

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Petition of Brent J. Edison	)	
	)	Supreme Court No. 20060091
Brent J. Edison,	)	
	)	
Petitioner,	)	
	)	
Vs.	)	
	)	
A Hearing Panel of the Disciplinary Board of	)	
The North Dakota Supreme Court and	)	
William P. Harrie,	)	
	)	
Respondents.	)	

**RESPONDENT WILLIAM P. HARRIE'S SUPPLEMENTAL BRIEF**

Review of Order of Hearing Panel of the  
Disciplinary Board of the North Dakota Supreme Court.

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

The issues on appeal are:

- I. WHETHER HARRIE VIOLATED RULE 4.1, N.D.R. PROF. CONDUCT.
- II. WHETHER HARRIE VIOLATED RULE 1.2A(3), N.D.R. LAW. DISC.

## STATEMENT OF THE FACTS

This disciplinary action arose out of a case entitled Muhammed v. Welch, 2004 ND 46, 675 N.W.2d 402 in which Respondent William Harrie represented the defendant, Ellen Welch. H. Patrick Weir, Jr. represented the plaintiff, Sefin Muhammed. The case involved a bodily injury claim brought by Muhammed against Welch arising from a December 29, 1995 motor vehicle accident. Disciplinary Counsel claims that answers Harrie served in the Muhammed case contain a statement of fact or law Harrie knew to be false, in violation of Rule 4.1, N.D.R. Prof. Conduct (2005) and Rule 1.2A(3), N.D.R. Lawyer Discipl. (2006). Disciplinary Counsel's allegations are without merit.

### **I. BACKGROUND OF THE MUHAMMED CASE.**

Many of the facts regarding the background of this matter are not, and never have been, disputed. Disciplinary Counsel's Supplemental Brief contains a "time line". (Counsel's Supp. Brf. at p.p. 5-6). While that time line identifies correct dates when certain events took place, the time line omits important dates. Disciplinary Counsel's interpretation and "spin" of the events that took place on certain dates is also incorrect.

The evidence showed that before Harrie became involved in the Muhammed v. Welch case, in addition to the "chronology of events" identified in Disciplinary Counsel's Brief, the following events took place:

December 28, 1995, Carlton Goughner, an independent insurance adjuster, was retained by Austin Mutual, Ellen Welch's insurance company, to investigate the December 27 accident and any possible claim arising from the accident. (Sep. App. at 45).<sup>1</sup>

August of 1996 - Goughner closed his file regarding the accident. (Sep. App. at 45).

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<sup>1</sup> Respondent William P. Harrie's Separate Appendix is abbreviated in this Brief as "Sep. App." Petitioner's Appendix is abbreviated in this Brief as "App."

January of 1999 – Attorney Paul Johnson notifies Austin Mutual that he is representing Sefin Muhammed with regard to the December 27, 1995 motor vehicle accident. Carlton Goughner reopens his file. (Sep. App. at 46, ¶ 3).

July of 2001 – Pat Weir Jr. takes all of Paul Johnson’s cases. (Tr. at 157; Sep. App. at 62). By taking all of Paul Johnson’s cases Weir took the good and the bad. Id. One of the cases Weir inherited from Mr. Johnson in July of 2001 was the Muhammed case, which Weir admits was not a very good case. (Tr. at 157-158; Sep. App. at 62-63).

July of 2001 through early 2002 - Negotiations take place between Weir and Goughner to see if the Muhammed case can be settled. (Sep. App. at 46, ¶¶4, 5, 6).

September 1, 2001 –Weir serves the Summons and Complaint. (App. at 32).

Weir does not serve the summons and complaint by personal service to assure that it is served on Ellen Welch. Rather, Weir serves the summons and complaint by certified mail, return receipt requested. (App. at 32).

Pat Welch, Ellen Welch’s surviving spouse, receives the letter serving the summons and complaint by signing the return receipt/green card. (App. at 32). The Post Office allows Pat Welch to sign for the letter even though the certified portion of the letter sent to Ellen Welch is marked “Restricted Delivery,” Id. Section 4(d)(2)(A)(v), N.D.R. Civ.P. (2005) requires a “signed receipt and resulting in delivery to that person.” Section 4(d)(2)(A)(v) does not allow a signed receipt from the husband or other family member. Upon receipt of the certified mail receipt form the post office, Weir did not inquire as to why Pat Welch signed for the certified letter which was sent via restricted delivery. (Tr. at 159; Sep. App. at 64). Weir just assumed that Pat Welch and Ellen Welch were still married. Id.

Weir did not, either before serving the summons and complaint or after receiving the “green card” back from the Post Office, check to see if Ellen Welch was alive.

September 13, 2001 letter from insurance agent. (Sep. App. at 6). The September 13, 2001 letter does not advise as to when Ellen Welch died and does not state upon whom the summons and complaint had been served and/or if only by mail who “signed” for the documents.

September 13, 2001 through early 2002. Weir and Goughner continue discussions regarding possible resolution of Mr. Muhammed’s claim against Ellen Welch. At no time did the fact Ellen Welch was deceased ever come up. (App. at 46, at ¶ 4).

March 14, 2002 Goughner faxes Weir's March 13, 2002 letter to Harrie retaining Harrie, on behalf of Austin Mutual, to represent Ellen Welch in the Muhammed case. (App. at 19-20).

The backdrop to when Harrie first started working on the Muhammed case is important because, as shown by the testimony from all of the witnesses at the November 30 hearing, a number of checks and balances are in place in lawsuits arising from motor vehicle accident cases to make sure that the correct parties are sued.

Prior to when Harrie received the file, a number of red flags would have arisen and there was ample opportunity to correct any miscommunication regarding Ellen's death. It is important to note that prior to when Harrie received the file Muhammed had been represented by an attorney for over three years (since January of 1999). (E.g., Tr. at 158; App. at 63). Ellen was being provided a defense through her automobile liability insurance carrier, who had an experienced adjuster, Goughner, adjusting the claim, on and off, since a day or two after the December 1995 accident. (See Sep. App. at 45, ¶1) In contrast, Harrie had been involved in the case for only 13 days (from March 14 to March 27, 2002) before he served the Answer to the Complaint. (See App. at 19, 23).

Two experienced personal injury lawyers (Johnson and Weir) had the case and never investigated or determined that Ellen was deceased, even when the statute of limitations was approaching and the summons and complaint, sent via restricted delivery, were returned with someone else's signature. That the attorneys representing Muhammed could have easily learned of the death of Ellen Welch was explained by Weir who testified during the Hearing that, after he was informed by Harrie in May of 2002 that Ellen was deceased, he did a simple internet search and learned that Ellen died in April of 1998 from complications of cancer. (Tr. at 173; App. at 73).

