

Board of Disciplinary Appeals

IN THE MATTER OF §  
JAMES MICHAEL O'BRIANT, § CAUSE NO. 59134  
STATE BAR CARD NO. 00788875 §

James Michael O'Briant - Petition for Reciprocal Discipline  
Page 1 of 5

*Michigan Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 16-66-GA.

5. On or about January 18, 2017, a Report of Tri-County Hearing Panel #23 (Exhibit 1) was filed with the State of Michigan Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 16-66-GA.

6. On or about January 18, 2017, an Order of Disbarment (Exhibit 1) was filed with the State of Michigan Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 16-66-GA, that states in pertinent part as follows:

...IT IS ORDERED that respondent, James M. O'Briant, is DISBARRRED from the practice of law in Michigan EFFECTIVE February 9, 2017 and until further order of the Supreme Court, the Attorney Disciplinary Board or a hearing panel, and until respondent complies with the requirements of MCR 9.123(B) and (c) and MCR 9.124....

7. On or about March 15, 2017, an Order Denying Respondent's Motion for New Trial (Exhibit 1) was filed with the State of Michigan Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 16-66-GA.

8. On or about March 15, 2017, a Notice of Disbarment (Exhibit 1) was issued by the State of Michigan Attorney Discipline Board in a matter styled, *James M. O'Briant, P41556, Midland, Texas, by the Attorney Disciplinary Board Tri-County Hearing Panel #23*.

9. The Notice of Disbarment stated that Respondent filed an answer to the six-count formal complaint in which he admitted almost every allegation of misconduct. Subsequently, the Grievance Administrator filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and MCR 9.115(A) moving for entry of judgment against respondent, the

motion was unopposed by respondent, and then granted by the panel. Therefore, the hearing panel found that respondent engaged in the professional misconduct as set forth in all six counts of the formal complaint.

Specifically, the panel found that respondent handled a matter without preparation adequate in the circumstances, in violation of MRPC 1.1(b); neglected six legal matters, in violation of MRPC 1.1(c); failed to seek the lawful objective of a client, in violation of MRPC 1.2(a); failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3; failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information, in violation of MRPC 1.4(a); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b); failed to promptly render a full accounting of client funds upon request, in violation of MRPC 1.15(b)(3); failed to refund an advance payment of fee which was not earned, in violation of MRPC 1.16(d); made a false statement of material fact to a tribunal, in violation of MRPC 3.3(a)(1); failed to notify an active client of his suspension from the practice of law, in violation of MCR 9.119(A); and failed to file a notice of disqualification with a tribunal in which he represented a client in litigation, in violation of MCR 9.119(8). Respondent was also found to have violated MRPC 8.4(b) and (c), and MCR 9.104(1)-(3).

Copies of the Formal Complaint, James M. O'Briant's Response to Formal Complaint, Report of Tri-County Hearing Panel #23, Order of Disbarment, Order Denying Respondent's Motion for New Trial and Notice of Disbarment, are attached hereto as Petitioner's Exhibit 1 and made a part hereof for all intents and purposes as if the same were copied verbatim herein.

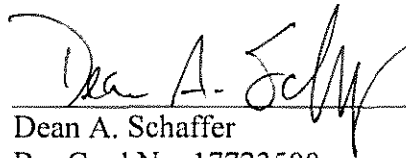
Petitioner expects to introduce a certified copy of Exhibit 1 at the time of hearing of this cause.

10. Petitioner prays that, pursuant to Rule 9.02, Texas Rules of Disciplinary Procedure, that this Board issue notice to Respondent, containing a copy of this Petition with exhibits, and an order directing Respondent to show cause within thirty (30) days from the date of the mailing of the notice, why the imposition of the identical discipline in this state would be unwarranted. Petitioner further prays that upon trial of this matter that this Board enters a judgment imposing discipline identical with that imposed by the State of Michigan Attorney Disciplinary Board and that Petitioner have such other and further relief to which it may be entitled.

Respectfully submitted,

Linda A. Acevedo  
Chief Disciplinary Counsel

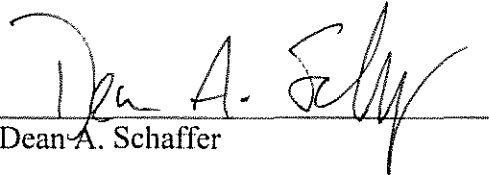
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\_\_\_\_\_  
Dean A. Schaffer  
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ATTORNEYS FOR PETITIONER

# CERTIFICATE OF SERVICE

I certify that upon receipt of the Order to Show Cause from the Board of Disciplinary Appeals, I will serve a copy of this Petition for Reciprocal Discipline and the Order to Show Cause on James Michael O'Briant by personal service.

James Michael O'Briant  
908 Pine Ct.  
Midland, Texas 79705

  
Dean A. Schaffer

# INTERNAL PROCEDURAL RULES

## Board of Disciplinary Appeals

*Effective February 19, 2015 and amended September 20, 2016*

### Contents

<b>SECTION 1: GENERAL PROVISIONS .....</b>	<b>1</b>
Rule 1.01 Definitions.....	1
Rule 1.02 General Powers .....	1
Rule 1.03 Additional Rules in Disciplinary Matters.....	1
Rule 1.04 Appointment of Panels.....	1
Rule 1.05 Filing of Pleadings, Motions, and Other Papers.....	1
Rule 1.06 Service of Petition.....	2
Rule 1.07 Hearing Setting and Notice .....	3
Rule 1.08 Time to Answer.....	3
Rule 1.09 Pretrial Procedure.....	3
Rule 1.10 Decisions.....	4
Rule 1.11 Board of Disciplinary Appeals Opinions .....	4
Rule 1.12 BODA Work Product and Drafts .....	5
Rule 1.13 Record Retention.....	5
Rule 1.14 Costs of Reproduction of Records .....	5
Rule 1.15 Publication of These Rules.....	5
<b>SECTION 2: ETHICAL CONSIDERATIONS .....</b>	<b>5</b>
Rule 2.01 Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases.....	5
Rule 2.02 Confidentiality .....	5
Rule 2.03 Disqualification and Recusal of BODA Members .....	5
<b>SECTION 3: CLASSIFICATION APPEALS .....</b>	<b>6</b>
Rule 3.01 Notice of Right to Appeal .....	6
Rule 3.02 Record on Appeal.....	6
<b>SECTION 4: APPEALS FROM EVIDENTIARY PANEL HEARINGS.....</b>	<b>6</b>
Rule 4.01 Perfecting Appeal.....	6
Rule 4.02 Record on Appeal.....	7
Rule 4.03 Time to File Record .....	9
Rule 4.04 Copies of the Record.....	10
Rule 4.05 Requisites of Briefs.....	10

Rule 4.06 Oral Argument .....	11
Rule 4.07 Decision and Judgment .....	11
Rule 4.08 Appointment of Statewide Grievance Committee .....	12
Rule 4.09 Involuntary Dismissal .....	12
<b>SECTION 5: PETITIONS TO REVOKE PROBATION .....</b>	<b>12</b>
Rule 5.01 Initiation and Service .....	12
Rule 5.02 Hearing.....	12
<b>SECTION 6: COMPULSORY DISCIPLINE .....</b>	<b>12</b>
Rule 6.01 Initiation of Proceeding.....	12
Rule 6.02 Interlocutory Suspension.....	12
<b>SECTION 7: RECIPROCAL DISCIPLINE .....</b>	<b>13</b>
Rule 7.01 Initiation of Proceeding.....	13
Rule 7.02 Order to Show Cause.....	13
Rule 7.03 Attorney’s Response .....	13
<b>SECTION 8: DISTRICT DISABILITY COMMITTEE HEARINGS .....</b>	<b>13</b>
Rule 8.01 Appointment of District Disability Committee .....	13
Rule 8.02 Petition and Answer .....	14
Rule 8.03 Discovery .....	14
Rule 8.04 Ability to Compel Attendance.....	15
Rule 8.05 Respondent’s Right to Counsel .....	15
Rule 8.06 Hearing.....	15
Rule 8.07 Notice of Decision.....	15
Rule 8.08 Confidentiality.....	15
<b>SECTION 9: DISABILITY REINSTATEMENTS .....</b>	<b>15</b>
Rule 9.01 Petition for Reinstatement.....	15
Rule 9.02 Discovery .....	15
Rule 9.03 Physical or Mental Examinations.....	16
Rule 9.04 Judgment .....	16
<b>SECTION 10: APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS.....</b>	<b>16</b>
Rule 10.01 Appeals to the Supreme Court.....	16

## **SECTION 1: GENERAL PROVISIONS**

### **Rule 1.01 Definitions**

- (a) “BODA” is the Board of Disciplinary Appeals.
- (b) “Chair” is the member elected by BODA to serve as chair or, in the Chair’s absence, the member elected by BODA to serve as vice-chair.
- (c) “Classification” is the determination by the CDC under TRDP 2.10 or by BODA under TRDP 7.08(C) whether a grievance constitutes a “complaint” or an “inquiry.”
- (d) “BODA Clerk” is the executive director of BODA or other person appointed by BODA to assume all duties normally performed by the clerk of a court.
- (e) “CDC” is the Chief Disciplinary Counsel for the State Bar of Texas and his or her assistants.
- (f) “Commission” is the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.
- (g) “Executive Director” is the executive director of BODA.
- (h) “Panel” is any three-member grouping of BODA under TRDP 7.05.
- (i) “Party” is a Complainant, a Respondent, or the Commission.
- (j) “TDRPC” is the Texas Disciplinary Rules of Professional Conduct.
- (k) “TRAP” is the Texas Rules of Appellate Procedure.
- (l) “TRCP” is the Texas Rules of Civil Procedure.
- (m) “TRDP” is the Texas Rules of Disciplinary Procedure.
- (n) “TRE” is the Texas Rules of Evidence.

### **Rule 1.02 General Powers**

Under TRDP 7.08, BODA has and may exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining

disciplinary proceedings. But TRDP 15.01 applies to the enforcement of a judgment of BODA.

### **Rule 1.03 Additional Rules in Disciplinary Matters**

Except as varied by these rules and to the extent applicable, the TRCP, TRAP, and TRE apply to all disciplinary matters before BODA, except for appeals from classification decisions, which are governed by TRDP 2.10 and by Section 3 of these rules.

### **Rule 1.04 Appointment of Panels**

- (a) BODA may consider any matter or motion by panel, except as specified in (b). The Chair may delegate to the Executive Director the duty to appoint a panel for any BODA action. Decisions are made by a majority vote of the panel; however, any panel member may refer a matter for consideration by BODA sitting en banc. Nothing in these rules gives a party the right to be heard by BODA sitting en banc.
- (b) Any disciplinary matter naming a BODA member as Respondent must be considered by BODA sitting en banc. A disciplinary matter naming a BODA staff member as Respondent need not be heard en banc.

### **Rule 1.05 Filing of Pleadings, Motions, and Other Papers**

- (a) **Electronic Filing.** All documents must be filed electronically. Unrepresented persons or those without the means to file electronically may electronically file documents, but it is not required.
  - (1) **Email Address.** The email address of an attorney or an unrepresented party who electronically files a document must be included on the document.
  - (2) **Timely Filing.** Documents are filed electronically by emailing the document to the BODA Clerk at the email address designated by BODA for that purpose. A document filed by email will be considered filed the day



that the email is sent. The date sent is the date shown for the message in the inbox of the email account designated for receiving filings. If a document is sent after 5:00 p.m. or on a weekend or holiday officially observed by the State of Texas, it is considered filed the next business day.

