IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

In Re: JASON M. BRUNO, Respondent.	**8:20AD19** **FINDINGS, RECOMMENDATION AND ORDER**

On October 9, 2020, the Arizona Supreme Court entered a disciplinary ruling which prohibits Jason M. Bruno, ("Respondent"), from practicing law in that forum for six months followed by two years of probation.

Respondent self-reported the Arizona disciplinary ruling to this forum on October 14, 2020. (Filing No. 1). This court entered an order to show cause why reciprocal discipline should not be imposed. (Filing No. 3); see also NEGenR 1.8(e)(2). Respondent timely responded on November 6, 2020, and he objects to this court imposing reciprocal discipline. (Filing No. 5). The matter is now pending before me for findings and a recommendation.[1]

For the reasons discussed below, the undersigned magistrate judge finds reciprocal discipline should be imposed. Respondent was afforded due process in the Arizona proceedings; the evidentiary findings of that tribunal are fully supported by the evidence; and based on those findings and the totality of the circumstances, the discipline imposed by the Arizona Bar and affirmed on appeal by the Arizona Supreme Court is appropriate for the disciplinary violations committed by Respondent.

[1] See Nebraska General Rule 1.8(a)(4).

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I. ARIZONA RECORD

When considering the issue of reciprocal discipline, this court's review is based on the "face of the record" before the disciplining jurisdiction. NEGenR 1.8(e)(4). If the state hearing comported with due process, the Due Process Clause

does not require a hearing on disbarment from a federal court. Marinangeli v. Lehman, 32 F. Supp. 2d 1, 7 (D.D.C. 1998) (citing Selling v. Radford, 243 U.S. 46, 50–51 (1917); In re Thies, 662 F.2d 771, 772 (D.C.Cir.1980)).

Here, Respondent filed a portion of the Arizona record as attachments to his response to the show cause order. See Filing Nos. 5-1 through 5-24.[2] However, after noting that some key exhibits discussed during the disciplinary hearing and in the panel's decision were missing from Respondent's submission, the court obtained the full record from the Arizona State Bar.[3] Based on the state record, the relevant facts are as follows.[4]

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[2] Compounding the complexity of this review, Respondent assigned different exhibit numbers to the exhibits in his show cause response than those assigned to the same documents during the Arizona disciplinary hearing. To assist anyone who reviews this opinion, the exhibit numbers referenced herein refer to the numbering used in the Arizona administrative record. Respondent's show cause exhibit numbering has been disregarded.

[3] As relevant to this decision, Respondent did not attach copies of Exhibits 5, 6, 7, 8 and 13 from the disciplinary hearing to his show cause response.

Exhibit 5 is a copy of a subpoena served by defense counsel on Plaintiffs' retained expert. (Filing No. 7-5, at CM/ECF pp. 7-9, (Ex. 5)).

Exhibits 6 and 7, dated May 20, 2014, are letters written by Respondent and the expert, respectively, to defense counsel objecting to the subpoena and explaining the subpoena would serve no purpose because the information requested in the subpoena had already been disclosed. (Filing No. 7-5, at CM/ECF pp. 19-20 (Ex. 6) & p. 22 (Ex. 7)).

Exhibit 8 is Respondent's email response to defense counsel stating defense counsel is not allowed to argue with Plaintiffs' expert and stating the expert would produce copies of his file upon payment of $600. (Filing No. 7-5, at CM/ECF p. 23-32 (Ex. 8)).

Exhibit 13 is the expert's final report which, upon comparison with the draft report, verifies all comments raised by Respondent in the 2013 emails were incorporated into the final report. (Filing No. 7-6, at CM/ECF pp. 42-76 (Ex. 13–final report)). These exhibits were a topic of questioning at the disciplinary hearing,(see, e.g., Filing No. 5-5, at CM/ECF p. 37, 39, 205-06 (hearing transcript 8-12-19)), and they were cited in the panel's opinion as supporting their finding that Respondent concealed discovery and misled defense counsel to believe the expert's entire file had been disclosed. (Filing No. 1-1, at CM/ECF pp. 8-9, 12 (AZ panel decision)).

[4] The undersigned magistrate judge has reviewed Arizona's entire disciplinary record, but not all exhibits received at that hearing are cited in this decision. For example, the summary judgment

A. Respondent's Professional Background

Respondent attended the Creighton University School of Law and began practicing law in Omaha, Nebraska at Sherrets & Becker, LLC. (now Sherrets Bruno & Vogt) in 2004. (Filing No. 5-5, at CM/ECF p. 142 (hearing transcript 8-12-19)). He was first admitted to practice in Arizona on November 15, 2004. (Filing No. 5-9, at CM/ECF p. 3, ¶ 1 (pre-hearing statement)). In addition to Arizona, he is admitted to practice law in Nebraska, Texas, Minnesota, the United States District Courts for Colorado, Arizona, and Nebraska, and the United States Court of Appeals for the Eighth Circuit and for the Ninth Circuit. (Filing No. 5-5, at CM/ECF pp. 142-43 (hearing transcript 8-12-19)). Other than the disciplinary ruling at issue in this case, he has no record of attorney discipline. (Filing No. 1-5, at CM/ECF p. 1 (Az. Sup. Ct. decision)). At his disciplinary hearing, three witnesses testified, (Filing No. 5-2, at CM/ECF pp. 63-81 (hearing transcript 8-13-19)), and six reference letters were received into evidence, all attesting to Respondent's excellent character and integrity in the profession. (Filing No. 7-12, at CM/ECF pp. 58-94) (character reference letters) (Exs. 107-112)).

B. The Underlying Case

In 2013, Respondent filed a legal malpractice case on behalf of David Berg and a related LLC (hereafter "Berg" or "Plaintiffs") in the Superior Court of Maricopa County, Arizona, CV2013-015419 ("the Berg Case"). (Filing No. 7-9, at CM/ECF pp. 6-12 (Ex. 37)). Plaintiffs alleged attorneys Mark Weiss and Shari Weiss, and the Weiss & Moy P.C. law firm ("Defendants") committed legal malpractice

motions and briefs were received by stipulation in the Arizona disciplinary proceeding, but they were not referenced in the testimony or cited in the briefing or opinions in the Arizona proceedings. They are likewise not referenced or discussed herein.

resulting in harm to Plaintiffs. (Filing No. 5-9, at CM/ECF p. 3, ¶¶ 2-3) (pre-hearing statement)). Before the legal malpractice lawsuit was filed, Plaintiffs hired Timothy Downer of Financial Architects ("Downer") to render an expert opinion on damages. Downer prepared a draft report and provided the draft to Berg, who then forwarded it to Respondent. (Filing No. 7-6, at CM/ECF pp. 7-41 (Ex. 12); Filing No. 5-9, at CM/ECF p. 3, ¶¶ 4-5 (pre-hearing statement)).

On October 23 and 24, 2013, emails were exchanged among Respondent, Berg, and Downer, (hereafter the "2013 emails"). Within that email string, Respondent listed his changes to Downer's report, (Filing No. 7-6, at CM/ECF pp. 1-5 (Ex. 11) (the 2013 emails)). Those changes included deleting paragraphs 6 and 7, a portion of paragraph 9, all of page 9, and a sentence which stated "Berg believes he was given improper counsel by Weiss and later Neil J. Beller[5] resulting in the loss of his managerial rights and subsequent financial interest in Tstix, LLC." (Filing No. 7-6, at CM/ECF p. 4 (Ex. 11) (the 2013 emails)). Respondent's listed changes was wholly adopted by Downer. Compare, (Filing No. 7-6, at CM/ECF pp. 6-41 (Ex. 12 – draft report))[6] with (Filing No. 7-6, at CM/ECF pp. 42-76 (Ex. 13. – final report)). The final report, as modified, was then provided to Defendants' counsel in October 2013. (Filing No. 5-5, at CM/ECF pp. 20-21 (hearing transcript 8-12-19)). The malpractice action was filed in November of 2013. (Filing No. 5-5, at CM/ECF p. 19 (hearing transcript 8-12-19)).

