nextel Corp.*, No. 06-105, at 3 (ARB Sept. 30, 2009) (lawyer "not precluded from relying on statements or documents covered by the attorney-client privilege in pursuit of his SOX whistleblower complaint").

We agree with that conclusion. Insofar as this case involves disclosures made in the DOL proceeding, the Model Rules apply. Disciplinary Counsel does not seriously contend otherwise, ODC Br. at 16, and practical considerations reinforce that view. Ms. Koeck's Sarbanes-Oxley complaint arose out of events in Kentucky; her complaint was necessarily filed with OSHA's Regional Office in Georgia; the case was assigned to an investigator in Tennessee; and after the OSHA office dismissed the complaint, it was assigned to an ALJ in Ohio and then to an ALJ in Washington, D.C., where it was eventually appealed to the ARB. FF 3, 13, 28; RX E at 3. The uniform application of the Model Rules throughout the proceeding ensured a consistent, well-ordered ethics regime.

Disciplinary Counsel concedes that Ms. Koeck could properly disclose GE confidences and secrets to the DOL because of the preemptive effect of Sarbanes-Oxley. "Because SOX is a federal statute, it is likely, and for purposes of these proceedings [Disciplinary] Counsel will agree, that it is permissible for a member of

the D.C. Bar to disclose client confidences and secrets to establish a SOX claim, and not just to defend against a claim brought by a client." ODC Proposed Findings of Fact at 13; *see also* ODC Post-Hearing Br. at 17 ("Disciplinary Counsel . . . assumes, for the purposes of this litigation only, that [Sarbanes-Oxley] preempts Rule 1.6 in that it allows a lawyer to use client confidences to the extent reasonably necessary to establish a Section 806 whistleblower retaliation suit against an organization-client").

Nevertheless, Disciplinary Counsel—although candidly acknowledging that "no case . . . squarely holds that an in-house lawyer must report up the chain of command before filing a SOX retaliation claim in the Department of Labor" (ODC Br. at 19)—contends that before filing her SOX complaint, Ms. Koeck was obligated to exhaust the "reporting up" requirements in Rule 1.13 and the SEC's professional conduct standards (17 C.F.R. § 205.2(a)(1)).[12] ODC Br. at 20-21. We reject both contentions.

First, Rule 1.13 has no bearing on this case. Disciplinary Counsel charged Ms. Koeck with violating only Rule 1.6(a) and (g). She was not charged with a Rule 1.13 violation. Disciplinary Counsel may not properly seek to engraft Rule 1.13's procedural protocols onto the Rule 1.6 charge. We note that Rule 1.13 specifically provides that it "does not limit or expand the lawyer's responsibility under Rule[]

---

[12] Rule 1.13(b) provides: "Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."

1.6 . . . ." Rule 1.13, cmt. [7]; *see also* Model Rule 1.13, cmt. [6] ("[T]his Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but *does not modify, restrict, or limit* the provisions of Rule 1.6(b)(1) – (6)." (emphasis added)).

Second, Disciplinary Counsel argues that internal reporting requirements of 17 C.F.R. § 205 also required Ms. Koeck to report further "up the chain" to GE's Board of Directors before filing her Section 806 complaint. The Hearing Committee correctly concluded, however, that the record was unclear as to whether Ms. Koeck was covered by Sarbanes-Oxley but, if she was, it was as a subordinate attorney who had fulfilled the reporting duties imposed upon her:

> 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).

HC Rpt. at 25. Ms. Koeck reported her concerns to her supervisor (her operating division's General Counsel), and also lodged her complaint with the GE Corporate Ombudsman. Sarbanes-Oxley required no more of her.

Finally, Disciplinary Counsel criticizes the substance of Ms. Koeck's Sarbanes-Oxley retaliation complaint, arguing that the disclosures were not reasonably necessary to the assertion of a retaliation claim because Ms. Koeck filed

a "false retaliation claim." *See* ODC Br. at 15-16. While Model Rule 1.6(b)(5) permits disclosures "to the extent the lawyer reasonably believes necessary . . . to establish a claim," Disciplinary Counsel argues it can "never be either reasonable or necessary to make a false claim." *Id*. at 16. Once again, however, we agree with the Hearing Committee that the filings were "reasonably necessary" to an adequate exposition of Ms. Koeck's complicated assertions of fraud, her purported discovery of the fraud, and the alleged retribution for her reporting of it. *See* HC Rpt. at 25-27.