- (3) It is the responsibility of the party filing a document by email to obtain the correct email address for BODA and to confirm that the document was received by BODA in legible form. Any document that is illegible or that cannot be opened as part of an email attachment will not be considered filed. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from BODA.
- (4) **Exceptions.**
  - (i) An appeal to BODA of a decision by the CDC to classify a grievance as an inquiry is not required to be filed electronically.
  - (ii) The following documents must not be filed electronically:
    - a) documents that are filed under seal or subject to a pending motion to seal; and
    - b) documents to which access is otherwise restricted by court order.
  - (iii) For good cause, BODA may permit a party to file other documents in paper form in a particular case.
- (5) **Format.** An electronically filed document must:
  - (i) be in text-searchable portable document format (PDF);
  - (ii) be directly converted to PDF

rather than scanned, if possible;  
and

(iii) not be locked.

- (b) A paper will not be deemed filed if it is sent to an individual BODA member or to another address other than the address designated by BODA under Rule 1.05(a)(2).
- (c) **Signing.** Each brief, motion, or other paper filed must be signed by at least one attorney for the party or by the party pro se and must give the State Bar of Texas card number, mailing address, telephone number, email address, and fax number, if any, of each attorney whose name is signed or of the party (if applicable). A document is considered signed if the document includes:
  - (1) an “/s/” and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or
  - (2) an electronic image or scanned image of the signature.
- (d) **Paper Copies.** Unless required by BODA, a party need not file a paper copy of an electronically filed document.
- (e) **Service.** Copies of all documents filed by any party other than the record filed by the evidentiary panel clerk or the court reporter must, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

#### **Rule 1.06 Service of Petition**

In any disciplinary proceeding before BODA initiated by service of a petition on the Respondent, the petition must be served by personal service; by certified mail with return receipt requested; or, if permitted by BODA, in any other manner that is authorized by the TRCP and reasonably calculated under all the circumstances to apprise the Respondent of the proceeding and to give him or her reasonable time to appear and answer. To establish

service by certified mail, the return receipt must contain the Respondent's signature.

### **Rule 1.07 Hearing Setting and Notice**

- (a) **Original Petitions.** In any kind of case initiated by the CDC's filing a petition or motion with BODA, the CDC may contact the BODA Clerk for the next regularly available hearing date before filing the original petition. If a hearing is set before the petition is filed, the petition must state the date, time, and place of the hearing. Except in the case of a petition to revoke probation under TRDP 2.23, the hearing date must be at least 30 days from the date that the petition is served on the Respondent.
- (b) **Expedited Settings.** If a party desires a hearing on a matter on a date earlier than the next regularly available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the request. Unless the parties agree otherwise, and except in the case of a petition to revoke probation under TRDP 2.23, the expedited hearing setting must be at least 30 days from the date of service of the petition, motion, or other pleading. BODA has the sole discretion to grant or deny a request for an expedited hearing date.
- (c) **Setting Notices.** BODA must notify the parties of any hearing date that is not noticed in an original petition or motion.
- (d) **Announcement Docket.** Attorneys and parties appearing before BODA must confirm their presence and present any questions regarding procedure to the BODA Clerk in the courtroom immediately prior to the time docket call is scheduled to begin. Each party with a matter on the docket must appear at the docket call to give an announcement of readiness, to give a time estimate for the hearing, and to present any preliminary motions or matters. Immediately following the docket call, the Chair will set and announce the order of cases to be heard.

### **Rule 1.08 Time to Answer**

The Respondent may file an answer at any time, except where expressly provided otherwise by these rules or the TRDP, or when an answer date has been set by prior order of BODA. BODA may, but is not required to, consider an answer filed the day of the hearing.

### **Rule 1.09 Pretrial Procedure**

- (a) **Motions.**
  - (1) **Generally.** To request an order or other relief, a party must file a motion supported by sufficient cause with proof of service on all other parties. The motion must state with particularity the grounds on which it is based and set forth the relief sought. All supporting briefs, affidavits, or other documents must be served and filed with the motion. A party may file a response to a motion at any time before BODA rules on the motion or by any deadline set by BODA. Unless otherwise required by these rules or the TRDP, the form of a motion must comply with the TRCP or the TRAP.
  - (2) **For Extension of Time.** All motions for extension of time in any matter before BODA must be in writing, comply with (a)(1), and specify the following:
    - (i) if applicable, the date of notice of decision of the evidentiary panel, together with the number and style of the case;
    - (ii) if an appeal has been perfected, the date when the appeal was perfected;
    - (iii) the original deadline for filing the item in question;
    - (iv) the length of time requested for the extension;
    - (v) the number of extensions of time that have been granted

- previously regarding the item in question; and
- (vi) the facts relied on to reasonably explain the need for an extension.
- (b) **Pretrial Scheduling Conference.** Any party may request a pretrial scheduling conference, or BODA on its own motion may require a pretrial scheduling conference.
- (c) **Trial Briefs.** In any disciplinary proceeding before BODA, except with leave, all trial briefs and memoranda must be filed with the BODA Clerk no later than ten days before the day of the hearing.
- (d) **Hearing Exhibits, Witness Lists, and Exhibits Tendered for Argument.** A party may file a witness list, exhibit, or any other document to be used at a hearing or oral argument before the hearing or argument. A party must bring to the hearing an original and 12 copies of any document that was not filed at least one business day before the hearing. The original and copies must be:
  - (1) marked;
  - (2) indexed with the title or description of the item offered as an exhibit; and
  - (3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

All documents must be marked and provided to the opposing party before the hearing or argument begins.

#### **Rule 1.10 Decisions**

- (a) **Notice of Decisions.** The BODA Clerk must give notice of all decisions and opinions to the parties or their attorneys of record.
- (b) **Publication of Decisions.** BODA must report judgments or orders of public discipline:
  - (1) as required by the TRDP; and

- (2) on its website for a period of at least ten years following the date of the disciplinary judgment or order.
- (c) **Abstracts of Classification Appeals.** BODA may, in its discretion, prepare an abstract of a classification appeal for a public reporting service.

#### **Rule 1.11 Board of Disciplinary Appeals Opinions**

- (a) BODA may render judgment in any disciplinary matter with or without written opinion. In accordance with TRDP 6.06, all written opinions of BODA are open to the public and must be made available to the public reporting services, print or electronic, for publishing. A majority of the members who participate in considering the disciplinary matter must determine if an opinion will be written. The names of the participating members must be noted on all written opinions of BODA.
- (b) Only a BODA member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this rule, in hearings in which evidence is taken, no member may participate in the decision unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.
- (c) A BODA determination in an appeal from a grievance classification decision under TRDP 2.10 is not a judgment for purposes of this rule and may be issued without a written opinion.

### **Rule 1.12 BODA Work Product and Drafts**

A document or record of any nature—regardless of its form, characteristics, or means of transmission—that is created or produced in connection with or related to BODA’s adjudicative decision-making process is not subject to disclosure or discovery. This includes documents prepared by any BODA member, BODA staff, or any other person acting on behalf of or at the direction of BODA.

### **Rule 1.13 Record Retention**

Records of appeals from classification decisions must be retained by the BODA Clerk for a period of at least three years from the date of disposition. Records of other disciplinary matters must be retained for a period of at least five years from the date of final judgment, or for at least one year after the date a suspension or disbarment ends, whichever is later. For purposes of this rule, a record is any document, paper, letter, map, book, tape, photograph, film, recording, or other material filed with BODA, regardless of its form, characteristics, or means of transmission.

### **Rule 1.14 Costs of Reproduction of Records**

The BODA Clerk may charge a reasonable amount for the reproduction of nonconfidential records filed with BODA. The fee must be paid in advance to the BODA Clerk.

### **Rule 1.15 Publication of These Rules**

These rules will be published as part of the TDRPC and TRDP.

## **SECTION 2: ETHICAL CONSIDERATIONS**

### **Rule 2.01 Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases**

- (a) A current member of BODA must not represent a party or testify voluntarily in a disciplinary action or proceeding. Any BODA member who is subpoenaed or otherwise compelled to appear at a disciplinary action or proceeding, including at a deposition, must promptly notify the BODA Chair.

- (b) A current BODA member must not serve as an expert witness on the TDRPC.
- (c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

### **Rule 2.02 Confidentiality**

- (a) BODA deliberations are confidential, must not be disclosed by BODA members or staff, and are not subject to disclosure or discovery.
- (b) Classification appeals, appeals from evidentiary judgments of private reprimand, appeals from an evidentiary judgment dismissing a case, interlocutory appeals or any interim proceedings from an ongoing evidentiary case, and disability cases are confidential under the TRDP. BODA must maintain all records associated with these cases as confidential, subject to disclosure only as provided in the TRDP and these rules.
- (c) If a member of BODA is subpoenaed or otherwise compelled by law to testify in any proceeding, the member must not disclose a matter that was discussed in conference in connection with a disciplinary case unless the member is required to do so by a court of competent jurisdiction.

### **Rule 2.03 Disqualification and Recusal of BODA Members**

- (a) BODA members are subject to disqualification and recusal as provided in TRCP 18b.
- (b) BODA members may, in addition to recusals under (a), voluntarily recuse themselves from any discussion and voting for any reason. The reasons that a BODA member is recused from a case are not subject to discovery.
- (c) These rules do not disqualify a lawyer who is a member of, or associated with, the law firm of a BODA member from serving on

a grievance committee or representing a party in a disciplinary proceeding or legal malpractice case. But a BODA member must recuse him- or herself from any matter in which a lawyer who is a member of, or associated with, the BODA member's firm is a party or represents a party.

## **SECTION 3: CLASSIFICATION APPEALS**

### **Rule 3.01 Notice of Right to Appeal**

- (a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule.
- (b) To facilitate the potential filing of an appeal of a grievance classified as an inquiry, the CDC must send the Complainant an appeal notice form, approved by BODA, with the classification disposition. The form must include the docket number of the matter; the deadline for appealing; and information for mailing, faxing, or emailing the appeal notice form to BODA. The appeal notice form must be available in English and Spanish.

### **Rule 3.02 Record on Appeal**

BODA must only consider documents that were filed with the CDC prior to the classification decision. When a notice of appeal from a classification decision has been filed, the CDC must forward to BODA a copy of the grievance and all supporting documentation. If the appeal challenges the classification of an amended grievance, the CDC must also send BODA a copy of the initial grievance, unless it has been destroyed.

## **SECTION 4: APPEALS FROM EVIDENTIARY PANEL HEARINGS**

### **Rule 4.01 Perfecting Appeal**

- (a) **Appellate Timetable.** The date that the evidentiary judgment is signed starts the appellate timetable under this section. To make TRDP 2.21 consistent with this

requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21.

- (b) **Notification of the Evidentiary Judgment.** The clerk of the evidentiary panel must notify the parties of the judgment as set out in TRDP 2.21.

- (1) The evidentiary panel clerk must notify the Commission and the Respondent in writing of the judgment. The notice must contain a clear statement that any appeal of the judgment must be filed with BODA within 30 days of the date that the judgment was signed. The notice must include a copy of the judgment rendered.