Defendants served written discovery. Request for Production No. 1 demanded production of "copies of all information, notes, documents, and correspondence Plaintiffs provided to Financial Architects for Financial Architects'

[5] Hereafter referred to as "Beller.""

[6] The deletion of the sentence referring to Beller becomes readily apparent upon comparison of the last paragraphs on page 10 of the draft report (Exhibit 12) and page 9 of the final report, (Exhibit 13).

use in preparing the October 11, 2013, Report prepared for Jason Bruno." On April 8, 2014, Plaintiffs responded:

> Plaintiffs object to the foregoing request as it may seek information that is possibly restricted from disclosure pursuant to a confidentiality agreement. Without waiving their objections, see attached compact disk containing Bate Stamped Documents DB004319-DB004398. Plaintiffs are not disclosing, out of an abundance of caution and to protect confidentiality, the following:
>
> - Tstix, L.L.C. QuickBooks file. Electronic Format. 2MB;
> - Tstix Consumer Insight + Branding Research Final Report. 83 Pages;
> - Observations on Tstix Report. 12 Pages; and
> - Independent Sales Representative Agreement executed April 17, 2012. 16 Pages.
>
> Plaintiffs will produce the foregoing documents upon the entry of an appropriate Protective Order that protects third parties and prohibits the dissemination of this information.

(Filing No. 7-4, at CM/ECF pp. 7-9 (Ex. 2)).

After the protective order was entered, Respondent supplemented the response to Request No. 1, stating:

> See attached compact disk containing Bate Stamped Documents DB004399-DB0004530. Please note the attached documents arc marked CONFIDENTIAL and SUBJECT TO PROTECTIVE ORDER in accordance with the Court's April 10, 2014 Minute Entry. The documents provided to Financial Architects were identical, but did not have the CONFIDENTIAL and SUBJECT TO PROTECTIVE ORDER watermarks.

(Filing No. 7-4, at CM/ECF pp. 10-12 (Ex. 3)). A few weeks later, it was again supplemented to add "Bate Stamped Documents DB004531-DB0004534." (Filing No. 7-4, at CM/ECF pp. 145-147) (Ex. 4)). The responses and supplemental responses to Request No. 1 did not include a copy of the Downer's draft report or the 2013 emails. The responses did not identify any documents withheld.[7]

In preparation for deposing Downer, Defendants served a subpoena duces tecum on Downer. (Filing No. 7-5, at CM/ECF pp. 7-13 (Ex. 5)). The subpoena requested Downer's entire file, "including . . . draft reports, and all other information which [he] received, reviewed and/or relied upon in preparing" his report. (Filing No. 7-5, at CM/ECF p. 13 (Ex. 5)).

Respondent objected to the subpoena duces tecum, stating "There is no purpose to the subpoena. The Plaintiffs have already provided the information to you directly so there is no need to burden Mr. Downer any further." (Filing No. 7-5, at CM/ECF p. 19 (Ex. 6)). "On April 8, 2014, we served responses to Plaintiff's First Set of Requests for Production of Documents where you specifically requested 'copies of all information, notes, documents, correspondence Plaintiffs provided to Financial Architects for Financial Architects' use in preparing the October 11, 2013, Report prepared for Jason Bruno.'" (Id); see also (Filing No. 5-5, at CM/ECF p. 34 (hearing transcript 8-12-19)).

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[7] The current Ariz. R. Civ. P. Rule 26(b)(6)(A) states:

> When a party withholds information, a document, or electronically stored information in response to a written discovery request on the claim that it is privileged or subject to protection as work product, the party must promptly identify in writing the information, document, or electronically stored information withheld, and describe the nature of that information, document, or electronically stored information in a manner that ... will enable other parties to assess the claim.

However, the language requiring an attorney to identify withheld documents was not part of Rule 26 in 2013. It was approved as an addition to the rule in 2016 with a January 1, 2017 effective date. 16 A.R.S. Rules of Civil Procedure, Rule 26.

Respondent forwarded his objection letter to Downer who, in turn, also objected to the subpoena, echoing the language used by Respondent and stating "Please be advised that we object to the issuance of the subpoena. There is no purpose to the subpoena. It is our understanding that the Plaintiffs have already provided the information to you directly so there is no need for us to provide the information requested." (Filing No. 7-5, at CM/ECF pp. 22, 26 (Ex. 7)); see also (Filing No. 5-5, at CM/ECF p. 37 (hearing transcript 8-12-19)). As of that time, Respondent had not disclosed to defense counsel a copy of Downer's draft expert report or the 2013 emails. Respondent did not object to production based on the attorney-client privilege or work product doctrine, and he did not advise defense counsel that the undisclosed draft report and 2013 emails existed. Defense counsel responded to Downer's subpoena objection. Respondent intervened on Downer's behalf, emailing defense counsel and stating defense counsel cannot argue with the expert but must seek a court order if he wishes for enforce the subpoena. Respondent further stated that Downer would comply with the subpoena upon payment of $600.00. (Filing No. 7-5, at CM/ECF p. 23-32 (Ex. 8)).

Prior to Downer's deposition, defense counsel received some documents from Downer in response to the subpoena. But he did not receive the draft report or the 2013 emails. (Filing No. 5-5, at CM/ECF pp. 34-44)).

Defendants deposed Downer on July 25, 2014. (Filing No. 5-9, at CM/ECF p. 3, ¶ 7 (pre-hearing statement)). Prior to the deposition, Respondent spoke with Downer to discuss his testimony. Downer explained that during his pre-deposition preparation with Respondent, the draft report was discussed very generally. Downer stated Respondent did not tell Downer how to answer questions about the

draft report, but Respondent did advise Downer to "stick to the final" and "not mention drafts." (Filing No. 7-6, at CM/ECF p. 86) (Ex.14)).

Respondent was present when Downer was deposed, but Respondent did not represent Downer at the deposition, and he did not elicit any testimony from Downer during the deposition. (Filing No. 5-9, at CM/ECF p. 4, ¶¶ 8-9)).

In response to defense counsel's deposition questioning, Downer testified:

Q. Did you make any changes to the draft report you had in front of you at the time of that call?

A. I don't think I did, because— this is the only draft that I have. So I don't think I made any changes. It was probably clarification, making sure I got the information correct.

Q. Had you shown him a copy of your drafts at that time?

A. No. I don't think I had, no.

Q. Okay. I'll assume that you didn't sit a down and read your report to him over the phone?

A. No, no. Certainly not I didn't have that kind of time.

Q. I understand. Did you send him a copy of this before you finalized it, that is, a copy of your report?

A. I mean, it's my practice to send, you know, final copies just for my protection primarily. So if I had sent him something it showed in the file draft, it would have been the final draft.

Q. So you did not get any input from Mr. Berg or Mr. Bruno regarding the report?

A. No. I mean, if I -of course, you know, when I called David and talked to him and Mr. Bruno, I gave them - you know, I told David, you know, specific points of the report, specifically the

> numbers. And, you know, from what I recall, he may have suggested that he didn't like the numbers or something like that. But I'm supposed to be independent. So I wouldn't change my opinion based on his feelings. . . .

(Filing No. 1-4, at CM/ECF p. 62 (Downer Dep. (22:22-24:3)). Respondent did not advise defense counsel that Downer's testimony was incorrect—that a draft report was prepared, reviewed by Respondent, and modified to incorporate Respondent's list of changes—either by directly telling defense counsel, through follow up questioning of Downer, or during pretrial preparation for three years thereafter. (Filing No. 7-7, at CM/ECF pp. 80-82 (Ex.22); Filing No. 7-9, at CM/ECF pp. 101-103 (Ex. 46); Filing No. 7-12, at CM/ECF pp. 1-3) (Ex. 100)).

Defendants moved for sanctions on April 17, 2017, (Filing No. 7-7, at CM/ECF pp. 19-39) (Ex.17)), stating "Berg and Bruno have suppressed, concealed and spoliated a vast amount of relevant and discoverable evidence, perjured themselves to cover their tracks, and routinely misrepresented facts to the Court in their bid to keep the evidence concealed." (Filing No. 7-7, at CM/ECF p. 20) (Ex.17)). Defendants asked the court to sanction Plaintiffs and their counsel "for their outrageous discovery violations by striking the Complaint with prejudice." (Filing No. 7-7, at CM/ECF p. 21)).