For these reasons, we conclude that Ms. Koeck did not violate Model Rule 1.6 in connection with her filing of the retaliation complaint.[13]

C. Ms. Bernabei Violated Rule 8.4(a) on One Occasion.

Rule 8.4(a) provides that it is professional misconduct for an attorney to "knowingly assist or induce another to [violate or attempt to violate the Rules of Professional Conduct] . . . ." To act "knowingly" within the meaning of the Rule is to act with "actual knowledge of the fact in question," and knowledge "may be inferred from circumstances." Rule 1.0(f). Disciplinary Counsel contends that Ms. Bernabei violated Rule 8.4(a) when she assisted Ms. Koeck in making disclosures first to the press and later to the SEC. Ms. Bernabei concedes the former allegation

[13] Before the Board, Disciplinary Counsel does not challenge the Hearing Committee's rejection of a Model Rule 1.6 violation for disclosures made in the appellate brief to the ARB or the Motion for Partial Summary Judgment. Disciplinary Counsel's contention before the Board is focused on the initial failure to report up the chain of command prior to the filing the initial complaint. *See* ODC Br. at 12-20; ODC Reply Br. at 2.

and disputes the latter. The parties fundamentally disagree over the state of mind necessary to establish a violation of the Rule.

The Hearing Committee did not meaningfully address the state of mind issue. It simply concluded that Ms. Bernabei violated 8.4(a) with respect to the press disclosures because her "[principal] purpose was to advantage the employment litigation." HC Rpt. at 30. It found no Rule 8.4(a) violation with respect to the SEC disclosure because it found the disclosure to have been proper. *See id.* at 27.

Disciplinary Counsel argues for a rigid liability standard with a minimal scienter component. That proposed standard is particularly problematic here, where the misconduct charge is predicated upon legal advice the respondent lawyer gave to a client. According to Disciplinary Counsel, even if Ms. Bernabei "genuinely, but mistakenly believed, that Ms. Koeck's disclosures were permissible," she violated the Rule. ODC Reply Br. at 15. Indeed, even where a lawyer acts without fault—that is, has done everything appropriate to avoid malpractice—and is completely convinced that advice provided to a client is correct, Disciplinary Counsel would find a violation if the advice turns out to be wrong. In effect, Disciplinary Counsel argues for a rule of strict liability. *See* OA Tr. 17-18.

Respondent, on the other hand, contends that "knowingly" to assist a client in a Rule violation requires knowledge of that violation. Bernabei Br. at 32. Ms. Bernabei argues that because she believed that Ms. Koeck's disclosures to the SEC were appropriate, she did not "knowingly" assist Ms. Koeck to violate Rule 1.6, and thus did not violate Rule 8.4(a). *Id.* at 32-33.

To that end Ms. Bernabei relies on elemental grammatical construction explained, albeit in a criminal case, by the Supreme Court in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). *Id.* In *Flores-Figueroa*, the Court construed a statute that provided for enhanced penalties if a person, in the course of committing one of an enumerated list of crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person . . . ." *Flores-Figueroa*, 556 U.S. at 652-53 (quoting 18 U.S.C. § 1028A(a)(2)). The government argued the term "knowingly" does not "modify the statute's last phrase ('a means of identification of another person') or, at the least . . . does not modify the last three words of that phrase ('of another person')." *Id*. at 648. The Court held, however, that as a "matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Id*. at 650; *see also United States v. Olson*, 856 F.3d 1216, 1220 (9th Cir. 2017) (for conviction of misprision of felony, government must prove not only that principal engaged in conduct that satisfies essential elements of the underlying felony, but also the defendant's knowledge that the conduct itself was a felony). It follows that it is equally "natural" to read Rule 8.4(a)'s word "knowingly" as applying to the underlying Rule violation.