Jack Marcil, an attorney with over 30 years of experience in litigating bodily injury claims (Tr. at 209; Sep. App. at 91) explained during the hearing that receiving a return receipt signed by someone other than the defendant, even if it is the defendant's husband, should raise concerns with a plaintiff's attorney, who should then personally serve the summons and complaint on the named defendant, especially if the statute of limitations may soon expire. (Tr. at 215-216, 221; Sep. App. at 93, 94, 96). No personal service was attempted on Ellen Welch. Weir did not ask Goughner whether Goughner would secure Ellen's signature on an admission of service. Either personal service or a request that Ellen Welch admit service would have resulted in Weir discovering that Ellen Welch was deceased.

That red flags regarding Ellen's death should have appeared to the individuals handling the Muhammed case before Harrie became involved is not being raised to criticize any of those individuals or to somehow try to "shift blame." Rather, the relevance of the fact that red flags did not go up with Weir, Johnson or Goughner is to show that, because of a number of events in which Harrie had no involvement, a number of the checks and balances that exist in the system failed. In other words, the result of the confusion regarding the fact and significance of Ellen's death was the result of miscommunication among a number of people and the result of a failure of the checks and balances – not the result of any "knowingly false statement" or fraud by Harrie.

In addition to the background of the case at the time Harrie received it, it is also important to have an understanding on the background on motor vehicle cases.

## **II. BACKGROUND ON MOTOR VEHICLE, PERSONAL INJURY CASES.**

As shown in the testimony at the hearing, including the testimony from all of the attorneys who testified, the background of the Muhammed case, the type of case it was, and the relationship between Harrie and Weir shows that an allegation that Harrie made a “false statement” is simply implausible.

Missing from Disciplinary Counsel’s Briefs is any discussion of the consistent testimony provided by ALL of the attorney witnesses at the hearing. The testimony from those witnesses provide insight and opinions from attorneys who handle almost exclusively the defense side of motor vehicle accident cases (Bradley Beehler and Harrie) and from attorneys who handle almost exclusively the plaintiff’s side (Weir and Marcil). Those attorneys, Harrie, Beehler, Marcil and Weir, have nearly 70 years of combined experience in handling motor vehicle accident personal injury cases. (Harrie 19 yrs; Beehler, 9 yrs; Weir, 15 yrs; and Marcil, 37 yrs. (See C.R. 14, Tr. at 31, 142, 186, 209). It is important to note that the testimony from those experienced attorneys was never controverted at the hearing, or in the Disciplinary Counsel’s Brief.

The uncontroverted testimony from the attorneys who testified at the Hearing is important because it shows how motor vehicle accident cases are handled in Eastern North Dakota. The testimony explains the checks and balances in place to prevent an improper defendant from being sued and also how such an error is easily cured. The testimony from those witnesses also shows that Disciplinary Counsel’s interpretation of the Answers served by Harrie is incorrect.

The Muhammed case was an insurance defense case. As explained during the testimony at the Hearing, Harrie was retained by the Welch’s insurer, Austin Mutual, to

provide a defense in the Muhammed lawsuit. (See Tr. at 34; Sep. App. at 18). That defense is provided as long as the named defendant is an “insured” under the insurance policy and regardless of whether the Plaintiff has the defendant identified correctly and/or whether the defendant is deceased. (See e.g., Tr. at 86, 188; Sep. App. at 42).

At the time an Answer is served in a motor vehicle accident case it is not unusual for the attorney, hired to represent the insured, not to talk with the insured defendant before an Answer is served. (Tr. at 81, 193; Sep. App. at 38, 82). The attorney will talk to the insured defendant later in the process, usually when information is required to respond to discovery or to prepare the insured for a deposition. (Tr. at 193; Sep. App. at 82). Long-time insurance defense Attorney Bradley Beehler testified that in these types of cases he doesn’t recall ever talking to an insured defendant before serving an Answer. (Tr. at 193; Sep. App. at 82). While that may seem strange to a layperson, because of the nature of motor vehicle accident cases there are a myriad of reasons why speaking with the insured at the time the Answer is served is not important.

For example, pleadings in motor vehicle accident cases are very standard and basically the same from case-to-case. As explained by Beehler and Harrie, the Answers in motor vehicle accident cases do not contain factual allegations, but rather contain the standard affirmative defenses. (Tr. at 79-80, 192-193; Sep. App. at 36, 37, 81, 82). Weir and Marcil, attorneys who have seen thousands of pleadings in motor vehicle accident cases, confirmed that practice. (Tr. at 161, 221-222, App. at 66, 96-97). Weir and Marcil also explained that complaints in motor vehicle cases are also standard from case-to-case. (Tr. at 160, 161, 221; Sep. App. at 65, 66, 96).

At the time an Answer is served the defense attorney only has very limited information. (Tr. at 126, 192-193; Sep. App. at 56, 81, 82). Thus, in motor vehicle accident cases a detailed investigation into the facts of the accidents and claims in the Complaint are not required, and generally not undertaken, at the time the Answer is served. Rather, at the “Answering stage” investigation is just beginning.

Part of that investigation is to obtain the relevant records as soon as possible. As explained at the Hearing by Harrie and Beehler, it is critical to send authorizations to the plaintiff’s attorney as soon as possible so medical, school, employment, worker’s compensation, and other records can be obtained as soon as possible. (See e.g., Tr. at 82, 161-162, 195; Sep. App. at 39, 66, 67, 84). It can take months to obtain records from some of the health care providers. (Tr. at 83; Sep. App. at 40). Thus, waiting to contact and interview an insured before sending out a standard Answer that simply alleges affirmative defenses can result in loss of valuable time.

It can be difficult to contact an insured before serving an Answer. During the Hearing, Beehler and Harrie both described cases where they were unable to locate an insured defendant until long after the Complaint was served, and the Answer was due. (Tr. at 42-43, 194; Sep. App. at 20, 21, 83).

Adding to the time pressures facing an attorney representing an insured in a motor vehicle accident case is the requirement to provide reports to the insurance company. Beehler and Harrie both explained during the Hearing that initial suit reports to an insurance company are commonly required shortly after a case is received by an attorney and the deadline to provide those reports is not based on when an Answer is served. (Tr. at 83-84, 195-196; Sep. App. at 40, 41, 84, 85). Part of the initial report to an insurance

company is to confirm that the case is proceeding forward and that requests to obtain information have been sent. (Tr. at 83-84; Sep. App. at 40, 41).

It is not critical to talk to an insured before an Answer is served because any errors in the caption are easily cured. During the Hearing, all of the attorneys testified as to the methods available, under the Rules and/or through agreement/stipulation, to amend a caption to correctly identify a defendant. For example, if the complaint incorrectly identifies the defendant, the parties can either stipulate, or a motion can be brought to the court, to amend the caption to correctly identify the defendant. (Tr. at 92, 164, 165, 196-197, 222-223; Sep. App. at 44, 68, 69, 85, 86, 97, 98). With regard to a deceased defendant, Rule 25, N.D.R.Civ.P. provides for substitution of the proper party in lieu of death. Also, pleadings are not initially filed in North Dakota State District Court cases. See e.g., N.D.R.Civ.P. 5(d) (2006). Pleadings are not filed until one of the parties desires to place the case on a trial calendar or a party seeks intervention from the Court to, for example, resolve a dispute. Amending the pleading, either by stipulation or motion, therefore is usually not undertaken until the action is filed with the court. (Tr. at 92, 164-165, 197; Sep. App. at 44, 68, 69, 86). If the action is not filed, then the issue of the proper defendant is usually resolved in the settlement agreement and release. Id. Thus, the issue of whether the defendant is properly named in the complaint is not something that has to, and usually is not, addressed at the time the Answer is served.