After considering the evidence and arguments, the presiding judge dismissed Plaintiffs' case, with prejudice, as a discovery sanction.[8] (Filing No. 7-7, at CM/ECF pp. 83-120) (Ex. 23)).

[8] To be clear, Respondent's alleged conduct was not identified as a basis for dismissal. The Arizona trial court held Berg himself had concealed and spoliated material evidence to such a degree that dismissal with prejudice was warranted. That judgment of dismissal with prejudice was appealed.

C. The Disciplinary Proceedings

After dismissing the Berg case, the presiding judge notified the Arizona State Bar that he believed Respondent violated the ethical rules by failing to produce requested documents in response to Defendants' Request No. 1; falsely telling opposing counsel that subpoenaing Downer's file would serve no purpose because the documents requested within the subpoena (including draft reports and any communications between the expert and Plaintiffs and/or Respondent) had already been disclosed; and failing to undertake remedial measures when Downer provided deposition testimony that Respondent knew to be false. (Filing No. 7-4, at CM/ECF pp. 1-6 (Ex. 1)).

1. Disciplinary Complaint

On March 18, 2019, a disciplinary complaint was filed against Respondent by the Staff Bar Counsel for the State Bar of Arizona. (Filing No. 1-4). The Complaint alleged Respondent violated Arizona's ethical rules 3.3, 3.4(a) and (d), 8.4(c), and 8.4(d). Specifically, the complaint alleged Respondent:

- Failed to produce the October 2013 email communications and the expert's draft report in response to Defendants' discovery requests;
- Knowingly misled defense counsel by objecting to a subpoena of the expert's entire file on the stated but false grounds that all file contents had already been disclosed to Defendants; and
- Failed to take remedial steps to correct the record when Downer falsely testified that he received no substantive input from Berg or Respondent regarding the expert report and that he had not modified the report in response to Respondent's comments.

(Filing No. 5-12).

2. Panel Proceedings

On August 12 and 13, 2019, an evidentiary hearing was held before a disciplinary panel composed of the presiding disciplinary judge, (PDJ), a volunteer lawyer, and a volunteer layperson. During that hearing, Respondent, acting through his counsel, cross-examined the witnesses called by the Arizona Staff Bar Counsel. He personally testified, and he called witnesses and offered documentary evidence in defense of the allegations. (Filing No. 5-2, (hearing transcript 8-13-19)); (Filing No. 5-5 (hearing transcript 8-12-19)). Respondent testified that consistent with custom and practice in the Arizona courts, the parties had agreed there would be no disclosure nor discovery of certain expert witness information, including draft reports and communications with the party and his or her counsel regarding the content of the expert's report. (Filing No. 5-5, at CM/ECF pp. 154-168 (hearing transcript 8-12-19)).

The Arizona disciplinary panel entered an order of discipline on October 16, 2019 (Filing No. 1-1). The order identified three issues under consideration: 1) "whether there was an agreement, never memorialized, that there would be no disclosure nor discovery regarding certain expert witness information;" 2) "if such a non-memorialized agreement existed, whether an attorney may refuse to fully respond to clear discovery demands, by actively and misleadingly hiding information;" and 3) "whether Respondent knew that the expert witness covered up evidence while testifying, at Respondent's direction, to the point of being untruthful, and Respondent did not correct the record." (Filing No. 1-1, at CM/ECF pp. 2-3).

Having observed the witnesses, including Respondent, as they testified, the panel concluded Respondent's testimony was not entirely credible. It held that contrary to Respondent's testimony, Respondent directed rather than suggested

changes to Downer's report; and those changes were material, not merely incidental. (Filing No. 1-1, at CM/ECF pp. 7-8). It held that Respondent's objection to the subpoena served on Downer "was a protestation falsely stating that everything had already been produced," and after agreeing to comply with the subpoena without involving the court, Respondent was bound by the clear, broad scope of the subpoena." (Filing No. 1-1, at CM/ECF p. 13). And since Respondent knew that the draft report and the 2013 emails existed but were not disclosed to defense counsel, Respondent's statement that opposing counsel already had the documents requested was intentionally misleading. (Filing No. 1-1, at CM/ECF p. 15). The panel found Respondent's testimony that he did not believe the 2013 emails and the draft report fell within the scope of the documents requested in the subpoena was not credible. (Filing No. 1-1, at CM/ECF p. 18).

The panel concluded Respondent intended to mislead defense counsel, in part because when preparing Downer for his testimony, he instructed Downer to "stick to the final" report and "not mention drafts." (Filing No. 1-1, at CM/ECF pp. 15-16). The panel found Downer provided false and misleading deposition responses regarding whether a draft report existed and whether Respondent directed changes to that report. It found "Respondent allowed Downer to answer questions falsely, [and he] took no remedial steps to correct the record; instead Respondent allowed Downer's false testimony to stand." (Filing No. 1-1, at CM/ECF p. 16). Although Respondent testified that he did not believe that Downer's deposition testimony needed to be corrected, the panel found this testimony was not credible. (Filing No. 1-1, at CM/ECF p. 16).

Summarizing its findings, the panel found:

> Defendants made clear and unequivocal discovery requests pertaining to an expert witness report. These discovery requests began with a request for production of documents, followed by a

> subpoena directing Respondent to produce the materials requested. Defendants later deposed Respondent's expert witness without having received notice from Respondent that these materials existed. Respondent withheld and actively hid these materials from opposing counsel. He advised the expert to testify in a manner to continue to conceal that information and failed to correct the expert's deposition testimony regarding the existence of these materials.

(Filing No. 1-1, at CM/ECF pp. 1-2).

The panel held "Respondent flaunted numerous Arizona Rules of Professional Conduct over an extended period," including Rule 42, Ariz. R. Sup. Ct., ERs 3.3(a)(3), 3.4(a), 3.4(d), 8.4(c), and 8.4(d),[9] and he "expressed no remorse." (Filing No. 1-1, at CM/ECF p. 17; Filing No. 1-1, at CM/ECF p. 33). The panel ordered:

> 1) Respondent shall be suspended from the practice of law for six (6) months effective thirty (30) days from the date of this order.

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[9] As relevant to this case, Arizona has adopted the Model Rules of Professional Conduct. Arizona Rule 3.3(a)(3) states:

> A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Arizona Rules 3.4(a) and (d) state: "A lawyer shall not (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act" and shall not "(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

Arizona Rules 8.4 (c) and (d) state "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice. . . ." See Rule 42. Arizona Rules of Professional Conduct, https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/ (last visited on December 8, 2020).

2) Upon reinstatement, Respondent shall be placed on two (2) years of probation. Respondent shall obtain ten (10) hours of continuing legal education in the areas of professionalism and discovery in addition to the mandatory CLE required under Rule 45, Ariz. R. Sup. Ct.

3) As a condition of reinstatement, Respondent shall obtain a MAP assessment.[10] Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258 to schedule the assessment. Thereafter, the Compliance Monitor shall develop terms and conditions of participation if the results of the assessment so indicate and the terms, including reporting requirements, shall be incorporated herein. Respondent shall be responsible for any costs associated with participation with compliance.

4) Respondent shall timely comply with the requirements of Rule 72, Ariz. R. Sup. Ct. which include, but are not limited to, notification of clients and others and filing all notices and affidavits required.

5) Respondent shall pay the State Bar's costs and expenses in this matter. There are no costs or expenses incurred by the Presiding Disciplinary Judge's Office in these disciplinary proceedings.

(Filing No. 1-1, at CM/ECF p. 33).

3. Appellate Proceedings

Respondent appealed the ruling to the Arizona Supreme Court. Respondent's appellate brief argued:

1) The decision must be vacated on due process grounds because the panel:

[10] The Arizona Bar Association's "Member Assistance Program, also called 'MAP', offers a peer support network of volunteer lawyers who have been trained to offer support to lawyers, judges and law students or their immediate families, who experience issues in their personal or professional life." See https://www.azbar.org/for-lawyers/benefits-services/member-assistance-program/, (last visited on November 16, 2020).