- (2) The evidentiary panel clerk must notify the Complainant that a judgment has been rendered and provide a copy of the judgment, unless the evidentiary panel dismissed the case or imposed a private reprimand. In the case of a dismissal or private reprimand, the evidentiary panel clerk must notify the Complainant of the decision and that the contents of the judgment are confidential. Under TRDP 2.16, no additional information regarding the contents of a judgment of dismissal or private reprimand may be disclosed to the Complainant.

- (c) **Filing Notice of Appeal.** An appeal is perfected when a written notice of appeal is filed with BODA. If a notice of appeal and any other accompanying documents are mistakenly filed with the evidentiary panel clerk, the notice is deemed to have been filed the same day with BODA, and the evidentiary panel clerk must immediately send the BODA Clerk a copy of the notice and any accompanying documents.

- (d) **Time to File.** In accordance with TRDP 2.24, the notice of appeal must be filed within 30 days after the date the judgment

is signed. In the event a motion for new trial or motion to modify the judgment is timely filed with the evidentiary panel, the notice of appeal must be filed with BODA within 90 days from the date the judgment is signed.

- (e) **Extension of Time.** A motion for an extension of time to file the notice of appeal must be filed no later than 15 days after the last day allowed for filing the notice of appeal. The motion must comply with Rule 1.09.

#### **Rule 4.02 Record on Appeal**

- (a) **Contents.** The record on appeal consists of the evidentiary panel clerk's record and, where necessary to the appeal, a reporter's record of the evidentiary panel hearing.
- (b) **Stipulation as to Record.** The parties may designate parts of the clerk's record and the reporter's record to be included in the record on appeal by written stipulation filed with the clerk of the evidentiary panel.
- (c) **Responsibility for Filing Record.**
  - (1) Clerk's Record.
    - (i) After receiving notice that an appeal has been filed, the clerk of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk's record.
    - (ii) Unless the parties stipulate otherwise, the clerk's record on appeal must contain the items listed in TRAP 34.5(a) and any other paper on file with the evidentiary panel, including the election letter, all pleadings on which the hearing was held, the docket sheet, the evidentiary panel's charge, any findings of fact and conclusions of law, all other pleadings, the judgment or other orders appealed from, the notice of decision sent to each

party, any post submission pleadings and briefs, and the notice of appeal.

- (iii) If the clerk of the evidentiary panel is unable for any reason to prepare and transmit the clerk's record by the due date, he or she must promptly notify BODA and the parties, explain why the clerk's record cannot be timely filed, and give the date by which he or she expects the clerk's record to be filed.

#### **(2) Reporter's Record.**

- (i) The court reporter for the evidentiary panel is responsible for timely filing the reporter's record if:
  - a) a notice of appeal has been filed;
  - b) a party has requested that all or part of the reporter's record be prepared; and
  - c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.
- (ii) If the court reporter is unable for any reason to prepare and transmit the reporter's record by the due date, he or she must promptly notify BODA and the parties, explain the reasons why the reporter's record cannot be timely filed, and give the date by which he or she expects the reporter's record to be filed.

#### **(d) Preparation of Clerk's Record.**

- (1) To prepare the clerk's record, the evidentiary panel clerk must:
  - (i) gather the documents

- designated by the parties' written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);
  - (ii) start each document on a new page;
  - (iii) include the date of filing on each document;
  - (iv) arrange the documents in chronological order, either by the date of filing or the date of occurrence;
  - (v) number the pages of the clerk's record in the manner required by (d)(2);
  - (vi) prepare and include, after the front cover of the clerk's record, a detailed table of contents that complies with (d)(3); and
  - (vii) certify the clerk's record.
- (2) The clerk must start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page.
- (3) The table of contents must:
- (i) identify each document in the entire record (including sealed documents); the date each document was filed; and, except for sealed documents, the page on which each document begins;
  - (ii) be double-spaced;
  - (iii) conform to the order in which documents appear in the clerk's record, rather than in alphabetical order;
  - (iv) contain bookmarks linking each description in the table of contents (except for descriptions of sealed documents) to the page on which the document begins; and
  - (v) if the record consists of multiple volumes, indicate the page on which each volume begins.
- (e) **Electronic Filing of the Clerk's Record.** The evidentiary panel clerk must file the record electronically. When filing a clerk's record in electronic form, the evidentiary panel clerk must:
- (1) file each computer file in text-searchable Portable Document Format (PDF);
  - (2) create electronic bookmarks to mark the first page of each document in the clerk's record;
  - (3) limit the size of each computer file to 100 MB or less, if possible; and
  - (4) directly convert, rather than scan, the record to PDF, if possible.
- (f) **Preparation of the Reporter's Record.**
- (1) The appellant, at or before the time prescribed for perfecting the appeal, must make a written request for the reporter's record to the court reporter for the evidentiary panel. The request must designate the portion of the evidence and other proceedings to be included. A copy of the request must be filed with the evidentiary panel and BODA and must be served on the appellee. The reporter's record must be certified by the court reporter for the evidentiary panel.
  - (2) The court reporter or recorder must prepare and file the reporter's record in accordance with TRAP 34.6 and 35 and the Uniform Format Manual

for Texas Reporters' Records.

- (3) The court reporter or recorder must file the reporter's record in an electronic format by emailing the document to the email address designated by BODA for that purpose.
- (4) The court reporter or recorder must include either a scanned image of any required signature or "/s/" and name typed in the space where the signature would otherwise appear.
- (5) A court reporter or recorder must not lock any document that is part of the record.
- (6) In exhibit volumes, the court reporter or recorder must create bookmarks to mark the first page of each exhibit document.
- (g) **Other Requests.** At any time before the clerk's record is prepared, or within ten days after service of a copy of appellant's request for the reporter's record, any party may file a written designation requesting that additional exhibits and portions of testimony be included in the record. The request must be filed with the evidentiary panel and BODA and must be served on the other party.
- (h) **Inaccuracies or Defects.** If the clerk's record is found to be defective or inaccurate, the BODA Clerk must inform the clerk of the evidentiary panel of the defect or inaccuracy and instruct the clerk to make the correction. Any inaccuracies in the reporter's record may be corrected by agreement of the parties without the court reporter's recertification. Any dispute regarding the reporter's record that the parties are unable to resolve by agreement must be resolved by the evidentiary panel.
- (i) **Appeal from Private Reprimand.** Under TRDP 2.16, in an appeal from a judgment of private reprimand, BODA must mark the record as confidential, remove the

attorney's name from the case style, and take any other steps necessary to preserve the confidentiality of the private reprimand.

#### **Rule 4.03 Time to File Record**

- (a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or apply presumptions against the appellant.
- (b) **If No Record Filed.**
  - (1) If the clerk's record or reporter's record has not been timely filed, the BODA Clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days. The BODA Clerk must send a copy of this notice to all the parties and the clerk of the evidentiary panel.
  - (2) If no reporter's record is filed due to appellant's fault, and if the clerk's record has been filed, BODA may, after first giving the appellant notice and a reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter's record for a decision. BODA may do this if no reporter's record has been filed because:
    - (i) the appellant failed to request a



- reporter's record; or
- (ii) the appellant failed to pay or make arrangements to pay the reporter's fee to prepare the reporter's record, and the appellant is not entitled to proceed without payment of costs.
- (c) **Extension of Time to File the Reporter's Record.** When an extension of time is requested for filing the reporter's record, the facts relied on to reasonably explain the need for an extension must be supported by an affidavit of the court reporter. The affidavit must include the court reporter's estimate of the earliest date when the reporter's record will be available for filing.
- (d) **Supplemental Record.** If anything material to either party is omitted from the clerk's record or reporter's record, BODA may, on written motion of a party or on its own motion, direct a supplemental record to be certified and transmitted by the clerk for the evidentiary panel or the court reporter for the evidentiary panel.

#### **Rule 4.04 Copies of the Record**

The record may not be withdrawn from the custody of the BODA Clerk. Any party may obtain a copy of the record or any designated part thereof by making a written request to the BODA Clerk and paying any charges for reproduction in advance.

#### **Rule 4.05 Requisites of Briefs**

- (a) **Appellant's Filing Date.** Appellant's brief must be filed within 30 days after the clerk's record or the reporter's record is filed, whichever is later.
- (b) **Appellee's Filing Date.** Appellee's brief must be filed within 30 days after the appellant's brief is filed.
- (c) **Contents.** Briefs must contain:
  - (1) a complete list of the names and addresses of all parties to the final decision and their counsel;

- (2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;
- (3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;
- (4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;
- (5) a statement, without argument, of the basis of BODA's jurisdiction;
- (6) a statement of the issues presented for review or points of error on which the appeal is predicated;
- (7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;
- (8) the argument and authorities;
- (9) conclusion and prayer for relief;
- (10) a certificate of service; and
- (11) an appendix of record excerpts pertinent to the issues presented for review.
- (d) **Length of Briefs; Contents Included and Excluded.** In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of the jurisdiction, signature, proof of service, certificate of compliance, and appendix. Briefs must not exceed 15,000 words if computer-generated, and 50 pages if not, except on leave of BODA. A reply brief must not exceed 7,500 words if computer-generated, and 25 pages if not, except on

leave of BODA. A computer-generated document must include a certificate by counsel or the unrepresented party stating the number of words in the document. The person who signs the certification may rely on the word count of the computer program used to prepare the document.

- (e) **Amendment or Supplementation.** BODA has discretion to grant leave to amend or supplement briefs.
- (f) **Failure of the Appellant to File a Brief.** If the appellant fails to timely file a brief, BODA may:
  - (1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure, and the appellee is not significantly injured by the appellant's failure to timely file a brief;
  - (2) decline to dismiss the appeal and make further orders within its discretion as it considers proper; or
  - (3) if an appellee's brief is filed, regard that brief as correctly presenting the case and affirm the evidentiary panel's judgment on that brief without examining the record.

#### **Rule 4.06 Oral Argument**

- (a) **Request.** A party desiring oral argument must note the request on the front cover of the party's brief. A party's failure to timely request oral argument waives the party's right to argue. A party who has requested argument may later withdraw the request. But even if a party has waived oral argument, BODA may direct the party to appear and argue. If oral argument is granted, the clerk will notify the parties of the time and place for submission.
- (b) **Right to Oral Argument.** A party who has filed a brief and who has timely requested oral argument may argue the case to BODA unless BODA, after examining the briefs, decides that oral

argument is unnecessary for any of the following reasons:

- (1) the appeal is frivolous;
  - (2) the dispositive issue or issues have been authoritatively decided;
  - (3) the facts and legal arguments are adequately presented in the briefs and record; or
  - (4) the decisional process would not be significantly aided by oral argument.
- (c) **Time Allowed.** Each party will have 20 minutes to argue. BODA may, on the request of a party or on its own, extend or shorten the time allowed for oral argument. The appellant may reserve a portion of his or her allotted time for rebuttal.

#### **Rule 4.07 Decision and Judgment**

- (a) **Decision.** BODA may do any of the following:
  - (1) affirm in whole or in part the decision of the evidentiary panel;
  - (2) modify the panel's findings and affirm the findings as modified;
  - (3) reverse in whole or in part the panel's findings and render the decision that the panel should have rendered; or
  - (4) reverse the panel's findings and remand the cause for further proceedings to be conducted by:
    - (i) the panel that entered the findings; or
    - (ii) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.
- (b) **Mandate.** In every appeal, the BODA Clerk must issue a mandate in accordance with BODA's judgment and send it to the evidentiary panel and to all the parties.