Another part of the background that existed when Harrie served the Answer in the Muhammed case is the fact motor vehicle accident cases are handled by a relatively small group of attorneys in Eastern North Dakota. The testimony at the Hearing established that a handful of lawyers handle personal injury plaintiff cases almost

exclusively, with an equally small number handling insurance defense cases on an almost exclusive basis. (Tr. at 70-73; 153-155; 188-189; Sep. App. at 30-33; 58-60; 78, 79). Thus, the attorneys handling these cases know each other well and it is not uncommon to have many cases against the same attorney. All of the attorneys who testified at the Hearing explained why an attorney's reputation for truthfulness, especially with such a tight group of lawyers working in the same area, is important. (Tr. at 72-73, 154-155, 189-190, 211; Sep. App. at 32-33, 59-60, 79-80, 92). It was explained that "trust" is critical to maintaining one's reputation and being able to represent one's clients. (Tr. at 189-190; Sep. App. at 79-80).

The testimony by Weir and Harrie showed that they have had a large number of cases against each other, including before, during, and after the Muhammed case. (Tr. at 73-74, 155-156; Sep. App. at 33-34, 60-61). Weir and Harrie see each other "outside of work". (Tr. at 69-70, 74-75, 157; Sep. App. at 29-30, 34-35, 62). Their sons play on the same hockey team. (Tr. at 69-70; Sep. App. at 30). Thus, even a suggestion that Harrie would knowingly make a false statement to Weir is beyond belief.

With the above background in mind, an analysis of the law and facts shows that Harrie did not, and would not, knowingly make a false statement to Weir. Reaching such a conclusion from the Answers Harrie served is simply incorrect and requires one to ignore the relevant law, facts and evidence.

## ARGUMENT

### **I. THE STANDARD OF REVIEW AND DISCIPLINARY COUNSEL'S BURDEN OF PROOF.**

The standard of review is de novo. E.g., Disciplinary Board v. Boulger, 2001 ND 210, 637 N.W.2d 710. Counsel must prove a violation by clear and convincing evidence. Id. Clear and convincing means evidence which leads to a firm belief or conviction that the allegations are true. Zander v. Workforce Safety And Insurance, 672 N.W.2d 668, 6712003 ND 194.

Disciplinary Counsel has made accusations against Harrie that cut deep – that cut to the very heart of a person. The allegations go to who Harrie is as a lawyer and a person. In addition to claiming a false statement knowingly made in violation of N.D.R. Prof. Conduct 4.1, Disciplinary Counsel piles on and alleges, without any specification, that Harrie engaged in “fraud, deceit and misrepresentation” in violation of Rule 1.2A(3) N.D.R.. Lawyer Discipl. This Court closely scrutinizes such claims. E.g., Toth v. Disciplinary Board, 1997 ND 75, par. 11, 562 N.W.2d 744 (“an allegation of dishonesty, fraud, deceit or misrepresentation is one of the most serious charges that can be brought against an attorney”).

### **II. RULES 4.1 AND 1.2A(3).**

It is critical that three undisputed facts be kept in mind. First, Harrie did disclose Ellen’s death to Pat Weir, Jr. (App. 33). Thus, Disciplinary Counsel is merely arguing that Ellen’s death was not disclosed soon enough. Second, Harrie was not aware when he served the Answers that Weir was ignorant of the fact of Ellen’s death. (See Tr. at 98-100; Sep. App. at 50, 50a, 51). Third, even Weir agrees that the timing and manner in

which Ellen's death was disclosed was not done by Harrie in attempt to take advantage of Muhammed or Weir. (Tr. at 176-177; Sep. App. at 75-76).

**A. Rule 4.1.**

Rule 4.1, N.D. R. Prof. Conduct provides as follows:

In the course of representing a client a lawyer shall not make a statement to a third person of fact of law the lawyer **knows** to be false.

(emphasis added). The terms "knowingly", "known" or "knows" are defined in the Rules of Professional Conduct as denoting "actual knowledge of the fact in question." N.D.R. Prof. Conduct, p. 484 (2006). Proving "knowledge" requires more than a showing that Harrie "should have known". For example, "reasonably should know" is defined in the "terms" section of the Rules to mean what "a lawyer of reasonable prudence and competence would ascertain in the matter in question." Id. Thus, a mere showing that Harrie "should have known" or "reasonably should have known" that a statement was false is not sufficient. This is further shown by the fact this Court has repeatedly expressed concern over disciplining an attorney for a single occasion of negligence. E.g. Disciplinary Board v. Hoffman, 2005 ND 153, 703 N.W.2d 345, ¶ 9. Thus, for Disciplinary Counsel to meet his high burden of proof, Disciplinary Counsel must prove that Harrie had actual knowledge that a statement was false.

Also, a lawyer must be an advocate for his or her client. The comment to N.D.R. Prof. Conduct 4.1 provides that "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."

**B. Rule 1.2A(3)**

Disciplinary Counsel's reliance on Rule 1.2A(3), N.D.R. Lawyer Discipl. is curious. Rule 1.2A(3) provides that a lawyer may be disciplined for "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation." Disciplinary Counsel has not specifically explained which of those "claims" Counsel is relying upon. Counsel concedes, however, that Harrie lacked the *specific* intent to mislead or deceive his litigation opponent about the statute of limitations or manner of service of process, such as would require disbarment . . . " (Counsel's Supp. Bf. at 10). Thus, while Harrie can only guess, it appears that Counsel's allegation that Rule 1.2A(3) was violated is premised on some type of "misrepresentation."

**III. HARRIE DID NOT VIOLATE RULES 4.1 OR 1.2A(3).**

Disciplinary Counsel's claim that Rules 4.1 and 1.2A(3) were violated is premised on two arguments: (1) that Harrie failed to disclose Ellen's death, i.e., that a simple omission is sufficient for Disciplinary Counsel to carry the heavy burden of proof in this case; and, (2) that the Answers contain an "affirmative representation that falsely suggested Ellen was living." (Counsel's Supp. Brf at p. 6). Disciplinary Counsel's allegations are incorrect.