- imposed discipline for charges that were not included within the disciplinary complaint; specifically, "The State Bar did not allege, plead, or accuse Bruno of coaching Downer to give inaccurate testimony or to conceal draft reports from Weiss." (Filing No. 1-2, at CM/ECF p. 18); and

- precluded him from discussing or offering evidence of the forensic investigation he performed to comply with a later discovery order.

2) The panel's determination that Respondent intentionally violated his ethical duties was clearly erroneous; that Respondent believed withholding the draft expert reports and report preparation emails was consistent with the parties' agreement and the practice and custom in Arizona courts, and when he was ordered three years later to disclose these documents, he did. (Filing No. 1-2, at CM/ECF pp. 24-27).

3) The draft report and expert communications withheld were not discoverable under Arizona law, either in response to the document production request served on Berg or to the subpoena served on Downer. (Filing No. 1-2, at CM/ECF pp. 28-30).

4) Respondent had no duty under E.R. 3.3(a)(3) to correct Downer's testimony because he neither represented nor questioned Downer during the expert's deposition. (Filing No. 1-2, at CM/ECF pp. 38-42).

5) The defendants in the Berg case were not prejudiced by the nondisclosure of the draft report and report preparation emails. (Filing No. 1-2, at CM/ECF pp. 43-47).

6) The discipline imposed by the panel was excessive and did not consider mitigating factors. (Filing No. 1-2, at CM/ECF pp. 48-52).

The Arizona Supreme Court affirmed the panel's order on October 9, 2020. (Filing No. 1-5).[11] It ruled the panel's findings were not clearly erroneous, and it "accept[ed] the panel's findings that Respondent's conduct violated ERs 3.3(a) (3), 3.4(a) and (d), and 8.4(c) and (d)." (Filing No. 1-5, at CM/ECF p. 1). As to the amount of discipline imposed, it noted the undisputed evidence supported mitigating factors; that Respondent was a member of the Arizona Bar since 2004 and had no record of prior attorney discipline, and several witnesses had testified as to his character. However, it concluded these additional factors in mitigation "[did] not overcome the presumptive sanction of suspension." (Id).

II. RECIPROCAL DISCIPLINE

On October 14, 2020, Respondent self-reported the Arizona disciplinary ruling to this court. (Filing No. 1). In response to this court's show cause order, (Filing No. 3), Respondent filed objections to imposing reciprocal discipline on November 6, 2020, arguing:

> [The Arizona panel and appellate court] assumed the worst about Bruno while ignoring a substantial volume of record and stipulated facts, entire defenses, rational explanations, exculpatory evidence, unambiguous rules, and applicable law to find nefarious, completely out-of-character conduct, where none existed. Bruno was then issued an excessive sanction that was not commensurate with any applicable disciplinary case. The conduct actually charged did not give rise to a violation, so Arizona relied upon fictitious events that were never

[11] The Arizona Supreme Court's decision does not include a detailed discussion of the facts. Instead, it affirmed the panel's decision as supported by the facts. Therefore, as to the facts supporting the discipline imposed on Respondent, this decision cites primarily to the panel's decision.

> charged, not disclosed or asserted in the Pre-Hearing Statement, and supported only by "evidence" created by the prosecuting attorney.

(Filing No. 5, at CM/ECF p. 3). Respondent intends to file a Petition for Writ of Certiorari to the United States Supreme Court.[12]

A. Standard of Review

This court will impose the same discipline imposed by another jurisdiction unless, upon review of the proceedings before the disciplining jurisdiction, the respondent attorney shows, or this court finds:

> (A) the procedure was so lacking in notice or opportunity to be heard that it resulted in a deprivation of due process;
>
> (B) an infirmity of proof establishing the misconduct shows that the judge could not, consistent with his or her duty, accept as final the conclusion on that subject;
>
> (C) the imposition of the same discipline would result in injustice;
>
> (D) the established misconduct warrants substantially different discipline; or
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> (E) the conduct found to warrant discipline in the other jurisdiction would not constitute a violation of the ethical standards stated in Nebraska General Rule 1.7(b) and, accordingly, no discipline should be imposed in this court.

NEGenR 1.8(e)(4). Under Nebraska General Rule 1.7(b), discipline may be imposed for “conduct unbecoming a member of the bar.”

[12] (Filing No. 5, at CM/ECF p. 1, n.1)

The attorney bears the burden of showing reciprocal discipline should not be imposed. In re Hoare, 155 F.3d 937, 940 (8th Cir. 1998). Although state discipline does not automatically result in the same discipline in the federal courts, "high respect" is given to the judgment of the state court in the disciplinary proceedings. Matter of Caranchini, 160 F.3d 420, 424 (8th Cir. 1998) (quoting Randall v. Reynoldson, 640 F.2d 898, 901 (8th Cir.1981)).

B. Analysis

Respondent's opposition to reciprocal discipline raises the following arguments:

1) The Arizona proceedings violated Respondent's due process rights by:

- imposing discipline on charges that were not brought, prohibiting him from offering relevant evidence, and relying solely on "evidence" created by the prosecutor, (Filing No. 5, at CM/ECF p. 6);

- punishing him because he refused to admit to wrongdoing and insisted on a trial, (Filing No. 5, at CM/ECF p. 13); and

- depriving him of "the opportunity to demonstrate his extraordinary efforts to provide information to opposing counsel at great personal sacrifice and cost," (Filing No. 5, at CM/ECF p. 16).

2) There was insufficient proof of misconduct to support the discipline imposed because:

- Respondent did not conceal evidence. He had no duty to disclose the expert information at issue until he was ordered to do so, and when that occurred, he produced it. (Filing No. 5, at CM/ECF pp. 19-28).

- He cannot be disciplined for violating E.R. 3.3(a)(3) because the alleged false testimony of his client's retained expert occurred during a deposition taken by his opposing counsel. Respondent did not elicit this false testimony, and he did not represent the expert. . (Filing No. 5, at CM/ECF p. 29-30).

- The opposing party had notice of additional expert records and the ability to obtain those records once it served a subpoena on the expert, and it failed to do so. (Filing No. 5, at CM/ECF p. 22).

- The Arizona bar cited no relevant case law supporting its finding that Respondent violated the ethical rules. (Filing No. 5, at CM/ECF p. 34).

3) Imposing reciprocal discipline will cause a grave injustice by punishing Respondent unnecessarily while providing no benefit to the public or the profession. (Filing No. 5, at CM/ECF p. 37).

Each argument will be addressed, in turn, below.

1. Due Process Claims

The authority to suspend or disbar attorneys is an "inherent power derived from the attorney's role as an officer of the court that granted admission." Hoare, 155 F.3d at 940. A court's power to discipline members of its bar is autonomous, but nonetheless limited by the constitutional requirements of due process. "In an attorney disciplinary proceeding, due process requires, at a minimum, notice and an opportunity to be heard, and that the district court follow its procedural rules governing attorney discipline." In re Fletcher, 424 F.3d 783, 792 (8th Cir. 2005) (citing Charges of Unprofessional Conduct Against 99–37 v. Stuart, 249 F.3d 821, 825 (8th Cir.2001); In re Bird, 353 F.3d 636, 638 (8th Cir.2003) (internal quotation marks omitted)).

a. Discipline for charges that were not filed

Respondent argues his due process rights were violated because the Arizona forums imposed discipline for charges that were not raised in the disciplinary complaint. Specifically, he claims he was disciplined for instructing Downer to provide false testimony, but that allegation is not included in the charging document.

The disciplinary complaint does not allege that Respondent coached Downer to lie, but it does allege that Respondent did not correct Downer's erroneous testimony and that his failure to do so was intentional. The Arizona panel and Supreme Court did not impose discipline on Respondent for instructing Downer to lie. Rather, the panel concluded Respondent "advised the expert to testify in a manner to continue to conceal that information and failed to correct the expert's deposition testimony regarding the existence of these materials," and this conduct "was telling and additional evidence that his deception was intentional." (Filing No. 1-1, at CM/ECF pp. 1-2, 16). Respondent's instruction that Downer should "stick to the final" report and "not mention drafts" was considered relevant to Respondent's state of mind; that is, whether he intentionally concealed communications with Downer and the expert's draft report—an allegation clearly made within the disciplinary complaint. There is no merit to Respondent's claim that his due process rights were violated because he was sanctioned for unalleged conduct.

b. Admitting the Downer letter

Respondent argues his due process rights were violated because there was no admissible evidence of his alleged pre-deposition instructions to Downer. "[T]his entire event, which never occurred, was derived solely from a self-serving letter

authored by Arizona's prosecutor interpreting a private conversation he had with the expert. . . [.] The prosecutor's letter was not competent evidence, lacked foundation, and was rank hearsay." (Filing No. 5, at CM/ECF p. 11).

