DKT NO: X06-UWY-CV186046436-S	**: COMPLEX LITIGATION DKT**
ERICA LAFFERTY	**: JUDICIAL DISTRICT WATERBURY**
v.	**: AT WATERBURY, CONNECTICUT**
ALEX EMRIC JONES	**: JANUARY 3, 2023**

DKT NO: X06-UWY-CV186046437-S

WILLIAM SHERLACH

v.

ALEX EMRIC JONES

DKT NO: X06-UWY-CV186046438-S

WILLIAM SHERLACH

v.

ALEX EMRIC JONES

SHOW CAUSE HEARING AS TO NORMAN PATTIS

DISCIPLINARY COUNSEL'S POST TRIAL REPLY MEMORANDUM OF LAW

Disciplinary counsel submits this Post Hearing Reply Memorandum of Law following presentation of this matter to the court, Bellis, J.

The court should remain cognizant of the fact that the determination of a disciplinary matter is a two-step process. The court must first make findings of fact to determine whether disciplinary counsel has proved by clearing and convincing evidence that the respondent has violated a rule professional conduct or court. Once the court makes this finding it shall then apply the American Bar

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Association's standards for imposing lawyer discipline to determine the appropriate sanction. The two steps should not be co-mingled. It is not appropriate for a respondent to dispute a violation and nevertheless argue "no harm, no foul", as if this would negate a finding of a rule violation in the first instance.

Rule 5.1 (b)

Rule 5.1 (b), Responsibilities of Partners, Managers, and Supervisory Lawyers, of the Rules of Professional Conduct, provide that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct. Furthermore, rule 5.1 (c) provides that "[a] lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if: (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Respondent argues that he had no supervisory authority over Attorney Reynal because they were not members of the same "firm" and, alternatively, since Reynal never filed an appearance in the case the application for admission pro hac vice was negated ab initio.

The commentary to the rule limits the relationship between the supervisory attorney and work of other lawyers "in a firm". The language of the Practice Book has no such restriction. This issue was recently addressed by the Connecticut

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Supreme Court in *Cohen* v. *Statewide Grievance Committee*, 339 Conn. 503 (2021). The Court declined to limit the scope of rule 3.3 to situations where the lawyer is representing a client. The commentary to rule 3.3 indicated that the rule applied to a lawyer when representing a client, but the text of the rule had no restriction.

> According to the preface to the Rules of Professional Conduct, ''[t]he [c]ommentary accompanying each [r]ule explains and illustrates the meaning and purpose of the [r]ule. . . . The [c]ommentaries are intended as guides to interpretation, but the text of each [r]ule is authoritative. Commentaries do not add obligations to the [r]ules but provide guidance for practicing in compliance with the [r]ules.'' (Emphasis added.) Rules of Professional Conduct, scope, p. 3. Therefore, although we must read the text of the rules and the commentary together, the commentary is not intended to be definitive, authoritative, or limiting but, rather, is intended to be illustrative and to guide our interpretation of the rules.

Cohen, supra, 339 Conn. 515.

The application of Reynal was granted with the provision that he file an appearance within 10 days. It is clear from the order that the granting of the motion was final and the instruction concerning filing the appearance was not a condition precedent to the order being granted. There is clear and convincing evidence that respondent violated rule 5.1 (b) and (c).

Rule 1.1

Rule 1.1, Competence, of the Rules of Professional Conduct provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The commentary to this rule provides that competent handling of a particular matter includes inquiry into and

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analysis of the factual and legal elements of a problem. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transaction ordinarily require more extensive treatment the matters of lesser complexity and consequence.

Respondent argues that he did not violate rule 1.1 because "Disciplinary Counsel does not set forth what proficiency was lacking of attorney Pattis, or what expertise, if any, beyond a general practitioner was required." Respondent's brief page 10. He also argues that there was no proof of steps he was required to take after disclosure and in any event, the Connecticut plaintiffs was set sharing information with attorney Bankston already (no harm, no foul).

The flaws in respondent's arguments are easily revealed. There is no expertise beyond a general practitioner, or law school student for that matter, required of an attorney involved in a high profile, nationally reported case, resulting in a $1 billion judgment, involving one of the most horrific incidents in Connecticut history, to comply with the plain language of a protective order regarding highly confidential medical and psychiatric records.