**A. Harrie Did Not Fail To Properly Disclose The Death Of Ellen Welch.**

**1. Harrie Did Not Have A Duty To Disclose Ellen's Death Any Sooner.**

Disciplinary Counsel's claim against Harrie is premised on the assumption that Harrie had a duty to advise Pat Weir of Ellen Welch's death. **Harrie did advise Weir of Ellen Welch's death.** Harrie advised of the death in his May 23, 2002 letter to Weir. (App. at 33). Harrie did so after completing legal research and confirming that Ellen's

death was material, at that time, to a possible statute of limitations defense. (Tr. at 67-68, 100-101; Sep. App. at 28a, 28b, 1, 52). Thus, the issue is not whether Harrie failed to advise Pat Weir of Ellen's death. It is undisputed that Harrie did advise Weir. Rather, the issue apparently has to do with when Harrie advised Weir.

There is no Rule of Professional Conduct providing that an attorney must immediately advise an adversary that a defendant is deceased. Disciplinary Counsel must prove more than just a false statement, Counsel must prove by clear and convincing evidence that a false statement was knowingly made, which triggers the issues of materiality (i.e. harm caused by the statement) and motive.

Disciplinary Counsel's argument appears to be that by not disclosing Ellen's death in the Answers harm resulted to Muhammed, *i.e.*, the statute of limitations was found, at least at the trial court level, to bar Mr. Muhammed's claim. (Counsel's Supp. Brf. at 9). In other words, Counsel's argument is that Weir should have been advised of Ellen's death sooner and that a "mere omission" of the fact of Ellen Welch's death somehow constitutes a "knowingly" false statement. That argument was rejected by this Court in Kimball v. Landeis, 2002 ND 162, 652 N.W.2d 330. Surprisingly, Disciplinary Counsel's Briefs filed with this Court do not discuss, or even cite to, Kimball.

In Kimball, a case with surprisingly similar facts, plaintiff Larry Kimball was injured as the result of a February 17, 1995, head-on collision between a snowmobile he was operating and a snowmobile being operated by defendant Jack Landeis. 652 N.W.2d at 332. Kimball suffered a closed head injury as a result of the accident. Id. Because of the extent of Kimball's head injury, in June of 1995 Kimball's mother was appointed his guardian. Id. At 333.

In February 2001, Kimball served Landeis, and the driver of another snowmobile that was near the accident scene, with a summons and complaint alleging negligence in causing the February 1995 accident and Kimball's resulting injury and damages. Id. Landeis served an answer to the complaint alleging, among other things, insufficient service of process. Id. Landeis also served a cross-claim and counterclaim. Id. The answer, cross-claim and counterclaim **did not refer to the guardianship.** Id. In July of 2001, Landeis' counterclaim and cross-claim were dismissed by stipulation of the parties. The stipulation stated that Landeis was acting through his guardian. Id. at 333. It appears that the first time Landeis disclosed the appointment of the guardian was in July of 2001, after the statute of limitations had expired on February 17, 2001. Id. at 333, 340. In November of 2001, Landeis moved to dismiss Kimball's claim against him for insufficient service of process. Id. The trial court granted summary judgment in favor of Landeis, finding that the claim was time barred because the summons and complaint were not served on Landeis' guardian. Id.

In affirming the trial court's summary judgment, this Court held that, while it did not condone any failure to reflect the appointment of the guardian in the answer, **"Landeis was not obligated to inform Kimball of the guardianship before the expiration of the statute of limitations."** Id. At 340 (emphasis added). In other words, even though Landeis' attorney was aware that Landeis had a guardian appointed, was aware that the summons and complaint were not served on the guardian, and was aware that if the summons and complaint were not served on the guardian before the statute of limitations expired the claim would be time barred, the attorney still did not have a duty to inform Kimball's attorney of the appointment of the guardian or the improper service.

In so holding, this Court explained that “Landeis’s guardianship is a matter of public record, and Kimball has not demonstrated (that) the guardianship could not have been ascertained by a timely diligent inquiry.” Id.

As in Landeis, any attorney representing Ellen in the Muhammed case, even if s/he knew that Ellen Welch was deceased, did not have a duty or obligation to provide in the Answer, or otherwise advise Weir, that the service of process on Pat Welch was improper because Ellen was deceased. Like an appointment of a guardian, the fact of Ellen’s death was a matter of public record. In fact, it is easier to find determine if someone is deceased rather than determine if a guardian has been appointed for a specific person. As Weir explained during the hearing, a simple internet search showed that Ellen Welch was deceased. (Tr. at 173; Sep. App. at 73). Therefore, Landeis shows that the premise of Disciplinary Counsel’s claims against Harrie are legally deficient - Harrie did not have a duty or obligation to inform Weir of Ellen’s death any sooner than he did.

In addition to an insufficient legal premise, the evidence shows that the factual basis for Disciplinary Counsel’s arguments are without merit.

**2. The Timing In Which the Answers Were Served And When Harrie Advised Weir Of Ellen Welch’s Death Did Not Cause Prejudice.**

**a. The March 27, 2002 Answer.**

On March 18, 2002, Harrie received limited file materials from Austin Mutual regarding the Muhammed v. Welch lawsuit. The materials Harrie received that day included the Summons and Complaint and the September 13, 2001 letter from the insurance agent forwarding the summons and complaint to Austin Mutual. (See fax headers from Carlton Goughner on Sep. App. at 1-4 and on App. 21-22). Contrary to the spin put on the documents by Disciplinary Counsel, (See Counsel’s Supp. Brf. at p. 5).

Harrie was not provided a communication directed to him advising that Ellen had died. The September 13, 2001 letter was not addressed to Harrie. Therefore, how that letter was placed in Harrie's file by his staff before it was reviewed by Harrie (and whether it was reviewed by Harrie) when the March 27, 2002 Answer was served, is unknown. (See Tr. at 132-133; Sep. App. at 57-58). More important, the September 2001 letter does not state when Ellen died and does not state upon whom the summons and complaint had been served and/or, if served only by mail, who "signed" for the documents. (See App. at 22). It is also important to note that the materials Harrie was provided did not state or even "indicate" that Weir was ignorant that Ellen Welch was deceased. (See App. at 19-22).

Harrie served the initial Answer to the Complaint on March 27, 2002. (App. 26). March 27, 2002 turned out to be the same day the statute of limitations expired on Muhammed's claim. Section 30.1-19-02, N.D.C.C. extended the statute of limitations by three months due to Ellen's death. See also Estate of Stirling, 537 N.W.2d 554, 558 (N.D. 1995). Thus, because of Ellen's death, the statute of limitations was extended three months past the original six years, i.e., past December 27, 2005. That the statute of limitations was extended by three months was not known to Harrie at the time the Answers were served. (Tr. at 56-57; Sep. App. at 27-28). Yet, Disciplinary Counsel attempts to paint the picture that the fact the Answer was served on the date the statute of limitations expired shows some type of improper motive by Harrie and/or some type of harm or injury as a result of the date the Answer was served. (Counsel's Supp. Brf. at 15). Counsel's attempts are futile.