Respondent's argument is wholly undermined by the record. The letter at issue is a summary report of Staff Bar Counsel's pre-hearing interview of Downer, prepared to preserve Downer's version of the facts prior to his testimony at the disciplinary hearing. Downer reviewed the summary and signed it, verifying its contents. (Filing No. 7-6, at CM/ECF pp. 77-86) (Ex.14)). Prior to the hearing, Respondent moved in limine to exclude this document, but the PDJ ruled that depending on how Downer testified, the letter or parts thereof may be admissible. So, the motion in limine was denied. (Filing No. 5-3, at CM/ECF p. 22).

At the disciplinary hearing, the letter (Exhibit 14) was verified as signed by Downer during his testimony. Staff Bar Counsel then offered the exhibit, and Respondent did not object. In fact, Staff Bar Counsel had offered only a portion of the exhibit, (without the emails showing it was sent to/from Downer for verification), but Respondent requested that the entire exhibit be received. The PDJ received the exhibit as requested by Respondent. The exhibit was then used during Downer's hearing testimony to refresh his recollection of the instructions he received from Respondent prior to his deposition. (Filing No. 5-2, at CM/ECF p. 49-52; Filing No. 7-6, at CM/ECF pp. 77-86) (Ex.14)). And after the exhibit was received, Respondent was afforded an opportunity to further examine Downer on redirect. (Filing No. 5-2, at CM/ECF p. 55 (hearing transcript 8-13-19)).

Under these facts of record, Respondent cannot argue his due process rights were violated by admission of the letter summarizing Downer's pre-hearing interview with the prosecuting attorney. Even assuming the exhibit was hearsay and inadmissible upon objection under the Rules of Evidence, Respondent clearly

joined in offering the exhibit into evidence, thereby waiving any objections to receipt of the Downer letter and the panel's consideration of its contents.

c. Prohibiting evidence in defense

Citing two separate PDJ motion in limine rulings, Respondent argues his due process rights were violated because he was prohibited from offering evidence in his defense. Respondent claims the prosecuting attorney created and introduced the Downer letter that stated Respondent had instructed Downer to "stick to the final" report and "not mention drafts" in response to deposition questioning, but Respondent was not permitted to call witnesses to refute this evidence. (Filing No. 5, at CM/ECF p. 10). He further argues the PDJ prohibited him from introducing evidence of Respondent's laborious forensic review of ESI performed in 2017—a review that led to disclosing ESI that was potentially harmful to his client's interests. (Filing No. 5, at CM/ECF pp. 16-18).

i. Prohibiting character evidence to refute the charges

Respondent wanted to call eleven character witnesses to contest a finding that Respondent violated the ethical rules, citing Arizona Rules of Evidence 404, 405, 406, and 608 as authority to do so. Applying and discussing these rules, the PDJ held that character witnesses could provide testimony as to aggravating and mitigating factors. However, they could not offer testimony that in their cases with Respondent, Respondent did not ask them to lie, withhold evidence, or conceal information. (Filing No. 5-3, at CM/ECF pp. 5, 9). For example, Respondent intended to call two Berg case experts (other than Downer) to testify that Respondent did not tell them to withhold information. The PDJ held such evidence was inadmissible to prove Respondent likewise did not withhold or conceal Downer's draft report. (Filing No. 5-3, at CM/ECF p. 9).

The PDJ held that as to the issue of whether Respondent violated the ethical rules, the fact "[t]hat individuals have found Respondent honest in their dealings with him is admissible," but "evidence of specific acts [by Respondent] to prove conformity in conduct in this case" was prohibited. (Filing No. 5-3, at CM/ECF pp. 6-7) (citing Arizona Evidence Rule 404(a)). Rule 405 was deemed inapplicable because Respondent intended to elicit the character evidence from his eleven witnesses on direct rather than cross-examination. And under Rule 406, "[t]hat Respondent routinely never 'directed anyone to lie, withhold evidence, or conceal information in this case or any other' is not evidence that can rebut the allegation that he himself lied, withheld evidence, or concealed information" in this case. (Filing No. 5-3, at CM/ECF p. 8). Finally, applying Rule 608, the PDJ held Respondent's proposed witness testimony was inadmissible to refute the charges because "extrinsic evidence is not admissible to prove specific instances of a witness's conduct to . . . support the witness's character for truthfulness." (Filing No. 5-3, at CM/ECF p. 9).

Simply stated, the PDJ applied Arizona's Rules of Evidence to the stated purpose of Respondent's proposed witnesses and concluded that a portion of their testimony was inadmissible. (Filing No. 5-3, at CM/ECF pp. 6-9). Respondent cannot claim these evidentiary rulings violated his due process rights.

The State also objected under Rule 403 to the number of character witnesses Respondent intended to call. The PDJ granted this motion in part, allowing Respondent to call three witnesses to provide live testimony, while the others could submit letters. (Filing No. 5-3, at CM/ECF pp. 4-6). Limiting the witnesses as such did not violate Respondent's due process rights.

ii. Prohibiting evidence of the 2017 forensics examination

Respondent states that in the Berg case, he complied with a court order which required him to conduct a forensic investigation of 3,189 computer files, a task consuming over 256 hours of time for which he was never paid. This forensic review occurred in 2017. Respondent was "solely entrusted with the responsibility to withhold objectionable files and produce the remainder to his opponent, accompanied by privilege logs." (Filing No. 5, at CM/ECF p. 16). Respondent explains he withheld approximately 980 of those files based upon objections detailed in privilege logs, and he turned over the remaining 2,209 files even though he knew they would be used against his client. And the disclosed files were, in fact, relied on to sanction Berg and dismiss his case with prejudice after five years of litigation. (Filing No. 5, at CM/ECF p. 17).

Respondent intended to offer evidence of the 2017 forensic review at his disciplinary hearing, stating it was relevant to prove he was not "concealing information harmful to his client, engaging in conduct prejudicial to the administration of justice, having a 'dishonest or selfish motive,' and engaging in a 'pattern of misconduct' over an extended period." (Filing No. 5, at CM/ECF pp. 17-18). The PDJ prohibited this evidence in limine, stating it was not relevant to the charges. (Filing No. 5-3, at CM/ECF p. 11). Respondent claims this ruling deprived his right to a fair trial because he was "unable to fully explain or show the circumstances of the underlying case and his actions, motivations, and years of extraordinary efforts to provide discoverable information to opposing counsel." (Filing No. 5, at CM/ECF p. 18).

Respondent was charged with concealing his 2013 communications with a retained expert and the expert's October 2013 draft report, misleading the opposing party into believing such documents did not exist, and when the expert

falsely testified on this issue in 2014, failing to correct the record. Those charges were limited to Respondent's conduct with respect to Downer's files and testimony. As with Respondent's proposed character witness testimony, the fact that Respondent conducted himself admirably in 2017 is not relevant to whether he did so in 2013, particularly where the discovery topics were wholly different. Respondent's due process rights were not violated when the PDJ limited the evidence to Respondent's 2013-14 alleged misconduct regarding Downer's draft and final expert reports.

d. Punishment for exercising his right to a trial

Respondent claims Arizona clearly punished him for exercising his trial rights. (Filing No. 5, at CM/ECF p. 14). Respondent argues:

> Arizona did not hold separate hearings on liability and punishment. Arizona did not determine the sanction only after liability was determined. Arizona combined those determinations into one, thereby placing [Respondent] in the constitutionally offensive position of being required to admit liability and give up his right to trial in exchange for receiving a lesser sanction. That does not present a voluntary choice, but a violation of the unconstitutional conditions doctrine because it coerces the surrender of constitutionally protected rights.