#### **Rule 4.08 Appointment of Statewide Grievance Committee**

If BODA remands a cause for further proceedings before a statewide grievance committee, the BODA Chair will appoint the statewide grievance committee in accordance with TRDP 2.27. The committee must consist of six members: four attorney members and two public members randomly selected from the current pool of grievance committee members. Two alternates, consisting of one attorney and one public member, must also be selected. BODA will appoint the initial chair who will serve until the members of the statewide grievance committee elect a chair of the committee at the first meeting. The BODA Clerk will notify the Respondent and the CDC that a committee has been appointed.

#### **Rule 4.09 Involuntary Dismissal**

Under the following circumstances and on any party's motion or on its own initiative after giving at least ten days' notice to all parties, BODA may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal:

- (a) for want of jurisdiction;
- (b) for want of prosecution; or
- (c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.

### **SECTION 5: PETITIONS TO REVOKE PROBATION**

#### **Rule 5.01 Initiation and Service**

- (a) Before filing a motion to revoke the probation of an attorney who has been sanctioned, the CDC must contact the BODA Clerk to confirm whether the next regularly available hearing date will comply with the 30-day requirement of TRDP. The Chair may designate a three-member panel to hear the motion, if necessary, to meet the 30-day requirement of TRDP 2.23.

- (b) Upon filing the motion, the CDC must serve the Respondent with the motion and any supporting documents in accordance with TRDP 2.23, the TRCP, and these rules. The CDC must notify BODA of the date that service is obtained on the Respondent.

#### **Rule 5.02 Hearing**

Within 30 days of service of the motion on the Respondent, BODA must docket and set the matter for a hearing and notify the parties of the time and place of the hearing. On a showing of good cause by a party or on its own motion, BODA may continue the case to a future hearing date as circumstances require.

### **SECTION 6: COMPULSORY DISCIPLINE**

#### **Rule 6.01 Initiation of Proceeding**

Under TRDP 8.03, the CDC must file a petition for compulsory discipline with BODA and serve the Respondent in accordance with the TRDP and Rule 1.06 of these rules.

#### **Rule 6.02 Interlocutory Suspension**

- (a) **Interlocutory Suspension.** In any compulsory proceeding under TRDP Part VIII in which BODA determines that the Respondent has been convicted of an Intentional Crime and that the criminal conviction is on direct appeal, BODA must suspend the Respondent's license to practice law by interlocutory order. In any compulsory case in which BODA has imposed an interlocutory order of suspension, BODA retains jurisdiction to render final judgment after the direct appeal of the criminal conviction is final. For purposes of rendering final judgment in a compulsory discipline case, the direct appeal of the criminal conviction is final when the appellate court issues its mandate.
- (b) **Criminal Conviction Affirmed.** If the criminal conviction made the basis of a compulsory interlocutory suspension is affirmed and becomes final, the CDC must

file a motion for final judgment that complies with TRDP 8.05.

- (1) If the criminal sentence is fully probated or is an order of deferred adjudication, the motion for final judgment must contain notice of a hearing date. The motion will be set on BODA's next available hearing date.
- (2) If the criminal sentence is not fully probated:
  - (i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or
  - (ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.
- (c) Criminal Conviction Reversed. If an appellate court issues a mandate reversing the criminal conviction while a Respondent is subject to an interlocutory suspension, the Respondent may file a motion to terminate the interlocutory suspension. The motion to terminate the interlocutory suspension must have certified copies of the decision and mandate of the reversing court attached. If the CDC does not file an opposition to the termination within ten days of being served with the motion, BODA may proceed to decide the motion without a hearing or set the matter for a hearing on its own motion. If the CDC timely opposes the motion, BODA must set the motion for a hearing on its next available hearing date. An order terminating an interlocutory order of suspension does not automatically reinstate a Respondent's license.

## **SECTION 7: RECIPROCAL DISCIPLINE**

### **Rule 7.01 Initiation of Proceeding**

To initiate an action for reciprocal discipline under TRDP Part IX, the CDC must file a petition with BODA and request an Order to Show Cause. The petition must request that the Respondent be disciplined in Texas and have attached to it any information concerning the disciplinary matter from the other jurisdiction, including a certified copy of the order or judgment rendered against the Respondent.

### **Rule 7.02 Order to Show Cause**

When a petition is filed, the Chair immediately issues a show cause order and a hearing notice and forwards them to the CDC, who must serve the order and notice on the Respondent. The CDC must notify BODA of the date that service is obtained.

### **Rule 7.03 Attorney's Response**

If the Respondent does not file an answer within 30 days of being served with the order and notice but thereafter appears at the hearing, BODA may, at the discretion of the Chair, receive testimony from the Respondent relating to the merits of the petition.

## **SECTION 8: DISTRICT DISABILITY COMMITTEE HEARINGS**

### **Rule 8.01 Appointment of District Disability Committee**

- (a) If the evidentiary panel of the grievance committee finds under TRDP 2.17(P)(2), or the CDC reasonably believes under TRDP 2.14(C), that a Respondent is suffering from a disability, the rules in this section will apply to the de novo proceeding before the District Disability Committee held under TRDP Part XII.
- (b) Upon receiving an evidentiary panel's finding or the CDC's referral that an attorney is believed to be suffering from a disability, the BODA Chair must appoint a District Disability Committee in compliance with TRDP 12.02 and designate a chair. BODA will reimburse District Disability Committee members for

reasonable expenses directly related to service on the District Disability Committee. The BODA Clerk must notify the CDC and the Respondent that a committee has been appointed and notify the Respondent where to locate the procedural rules governing disability proceedings.

- (c) A Respondent who has been notified that a disability referral will be or has been made to BODA may, at any time, waive in writing the appointment of the District Disability Committee or the hearing before the District Disability Committee and enter into an agreed judgment of indefinite disability suspension, provided that the Respondent is competent to waive the hearing. If the Respondent is not represented, the waiver must include a statement affirming that the Respondent has been advised of the right to appointed counsel and waives that right as well.
- (d) All pleadings, motions, briefs, or other matters to be filed with the District Disability Committee must be filed with the BODA Clerk.
- (e) Should any member of the District Disability Committee become unable to serve, the BODA Chair must appoint a substitute member.

#### **Rule 8.02 Petition and Answer**

- (a) **Petition.** Upon being notified that the District Disability Committee has been appointed by BODA, the CDC must, within 20 days, file with the BODA Clerk and serve on the Respondent a copy of a petition for indefinite disability suspension. Service must comply with Rule 1.06
- (b) **Answer.** The Respondent must, within 30 days after service of the petition for indefinite disability suspension, file an answer with the BODA Clerk and serve a copy of the answer on the CDC.
- (c) **Hearing Setting.** The BODA Clerk must set the final hearing as instructed by the

chair of the District Disability Committee and send notice of the hearing to the parties.

#### **Rule 8.03 Discovery**

- (a) **Limited Discovery.** The District Disability Committee may permit limited discovery. The party seeking discovery must file with the BODA Clerk a written request that makes a clear showing of good cause and substantial need and a proposed order. If the District Disability Committee authorizes discovery in a case, it must issue a written order. The order may impose limitations or deadlines on the discovery.
- (b) **Physical or Mental Examinations.** On written motion by the Commission or on its own motion, the District Disability Committee may order the Respondent to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. Nothing in this rule limits the Respondent's right to an examination by a professional of his or her choice in addition to any exam ordered by the District Disability Committee.
  - (1) **Motion.** The Respondent must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.
  - (2) **Report.** The examining professional must file with the BODA Clerk a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the CDC and the Respondent.
- (c) **Objections.** A party must make any objection to a request for discovery within 15 days of receiving the motion by filing a written objection with the BODA Clerk. BODA may decide any objection or contest to a discovery motion.

#### **Rule 8.04 Ability to Compel Attendance**

The Respondent and the CDC may confront and cross-examine witnesses at the hearing. Compulsory process to compel the attendance of witnesses by subpoena, enforceable by an order of a district court of proper jurisdiction, is available to the Respondent and the CDC as provided in TRCP 176.

#### **Rule 8.05 Respondent's Right to Counsel**

- (a) The notice to the Respondent that a District Disability Committee has been appointed and the petition for indefinite disability suspension must state that the Respondent may request appointment of counsel by BODA to represent him or her at the disability hearing. BODA will reimburse appointed counsel for reasonable expenses directly related to representation of the Respondent.
- (b) To receive appointed counsel under TRDP 12.02, the Respondent must file a written request with the BODA Clerk within 30 days of the date that Respondent is served with the petition for indefinite disability suspension. A late request must demonstrate good cause for the Respondent's failure to file a timely request.

#### **Rule 8.06 Hearing**

The party seeking to establish the disability must prove by a preponderance of the evidence that the Respondent is suffering from a disability as defined in the TRDP. The chair of the District Disability Committee must admit all relevant evidence that is necessary for a fair and complete hearing. The TRE are advisory but not binding on the chair.

#### **Rule 8.07 Notice of Decision**

The District Disability Committee must certify its finding regarding disability to BODA, which will issue the final judgment in the matter.

#### **Rule 8.08 Confidentiality**

All proceedings before the District Disability Committee and BODA, if necessary, are closed to the public. All matters before the District

Disability Committee are confidential and are not subject to disclosure or discovery, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court of Texas.

### **SECTION 9: DISABILITY REINSTATEMENTS**

#### **Rule 9.01 Petition for Reinstatement**

- (a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. The petitioner must serve a copy of the petition on the CDC in the manner required by TRDP 12.06. The TRCP apply to a reinstatement proceeding unless they conflict with these rules.
- (b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.
- (c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may make all or any part of the record of the proceeding confidential.

#### **Rule 9.02 Discovery**

The discovery period is 60 days from the date that the petition for reinstatement is filed. The BODA Clerk will set the petition for a hearing on the first date available after the close of the discovery period and must notify the parties of the time and place of the hearing. BODA may continue the hearing for good cause shown.

### **Rule 9.03 Physical or Mental Examinations**

- (a) On written motion by the Commission or on its own, BODA may order the petitioner seeking reinstatement to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. The petitioner must be served with a copy of the motion and given at least seven days to respond. BODA may hold a hearing before ruling on the motion but is not required to do so.
- (b) The petitioner must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.
- (c) The examining professional must file a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the parties.
- (d) If the petitioner fails to submit to an examination as ordered, BODA may dismiss the petition without notice.
- (e) Nothing in this rule limits the petitioner's right to an examination by a professional of his or her choice in addition to any exam ordered by BODA.

### **Rule 9.04 Judgment**

If, after hearing all the evidence, BODA determines that the petitioner is not eligible for reinstatement, BODA may, in its discretion, either enter an order denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the petitioner provides additional proof as directed by BODA. The judgment may include other orders necessary to protect the public and the petitioner's potential clients.

## **SECTION 10: APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS**

### **Rule 10.01 Appeals to the Supreme Court**

- (a) A final decision by BODA, except a determination that a statement constitutes an inquiry or a complaint under TRDP 2.10, may be appealed to the Supreme Court of Texas. The clerk of the Supreme Court of Texas must docket an appeal from a decision by BODA in the same manner as a petition for review without fee.
- (b) The appealing party must file the notice of appeal directly with the clerk of the Supreme Court of Texas within 14 days of receiving notice of a final determination by BODA. The record must be filed within 60 days after BODA's determination. The appealing party's brief is due 30 days after the record is filed, and the responding party's brief is due 30 days thereafter. The BODA Clerk must send the parties a notice of BODA's final decision that includes the information in this paragraph.
- (c) An appeal to the Supreme Court is governed by TRDP 7.11 and the TRAP.