It cannot even be argued by respondent that this was mere oversight or inadvertence. Respondent was cautioned by attorney Wolman that it may not be appropriate to comply with attorney Lee's request for the information. It is during this email chain that on May 2, 2022 that Wolman provided to Lee, Pattis, Atkinson and others with the following caution: "I should also add a caveat (and a word of precaution to Norm) before the drive of the files are sent to you. Under the confidentiality order in the Connecticut case, I'm not confident you're eligible

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to receive documents marked by the plaintiff as confidential or AEO. As I am not counsel of record, I don't feel comfortable making any decisions that would implicate the order and potentially expose the clients to pay any liability. Sincerely, Jay Wolman." [Exhibit 4]. Shortly after the emails of May 2, 2022, Pattis instructed Atkinson to send the white external hard drive to Lee which Lee received in a bubble wrap envelope with cover letter. [Plaintiff's Exhibit 2 page 2; Second Stipulation of Facts; T.T. 8/17/2022, Lee, p.129 l. 20-27]. No one from the Pattis law firm ever elaborated on the protective order that was in place with regard to the information that was ultimately provided to Lee although the Pattis law firm was included on the email chain. [Plaintiff's Exhibit 4]. In response, respondent has introduced no evidence in the record that he took any investigation or inquiry into attorneys Lee's need for the information and whether it would be appropriate under the protective order.

It is confusing why respondent would argue that nothing happened here because attorney Bankston ended up receiving the discovery which the Connecticut plaintiffs could have shared with them directly. This argument does not go to whether or not the respondent violated rule 1.1 by not competently handling the information in undertaking the necessary preparation before transferring the highly confidential reports. Respondent did not transfer the medical reports to attorney Bankston. The violation occurred when respondent transferred the reports to Attorney Lee who is not authorized to receive it. Respondent transferred the information without identifying the information as highly confidential information was subject to a protective order so that Lee could

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properly safeguard the information. Respondent's failure to take any of the steps resulted in the information then being passed on from Lee to Reynal and then further disclosed to Bankston.

At this point I must address the "no harm, no foul" argument. The ABA guidelines provide that the initial factor in determining discipline is the amount of the actual or potential injury caused by the lawyer's misconduct. In this case the potential injury would have been devastating. Attorney Mattei has testified the concerns over the litigation tactics of the defendants in the civil case and the fear that the highly confidential information would be disclosed. The respondent, by sending out the information to Lee who then passed it on without even knowing what was on the hard drive could have very easily compromised the information as it any time it could have been made available to the defendants or the press, and this danger was compounded with each transfer.

Rule 3.4 (3)

Rule 3.4, Fairness to Opposing Party and Counsel, of the Rules of Professional Conduct, provides in relevant part a lawyer shall not "(3) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Rule 1.0 defines knowingly as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

Respondent argues that Disciplinary Counsel has not proved that respondent has "knowingly [disobeyed] an obligation under the rules of a tribunal". But it is the respondent's case that lacks any evidence. Disciplinary

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counsel has proved its case by clear and convincing evidence. It has done this without even relying upon inferences that may be drawn from respondent's assertion of the right to remain silent under the Fifth Amendment to the United States Constitution. Respondent was attorney of record in the case. He had actual knowledge of the protective order as a pleading filed in the case by consent of the parties and based on the warning provided by Wolman in his email. Respondent, nevertheless, transferred highly confidential medical reports and psychiatric records to an unauthorized recipient without any notice of what it was being transferred and that the information was subject to a protective order. The conclusion that respondent knowingly disobeyed the protective order is logical and legally appropriate. This is testimony in the record and has not been disputed.

Respondent's counsel argues that the transfer may have been an inadvertent mistake or a misinterpretation of the protective order. But that is only respondent's counsel's argument. These are two separate and conflicting arguments. There is no testimony or exhibit in the record that would support this position.

Rule 1.15

Rule 1.15 (b) of the Rules of Professional Conduct provides in relevant part that "a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.… Other property shall be identified as such and

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appropriately safeguarded." The commentary to this rule provides that "[a] lawyer should hold property of others with the care required of a professional fiduciary."

The respondent argues that this rule is inapplicable to the situation at hand because it usually deals with monetary property of clients and co-mingling of funds by attorneys.

The plain language of the rule makes it applicable to this case. The rule refers to "property" of clients or "third persons". Here the property was highly confidential medical and psychiatric reports and the third persons are the plaintiff's in the Connecticut case. If the judges of the Superior Court wanted to limit this section to money held in the IOLTA account they could have easily done so. The commentary further provides that "[a] lawyer should hold property of others with the care required of a professional fiduciary." In this case, the protective order established the level of "care" required of respondent in holding the property. Section (b) specifically requires that "other property shall be identified as such and appropriately safeguarded." Unauthorized disclosure of highly confidential medical reports was not a proper safeguard of the property.