(Filing No. 5, at CM/ECF p. 15). Respondent claims his due process rights were violated because the Arizona forums considered whether he "'expressed no remorse' in its liability determination and as a mitigating factor when imposing a sanction." (Filing No. 5, at CM/ECF p. 14).

Respondent's claims are not supported by the law or the record. To begin with, the law does not require a two-stage hearing in an attorney discipline case, that is, there is no requirement that a bar panel convene to first decide culpability,

and if the attorney is found culpable, then reconvene to determine the sanction. In re Cook, 551 F.3d 542, 550 (6th Cir. 2009).

And contrary to Respondent's argument, at the sanctions stage, a court can and often does consider whether a defendant—in this case, an attorney who violated the ethical rules—expresses any contrition for his or her conduct. Accepting responsibility and genuine remorse are valid considerations when determining attorney discipline sanctions. McKune v. Lile, 536 U.S. 24, 40 (2002) (holding the Court often gives dispositive weight to whether an attorney has admitted his guilt and expressed contrition when deciding issues of reinstatement to practice). "Due process is not implicated by the consideration of a defendant's lack of remorse as an aggravating factor. It is well established that a defendant's remorse—or lack thereof—is an appropriate consideration in meting out punishment." In re Cook, 551 F.3d. at 551 (attorney discipline action, described infra). See also, United States v. Knight, 905 F.2d 189, 192 (8th Cir. 1990) (explaining § 3E1.1 of the federal sentencing guidelines "merely recognizes that a defendant who manifests genuine remorse should receive a shorter sentence than a defendant who does not").

More importantly, the language of the panel's opinion contradicts any claim that the panel considered Respondent's trial demand when deciding whether he violated the ethical rules or was remorseful for doing so. The opinion never mentions the fact that Respondent demanded a trial, and Respondent cites to nothing of record indicating it considered that demand. To the contrary, Arizona's disciplinary panel meticulously and with clear headings, separated the analysis of culpability from that of sanctions. As outlined in the opinion, the panel first decided whether Respondent violated his ethical responsibilities. (Filing No. 1-1, at CM/ECF pp. 17-30). Only then, under the heading "Sanction Standards," did it discuss what level of discipline to impose, and to do so, it applied the ABA

Standards for Imposing Lawyer Sanctions.[13] (Filing No. 1-1, at CM/ECF pp. 30-32). The three aggravating factors listed as applicable to Respondent's case were:

> Standard 9.22(b), Dishonest or Selfish Motive; explaining Respondent misrepresented his disclosures to benefit his case;
>
> Standard 9.22(i)- Substantial Experience in the Practice of Law; explaining Respondent was admitted to the practice of law in 2004,
>
> Standard 9.22(g)-Refusal to Acknowledge Wrongful Nature of Conduct, explaining "Respondent still maintains that he had no obligation to disclose the October emails or the draft report and no obligation to correct Downer's testimony."

(Filing No. 1-1, at CM/ECF p. 32).

Respondent appears to be arguing that the panel must have considered his trial demand as indicative of no remorse because there was no other evidence to support that finding. If that is his argument, it is wrong. Respondent testified at the hearing, explaining he withheld Downer's draft report and the 2013 emails based on a verbal agreement he had with defense counsel; that he conferred with defense counsel regarding the breadth of the subpoena and that issue was resolved consistent with the parties' prior oral agreement; and as to Downer's testimony, he believed Downer testified truthfully during his deposition and there was nothing to correct. Having reviewed the exhibits and observed Respondent, defense counsel, and Downer as they testified, the panel concluded Respondent's testimony was not credible. (Filing No. 1-1, at CM/ECF pp. 8, 15, 16, 19-20, ¶¶ 19,

[13] See, ABA Standards for Imposing Lawyer Sanctions, Approved, Feb. 1986, Amended, Feb. 1992. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.pdf (last visited on December 8, 2020).

43, 46). Based on that finding, the panel could certainly conclude Respondent lacked remorse, having chosen to fabricate excuses for failing to fully disclose discovery, misleading opposing counsel, and implementing no remedial action when these events occurred.

Under the facts established of record, Respondent's due process challenge alleging he was punished for asserting his trial rights must be denied. See In re Cook, 551 F.3d at 550 (denying an attorney's claim that state disbarment proceedings deprived her of due process where there was no showing that lack of remorse was considered except when, under the "Mitigation" section of the sanctions discussion, the Ohio court noted the attorney refused to acknowledge her wrongful conduct). An attorney cannot successfully argue he was punished for demanding a trial in violation of his due process rights where the disciplinary panel considered lack of remorse only after deciding the charges were true, and then only as a potentially mitigating or aggravating factor for determining the appropriate punishment. Id.

2. Insufficient proof

Respondent argues he did nothing wrong, and there was insufficient evidence to the contrary. In support of this claim, he argues:

- He disclosed Downer's draft expert report and communications in 2017 when ordered to do so, and prior to that order, he believed he was complying with the law. (Filing No. 5, at CM/ECF pp. 19-21).

- Downer notified defense counsel during Downer's deposition that additional documents were in his file, and Downer offered to send them to defense counsel. Respondent therefore assumed defense counsel obtained the records and he did not know the draft report and emails

were never sent to defense counsel until the issue erupted in 2017. (Filing No. 5, at CM/ECF pp. 22-23).

- Downer's draft report was not subject to mandatory disclosure by operation of Arizona's discovery rules, and Request No. 1 did not ask for it. (Filing No. 5, at CM/ECF pp. 24-26).

- Under the Arizona discovery rules in effect in 2013-14, an expert's draft report could not be discovered and parties were not permitted to subpoena an expert's file or seek to obtain draft reports or expert correspondence. He argues defense counsel's act of subpoenaing the expert's file was not authorized under the Arizona discovery rules and was unethical. (Filing No. 5, at CM/ECF pp. 26-27).

- Based on the plain language of Rule 3.3(a)(3), Respondent did not violate that rule because Downer was not Respondent's client at the deposition and Respondent did not solicit any testimony from Downer during the deposition. (Filing No. 5, at CM/ECF pp. 29-30).

- The record does not support a finding that Downer testified untruthfully or that Respondent knew he did, and in any event, had defense counsel followed through and obtained Downer's entire file as offered by Downer, he would have known a draft report existed. (Filing No. 5, at CM/ECF pp. 30-34).

- The facts do not support a finding that Respondent violated Rules 3.4(a) and (d), and 8.4 (c) and (d), and the case law cited by the panel to support the rule violation decision is wholly distinguishable. (Filing No. 5, at CM/ECF pp. 34-36).

Upon review of the evidentiary record, I find these claims lack merit. As explained below, contrary to Respondent's arguments, the evidence of record found credible by the Arizona disciplinary panel supports a finding that Respondent violated the ethical rules.

Respondent argues the court cannot find that he violated the ethical rules because he disclosed the 2013 emails and the Downer draft report in 2017 when ordered to do so by the court. The issue is not whether he ultimately disclosed the requested information, but whether he tried to hide it and disclosed it only after the concealment became known. "Belated honesty in the face of an adversary who had already discovered the truth is hardly worthy of applause." In re Filosa, 976 F. Supp. 2d 460, 470 (S.D.N.Y. 2013) (described, infra).

Respondent claims he objected to the scope of Request No. 1, and defendants did not move to compel further production until 2017. Request No. 1 demanded production of all information, notes, documents, and correspondence provided to Downer to prepare his report, and the subpoena served on Downer asked for this information and perhaps more, specifically mentioning "draft" reports in the listing of requested documents. (Filing No. 7-5, at CM/ECF pp. 7-13 (Ex. 5)). In response to the subpoena, Respondent sent a letter to defense counsel stating the subpoena was unnecessary as everything requested in the subpoena had already been produced, (Filing No. 7-5, at CM/ECF pp. 19-20 (Ex. 6)), leaving the clear impression that no undisclosed documents existed and filing a motion to compel would be futile. Respondent then sent his letter to Downer who, in turn, parroted Respondent's language and stated all documents requested in the subpoena had already been disclosed. (Filing No. 7-5, at CM/ECF p. 22 (Ex. 7)).