Disciplinary Counsel places principal reliance on the somewhat ambiguous statement in *In re Wiggins*, Bar Docket No. 428-03, at 29 (HC Rpt. Feb. 7, 2006), *adopted by BPR*, July 31, 2006, *recommendation adopted in relevant part*, *In re Penning*ton, 921 A.2d 135, 145 (D.C. 2007) that a respondent acted "knowingly" if

she was "aware of the critical facts underlying the violation." *See* ODC Post-Hearing Br. at 10; ODC Reply Br. at 14-15. Thus, Disciplinary Counsel argues, because "Ms. Bernabei does not dispute that she knew the information that Ms. Koeck revealed was confidential and secret and that GE vigorously objected to its disclosure," she "should have known that Ms. Koeck was violating a core ethical duty to her client by breaching her client's confidentiality" and thus violated the rule "[e]ven if [she] genuinely, but mistakenly believed, that Ms. Koeck's disclosures were permissible." ODC Reply Br. at 15.

Disciplinary Counsel, however, stretches the holding of *Wiggins* too far. *Wiggins* actually supports the argument posited by Ms. Bernabei.

In *Wiggins*, the respondent (Wiggins) advised his client (Pennington) that she (Pennington) could make core misrepresentations to her client. Bar Docket No. 428-03, at 30.

Before the Court of Appeals, Wiggins "concede[d] that Pennington's 'proposed course of conduct was fraudulent and that he knew it to be so . . . .'" *Pennington*, 921 A.2d at 144 (quoting Wiggins's brief). When Wiggins advised Pennington to mislead her client, he "knew, and certainly should have known, that her 'breach of her ethical responsibilities was an *obvious* one.'" *Id.* (emphasis added) (quoting Hearing Committee Report). Moreover, the *Wiggins* Hearing Committee rejected the rigid standard urged by Disciplinary Counsel in this case:

> Our conclusion *does not . . . saddle lawyers with "strict liability" for faulty legal advice. . . . We have no doubt that there are many gradations of poor legal advice that will not rise to the level of an ethical violation*. By the same token, however, ethical misconduct does

> not cease to be cognizable as such merely because it occurs through or in connection with the dispensation of legal advice. . . . In certain instances, advising a client can lead to an ethical violation. Rule 1.2(e) defines one such instance, *i.e.*, *where an attorney knowingly counsels a client to engage in fraudulent conduct. We find that that is precisely what Respondent did in this case.*

Wiggins, Bar Docket No. 428-03, at 26 (emphasis added) (internal citations omitted). *Wiggins* thus compels the conclusion that, in the context of providing legal advice to a lawyer, violation of Rule 8.4(a) requires scienter with respect to the impropriety of a client's conduct. That is, the "critical facts underlying the violation" of Rule 8.4(a) of which a respondent must be aware include knowledge of the client-lawyer's predicate Rule violation. *See, e.g.*, *In re LeBlanc*, 972 So. 2d 315, 318 (La. 2007) (per curiam) (knowingly assisting a judge's violation of Louisiana Rules of Professional Conduct where respondent "'clearly did know [the judge's solicitation of a donation to relative's political campaign] [was] wrong at the time he made the cash payment to Judge Green'") (quoting Hearing Committee Report). A respondent's testimony concerning his or her subjective awareness in that regard can be determinative so long as it is objectively reasonable under the circumstances. *Cf.* Rule 1.6, cmt. [21] ("Paragraphs (c) and (d) permit disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.").