In Kimball v. Landeis, 2002 ND 162, 652 N.W.2d 330, defendant Landeis's answer to the complaint was served on the day the statute of limitations for plaintiff Kimball's claim expired. 652 N.W.2d at 340. Even though Landeis' attorney knew that the summons and complaint were not properly served because a guardian had been appointed for Landeis and even though the answer did not raise the appointment of the guardian, this Court held that the fact the answer was served on the day the statute of limitations expired was of no consequence. This Court explained that:

The record, however, reflects an affidavit of mailing of Landeis's answer by counsel for Landeis on February 17, 2001, which was the day the statute of limitations expired. Under these circumstances, **Landeis's failure to identify the guardianship in his answer could not have affected Kimball's failure to timely serve Landeis's guardian.**

Id. at 340 (emphasis added). Therefore, as a matter of law, the fact the Answer Harrie served on March 17, 2002 turned out to be served on the date the statute of limitations expired is immaterial. No harm occurred to Mr. Muhammed as a result of the Answer being served on March 27, 2002, the date the statute of limitations expired. The Answer was not received by Weir until March 28, 2002, the day **after** the statute of limitations expired. (Tr. at 160; Sep. App. at 160). Thus, by the time Weir received the Answer it was too late for Weir to do anything to cure the improper service, even if the death of Ellen Welch had been disclosed in the Answer. See Landeis, supra. at p. 340. Also, as shown by Landeis, the fact the Answer did not identify that Ellen Welch was deceased "could not have affected (Weir's) failure to timely serve" the Complaint. Id.

Disciplinary Counsel contends that if the Answer had indicated that Ellen was deceased, Weir could have taken steps obtain proper service. (Counsel's Supp. Brf. at pp 11-12). That Weir could have done anything on the day the Answer was received to

properly appoint a special personal representative in Minnesota to accept service is, at best, speculative. As explained by Jack Marcil, it is very unlikely, if not impossible, that Weir could have properly served the Summons and Complaint on a special personal representative in one day. (Tr. at 225; Sep. App. at 100).

The evidence also shows that Harrie was not aware, in his own mind, when the first Answer was served on March 27, 2002 that Ellen was deceased or that the statute of limitations expired on that day. Harrie explained, and offered into evidence a time slip (Sep. App. at 103) confirming, that when he prepared and served the March 27, 2002 Answer, he did know in his mind that Ellen Welch was deceased. The time slip shows that on April 9, 2002, Harrie called “Ellen Welch” and left a message for her to call him back. (Sep. App. at 103). Harrie explained during the hearing that the next day he received a call from Pat Welch and had an embarrassing telephone conversation in which Pat Welch advised that Ellen had been dead since 1998. (Tr. at 48, 93-96; Sep. App. at 23, 45-48). Thus, when the first Answer was served on March 27, 2002, Harrie did not know that Ellen was deceased.

Harrie did have in his file when the first Answer was served the September 12, 2001 letter from the insurance agent advising that Ellen was deceased. Harrie voluntarily provided that letter to the Inquiry Committee. Harrie explained during the Hearing that he does not recall reviewing the letter. (E.g., Tr. at 39, 45; Sep. App. at 19, 22). Alleged sloppiness or even negligence in not picking up on the important facts in the September 12, 2001 letter from the insurance agent is not sufficient to support a disciplinary complaint. E.g. Disciplinary Board v. Hoffman, 2005 ND 153, 703 N.W.2d

345, par. 9. More important, being "sloppy" is not sufficient to support the very serious claims in this case, i.e., a knowingly false, deceitful or fraudulent act.

That Harrie was not aware in his mind of Ellen's death when the first Answer was served is unmistakably shown in the documents. First the time slip (Sep. App. at 103) shows Harrie was unaware of her death. The fact he left a message for "Ellen Welch" and had the embarrassing conversation with Pat Welch shows that Harrie did not have in his mind until April of 2002 that Ellen had died. Second, the Answer Harrie served shows that the death was not in his mind at that time. Simply put, if Harrie was aware that Ellen was deceased he would have raised the insufficiency of process/service of process (statute of limitations) defenses in the first Answer. He did not, which shows it was not in his mind at that time. By not raising it in the Answer, Harrie ran the risk of having waived those defenses.

Thus, the evidence shows that Disciplinary Counsel is unable to prove by clear and convincing evidence that the Answer served on March 26, 2002 contains a "knowingly false statement" by Harrie or otherwise violates Rules 4.1 or 1.2A(3).

**b. The April 10, 2002 Amended Answer.**

When Harrie talked with Pat Welch on April 10, 2002, and was advised that Ellen was deceased, red flags started to rise within Harrie's mind with regard to whether the September 2001 service of the summons and complaint was proper. (Tr. at 48-51; Sep. App. at 23-26). Harrie asked Pat Welch, among other things, how the summons and complaint were served and whether a personal representative had been appointed. (Tr. at 49-50; Sep. App. at 25-26). After visiting with Pat Welch, Harrie was not sure if some other method of service, besides by mail, had been implemented by Pat Weir. Harrie

As explained by the attorneys who testified during the Hearing, Answers in motor vehicle accident cases basically just raise the applicable affirmative defenses. That a defendant is dead is not an affirmative defense that must be raised under N.D.R. Civ.P. 8 (2005). Thus, in amending the answer, Harrie raised the affirmative defenses that applied

Weir, Harrie did his homework.

Harrie did not make accusations to Weir regarding any alleged improper service or issues with the claim being barred. Those are serious allegations that are not made until all the facts are known. (See Tr. at 100-101; Sep. App. at 51-52). An attorney should not loosely allege that another attorney has failed to comply with the statute of limitations. Rather, the attorney gets all the facts and researches the issue. That is what Harrie did when he requested, in the cover letter serving the Amended Answer on April 10, 2002 (App. at 26), that Weir provide evidence of service, and in also following up with research on the issue. In other words, before making strong accusations against

48-49).

Harrie, however, was also concerned as to whether he had waived the affirmative defenses of insufficiency of process and service of process so he quickly sent an Amended Answer to Pat Weir raising those defenses. (Tr. at 94-95; Sep. App. at 46-47). Other than raising those defenses, nothing from the original Answer was changed because, again, the caption could not be changed by Harrie. (Tr. at 96-97; Sep. App. at

at 8).

limitations. (Tr. at 49-50; Sep. App. at 24-25). Harrie so informed Goughner (Sep. App. conduct some research to determine whether there was an issue regarding the statute of wrote Weir to get evidence of service. (Tr. at 26; Sep. App. at 51). Harrie also had to

based on the information he had received, i.e., the insufficiency of process and service of process.

**c. Weir becomes aware of Ellen Welch's death.**

After Harrie received attorney Weir's May 9, 2002, letter (App. 30) providing the evidence of service, i.e. a copy of the "green card" from the post office showing that the only service of the summons and complaint was via certified mail signed by Pat Welch, (App. 32) Harrie completed his research and concluded that there was an issue with the service and the statute of limitations. He then wrote Pat Weir on May 23, 2002 and advised him of those issues. (App. 33 – 34) In doing so, Harrie explained that because Ellen was dead the service was improper. (App. At 33).