Respondent clearly told defense counsel that there was nothing to be gained by moving the court to enforce the subpoena, and defense counsel believed him. The ability to "secure the just, speedy, and inexpensive determination of every action" (Fed. R. Civ. P. 1) depends in large part on the integrity of attorneys—particularly in the discovery process. Attorneys and judges must be able to rely on

the statements of counsel to avoid needless discovery motion practice with its associated waste of attorney time and judicial resources.

Respondent argues that Downer, in his deposition, offered to provide his entire file to defense counsel and defense counsel was therefore aware that more documents existed. Even assuming that is true, defense counsel's alleged lack of diligence does not eliminate Respondent's duty to either provide all the documents requested or, if applicable, raise specific privilege objections to their disclosure.

Respondent argues defense counsel should not have served a subpoena to obtain the opposing expert's file, including any attorney-expert communications and draft reports within it. He argues that defense counsel committed an ethical violation by serving the subpoena. (Filing No. 5, at CM/ECF pp. 27-28). Even if the court assumes that argument is true, wrongful conduct by opposing counsel did not vest Respondent with the right to conceal the existence of the draft report and 2013 emails without court approval. The authority to decide whether and to what extent discovery requests are overly broad or contain improper document requests lies with the court. Respondent made no effort to raise any work product and attorney client objections in 2013-14. Raising these objections would have notified defense counsel of the potential need to file a motion to compel. Moreover, Respondent did not ask the court for a protective order that allowed nondisclosure of the requested and subpoenaed information.

In addition, contrary to Respondent's argument, the language of Arizona's Rule 26(b)(4) in 2013-14 did not preclude discovery of draft expert reports, and it was not interpreted by the Arizona courts as prohibiting such discovery. Slade v. Schneider, 212 Ariz. 176, 180-81, 129 P .3d 465, 469-70 (App. 2006) held that "in designating the accountant as a testifying expert, the accountant's entire case file is discoverable to the extent that he obtained those materials in the course of his

investigation and they relate to the subject of his testimony." The discovery rule language applicable in Slade remained the same until 2019, and it was therefore applicable in 2013.

Similarly, the ethics decision cited by Respondent, (Filing No. 5-20 (Arizona Bar Opinion 88-01)), is incorrectly described in his show cause response. Respondent argues that under Arizona Bar Opinion 88-01, Respondent "was not required to produce, and [his] opponent was not permitted to seek or obtain, draft expert reports or expert communications." (Filing No. 5, at CM/ECF p. 28). Opinion 88-01 does not address disclosure of expert reports. It addresses whether it is unethical for an attorney to conduct an *ex parte* interview of the opposing party's testifying expert. Opinion 88-01 states the methods of discovery from an expert are defined by the discovery rules. It explained that under Rule 26(b)(4), an opposing party can depose a testifying expert. From this language in Rule 26(b)(4), the Arizona Bar concludes a deposition, not an *ex parte* conversation, is the permissible means of questioning the opposing party's expert. Recognizing its authority to interpret the law is limited to only the question posed, the Arizona Committee on the Rules of Professional Conduct did not discuss if or how an expert's file can be discovered under Arizona's discovery rules, and it did not address the Slade opinion.

As to the deposition of Downer, Respondent claims he could not have violated Rule 3.3(a)(3) because he neither represented nor questioned Downer at the deposition. Under Rule 3.3(a)(3) a lawyer cannot offer evidence that the lawyer knows to be false, and if he calls a witness who testifies falsely and he knows that testimony is false, he must take reasonable remedial measures to correct the record. Respondent argues that extending the clear language of Rule 3.3(a)(3) to the facts of this case would violate his due process rights; that he would be

punished under an ex post facto re-write of the Rule with no prior notice that it could be applied to his conduct.

However, "[a] lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify" Restatement (Third) of the Law Governing Lawyers § 120 (2000). Here, Downer was testifying as the retained expert for Berg, Respondent prepared Downer for his deposition, and he intervened when Downer received a subpoena for his files (Filing No. 7-5, at CM/ECF pp. 19-20 (Ex. 6) and when defense counsel demanded a response to that subpoena. (Filing No. 7-5, at CM/ECF p. 24 (Ex. 8).[14] Under such circumstances, Respondent had an ethical responsibility to use remedial measures to assure Downer's false testimony was disclosed and corrected.

But even assuming this court accepts Respondent's reading of Rule 3.3(a)(3) and concluded Respondent did not violate that rule, Respondent nonetheless violated ethical rules. When considering the issue of reciprocal discipline, this court need not adopt or even consider every finding of the disciplinary panel. It can impose discipline, if appropriate, based on only a portion of the panel's findings. See In re Cook, 551 F.3d at 551 (upholding a federal district

[14] Exhibit 8 is an email from Respondent to defense counsel stating Downer would comply with the subpoena upon payment of $600.00. (Filing No. 7-5, at CM/ECF p. 23-32 (Ex. 8)) The letter further states, "I do not believe the Rules allow you to argue with Mr. Downer regarding the subpoena. You received a timely objection, which alleviates Mr. Downer's obligation to comply until and unless you obtain an order from the Court. It is certainly not 'immaterial whether Mr. Berg or his attorney has already provided some of that information' as you have an express obligation to 'avoid imposing an undue burden or expense' upon the deponent." (Filing No. 7-5, at CM/ECF p. 23).

court's reciprocal discipline ruling where the state panel allegedly violated due process by considering lack of remorse in determining a rules violation, but that state finding played no role in the federal court's decision to impose reciprocal disbarment).

Here, in addition to Rule 3.3(a)(3), the Arizona forums concluded Respondent violated Rule 3.4 (a) and (d) and Rule 8.4 (c) and (d). Respondent claims the Arizona cases cited by the panel do not support that conclusion. But even assuming for the sake of argument that the cases cited by the panel are factually distinguishable, a determination of whether the rules were violated depends on the meaning of the rules themselves, not on whether an Arizona court previously found a rules violation and imposed discipline under similar facts. Moreover, this court can rely on case law other than Arizona's when deciding if Respondent committed "conduct unbecoming a member of the bar." NEGenR 1.7(b).

In this case, Downer was an expert specifically retained by Respondent and his client. As such, whether stated in Downer's written expert report or provided in response to deposition questioning, Downer's statements were deemed responses to discovery provided by Respondent's client, and Respondent had an ethical duty to correct those responses if he knew they were false. Failing to do so violates the discovery rules and is professional misconduct under Rules 8.4 (c) and (d). See, e.g., In re Filosa, 976 F. Supp. 2d 460 (S.D. N.Y. 2013) (described, infra).

Contrary to Respondent's argument, Downer's testimony was false and based on the evidence found credible by the hearing panel, Respondent knew it was false. Downer testified that he did not incorporate comments from Berg or Respondent before finalizing his expert report. Based on the 2013 emails exchanged and a comparison of the draft and final report, that testimony was not

true. While Respondent claims there are no facts supporting a finding that he knew Downer's testimony was untrue, that claim is also unsupported by the evidence found credible by the disciplinary panel. The panel specifically determined that "Respondent allowed Downer to answer questions falsely. Respondent took no remedial steps to correct the record; instead Respondent allowed Downer's false testimony to stand. (Filing No. 1-1, at CM/ECF p. 16, ¶ 46).[15]

Respondent claims Downer offered to provide the remainder of his file to defense counsel during the deposition, and Respondent assumed that happened. As such, Respondent claims he did not know that defense counsel was operating under the mistaken belief that no draft report, or emails of Respondent's comments incorporated into that report, existed. Once again, Respondent improperly looks to the alleged inaction of others as an excuse for his own failure to timely and fully provide responses to discovery. Moreover, Respondent's argument is illogical. As stated in Opinion 88-01, defense counsel was not permitted to have *ex parte* discussions with Downer either before or following the deposition. So, unless Respondent assumed defense counsel would violate Opinion 88-01, any further disclosure of Downer's file would have to occur at the deposition or through Respondent. It did not occur at the deposition itself, and Respondent knew that because he was there. Since Respondent never forwarded the additional file contents to defense counsel after the deposition until ordered by the court to do so three years later, Respondent knew defense counsel did not receive those documents prior to the 2017 disclosure.