We believe that that this is the appropriate construction of Rule 8.4(a), and are also of the view that Disciplinary Counsel's interpretation of the Rule would be counterproductive. Rule 1.6 is written in such a way as to encourage attorneys to

seek legal advice with respect to their ethical duties. Thus, attorneys may disclose client confidences and secrets "to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law, including these Rules." Rule 1.6(e)(6). Such disclosures are authorized "because of the importance of a lawyer's compliance with the Rules of Professional Conduct and other law." Rule 1.6, cmt. [13]. The Rule recognizes that the optimal way for attorneys to comply with their ethical obligations, which frequently raise complex and subtle questions, is to seek the counsel of others who are experienced in professional responsibility matters. In return, professional responsibility attorneys willingly accept a risk that is endemic to the practice of law, *i.e.*, that they will be held liable for acts of legal malpractice. It is far less likely that they would willingly advise clients on difficult matters if, as Disciplinary Counsel would have it, they risk strict liability for a Rule violation despite their best efforts and good faith.

Applying these principles in the instant case, we are of the view that Ms. Bernabei violated Rule 8.4(a) on only one occasion.

Ms. Koeck's violation of Rule 1.6(a) was patently obvious when it came to disclosing GE confidences to the press. As the Hearing Committee concluded, Respondents

> sought to use the press not to report crime or to protect financial interests, but rather, to gain leverage in the advancement of Ms. 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.

HC Rpt. at 30. Both Respondents "knew, and certainly should have known, that her 'breach of her ethical responsibilities was an obvious one.'" *Pennington*, 921 A.2d at 135 (quoting Hearing Committee Report). Ms. Bernabei quite properly concedes the violation and makes no claim to the contrary.

The disclosures to the SEC, however, are of a different nature. Ms. Bernabei contends that she firmly believed that Ms. Koeck was authorized to report the GE matters to the SEC because her client "had a right to disclose to the SEC what she believed to be evidence of crime [or] fraud. Her services had been used in furtherance of that . . . ." Tr. 446. For that reason, she felt the documents were no longer privileged and could be disclosed to the SEC. Tr. 380; *see* 17 C.F.R. § 205.3(d)(2)(iii); Rule 1.6(d)(2). *See generally* Bernabei Br. at 25-26.

The factual record supports the conclusion that Ms. Bernabei subjectively believed that disclosure to the SEC was permitted.

- She had substantial experience with the substantive legal issues involved. The month before her retention in the DOL case, she co-authored an article concluding that in-house attorneys do not violate the attorney-client privilege by reporting corporate fraud and misconduct. *See* RX 6 (Lynne Bernabei, Alan R. Kabat, & Jason M. Zuckerman, *Seven Questions for Sarbanes-Oxley Whistleblowers to Ask*, The Practical Lawyer, Oct. 2007).
- She believed her client's narrative to be credible, and tested it to her own satisfaction by reviewing the corroborating documentation provided to her.

Tr. 361-63, 378, 470, 531-32. Ms. Koeck "provided . . . multiple timelines. [H]er stories were always consistent. She went over and over again who she reported to, what their response would be, and provided memos to verify that." Tr. 363-64.

- Her opinion was consistent with that of her law partner and an associate who, at her request, had (albeit superficially) researched the ethical disclosure issue and determined that disclosure would "be safe." RX 7; Tr. 386, 391-92, 394. Her view was also consistent with that of the California lawyer who filed the SOX complaint (who alleged that GE's attorney-client "privilege does not apply, since the documents reveal corporate counsel's complicity . . . in commission of both fraud and crime," *see* FF 17), and with that of Mr. Blakey, a prominent criminal law professor. BX 85 at ¶¶ 1-7, 26.

It is also clear that Ms. Bernabei's subjectively held belief was objectively reasonable. The factual and legal issues arising out of alleged tax fraud and attendant disclosure standards were complex, subtle, and far from settled. "No one disputes that Sarbanes Oxley is complex." ODC Reply Br. at 18-19; *see also* ODC Br. at 4, 21; ODC Brief on Sanction at 6 ("Although Ms. Bernabei purports to be an expert in whistleblower cases, the applicable law—Sarbanes-Oxley and Rules 1.6 and 1.13—is complex and compliance requires rigorous analysis."). This case is a far cry from the "obvious" and "readily apparent" issues confronting the respondent in *Wiggins*.