STATE OF MICHIGAN

Attorney Discipline Board

In Re JAMES M. O'BRIANT, P 41156

Case No. 16-66-GA

Respondent.

CERTIFICATE OF RECORDS

I, Julie Loiselle, a member of the staff of the Michigan Attorney Discipline Board, do hereby certify that attached hereto is a copy of:

FORMAL COMPLAINT

JAMES M. O'BRIANT'S RESPONSE TO FORMAL COMPLAINT

REPORT OF TRI-COUNTY HEARING PANEL #23

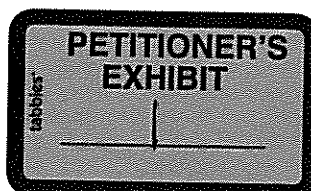
ORDER OF DISBARMENT

ORDER DENYING RESPONDENT'S MOTION FOR NEW TRIAL

NOTICE OF DISBARMENT

In testimony whereof, I have set my hand and affixed the seal of the Attorney Discipline Board this 17<sup>th</sup> day of April, 2017.

  
Julie Loiselle





State of Michigan  
Attorney Discipline Board

Grievance Administrator,  
Michigan Attorney Grievance Commission,

Petitioner,

Case No. 16-66-GA

v

James O'Briant, P41156,

Respondent.

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Formal Complaint

(Parties and Jurisdiction)

1. Petitioner, Grievance Administrator, is authorized by MCR 9.109(B)(6) to prosecute this Formal Complaint by the Attorney Grievance Commission, which is the prosecution arm of the Supreme Court for the discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

2. As a licensed Michigan attorney, Respondent is subject to the jurisdiction of the Supreme Court and the Attorney Discipline Board as set forth in MCR 9.104.

3. Michigan attorneys have a duty to conduct themselves personally and professionally at all times in conformity with the standards imposed on members of the bar as a condition of the privilege to practice law.

4. Respondent is a Michigan attorney who was licensed in 1988 and who last maintained an office for the practice of law in the county of Ingham.

### **Count One**

#### **(Factual Allegations)**

5. On November 21, 2003, Linda Kadzban retained Respondent regarding the conviction of her minor son, Gary Tyler Kadzban. Gary had been found liable for Criminal Sexual Conduct (CSC) 2<sup>nd</sup> degree in a probate proceeding in 2001. An unsuccessful motion for relief from judgment and appeals to the Court of Appeals and Michigan Supreme Court had been filed by prior counsel.

6. Ms. Kadzban signed a retainer agreement which stated that Respondent would investigate possible claims of relief against Shiawassee County and a legal malpractice action against Gary's trial counsel, Barry Furgason.

7. From November 21, 2003 through July 6, 2003, Ms. Kadzban paid Respondent a total of \$57,000 in attorney fees and costs.

8. On March 2, 2004, Respondent filed a complaint in Shiawassee Circuit Court alleging legal malpractice against Mr. Furgason.

9. The case settled for \$15,000 after facilitative mediation.

10. On October 17, 2005, a stipulated order of dismissal was entered in the legal malpractice case.

11. Respondent advised Ms. Kadzban to allow him to keep the \$15,000 settlement to fund a future action against Shiawassee County officials involved in Gary's CSC case, as well as a motion for relief from judgment and federal habeas action.

12. Ms. Kadzban agreed to this arrangement.

13. On January 4, 2006, Respondent advised Ms. Kadzban that after further investigation, he did not believe there was sufficient basis to bring legal action against the Shiawassee County Prosecutor or any other county employees. He advised that any due process claims would likely be dismissed on a theory of governmental immunity. He advised that he would instead focus on attempting to set aside Gary's conviction.

14. On April 18, 2006, Respondent filed a second motion for relief from judgment on behalf of Gary.

15. The motion was denied.

16. Respondent appealed the denial to the Court of Appeals and to the Michigan Supreme Court.

17. On April 4, 2008, the Supreme Court remanded the case back to probate court to conduct an evidentiary hearing on Gary's motion for new trial which alleged that he received ineffective assistance of counsel in the probate proceeding.

18. On August 16, 2008, Complainant paid Respondent \$5,000 to conduct the hearing.

19. Although Respondent filed a notice of hearing, no hearing on the motion for new trial was ever conducted by the court.

20. Respondent did not refund any of the fee paid for the hearing.

21. On February 12, 2009, Respondent filed a third motion for relief from judgment on behalf of Gary.

22. The motion was denied on May 27, 2009.

23. Respondent again appealed the denial to the Court of Appeals and Michigan Supreme Court.

24. His appeal was dismissed by the Supreme Court on September 15, 2010.

25. On January 25, 2011, Ms. Kadzban signed a second retainer agreement with Respondent. Respondent quoted a \$10,000 flat fee to have Gary's name removed from the sex offender registry.

26. On February 15, 2011, Ms. Kadzban paid Respondent \$10,000.

27. Respondent took no efforts to have Gary removed from the sex offender registry.

28. Later in 2011, Gary's reporting requirement was eliminated due to a statutory amendment.

29. Despite taking no action to achieve the relief requested, Respondent refunded no portion of the \$10,000 fee.

30. On March 7, 2012, Respondent filed a Notice of Intention to File a Claim in Ingham County Circuit Court. The claim was against Shiawassee County for due process violations in Gary's CSC case.

31. Respondent filed the notice although he had previously advised Ms. Kadzban that such a claim could not be sustained.

32. Respondent did not file any action against Shiawassee County.

33. On November 3, 2012, Ms. Kadzban paid Respondent \$3,500 to file a lawsuit against Jeff Kowalski, who operated a website called "The Rip-off Report."

34. Ms. Kadzban sought to enjoin Mr. Kowalski from listing information regarding Gary's CSC 2<sup>nd</sup> conviction on the website.

35. Respondent filed an action against Mr. Kowalski; however, it was dismissed for lack of service in December 2013.

36. Respondent did not refund any of the fee paid for the action.

37. In 2014, Ms. Kadzban repeatedly e-mailed Respondent requesting a status update on whether the action against Mr. Kowalski was re-filed and an accounting of fees paid to Respondent.

38. Respondent did not re-file the action or provide an accounting to Ms. Kadzban.

39. On January 21, 2015, Respondent was suspended from the practice of law for one year for unrelated misconduct.

40. Respondent did not notify Ms. Kadzban or Gary of the suspension.

41. In February 2015, Ms. Kadzban terminated Respondent's representation.

### **Grounds for Discipline**

42. By reason of the conduct described above in Count One of this Formal Complaint, Respondent has committed the following misconduct and is subject to discipline under MCR 9.104 as follows:

- a) neglected a client matter, in violation of MRPC 1.1(c);

- b) failed to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- c) failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3;
- d) failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information, in violation of MRPC 1.4(a);
- e) failed to explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);
- f) failed to promptly render a full accounting of client funds upon request, in violation of MRPC 1.15(b)(3);
- g) failed to refund an advance payment of fee which has not been earned, in violation of MRPC 1.16(d);
- h) failed to notify all active clients, in writing, by registered or certified mail, return receipt requested, of his suspension from the practice of law, in violation of MCR 9.119(A);
- i) engaged in conduct prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MC( 9.104(1);
- j) engaged in conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,

- k) engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

## **Count Two**

### **(Factual Allegations)**

43. In 2009, Joseph Prach retained Respondent for legal representation in two matters: 1) a quiet title action filed in Houghton County Circuit Court involving a dispute over real property between Mr. Prach and his aunts and uncles, and 2) a related probate matter filed in Houghton County Probate Court in which Mr. Prach was the personal representative of his brother's estate.

44. Both actions had previously been filed by Mr. Prach's prior counsel Jenelle Kiernan. Discovery and pre-trial matters were handled by Ms. Kiernan.

45. Respondent was paid a \$12,000 attorney fee to complete both matters.

46. In December 2009, the court conducted a bench trial in the quiet title action. Respondent represented Mr. Prach at trial.

47. On December 14, 2009, the court entered a judgment against Mr. Prach and imposed a constructive trust in favor of the defendants. The court held that Mr. Prach and his brother held a shared 1/6 interest in the property and that each of the five defendants held a 1/6 interest.

48. On June 16, 2011, there was a payment of \$3,000 by the defendants to Joseph and Kurt Prach to buy out their interest in the real property.

49. Joseph Prach signed the check from defendants and mailed it to Respondent with instructions to keep \$1,500 for his attorney fee and return the balance to him.

50. On June 30, 2011, Respondent sent an e-mail to Mr. Prach stating that he planned to keep the entire amount for his attorney fee for closing the probate estate. Respondent stated that he would send a final accounting when he closed the estate that summer.

51. On September 12, 2011, Mr. Prach e-mailed Respondent and asked if he had closed the estate and requested an itemization of fees paid to Respondent and a copy of the client file.

52. Respondent did not respond to the e-mail.

53. Respondent did not take any steps to close the estate.

54. Respondent did not provide the requested itemization or client file.

55. On March 11, 2012, Mr. Prach sent an e-mail to Respondent again requesting an itemization and that Respondent file the necessary papers to close the estate.

56. Respondent sent an e-mail to Mr. Prach later that day stating that he had been out of the country and, "I will check on it this week and get back to you."

57. Respondent did not provide an itemization or take any steps to close the estate.

58. On June 25, 2014, Joseph Prach sent an e-mail to Respondent again requesting that he complete the probate administration. Mr. Prach stated that he would report this matter to the disciplinary authorities if no action was taken.



59. On July 1, 2014, Respondent e-mailed Mr. Prach thanking him for his patience and stating, "I will get to the bottom of this. We may have to travel there to close the estate."

60. Respondent took no action to close the estate.

61. On February 4, 2015, Mr. Prach filed a request for investigation against Respondent.

62. On January 21, 2015, Respondent's license was suspended for one year for professional misconduct in an unrelated disciplinary matter.

63. Respondent did not notify Mr. Prach of the suspension as required by MCR 9.119(A).

64. Respondent did not file a notice of disqualification with the Houghton County Probate court despite the fact that the matter remained open and Respondent was listed as attorney of record.

65. In January of 2016, Mr. Prach filed documents with the probate court on his own to close the estate.

66. To date, Respondent has not provided any itemization or accounting of the \$15,000 attorney fee paid to him.

### **(Grounds for Discipline)**

67. By reason of the conduct described above in Count Two of this Formal Complaint, Respondent has committed the following misconduct and is subject to discipline under MCR 9.104 as follows:

- a) neglected a client matter, in violation of MRPC 1.1(c);
- b) failed to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- c) failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3;
- d) failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information, in violation of MRPC 1.4(a);
- e) failed to explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);
- f) failed to promptly render a full accounting of client funds upon request, in violation of MRPC 1.15(b)(3);
- g) failed to notify all active clients, in writing, by registered or certified mail, return receipt requested, of his suspension from the practice of law, in violation of MCR 9.119(A);
- h) failed to file a notice of disqualification with a tribunal in which he represented a client in litigation, violation of MCR 9.119(B);
- i) engaged in conduct prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR (9.104(1);

- j) engaged in conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- k) engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

### **Count Three**

#### **(Factual Allegations)**

68. Kolean England retained Respondent on October 12, 2010, to file a malpractice action against attorney Kenneth Struble related to his representation of Complainant in a probate matter.