[15] I also find that based on the deposition excerpts quoted in Respondent's show cause response before this court, (Filing No. 5, at CM/ECF pp. 22-23), the topic of undisclosed portions of Downer's file was raised during Downer's deposition. At that point, Respondent was either reminded of, or was willfully blind regarding, the obligation to produce the undisclosed portions of the file, including the draft report and the 2013 emails.

The facts of record support a claim that Respondent "unlawfully obstructed another party's access to evidence" by concealing the existence of Downer's draft report and Respondent's communications to Downer about its content. Arizona ER 3.4(a). And the facts support a claim that Respondent assisted Downer in failing to make reasonably diligent efforts to comply with the subpoena in violation of Arizona ER 3.4(d). In addition, Respondent's letter objecting to subpoenaing Downer's file as unnecessary because all files had been disclosed, and his silence regarding Downer's false testimony at the deposition, violated Arizona Rules 8.4 (c) and (d). The evidence found credible by the panel supports a finding that Respondent intentionally concealed the existence of the 2013 emails and Downer's draft report, and that the draft report was modified to wholly incorporate Respondent's comments. By doing so, Respondent engaged in professional misconduct. He misled defense counsel into believing these documents did not exist, (Arizona ER 8.4(c)), and did so in a manner that delayed disclosure of Berg's own belief that a third party may be responsible for all or part of his damages. The existence of a potential culpable third party was a material fact, and the delayed disclosure was prejudicial to the administration of justice. Arizona ER 8.4(d).

3. Unjust Sanction

Respondent argues a six-month suspension "would only serve to punish him unnecessarily and would not aid the public or the profession," explaining he has four active cases pending in this court and his clients will be adversely impacted if he is suspended. (Filing No. 5, at CM/ECF p. 37). He explains that a six-month suspension will not accomplish any good because he "has already schooled himself to increase focus on detail, more consistently and specifically assert objections, and listen more intently to deposition testimony so he can make corrections if he has any question about accuracy." (Filing No. 5, at CM/ECF p. 39). He professes he did nothing dishonest, explaining:

> Bruno did not violate any orders of the Superior Court, commit any crimes, present false evidence to the Superior Court, steal client's money, malpractice his client, or cause his client to lose his case. Had Bruno actually concealed the draft report or violated his ethical duties, he would have never been subjected to any disciplinary proceedings. If Bruno had a dishonest motive or was trying to conceal information from his opponent, he would have ignored the Superior Court's Order, not complied with it. If Bruno was acting dishonestly, he would not have turned over the thousands of forensic files even though no one else had seen them and Bruno knew they would be utilized adversely against his client.

(Filing No. 5, at CM/ECF p. 38). He states he has already paid a severe price because his Arizona practice was suspended at great financial detriment, he has expended hundreds of thousands of dollars in time, attorney fees, and costs stemming from these proceedings, and he has been publicly humiliated, is embarrassed, and his reputation has been damaged. He argues "a formal suspension or formal discipline by this Court is unnecessary and would be punitive." (Filing No. 5, at CM/ECF p. 39).

The question before this court is whether the discipline imposed in Arizona would result in injustice and whether the established misconduct warrants substantially different discipline. NEGenR 1.8(e)(4)(C) and (D). When deciding the extent of discipline to impose, the court considers: 1) the nature of the offense; 2) the need for deterring others; 3) the maintenance of the reputation of the bar as a whole; 4) the protection of the public; 5) the attitude of the offender generally; and 6) the offender's present or future fitness to continue in the practice of law. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Gilner, 280 Neb. 82, 87, 783 N.W.2d 790, 794 (2010). The court further considers "the attorney's acts both underlying the events of the case and throughout the proceeding," and any

aggravating or mitigating factors. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wickenkamp, 272 Neb. 889, 895, 725 N.W.2d 811, 815 (2007).

Here, Respondent concealed the fact that evidence existed which had not been disclosed to defense counsel. In doing so, he misled opposing counsel and altered the opposing party's case strategy. This continued for three years and was halted only upon opposing counsel's discovery of the nondisclosure and a court order. Such conduct undermines the credibility of the profession and delays the administration of justice.

The evidence of record supports the aggravating factors identified by the Arizona forums. Respondent concealed evidence to enhance the value of his client's case. But "an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." Nix v. Whiteside, 475 U.S. 157, 168 (1986). Respondent was aware of these professional obligations. As he states, he has a significant practice, and at the time of the events at issue, had been practicing for nine years. But even now, despite the documentary evidence supporting the Arizona panel's findings, he resists self-reflection and acceptance of responsibility; choosing instead to deflect responsibility onto his opposing counsel, Staff Bar Counsel, the Arizona disciplinary panel, and the Arizona courts. Like the Arizona appellate court, this court acknowledges Respondent had no disciplinary record prior to the current charges. But that mitigating factor does not erase the unethical conduct described in this opinion and by the Arizona forums, nor does it eliminate the need to impose sanctions for such conduct.

Upon consideration of the record as a whole, a six-month suspension for Respondent's concealment of material information requested in discovery is neither unjust nor excessive. See, e.g, State ex rel. Nebraska State Bar Ass'n v.

Roubicek, 225 Neb. 509, 406 N.W.2d 644 (1987) (imposing a two-year suspension where the attorney used false information to complete an estate tax return, thereby willfully concealing or misrepresenting facts material to the court's decision); State ex rel. Nebraska State Bar Ass'n v. Fisher, 170 Neb. 483, 103 N.W.2d 325 (1960) (imposing a one-year suspension where an attorney attempted to alter evidence); see also In re Fletcher, 424 F.3d 783 (8th Cir. 2005) (affirming a three-year suspension due to multiple findings of professional misconduct, including selectively quoting deposition testimony in a way that grossly mischaracterized the deponents' statements); The Fla. Bar v. Dupee, 160 So. 3d 838 (Fla. 2015) (imposing a one-year suspension where the attorney knowingly filed a dissolution client's inaccurate financial affidavit and failed to disclose existence of a cashier's check belonging to the client); In re Filosa, 976 F. Supp. 2d 460 (S.D. N.Y. 2013) (applying New York Rules 3.4 and 8.4 and imposing a one-year suspension where, in an employment case, the attorney intentionally concealed his client's job offers to obtain a more favorable settlement, knowingly misled the opposing party about his client's employment prospects when he served an inaccurate expert report, did not correct his client's evasive deposition testimony, and failed to timely produce documents that would have revealed that client had accepted two job offers); The Fla. Bar v. Miller, 863 So. 2d 231, 234 (Fla. 2003) (imposing a one-year suspension where the attorney engaged in an intentional, prolonged pattern of deliberate concealment by claiming he had no knowledge of the first notice in an employment case, filed affidavits to this effect, and permitted witnesses to testify in a way that created an impression that the first notice had not been received).

CONCLUSION

Upon review of Respondent's response to the show cause order and the panel and appeal records of the Arizona forums, I find Respondent has failed to

show any basis for not imposing reciprocal discipline in this forum. See NEGenR 1.8(e)(4).

Accordingly,

IT IS RECOMMENDED to the Honorable John M. Gerrard, Chief United States District Judge, pursuant to 28 U.S.C. § 636(b), that in accordance with Nebraska General Rule 1.8 (e), the court enter an order: 1) finding the respondent, Jason M. Bruno, has failed to show cause why reciprocal discipline should not be imposed and 2) suspending respondent from practice before the United States District Court for the District of Nebraska for six months, followed by 2 years of probation as ordered by the Arizona State Bar and affirmed by the Arizona Supreme Court.

Respondent is notified that failing to file an objection to this recommendation on or before December 29, 2020[16] may be held to be a waiver of any right to appeal the court's adoption of the recommendation.

IT IS ORDERED that the clerk shall mail a copy of this decision to Respondent Jason M. Bruno at his address of record.

December 11, 2020.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

[16] This deadline was calculated by applying the local rules which allow 14 days for responding to findings and a recommendation, plus three days for mailing.