Assessing all of the relevant circumstances, we conclude that Ms. Bernabei did not know that disclosure to the SEC was improper and her belief was objectively reasonable. Disciplinary Counsel thus did not prove that she violated Rule 8.4(a) in relation to Ms. Koeck's disclosures to the SEC.[14]

D. Ms. Bernabei's Statement to GE's Counsel Did Not Seriously Interfere with the Administration of Justice.

Rule 8.4(d) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that seriously interferes with the administration of justice." To violate Rule 8.4(d), the attorney's conduct must meet the following criteria: (i) the conduct must be improper; that is, "the attorney must either take improper action or fail to take action when, under the circumstances, he or she should act"; (ii) the conduct itself must bear directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) the conduct must taint the judicial process in more than a *de minimis* way; that is "at least potentially impact upon the process to a serious and adverse degree." *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996) (citation omitted).

Disciplinary Counsel argues that Ms. Bernabei's statement to GE's litigation counsel (that she had "marching orders" from her client to go the press if GE did not agree to mediation) sufficiently tainted the judicial process so as to violate Rule 8.4(d). Effectively recognizing that the remark had no actual effect on the DOL case, Disciplinary Counsel urges that a "smaller defendant might succumb to similar

---

[14] Because our decision is based on our assessment of Ms. Bernabei's state of mind, we need not—and do not—determine whether GE engaged in crime or fraud, or whether the disclosures to the SEC were authorized by Sarbanes-Oxley or Rule 1.6.

threats if opposing counsel threatened to go public with embarrassing or detrimental attorney-client secrets," and "[a]ccordingly, there was at least a potential severe or adverse effect on the judicial process." ODC Br. at 35.

Ms. Bernabei never explicitly threatened to expose GE's confidences, and the record indicates that her statement was literally true: If GE did not mediate, Ms. Koeck and Mr. Blakey intended to go to the press. Tr. 554-55. Moreover, "litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Often a lawyer involved in the litigation is in the best position to assist in furthering these legitimate objectives." Rule 3.6, cmt. [1].

Nevertheless, the remark was perceived as a crass and unsophisticated threat. It was also self-defeating, since it served only to antagonize and motivate GE in its dispute with Ms. Koeck. Statements such as that made by Ms. Bernabei do nothing to advance the legitimate interests of a client, and most assuredly fail to meet the objectives of courtesy, respect, and fair dealing to which capable trial lawyers aspire. Nevertheless, the issue before us is whether the statement violated Rule 8.4(d), and we conclude that it did not.

It is undisputed that the remark had no effect on the proceedings before the DOL, the only proceeding that was underway at the time. Undoubtedly aware that adverse publicity is an unavoidable risk of contemporary litigation, GE—though offended by the statement—did nothing in reaction to it. GE did not agree to mediate, filed no motion or complaint with the tribunal, sought no sanctions, and

failed even to mention the remark in later correspondence with Ms. Bernabei. *See* Tr. 69, 139-140, 239-240; Bernabei Br. at 34-35. The statement thus had no actual effect on the administration of justice.

Nor could the statement have the potential impact urged upon us by Disciplinary Counsel. An inappropriate request or demand to compel mediation does not potentially impact the judicial process to any adverse degree because it can not lead to a waste of a tribunal's time. *Cf. In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009) (Rule 8.4(d) violation where unnecessary expenditure of a tribunal's time and resources). All mediation proceedings are privileged and inadmissible, and any resulting settlement can have only a salutary, not adverse, effect on the judicial process.

In any event, we are unwilling to extend Rule 8.4(d) to apply to statements between counsel during settlement discussions. Unpleasant, hyperbolic, or offensive statements in settlement-related conferences are to be frowned upon but simply do not violate that Rule. Indeed, the type of harm that Disciplinary Counsel seeks to avoid through an expansive application of Rule 8.4(d) is precisely that addressed by the proscriptions in Rule 8.4(g), which forbids a lawyer to "seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter." *See also* D.C Bar Ethics Op. 220 (Sept. 1991) ("Threats to File Disciplinary Charges"). The statement in this case, however, threatened neither, and we decline to expand Rule 8.4(g) through a back-door expansion of Rule 8.4(d).