69. Ms. England paid Respondent \$10,000 for the representation.

70. On October 6, 2011, Respondent filed a legal malpractice action against Attorney Struble captioned *Kolean England v. Kenneth Struble*, Case No. 11-3151-NM, Calhoun County Circuit Court.

71. Attorney Struble filed a timely answer and counter-claim.

72. On January 16, 2012, Attorney Struble served Respondent with interrogatories.

73. Respondent did not provide a response to the interrogatories.

74. Respondent did not communicate with Ms. England about the interrogatories.

75. On April 16, 2012, Attorney Struble filed a motion to compel a response.

76. Respondent did not inform Ms. England of the motion or file a reply.

77. On June 8, 2012, Respondent signed a stipulation to dismiss the action with prejudice.

78. Respondent dismissed the action without the knowledge or consent of Ms. England.

**(Grounds for Discipline)**

79. By reason of the conduct described above in this Formal Complaint, Respondent has committed the following misconduct and is subject to discipline under MCR 9.104 as follows:

- a) Handled a matter without preparation adequate in circumstances, in violation of MRPC 1.1(b);
- b) Neglected a legal matter entrusted to him, in violation of MRPC 1.1(c);
- c) Failed to act with reasonable diligence and promptness, in violation of MRPC 1.3;
- d) Failed to keep a client reasonably informed of the status of a matter, in violation of MRPC 1.4(a);
- e) Failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);

- f) Engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b);
- g) Engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- h) Engaged in conduct that is contrary to ethics, in violation of MCR 9.104(3).

#### **Count Four**

#### **(Factual Allegations)**

80. On February 12, 2012, Kolean England retained Respondent to file an action against Oaklawn Hospital related to Oaklawn's release of Ms. England's medical records pursuant to a subpoena.

81. Ms. England paid Respondent \$10,000 for the representation.

82. At the time of the payment, Ms. England was not aware her legal malpractice action had been dismissed.

83. On September 10, 2013, Respondent filed an action against Oaklawn captioned *Kolean England v. Oaklawn Hospital*, Case No. 13-2862-NO, Calhoun County Circuit Court.

84. The complaint alleged a violation of Ms. England's privacy right pursuant to the Health Insurance Portability and Accountability Act (HIPPA).

85. On December 30, 2013, Oaklawn filed a motion for summary disposition.

86. Oaklawn also filed a motion for more definite statement stating that the complaint was vague and ambiguous.

87. Respondent did not advise Ms. England of the motions.

88. Respondent did not file a response to the motions.

89. Respondent subsequently stipulated to dismiss the HIPPA claim and to file an amended complaint setting forth factual statements and allegations that would reasonably inform Oaklawn of Ms. England's claims.

90. On January 22, 2014, the court entered a stipulated order dismissing the HIPPA claim and requiring an amended complaint to be filed by February 27, 2014.

91. Respondent did not advise Ms. England of the stipulated order.

92. Respondent did not file an amended complaint.

93. On March 4, 2014, Respondent stipulated to dismissal of Ms. England's case with prejudice.

94. The dismissal was without Ms. England's knowledge or consent.

95. In the spring of 2014, Respondent met with Ms. England at an Arby's restaurant in Marshall, MI.

96. Respondent told Ms. England that the litigation was proceeding.

97. Respondent's statement was knowingly false, as Respondent had already stipulated to dismissal of the case.

98. Ms. England later learned of the dismissal by contacting Houghton County Circuit Court and inquiring about the status of the case.

**(Grounds for Discipline)**

99. By reason of the conduct described above in this Formal Complaint, Respondent has committed the following misconduct and is subject to discipline under MCR 9.104 as follows:

- a) Handling a matter without preparation adequate in circumstances, in violation of MRPC 1.1(b);
- b) Neglecting a legal matter entrusted to him, in violation of MRPC 1.1(c);
- c) Failing to act with reasonable diligence and promptness, in violation of MRPC 1.3;
- d) Failing to keep a client reasonably informed of the status of a matter, in violation of MRPC 1.4(a);
- e) Failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);

- f) conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b);
- g) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- h) conduct that is contrary to ethics, in violation of MCR 9.104(3).

### **Count Five**

#### **(Factual Allegations)**

100. Pamela Rymanowicz retained Respondent in November of 2012 to bring a lawsuit on behalf of Ms. Rymanowicz's mother, who had several dogs seized from her home in 2009 by animal control officers.

101. Respondent agreed to file claims of illegal seizure and public corruption against Oceana County.

102. Ms. Rymanowicz signed a retainer agreement providing that Respondent would receive a \$1,000 advance payment and \$200 per hour for legal services provided.

103. The agreement further provided that Respondent would submit periodic billing statements to Ms. Rymanowicz and would return any portion of the unused retainer.



104. Ms. Rymanowicz paid Respondent \$1000 in November of 2012.

105. Ms. Rymanowicz paid Respondent an additional \$1,500 in cash in January of 2013.

106. In early 2013, Ms. Rymanowicz e-mailed Respondent documentation he requested regarding the seizure of the dogs.

107. In April 2013, Ms. Rymanowicz requested a status update on the matter.

108. Respondent told Ms. Rymanowicz that the initial fees were exhausted and that he needed an additional \$1,500 to file the lawsuit.

109. Ms. Rymanowicz requested, but did not receive, an itemized statement of Respondent's time.

110. Ms. Rymanowicz subsequently paid Respondent an additional \$2,500 in cash to proceed with the lawsuit.

111. In August of 2013, after leaving several e-mail and voicemail messages for Respondent, Ms. Rymanowicz was able to set an appointment to meet with Respondent in person.

112. On the date of her appointment, Ms. Rymanowicz went to Respondent's office and waited for him for two hours.

113. Respondent eventually called Ms. Rymanowicz's cellphone and stated that he was tied up in court and would have to meet with her by telephone. Respondent then told Ms. Rymanowicz that he had filed some paperwork in April but had to give the county six months' notice before he could proceed. He stated that he would proceed with the case in October 2013.

114. This statement was false, as Respondent had filed no paperwork on behalf of Ms. Rymanowicz's mother.

115. Ms. Rymanowicz attempted to contact Respondent in October of 2013 by telephone and e-mail.

116. Respondent did not reply to Ms. Rymanowicz's voicemail and e-mail messages.

117. On January 2, 2014, Ms. Rymanowicz sent a letter to Respondent by e-mail and certified mail regarding the status of the case and requesting a refund of the \$5,000. Ms. Rymanowicz stated that she would file a grievance unless a refund was paid in ten days.

118. On January 3, 2014, Respondent sent an e-mail to Ms. Rymanowicz apologizing for the delay and stating that he would back in town the following week and would "finalize and proceed" when he returned.

119. Over the next few weeks, Ms. Rymanowicz tried unsuccessfully to set an appointment with Respondent.

120. On February 3, 2014, Respondent e-mailed Ms. Rymanowicz a copy of a draft complaint to be filed in Oceana County Circuit Court.

121. The complaint was incomplete and omitted any statutory authority. The complaint contained a blank space in place of the value of the seized property.

122. Upon receipt of the complaint, Ms. Rymanowicz sent some corrections and additions to be included by Respondent.

123. On February 25, 2014, Respondent e-mailed Ms. Rymanowicz stating that, "we may be facing some time limit issues on your mothers case." (sic).

124. On September 12, 2014, Ms. Rymanowicz again requested a refund as nothing had been filed.

125. To date, Respondent has filed nothing related to Ms. Rymanowicz's retainer.

126. Respondent has not provided periodic billing statements to Ms. Rymanowicz as required by his retainer agreement.

127. To date, Respondent has refunded no portion of the \$5,000 attorney fee to Ms. Rymanowicz.

128. On January 21, 2015, Respondent was suspended from the practice of law for one year as a result of unrelated misconduct.

129. Respondent did not notify Ms. Rymanowicz of the suspension, as required by MCR 9.119(A), although she remained an active client at the time of his suspension.

#### **(Grounds for Discipline)**

130. By reason of the conduct described above in Count Five of this Formal Complaint, Respondent has committed the following misconduct and is subject to discipline under MCR 9.104 as follows:

- a) neglected a client matter, in violation of MRPC 1.1(c);
- b) failed to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- c) failed to failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3;

- d) failed keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information, in violation of MRPC 1.4(a);
- e) failed to explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);
- f) failed to refund an advance payment of fee that has not been earned, in violation of MRPC 1.16(d);
- g) failed to notify an active client of his suspension from the practice of law, in violation of MCR 9.119(A);
- h) failed to file a notice of disqualification with a tribunal in which he represented a client in litigation, in violation of MCR 9.119(B);
- i) engaged in conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- j) engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

**Count Six**

**(Factual Allegations)**

131. On May 15, 2014, Colonel Max Riekse retained Respondent to represent him in a malpractice action filed against his former divorce attorney, Ronald Panucci.

132. Col. Riekse paid Respondent a \$10,000 advance fee.

133. On May 21, 2014, Respondent filed an appearance, answer to counter-claim, and affirmative defenses.

134. On July 21, 2014, Respondent was charged with professional misconduct in an unrelated matter.

135. On November 12, 2014, Respondent signed a stipulation consenting to a one-year suspension set to take effect January 21, 2015.

136. Respondent did not disclose the imminent suspension to Col. Riekse.

137. On November 12, 2014, Col. Riekse paid Respondent an additional \$15,000 to prepare for trial of the malpractice action.

138. In December 2014, Respondent appeared at depositions of both Col. Riekse and defendant Ronald Panucci.

139. On about January 12, 2015, Respondent signed a stipulated order dismissing Col. Riekse's claims in the malpractice action.

140. Col. Riekse did not consent to the dismissal of his case.

141. Respondent did not inform Col. Riekse of the dismissal of his case.

142. On January 21, 2015, Respondent law license was suspended pursuant to the consent order of discipline.

143. Respondent did not inform Col. Riekse of his suspension from the practice of law.

144. Col. Riekse learned of Respondent's suspension in March 2015 from an attorney who saw the suspension listed in Lawyers' Weekly.

145. Col. Riekse then contacted the court and learned that his case was dismissed.

146. During the course of his representation of Col. Riekse, Respondent told Col. Riekse that he needed \$5,000 to retain an expert for the malpractice case.

147. Col. Riekse paid Respondent \$5,000 for retention of an expert witness.

148. Upon information and belief, Respondent consulted with attorney Stuart Shafer regarding expert testimony in Col. Riekse's case.

149. Attorney Shafer quoted a retainer of \$2,500 to review the matter and provide an expert opinion, not \$5,000.

150. Respondent never paid a retainer to Attorney Shafer or any other expert in this matter.

151. To date, Respondent has not refunded any portion of the \$25,000 attorney fee paid to him.

152. To date, Respondent has not refunded any portion of the \$5,000 paid to him to retain an expert witness, although no such witness was retained.

### **Grounds for Discipline**

153. By reason of the conduct described above in Count Six of this Formal Complaint, Respondent has committed the following misconduct and is subject to discipline under MCR 9.104 as follows:

- a) failed to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- b) failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information, in violation of MRPC 1.4(a);
- c) failed to explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);
- d) failed to refund an advance payment of fee that has not been earned, in violation of MRPC 1.16(d);
- e) engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b);
- f) made a false statement of material fact to a tribunal, in violation of MRPC 3.3(a)(1);
- g) failed to notify an active client of his suspension from the practice of law, in violation of MCR 9.119(A);

- h) engaged in conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- i) engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

Wherefore, Respondent should be subjected to such discipline as may be warranted by the facts or circumstances of such misconduct, including any restitution owed.