Rule 8.4 (4)

Rule 8.4 (4) of the Rules of Professional Conduct provides that "it is professional misconduct for a lawyer to:… Engage in conduct that is prejudicial to the ministration of justice." In addition to respondent's previous arguments that the disclosure was merely inadvertent, respondent adds to the argument that the respondent suffered under a "good faith dispute or misunderstanding" of the protective order. The post hearing brief then attempts to explain that respondent

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may have been confused between the term “counsel of record” as used in the confidentiality order entered 2019, and the term “counsel of record in this action” in the confidentiality order entered March 7, 2022. Unfortunately, respondent, who was the only person who can provide direct evidence as to whether or not he was actually confused, did not testify. The term “counsel of record in this action” is not confusing or ambiguous. Accordingly, the court is allowed to draw inferences from the facts that have been proved and that are in evidence.

It is a fact that respondent has been counsel of record in this action for Alex Jones since February 1, 2022. It is also a fact that the Pattis law firm has been counsel of record in this action for Free-Speech Systems, LLC since June 28, 2021. The previous protective order was amended March 7, 2022 to restrict disclosure of information to “counsel of record in this action”. Paragraph nine of the previous protective order that remained through the amendment provides as follows: “*Limitations on Use.* 9. Except to the extent expressly authorized by this Protective Order, Confidential Information shall not be used or disclosed for any purpose other than the preparation and trial of this case, all cases consolidated with this case, and in any appeal taken from any order or judgment herein.” Both Lee and Reynal testified they had no need of the Connecticut plaintiff’s highly confidential medical and psychiatric records.

The motion to amend the protective order indicates that it is filed by consent of the parties. Respondent was attorney of record for the defendants and gave his consent to the amendment. Furthermore, Wolman’s email dated May 2, 2022 addressed to Lee and CCed to respondent, absolutely brought the issue

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regarding Lee's eligibility to receive the documents to the forefront as "…a word of precaution to Norm…". [Exhibit 4]. Respondent's argument in his brief that the disclosure was inadvertent or based on a misunderstanding of the protective order is not consistent with the facts before the court.

Conn. Gen. Stat. § 52-146E

Respondent next argues that violation of Conn. Gen. Stat. § 52-146E requires proof that any disclosure was "without the consent of the patient or his authorized representative". Because no plaintiffs testified at the hearing, the respondent argues that there is no proof of non-consent.

The issue of non-consent can be inferred from the testimony and exhibits in this case. The individual plaintiffs were represented by counsel at the commencement of the Connecticut lawsuit. Attorney Mattei testified that, "[t]he Jones defendants' request of our clients, among other things, medical records, employment records, financial records. Communications that included personal identifying information, like social security numbers, email addresses, etcetera. And so it was very, very important to our client's that those materials be treated in a confidential and protected way, so that they weren't disseminated, either publicly, or in certain cases, to individuals associated with Mr. Jones and others, who our clients had reason to fear would not treat those records in a proper way." [T.T. 8/17/2022, Mattei, p.20. l. 9-18]. Furthermore, once Mattei learned of the unauthorized disclosure he took immediate steps by communicating with Lee, respondent and Reynal reiterating that the disclosure was not authorized and immediate steps were required to protect the information.[See Exhibit 2]. "It

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wasn't until I think August 3rd, whenever it was, where this – where it appeared that not only had Attorney Reynal obtained protected materials without authorization, but that a third attorney, Attorney Lee may have as well. [T.T. 8/17/2022, Mattei, p.60-1. l. 24-1]. Mattei's testimony that the plaintiffs highly confidential information was disclosed "without authorization" is direct evidence that respondent had no authority to disclose the information.

In fact, respondent's own statement in his email to Mattei dated August 4, 2022 admits that "I directed an associate to send our files to two attorneys who requested them to defend Alex. I did not direct the associate to withhold the plaintiff's information. If that is an error, responsibility for it falls on my shoulders." [Exhibit 2 p.2]. There has never been a claim by respondent that he separately received authority from the plaintiffs directly to disclose their highly confidential records to unauthorized third parties.

Attorney Lee's testimony.