Accordingly, the Hearing Committee correctly concluded that Ms. Bernabei did not violate Rule 8.4(d). *See* HC Rpt. 30.[15]

IV. SANCTION

As to Ms. Bernabei, we have reviewed *de novo* the Hearing Committee's recommendation of an informal admonition and hereby adopt it. As the Committee noted, Ms. Bernabei fully cooperated with Disciplinary Counsel's investigation, offered extensive mitigation evidence, and has no prior record of discipline. Because we do not find a Rule 8.4(d) violation, we decline to adopt Disciplinary Counsel's position that public censure is warranted for the combined Rule 8.4(a) and (d) violations.

As to Ms. Koeck, we have found three additional Rule 1.6 violations in addition to that found by the Hearing Committee: for her disclosures to the U.S. Attorney's Office, to Brazilian authorities, and to the SEC. These three additional

---

[15] Disciplinary Counsel argues that the Hearing Committee erred in admitting the testimony of Richard Moberly, who was qualified as an expert on the Sarbanes-Oxley Act and Department of Labor Procedures and whose testimony in the former area was properly limited by the Chair. *See* ODC Br. at 36-39; Tr. 733.

The admissibility of expert testimony is within the discretion of a Hearing Committee. Testimony by legal experts about practices and procedures is not unusual. *See, e.g.*, *In re Outlaw*, 917 A.2d 684, 686 (D.C. 2007) (per curiam) (expert testimony admitted in the field of personal injury practice in D.C. and Virginia); *In re Fair*, 780 A.2d 1106, 1111-1112 (D.C. 2001) (expert testimony admitted in the field of probate law). Ironically, although the Hearing Committee did not cite it, Disciplinary Counsel relied on and cited Mr. Moberly's testimony in a post-hearing brief. *See* ODC Post-Hearing Br. at 18, 22-27.

In any event, we will not render an advisory opinion, as requested by Disciplinary Counsel (ODC Br. at 38-39), concerning testimony that is not material and not relied upon either by the Hearing Committee or this Board. *In re Cooper*, 936 A.2d 832, 835 (D.C. 2007) (per curiam) ("Courts should not decide more than the occasion demands." (citation omitted)).

rule violations significantly increase the seriousness of her misconduct, the prejudice to GE, and the number of rule violations. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (providing that in determining the appropriate sanction, the Court considers: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his or her wrongful conduct; and (7) circumstances in mitigation or aggravation). For that reason, we believe a sixty-day suspension with a fitness requirement is warranted.[16] As noted *supra* and by the Hearing Committee, *see* HC Rpt. at 33, Ms. Koeck's repeated noncompliance with orders of the Committee, the Board, and the Court, as well as her failure to cooperate with Disciplinary Counsel, make a fitness requirement necessary and appropriate. *See In re Cater*, 887 A.2d 1, 6 (D.C. 2005) ("[T]o justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law."); *In re Hallmark*, 831 A.2d 366, 377 (D.C. 2003).

[16] While case law is somewhat limited in our jurisdiction, we are aware of other jurisdictions that have imposed suspensory sanctions in comparable cases. *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) (one-year suspension for disclosing secrets gained from prior employment).

CONCLUSION

Having determined that Disciplinary Counsel has proven, by clear and convincing evidence, that Ms. Koeck violated Rule 1.6(a) with her disclosures to the press, a U.S. Attorney's Office, Brazilian authorities, and the SEC, we recommend that she be sanctioned with a sixty-day suspension 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).

Having reviewed the record and case law, we adopt the Hearing Committee's conclusion that Ms. Bernabei violated Rule 8.4(a) by knowingly assisting Ms. Koeck's disclosures to the press. The Board hereby directs Disciplinary Counsel to issue an informal admonition to Ms. Bernabei.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: 

Robert C. Bernius
Chair

Dated: August 30, 2017

This matter was decided during the 2016-17 term of the Board. All members of the Board concur in this Report and Recommendation, except Mr. Bundy, Mr. Carter, and Ms. Soller, who are recused.