Dated:

6/29/16



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**Alan M. Gershel (P29652)**  
Grievance Administrator  
Attorney Grievance Commission  
535 Griswold St, Suite 1700  
Detroit, MI 48226  
(313) 961-6585



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ATTORNEY DISCIPLINE BOARD

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GRIEVANCE ADMINISTRATOR,  
MICHIGAN ATTORNEY GRIEVANCE COMMISSION

Petitioner,

Case No. 16-66-GA

v.

JAMES OBRIANT, P41156,  
Respondent.

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**JAMES M. O'BRIANT'S RESPONSE TO FORMAL COMPLAINT**

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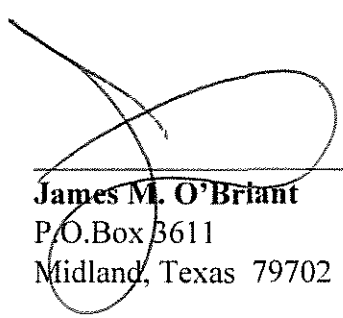
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- 150. ADMITTED;
- 151. Col. Rieske only paid a total retainer of \$20,000;
- 152. ADMITTED;
- 153. ADMITTED;

Dated: July 25, 2016



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**James M. O'Brian**  
P.O.Box 3611  
Midland, Texas 79702

STATE OF MICHIGAN

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ATTORNEY DISCIPLINE BOARD

Attorney Discipline Board

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GRIEVANCE ADMINISTRATOR,  
Attorney Grievance Commission,

Petitioner,

v

Case No. 16-66-GA

JAMES M. O'BRIANT, P 41156,

Respondent.

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**REPORT OF TRI-COUNTY HEARING PANEL #23**

**PRESENT:** Richard N. Lovernick, Chairperson  
Steven P. Ross, Member  
Margaret M. Smith, Member

**APPEARANCES:** Kimberly L. Uhuru,  
for the Attorney Grievance Commission

James M. O'Briant, Respondent, in pro per

**I. EXHIBITS**

- |                         |   |
|-------------------------|---|
| Petitioner's Exhibit 1: | October 17, 1995 Admonishment re: Crystal Ayers, AGC File No. 0509/94   |
| Petitioner's Exhibit 2: | November 30, 2006 Admonishment re: Charlene R. Mogg, AGC File No. 0947/06   |
| Petitioner's Exhibit 3: | February 28, 2013 Order of Reprimand (By Consent) and Report of Ingham County Hearing Panel #1, Case No. 12-90-GA                           |
| Petitioner's Exhibit 4: | August 25, 2014 Admonishment, AGC TAON File Nos. T290-13 and T303-13  |
| Petitioner's Exhibit 5: | February 24, 2015 Order of One-Year Suspension and Restitution (By Consent) and Report of Ingham County Hearing Panel #4, Case No. 14-78-GA |
| Petitioner's Exhibit 6: | Bank Records re: Payments from Mr. Riekse   |

Respondent's Exhibit A: Mental Health/Substance Use Evaluation Reporting Form  
re: Mike O'Briant

Respondent's Exhibit B: Bridges Behavioral Health Records

## **II. WITNESSES**

Pamela Rymanowicz  
Linda Kadzban  
James M. O'Briant

## **III. PANEL PROCEEDINGS**

On June 29, 2016, the Grievance Administrator filed Formal Complaint 16-66-GA, alleging in six separate counts that respondent committed professional misconduct. Specifically, Count One alleges respondent was retained by Linda Kadzban regarding the conviction of her minor son, Gary Tyler Kadzban. Respondent was paid to investigate claims against Shiawasee County and for a legal malpractice action against Gary's former attorney. Although the legal malpractice action was settled for \$15,000, a case against the County was never filed. In addition, respondent was paid \$5,000 to conduct a hearing on a motion for a new trial, but a hearing was never held and no money was ever refunded. Respondent was then paid \$10,000 to have Gary's name removed from the sex offender registry list. The complaint alleges respondent took no efforts to have the name removed from the registry, and never refunded Ms. Kadzban any of the money paid. Finally, Ms. Kadzban paid respondent \$3,500 to file a lawsuit against a website that was listing information regarding Gary's conviction. The lawsuit was dismissed for lack of service, was never re-filed, and no money was returned to Ms. Kadzban. Respondent also failed to notify Ms. Kadzban that his license was suspended for one year for professional misconduct in an unrelated disciplinary matter.

Count Two alleges respondent was retained to represent Joseph Prach in a quiet title action and to close a probate estate. It is alleged that respondent neglected the probate matter, failed to communicate with Mr. Prach and ultimately failed to take any action to close the probate estate. Respondent also failed to notify Mr. Prach that his license was suspended for one year for professional misconduct in an unrelated disciplinary matter.

Count Three alleges that respondent was retained by Kolean England to file a malpractice action against an attorney retained by her in a probate matter. Although respondent filed the action, he failed to respond to interrogatories and ultimately filed a stipulation to dismiss with prejudice, without the knowledge or consent of Ms. England.

Count Four also involves Ms. England's retention of respondent to file an action against Oaklawn Hospital relating to Oaklawn's release of medical records pursuant to a subpoena. It is alleged that respondent failed to communicate with Ms. England regarding the status of the case and pending motions. Respondent stipulated to dismiss the action so he could file an amended complaint, but never filed the amended complaint and never informed Ms. England about the dismissal. When Ms. England asked about her case, respondent told her the litigation was still pending.

Count Five alleges respondent was retained by Pamela Rymanowicz to bring a lawsuit on behalf of Ms. Rymanowicz's mother, who had several dogs seized from her by animal control officers. It is alleged that respondent failed to communicate with Ms. Rymanowicz about the case and his billing, and informed her he had filed paperwork when he had not. Respondent never filed anything relating to Ms. Rymanowicz's retainer, never provided billing statements, and never refunded any of the money paid to him. In addition, respondent also failed to notify Ms. Rymanowicz that his license was suspended for one year for professional misconduct in an unrelated disciplinary matter.

Count Six alleges Colonel Max Riekse retained respondent and paid him a \$10,000 advance fee to represent him in a malpractice action filed against his former divorce attorney. After respondent appeared in that case, he was charged with professional misconduct in an unrelated matter. Despite signing a stipulation consenting to a one-year suspension, respondent did not disclose his suspension to Col. Riekse. On the same day that respondent signed the stipulation agreeing to the suspension, he accepted an additional \$15,000 from Col. Riekse to prepare for trial in the malpractice action. Thereafter, respondent signed a stipulated order dismissing Col. Riekse's claims, without his knowledge or consent. Respondent failed to return any of the \$25,000 paid to him by Col. Riekse.

This matter was assigned to Tri-County Hearing Panel #23 and scheduled for hearing in accordance with MCR 9.115(G). Respondent was served with the formal complaint on July 6, 2016. On August 1, 2016, respondent filed an answer in which he admitted every allegation in the complaint, with the exception of the amount of retainer paid by Col. Riekse, which respondent claimed was only \$20,000 instead of \$25,000.<sup>1</sup>

After an adjournment, a hearing on the allegations contained in the formal complaint was held on November 14, 2016. Present was Kimberly L. Uhuru, counsel for the Attorney Grievance Commission and respondent, James M. O'Briant. In light of respondent's answer to the complaint, the Grievance Administrator filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(9) and MCR 9.115(A). At the start of the hearing, respondent asserted that he was not objecting to the motion, and was only disputing the sanctions. As a result, the panel granted petitioner's motion and immediately moved into the sanction portion of the hearing.

Counsel for the Grievance Administrator called two witnesses, complainants Pamela Rymanowicz and Linda Kadzban. Both witnesses testified as to the harm they incurred as a result of respondent's actions. Ms. Rymanowicz testified that she suffered both financial and emotional losses, and that she now distrusts lawyers and the legal profession in general. Likewise, Ms. Kadzban testified as to significant financial losses as well as a complete lack of trust in the legal profession as a result of respondent's actions. On cross examination, respondent apologized repeatedly to both witnesses.

Petitioner's exhibits 1 through 6 were admitted. Respondent then asked for an adjournment to further develop his alleged mitigating medical issue concerning a stroke he claims he may have had in 2011, his cancer, and his "exhaustion breakdown." (11/14/16 Sanction Tr, p 24). The panel

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<sup>1</sup> Respondent acknowledged at the hearing that he has since amended his answer, and now agrees that Col. Riekse paid him a total of \$25,000 as alleged. (11/14/16 Misconduct Tr, p 6).



denied the motion, because an adjournment had already been granted for the same reason, and there was no explanation as to why there was a need for an additional delay.

The hearing continued with respondent's arguments as to mitigating factors under 9.31 of the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards). Respondent submitted two exhibits to support his claim of personal or emotional problems. Exhibit A was a report dated May 1, 2013, from Molly Dean of the State Bar of Michigan's Lawyers & Judges Assistance Program. The report indicated respondent was diagnosed with alcohol abuse, and recommended mental health treatment and further assessment for possible bipolar I disorder and cannabis dependence. Exhibit B was a packet of medical records, psychiatric evaluations and psychological reports from Bridges Behavioral Health, where respondent was receiving treatment at the time of the hearing. Counsel for the Grievance Administrator objected to Exhibit B because she had not received the records prior to the hearing, to which respondent explained he had just received the records the day prior to the hearing. Exhibits A and B were admitted.

#### **IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT**

Upon consideration of respondent's answer to the complaint and lack of opposition to the Petitioner's motion for summary disposition, the hearing panel granted the motion, thereby finding that the factual allegations set forth in the formal complaint had been established and respondent had engaged in the professional misconduct as set forth in all six counts. Therefore, the hearing panel finds that respondent handled a matter without preparation adequate in circumstances, in violation of MRPC 1.1(b) (Counts 3 and 4); neglected six legal matters, in violation of MRPC 1.1(c) (Counts 1-6); failed to seek the lawful objective of a client, in violation of MRPC 1.2(a) (Counts 1, 2, 5 and 6); failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3 (Counts 1-5); failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information, in violation of MRPC 1.4(a) (Counts 1-6); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b) (Counts 1-6); failed to promptly render a full accounting of client funds upon request, in violation of MRPC 1.15(b)(3) (Counts 1 and 2); failed to refund an advance payment of fee which has not been earned, in violation of MRPC 1.16(d) (Counts 1, 5 and 6); made a false statement of material fact to a tribunal, in violation of MRPC 3.3(a)(1) (Count 6); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b) (Counts 3, 4 and 6); engaged in conduct prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1) (Counts 1 and 2); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure or reproach, in violation of MCR 9.104(2) (Counts 1-6); engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3) (Counts 1-6); failed to notify an active client of his suspension from the practice of law, in violation of MCR 9.119(A) (Counts 1, 2, 5 and 6); and failed to file a notice of disqualification with a tribunal in which he represented a client in litigation, in violation of MCR 9.119(B) (Counts 2 and 5).