It is important to note that the attorney representing the defendant for whom a guardian was appointed in the Landeis case was aware of the appointment, yet this Court held that the attorney did not have a duty to disclose the appointment to the other side, even if that meant the action would remain improperly served so the statute of limitations could run. 652 N.W.2d at 340. In other words, while one could argue that the attorney representing the defendant in Landeis set up the plaintiff's attorney for a later statute of limitations defense, that is not what happened in this matter. To the contrary, the uncontroverted evidence shows that Harrie was **not** trying to set up Pat Weir.

Harrie was advised that he had until April 15, 2002 to serve the Answer. (App. At 20). If Harrie had intended to "set up" Muhammed or Weir, Harrie simply would have waited until April 15; served the answer; advised that Ellen was dead; alleged insufficiency of process and service of process; and, advised Weir that the claim was barred by the statute of limitations. Weir testified during the Hearing that the fact Harrie

did not wait until April 15 and then raise the statute of limitations defense shows that Harrie was not, as Weir explained, “trying to sandbag” him or “lay in the weeds” so as to be able to raise a statute of limitations defense. (Tr. at p. 176 – 178; Sep. App. at 74-76). Thus, contrary to Disciplinary Counsel’s unsupported conclusion, Harrie’s serving the Answer on March 27, 2002 and the Amended Answer on April 10, 2002, was not a “conscious decision not to disclose Welch’s death” in a manner to take advantage of any statute of limitations defense. (See Counsel’s Supp. Brf. at p. 15).

Disciplinary Counsel’s brief intimates that Harrie’s May 23, 2002 letter to Weir (App. 33-34) advising Weir of the statute of limitations defense was done to somehow take advantage of the situation. (See Counsel’s Supp. Brf. at 6). In the May 23 letter, Harrie advises Weir that Harrie “would see if Austin Mutual is willing to offer money if you are interested in settlement.” (App. At 33). That language was placed in the letter as a professional courtesy to Pat Weir to see, even though there may be a statute of limitations defense, if the case could still be settled. (Tr. at 102-103; Sep. App. at 53-54). Weir testified during the hearing that he did not view that language, or Harrie’s letter, to be an attempt to take advantage of a situation. Rather, Weir correctly interpreted the letter as providing a professional courtesy. (Tr. at 171; Sep. App. at 72). Disciplinary Counsel is again, with all due respect, trying to spin the evidence to somehow find a violation of Rule 4.1 and 1.2A(3).

Therefore, the first argument raised by Disciplinary Counsel, that Harrie engaged in an “omission” regarding Ellen Welch’s death, is insufficient legally and/or factually to establish by clear and convincing evidence that Rules 4.1 or 1.2A(3) were violated.

**B. Harrie Did Not Make An Affirmative Representation That Falsely Suggested That Ellen Welch Was Alive.**

Disciplinary Counsel's second argument is that Harrie "made affirmative representations that falsely suggest that Ellen Welch was still living." (Counsel's Supp. Brf. at 8). There is no evidence that Harrie made any statement to Weir or anyone else that Ellen was alive. That is not, and cannot, be the claim. Rather, Disciplinary Counsel claims that merely a "false suggestion" is sufficient to carry his very high burden of proof. Disciplinary Counsel argues that "by submitting an Answer and Amended Answer on behalf of 'Defendant Ellen Welch,' and by not taking any corrective action until May 23, 2002, Harrie made affirmative representations that falsely suggested Ellen Welch was still living." (Counsel's Supp. Brf. at pp 8-9). Counsel then concludes, without any supporting authority, that such conduct violates Rules 4.1 and 1.2A(3). Again, Disciplinary Counsel's allegation is incorrect. *Id.* at p. 9.

Disciplinary Counsel cites no legal authority to support the argument that a "false suggestion" equates to a "knowingly false statement." To the contrary, as explained above, more is required, *e.g.* motive and materiality. If anything, the argument that a "false suggestion" is sufficient further shows that Disciplinary Counsel must prove improper motive.

Disciplinary Counsel claims that the boilerplate phrase "Defendant Ellen Welch," contained in the Answers served by Harrie, "falsely suggested" that Ellen was still living. (Counsel's Supp. Brf. at p. 8). That boilerplate language is in the introductory paragraph to the Answers and in the prayer for relief. (App. At 24, 25, 27, 29). The Answers also

provide that "The Defendant Ellen Welch demands a trial by jury of nine." (App. At 25 and 29). Those phrases are not allegations of fact and do not falsely suggest any fact.

As explained by the attorneys who testified at the Hearing, such language is standard, boilerplate language commonly used in Answers. Weir simply testified that there was nothing in the Answers Harrie served that changed his assumption that Ellen Welch was alive. (Tr. At 178 – 179; Sep. App. at 76-77). Weir did not testify that the "Defendant Ellen Welch" language lead him to conclude that Ellen was alive. Moreover, Bradley Beehler and Jack Marcil both testified that it would not be reasonable to rely on the "Defendant Ellen Welch" language as any kind of statement or representation that Ellen was alive. (Tr. 198-199, 223-225; Sep. App. at 87-88, 98-100). All of the attorneys testified that the boilerplate language simply takes the name of the defendant off the caption, a caption which Harrie could not change, and incorporates the name into the introductory language and request for a jury trial. (Tr. 87, 165-166, 196, 222; Sep. App. at 43, 69-70, 85, 97). If there is an error in the name of the Defendant, that error can be cured at a later time. (E.g., Tr. 92, 165, 196-197, 222-223; Sep. App. at 44, 69, 85-86, 97-98). Also, as explained during the Hearing, if a jury trial is not timely demanded it can be waived. (Tr. 97, 168; Sep. App. at 49, 71).

Disciplinary Counsel's argument regarding the "Defendant Ellen Welch" language is incorrect. That phrase was neither "an affirmative representation" nor a "false suggestion" that Ellen was still living. The "Defendant Ellen Welch" language is not a false statement that Harrie "knowingly" made. There simply are no facts to support a conclusion that in using the boilerplate language that Harrie knowingly made a false statement.

The evidence shows that there was no ulterior motive behind the use of the boiler plate language, e.g., to set up Muhammed for a statute of limitations defense. The relationship between Weir and Harrie; the importance of an attorney's reputation for honesty and truthfulness, especially in the close knit arena of attorneys handling motor vehicle accident cases; Harrie's reputation for honesty; the type of case in question, a straight forward, low value motor vehicle accident case; and, the ramifications of making false statements within the arena or representing defendants in motor vehicle accident cases; all show that there simply was no motive for Harrie to "falsely suggest" anything to Weir, including that Ellen was alive.