Respondent next argues that Lee was attorney of record in the bankruptcy matters in Texas but asked for anything from both Texas and Connecticut Counsel. Respondent argues that respondent was not required to have the expertise in bankruptcy law necessary to determine that Lee's request was wrong and overbroad. Disciplinary counsel does not require that respondent have any knowledge of bankruptcy law at all. The violations occurred because respondent did not comply with the plain language of the protective order to which he consented.

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Attorney Renal's testimony

Respondent argues that Reynal testified that respondent was fired late April 2022 and therefore could not have had any supervisory role over Reynal. Respondent never filed a motion to withdraw as counsel in this matter. No appearance was filed in lieu of respondent. Despite this assertion the respondent remained counsel of record for the defendants.

Respondent's Fifth Amendment argument.

Respondent argues that the court may not make an adverse inference from the respondent's decision to refuse to respond to questions asserting the privilege against self-incrimination. Respondent is making two arguments. The first argument is that he is being penalized for pleading the fifth amendment. The second argument is that the court is not allowed to draw an adverse inference based upon his invocation of the Fifth Amendment.

Respondent's argument that he is being penalized for pleading the fifth fails to understand the nature of the adverse inference. There is a line of cases that clearly hold that a person, under certain circumstances, cannot be penalized for pleading the fifth. These penalty cases are discussed in *McKune* v. *Lile*, 536 U.S. 24, 41, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). The penalty at issue in these cases is that a defendant's mere assertion of the Fifth Amendment cannot allow the fact finder penalize the defendant-in this case, sanction him because he pled the fifth. That is not what is happening here. The respondent is not being disciplined because he pled the fifth. He is being disciplined because he violated the enumerated rules of professional conduct.

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Our Supreme Court, as recently as 2022, addressed the somewhat difficult decision of whether to testify or plead the fifth. *In re Ivory W.*, 342 Conn. 692 (2022). In *Ivory* the primary issue before the Court is whether the trial court violated the constitutional due process rights of the respondent mother, Amber F., when it denied her motion for a continuance of the trial on petitions to terminate her parental rights pending the conclusion of a related criminal proceeding on the ground that she could not testify in her own defense in the termination proceeding without jeopardizing her Fifth Amendment right to avoid incriminating herself in the criminal proceeding. Counsel for mother reiterated that doing so would either violate the respondent's due process rights if she declined to testify in order to preserve her Fifth Amendment rights in the criminal proceeding or jeopardize her Fifth Amendment rights if she chose to testify. The trial court noted the objection and proceeded with the trial. The Connecticut Supreme Court noted as follows:

> Although a defendant has the right to refuse to testify in a civil proceeding when doing so might be incriminatory, "[a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his fifth amendment privilege ("[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the [c]onstitution does not by that token always forbid requiring him to choose" (internal quotation marks omitted)); ("[s]o long as the defendant is neither forced to exercise nor prevented from exercising his right to testify, the right to present a defense is not burdened by the strategic choice or resulting adverse consequences" (internal quotation marks omitted)), cert. denied, ("[t]he fact that the defendant had to make a difficult choice between [his Fifth Amendment right not to incriminate himself and his due process right to testify in his own defense] does not deprive him of due process").

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> Put another way, the fact that there may be adverse consequences when a defendant invokes the Fifth Amendment in a civil proceeding does not necessarily mean that the defendant is subject to unlawful compulsion for fifth amendment purposes. (when inmate convicted of rape refused to sign admission of guilt form as condition of participating in sexual abuse treatment program on ground that doing so could lead to charges of perjury, resulting reduction of inmate's privileges and his transfer to facility with poorer living conditions did not constitute compulsion for fifth amendment purposes) (when prison disciplinary board drew adverse inference from inmate's invocation of Fifth Amendment rights at disciplinary proceeding, board's action did not constitute "an invalid attempt by the [s]tate to compel testimony"). Accordingly, "the [c]onstitution ... does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." (Internal quotation marks omitted.) ("[e]ven [when] there are parallel criminal and civil proceedings, a defendant [ordinarily] has no constitutional right to a stay pending the outcome of a related criminal case"); (trial court did not violate defendant's due process rights by conducting probation and drug dependency hearings before defendant's trial on related pending criminal charge).
>
> (Internal citations omitted) In re Ivory W., supra 342 Conn. at 705-707.

In the present matter the respondent made an informed decision not to testify on his behalf knowing that the court could draw adverse inferences regarding the questions posed to him.

Respectfully submitted,
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CERTIFICATION OF SERVICE

I certify that a copy of this document was mailed or delivered electronically or non-electronically on January 3, 2023 to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery.

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By_____
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