## **V. REPORT ON DISCIPLINE**

Hearing panels must consider the ABA Standards when determining the appropriate sanction for an attorney's misconduct. *Grievance Administrator v Lopatin*, 462 Mich 235 (2001). Counsel argued that Standard 4.41 (Lack of Diligence), 4.61 (Lack of Candor), 5.11 (Failure to Maintain Personal Integrity), 6.11 (False Statements, Fraud and Misrepresentation) and 8.1 (Prior Discipline Orders) were the most applicable, and that disbarment is the presumptive level of discipline for respondent's misconduct. Specifically, Standard 4.41 states:

Disbarment is generally appropriate when:

(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or

(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

Standard 4.61 states:

Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

Standard 5.11 states:

Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another, or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 6.11 states:

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes

serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Standard 8.1 states:

Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

In addition to the above Standards, counsel for the Grievance Administrator cited aggravating and mitigating factors under the ABA Standards. Specifically, aggravating factors under ABA Standard 9.2 that are applicable here include: respondent's prior disciplinary offenses [9.22(a)], a dishonest motive [9.22(b)], a pattern of misconduct [9.22(c)], and multiple offenses [9.22(d)]. Petitioner also asserted that a mitigating factor under ABA Standard 9.32 that the panel should consider is the fact that respondent had already completed restitution per the recommendations of the Attorney Grievance Commission. Specifically, respondent paid \$5,000 to Ms. Rymanowicz, \$33,500 to Ms. Kadzban, \$9,000 to Mr. Prach, \$20,000 to Kolean England and \$25,000 to Max Riekse. Finally, petitioner requested that respondent be required to have a psychological evaluation and an assessment of his fitness to practice prior to reinstatement.

Respondent argued there are mitigating factors that warrant something other than revocation of his license to practice law. Respondent cited personal or emotional problems [9.32(c)], payment of restitution [9.32(d)], mental disability [9.32(i)], and remorse [9.32(l)]. Respondent also agreed to further treatment or testing to determine if he is mentally capable of practicing law again.

The panel has reviewed the duties violated, the lawyer's mental state, the actual or potential injury to the clients and the existence of aggravating or mitigating factors. It is the conclusion of this panel that, even though respondent has made restitution, his established misconduct and discipline history is sufficient to warrant disbarment in this matter. Respondent placed significant weight on his self-described emotional breakdown in 2011 as a result of the stress of his legal caseload. Although respondent's evidence suggests a myriad of both vocational and avocational stressors, as well as current health issues that would preclude respondent from effectively representing his clients, the record does not support a direct medical explanation for his conduct that gave rise to the allegations contained in the formal complaint. For these reasons, the panel unanimously holds that immediate disbarment is appropriate.

## **VI. SUMMARY OF PRIOR MISCONDUCT**

<b><u>AGC File No.</u></b>	<b><u>Description</u></b>	<b><u>Effective Date</u></b>
0509/94	Admonishment	10/17/95
0947/06	Admonishment	11/30/06
T290-13/T303-13	Admonishment	08/25/14

<b><u>ADB File No.</u></b>	<b><u>Description</u></b>	<b><u>Effective Date</u></b>
12-90-GA	Reprimand (By Consent)	02/28/13
14-78-GA	One-Year Suspension and Restitution (By Consent)	01/21/15


## **VII. ITEMIZATION OF COSTS**

Attorney Grievance Commission: (See Itemized Statement filed 11/28/16)	\$ 320.00
Attorney Discipline Board: Hearing held 11/14/16	\$ 384.50
Administrative Fee	<u>\$ 1,500.00</u>
<b>TOTAL:</b>	<b>\$ 2,204.50</b>

**ATTORNEY DISCIPLINE BOARD**  
Tri-County Hearing Panel #23

Dated: January 18, 2017

By:

  
Richard N. Lovefick, Chairperson

STATE OF MICHIGAN  
Attorney Discipline Board

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GRIEVANCE ADMINISTRATOR,  
Attorney Grievance Commission,

Petitioner,

v

Case No. 16-66-GA

JAMES M. O'BRIANT, P 41156,

Respondent.  
\_\_\_\_\_ /

**ORDER OF DISBARMENT**

Issued by the Attorney Discipline Board  
Tri-County Hearing Panel #23

Richard N. Lovernick, Chairperson  
Steven P. Ross, Member  
Margaret M. Smith, Member

This matter is before the panel upon the filing of Formal Complaint 16-66-GA charging that respondent, James M. O'Briant, has committed acts of professional misconduct warranting discipline. The panel has reported its findings and conclusions as to misconduct and discipline;

**NOW THEREFORE,**

**IT IS ORDERED** that respondent, James M. O'Briant, is **DISBARRED** from the practice of law in Michigan **EFFECTIVE February 9, 2017** and until further order of the Supreme Court, the Attorney Discipline Board or a hearing panel, and until respondent complies with the requirements of MCR 9.123(B) and (C) and MCR 9.124.

**IT IS FURTHER ORDERED** that from the effective date of this order and until reinstatement in accordance with the applicable provisions of MCR 9.123, respondent is forbidden from practicing law in any form; appearing as an attorney before any court, judge, justice, board, commission or other public authority; or holding himself out as an attorney by any means.

**IT IS FURTHER ORDERED** that, in accordance with MCR 9.119(A), respondent shall, within seven days after the effective date of this order, notify all of his active clients, in writing, by registered or certified mail, return receipt requested, of the following:

1. the nature and duration of the discipline imposed;
2. the effective date of such discipline;
3. respondent's inability to act as an attorney after the effective date of such discipline;

4. the location and identity of the custodian of the clients' files and records which will be made available to them or to substitute counsel;
5. that the clients may wish to seek legal advice and counsel elsewhere; provided that, if respondent was a member of a law firm, the firm may continue to represent each client with the client's express written consent;
6. the address to which all correspondence to respondent may be addressed.

**IT IS FURTHER ORDERED** that in accordance with MCR 9.119(B), respondent must, on or before the effective date of this order, in every matter in which respondent is representing a client in litigation, file with the tribunal and all parties a notice of respondent's disqualification from the practice of law.

**IT IS FURTHER ORDERED** that, respondent shall, within 14 days after the effective date of this order, file with the Grievance Administrator and the Attorney Discipline Board an affidavit of compliance as required by MCR 9.119(C).

**IT IS FURTHER ORDERED** that respondent's conduct after the entry of this order but prior to its effective date, shall be subject to the restrictions set forth in MCR 9.119(D); and respondent's compensation for legal services shall be subject to the restrictions described in MCR 9.119(F).

**IT IS FURTHER ORDERED** that respondent shall, on or before February 9, 2017, pay costs in the amount of **\$2,204.50**. Check or money order shall be made payable to the Attorney Discipline System and submitted to the Attorney Discipline Board [211 West Fort St., Ste. 1410, Detroit, MI 48226] for proper crediting. (See attached instruction sheet.)

**ATTORNEY DISCIPLINE BOARD**  
Tri-County Hearing Panel #23

By:

  
Richard N. Lovernick, Chairperson

Dated: January 18, 2017

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STATE OF MICHIGAN

Attorney Discipline Board

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GRIEVANCE ADMINISTRATOR,  
Attorney Grievance Commission,

Petitioner,

v

Case No. 16-66-GA

JAMES M. O'BRIANT, P 41156,

Respondent.

**ORDER DENYING RESPONDENT'S MOTION FOR NEW TRIAL**

Issued by the Attorney Discipline Board  
Tri-County Hearing Panel #23

On January 18, 2017, Tri-County Hearing Panel #23 issued a report and order of disbarment in this matter, disbarring respondent from the practice of law in Michigan, effective February 9, 2017.

On February 7, 2017, respondent filed a "Petition for Reconsideration Pursuant to MCR 9.118(E)" and a "Petition to Stay The Order of Revocation Pursuant to MCR 9.115(K)." Shortly thereafter, respondent was requested to clarify the relief he was seeking because it was unclear from respondent's pleadings whether he was seeking review by the Board or requesting a new trial from the hearing panel, pursuant to the applicable provisions of MCR 2.611 or 2.612. Respondent's request for a stay was taken under advisement pending clarification of the relief respondent was seeking.

Respondent subsequently indicated that his intent was to request a new trial on the sanction portion of the proceedings, pursuant to MCR 2.611, to provide medical mitigating evidence that he indicated was not available at the time of the original hearing on sanction.<sup>1</sup> On March 8, 2017, the Grievance Administrator filed an objection to respondent's request.

After careful consideration of the parties' submissions, the hearing panel is not persuaded that appropriate grounds have been established under the applicable provisions of MCR 2.611 or 2.612 to warrant reopening the record or retrying the sanction portion of these proceedings.

**NOW THEREFORE,**

**IT IS ORDERED** that respondent's motion for new trial is **DENIED**.

ATTORNEY DISCIPLINE BOARD  
Tri-County Hearing Panel #23

Dated: March 15, 2017

By:

*Richard N. Lovernick*

Richard N. Lovernick, Chairperson

/permission

*A. Plouffe*

<sup>1</sup> Given respondent's assertion that he is not seeking review by the Board, his request for a stay of the effective date of the order of disbarment under the provisions of MCR 9.115(K) is moot and no further action will be taken as to respondent's request in this regard.

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STATE OF MICHIGAN  
ATTORNEY DISCIPLINE BOARD



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**NOTICE OF DISBARMENT**

Case No. 16-66-GA

**Notice Issued: March 15, 2017**

James M. O'Briant, P 41156, Midland, Texas, by the Attorney Discipline Board Tri-County Hearing Panel #23.

Disbarred, Effective February 9, 2017

Respondent filed an answer to the six-count formal complaint in which he admitted almost every allegation of misconduct. Subsequently, the Grievance Administrator filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and MCR 9.115(A) moving for entry of judgment against respondent, the motion was unopposed by respondent, and then granted by the panel. Therefore, the hearing panel found that respondent engaged in the professional misconduct as set forth in all six counts of the formal complaint.

Specifically, the panel found that respondent handled a matter without preparation adequate in the circumstances, in violation of MRPC 1.1(b); neglected six legal matters, in violation of MRPC 1.1(c); failed to seek the lawful objective of a client, in violation of MRPC 1.2(a); failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3; failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information, in violation of MRPC 1.4(a); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b); failed to promptly render a full accounting of client funds upon request, in violation of MRPC 1.15(b)(3); failed to refund an advance payment of fee which was not earned, in violation of MRPC 1.16(d); made a false statement of material fact to a tribunal, in violation of MRPC 3.3(a)(1); failed to notify an active client of his suspension from the practice of law, in violation of MCR 9.119(A); and failed to file a notice of disqualification with a tribunal in which he represented a client in litigation, in violation of MCR 9.119(B). Respondent was also found to have violated MRPC 8.4(b) and (c), and MCR 9.104(1)-(3).

The panel ordered that respondent be disbarred from the practice of law in Michigan. Respondent filed a petition for reconsideration pursuant to MCR 9.118(E) and a petition for stay of discipline pursuant to MCR 9.115(K). Respondent clarified his motion,



STATE OF MICHIGAN • ATTORNEY DISCIPLINE BOARD

March 15, 2017

Page 2

upon request of the Board, as a motion for new trial pursuant to MCR 2.611. The motion was denied by the hearing panel. Given respondent's assertion that he was not seeking review by the Board, his request for a stay of the effective date of the order of disbarment under the provisions of MCR 9.115(K) was deemed moot and no further action was taken as to respondent's request in this regard. Costs were assessed in the amount of \$2,204.50.



Wendy A. Neeley  
Deputy Director