Disciplinary Counsel's argument that the "Defendant Ellen Welch" language is significant appears to arise out of a misapplication of this Court's decision in Muhammed v. Welch, and other case law. In Muhammed, this Court did not reverse the trial court's granting of summary judgment because of any finding of "fraud" or because of any finding that Harrie was involved in "lulling" Weir or Mr. Muhammed into a false sense of security. To the contrary, this Court reversed on the issue of equitable estoppel, finding that there were fact questions on whether the insurance company and its adjuster, not Harrie, lulled Weir into a false sense of security and whether Weir himself should have known of the fact of Ellen's death. Muhammed v. Welch, 675 N.W.2d 402, 414 (N.D. 2004). The portion of the Muhammed decision cited by Disciplinary Counsel on page 4 of Counsel's Supplemental Brief only states that there are questions of fact as to whether the insurance company and adjuster had a duty to disclose Ellen's death in light of obtaining the extension of time to answer. That quotation does not refer to Harrie and, in fact, Disciplinary Counsel had to place Harrie's name in brackets to somehow try to

implicate Harrie in that language. Regardless of how Disciplinary Counsel quotes from Muhammed, the decision simply does not provide that the Answers Harrie served were a knowingly false statement in violation of Rule 4.1, or is conduct falling within Rule 1.2A(3).

Therefore, a complete review of the evidence and applicable law shows that Harrie's Answers did not contain any "knowingly false" statement in violation of Rules 4.1 or 1.2A(3).

**C. The Cases Cited By Disciplinary Counsel Do Not Support A Claim For Discipline In This Matter.**

In addition to ignoring Landeis, Disciplinary Counsel's Post-Hearing Brief cites case law and ethics opinions from jurisdictions other than North Dakota, all of which are distinguishable. Before discussing the ethics opinions cited by Disciplinary Counsel, it must be remembered that Ethics Opinions from the ABA, or other jurisdictions, are not controlling or binding. They are just an opinion from the members of the respective committee at that time. Also, a complete review of the ethics opinions on a duty to disclose the death of a client shows they are based on either a finding of harm to the opposing party and/or apply different language than in Rule 4.1 N.D.R. Prof. Conduct.

For example, Disciplinary Counsel relies on an ABA Formal Opinion 95-397 to support the claims against Harrie. (Counsel's Supp. Brf. at 7). As shown in the block quote from ABA Op. 95-397 set out in Disciplinary Counsel's brief, the ABA committee merely found that when the death of a plaintiff client occurs during settlement negotiations the plaintiff's attorney must advise opposing counsel. The reason is because failing to advise the other side, during settlement negotiations, that a plaintiff has died is harmful in that the claimant's death is relevant to the settlement amount paid. If it is

known that the claimant is deceased then the damages claimed, for such things as future damages, are greatly impacted

In this matter, at the time the Answers were served the parties, Harrie and Weir were not in any kind of settlement negotiations. (Tr. at 105; Sep. App. at 55). Also the decedent in this matter, Ellen Welch was not the decedent/plaintiff and, therefore, her death would not materially impact the value of Mr. Muhammed's damages.

More important, ABA Op. 95-397 is premised on the ABA's version of Rule 4.1, which has different applicable language than North Dakota's rule. Specifically, the official comments to ABA Rule 4.1 provide that "misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." (See Addendum A attached). Conversely, North Dakota's official comment to Rule 4.1 does not have the "omissions are the equivalent of affirmative false statements" language. (See Comment to N.D.R.Prof. Conduct 4.1 (2006)). Therefore, the underlying basis for a finding of an omission, as set out in ABA Op. 95-397, is not applicable under North Dakota's Rule 4.1. To so find results in the insertion of a provision in the rule or the official comment that was specifically omitted when the rule and comment were adopted in North Dakota.

Missing from Disciplinary Counsel's brief is any discussion of the ethics opinions showing that there is not a duty to disclose the death of a client under the circumstances in this matter. For example, in 1993 the Pennsylvania Ethics Committee determined that a lawyer who is negotiating a settlement for a client in a medical malpractice case does not have to affirmatively reveal that the client has died suddenly from unrelated causes. (Addendum B attached). Similarly, the Ethics Committee from the Virginia State Bar

found that it was **NOT** improper for an attorney not to disclose the death of his client to an insurance company absent a direct inquiry from the insurance company regarding the client's health. (Addendum C attached). The attorney did not have to disclose the client's death until the offer of settlement is accepted. Id.

Disciplinary Counsel's Post-Hearing Brief also references a limited section of a legal treatise, the ABA/BNA Manual on Professional Conduct. (Counsel's Supp. Brf. at 7). Again, that "manual" is not controlling authority. Moreover, the section of the Manual quoted by Disciplinary Counsel merely affirms that ethical opinions and case law have found a duty to disclose the death of a client when settlement negotiations are taking place and, therefore, when harm will occur to the other party from a non-disclosure. In other words, ethics committees and courts that have addressed the issue have required some showing of motive, i.e., taking advantage of settlement negotiations, and harm to the other side, e.g., a larger settlement amount is paid than would have been paid if it was known that the claimant was deceased. No such showing was made here.

Disciplinary Counsel also cites a number of cases, in string cite format, on pages 5- 6 of his Post-Hearing Brief. The May 3, 2006 letter from the North Dakota Supreme Court's Clerk serving this Court's Order Granting Petition for Review, advised the parties that "supplemental briefs" can be filed. Therefore, Harrie is not restating the discussion in Respondent's (Harrie's) Response brief filed with the Court. As explained in that response brief, the cases from the other jurisdictions cited by Disciplinary Counsel are based upon a finding that the death of a party was concealed **during settlement negotiations** and/or that there was a **continuing course of dishonesty and deceit regarding the death of a party** and/or a **finding of an improper motive** in failing to

disclose the death of a client and harm resulting to the opposing party as a result of such non-disclosure and/or those cases are **based on different language** contained in Rule 4.1 or the comment to that Rule. (See Respondent's Response to Petition For Review at pp. 14 – 18). An example is Counsel's reliance on Yoh v. Hoffman, 29 Kan.App.2d 312, 27 P.3d 927 (2001).

Disciplinary Counsel apparently believes that Yoh stands for the proposition that anytime an attorney has signed an Answer as "Attorneys for Defendants" a fraud has occurred if the defendant is deceased. (Counsel's Supp. Brf. pp, 8, 12). That is incorrect.

In Yoh, a summons and complaint were served in a motor vehicle accident case by serving the defendant's dwelling. 27 P.3d at 929. At the time of the service, the defendant was deceased. Id. In affirming denial of summary judgment on the basis of the statute of limitations, the Kansas Court of Appeals applied a Kansas statute that allows pleadings to be amended to name the correct party when it is shown that the action was instituted within the limitation period; the opposing party is not prejudiced if the proper party is named; and, the opposing party knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the proper party. 27 P.3d at 930 – 931. The Yoh court found those elements to be met because the facts showed as follows:

1. Both the insurance company and the attorney hired to defend the case "were fully aware of plaintiff's ignorance of the defendant's death at the time of the filing of the original petition." Id. at 931. In this case, it is undisputed that Harrie was unaware of Weir's ignorance that Ellen was deceased.
2. The estate, its counsel and the insurance company conspired in a long-term deliberate deception of the opponent and the court. Id. In this matter, there is no evidence to even suggest a "conspiracy" or a "long-term deliberate deception" involving Harrie. Also, there is no evidence that either Harrie or

Weir were aware until well after the fact that the actual date the statute of limitations ran was on March 27, 2002.

Disciplinary Counsel quotes the following phrase in Yoh: “knowingly **filing** a pleading on behalf of a dead person as though he or she is still alive is fraud.” (Counsel’s Supp. Brf. at p. 8.) That phrase is simply a statement that failing to advise a court that a party is deceased can be a fraud on the court. Again, however, that is not what happened here. Harrie never **filed** a pleading with the court. Harrie never filed a motion or appeared at any court hearing in which the issue of Ellen’s death was unknown. The issue of Ellen’s death would have been taken care of before, or as part of, any initial filing with the Court. Finally, the Yoh Court based its decision on a finding of a “long-term and deliberate” “conspiracy” undertaken to deceive the plaintiff to take advantage of a possible statute of limitations defense. 27 P.3d at 931. Finally, as explained above, Disciplinary Counsel’s application of Yoh is inconsistent with the North Dakota Supreme Court’s holding in Landeis.

The bottom line is that the legal authority and facts surrounding this matter do not support the Disciplinary Counsel’s allegations. If there is a Rule that an attorney must immediately notify an opponent of the death of the attorney’s client, absent something more, such as a showing of improper motive or materiality/”injury” in any delay in so advising, then there should be a specific rule so stating and the bar should be advised. An enforcement proceeding is not the appropriate method in which to change a rule or write a new rule, especially when considering this Court’s decision in Landeis. A retroactive reversal or repeal of Landeis should not occur in an enforcement proceeding, especially in a proceeding with the facts of this case.

#### IV. NO SANCTION IS WARRANTED.

Disciplinary Counsel recommends that the Panel order a reprimand, plus payment of cost and expenses. (Counsel's Supp. Brf. at p. 15). The evidence and law show that Counsel has not met the very high burden of proving a violation of Rule 4.1 or 1.2A(3).

In addition to failing to meet the very high burden of proof, Disciplinary Counsel's discussion of the sanctions further shows overreaching and a myopic view of the evidence. While agreeing that Harrie did not act intentionally, Counsel argues that Harrie acted "knowingly" under Standard 5.13, N.D. Stds. Imposing Lawyer Sanctions and "negligently" under Standard 6.13. (Counsel's Supp. Brf. at pp 14 – 15). To support his argument that Harrie acted "knowingly", Disciplinary Counsel argues that:

In the exercise of free will, Harrie waited until his research was complete, and he was sure his opponent had missed the statute of limitations, before disclosing the death of Ellen Welch. It's really not very complicated: Harrie knew Ellen Welch was dead but for a period of time made a conscious decision not to disclose Welch's death to his litigation opponent. Accordingly, Harrie acted "knowingly" for purposes of Standard 5.13 ... ,

Id. at p. 15. Again, Counsel is making an argument that simply is not supported by the facts – there simply is no evidence submitted by Counsel showing that Harrie waited to disclose Ellen's death until he was sure Weir had missed the statute of limitations or that Harrie made any conscious decision not to disclose Ellen's death to Weir.

Counsel also claims that "Harrie acted negligently for purposes of Standard 6.13." (Counsel's Supp. Brf. at 15). It must again be noted that "negligence" is not the standard to be used in determining whether there was a violation of Rule 4.1. In re Boulger supra. "Negligence" for the purposes of imposing lawyer sanctions, if a violation of the Rules is found, "is the failure of a lawyer to heed a substantial risk that circumstances exist or that

a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” Definitions, N.D. Stds. Imposing Lawyer Sanctions (2005). There was no showing that Harrie failed to “heed a substantial risk” that a result would follow, which deviated from the standard of care. To the contrary, the testimony from all of the attorneys who testified at the hearing shows that Harrie’s Answers complied with the standard of practice and custom for bodily injury, motor vehicle accident cases.

For example, Bradley Beehler testified that, based on his review of all of the documents in this matter and listening to a majority of the testimony, he likely would have served Answers in this matter the same as Harrie did, e.g., used the standard, boilerplate language “Defendant Ellen Welch (Welch) for her Answer to the Complaint alleges . . .” (Tr. at 206-207; Sep. App. at 89-90). Thus, Disciplinary Counsel has not proven, by clear and convincing evidence, “negligence” for purposes of imposing lawyer sanctions.

Missing from Disciplinary Counsel’s Supplemental Brief is any discussion or recognition that Harrie has no prior disciplinary record; that Harrie fully and freely disclosed information to the disciplinary board and had a cooperative attitude toward the proceeding; and, Harrie’s excellent character and reputation. There also is no proof of a dishonest or selfish motive in the matter at hand.

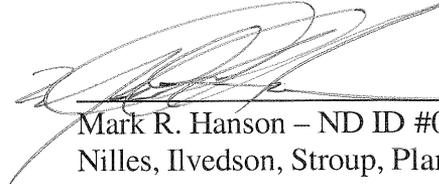
Disciplinary Counsel's Affidavit of Costs and Expenses fails to attach supporting documents to allow a determination as to whether all of the costs and expense are reasonable. The Court, however, need not review any detail on the claimed costs and

expenses because no such award should be ordered. Disciplinary Counsel failed to meet his high burden of proving that Harrie violated Rules 4.1 or 1.2A(3).

### CONCLUSION

For the reasons stated above, Respondent William Harrie respectfully requests that the Court dismiss the Petition for Discipline and that no sanction or costs be ordered.

Dated this 27<sup>th</sup> day of June, 2006.



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# **ADDENDUM**

American Bar Association  
Annotated Model Rules of Professional Conduct, 5th Edition  
June 2003

**RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

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In the course of representing a client a lawyer shall not knowingly:  
(a) make a false statement of material fact or law to a third person; or  
(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

**COMMENT**

**Misrepresentation**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

**Statements of Fact**

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

**Crime or Fraud by Client**

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.



Pennsylvania Bar Association

P.O. Box 186  
Harrisburg PA, 17108  
Phone: (717) 238-6715, or 1-800-932-0311  
Ext. 2229  
Fax: (717) 238-4134

**F A X**

Date: November 21, 2005

To: Mark Hanson, Esq.

Fax Number: 701/280-0762

From: MaryAnne Delaney  
Member Service Center

# of pages including cover sheet: 2 6

As requested

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ETHICS OPINIONS ARE AUTHORED BY THE PENNSYLVANIA BAR ASSOCIATION COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY.

**CAVEAT: BE ADVISED THAT ALL OPINIONS DATED PRIOR TO JANUARY 1, 2005 WERE WRITTEN UNDER THE PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT THEN IN EFFECT. ALL OPINIONS WRITTEN SUBSEQUENT TO JANUARY 1, 2005 ARE WRITTEN UNDER THE AMENDED RULES OF PROFESSIONAL CONDUCT OR NEW RULES OF PROFESSIONAL CONDUCT DRAFTED PURSUANT TO THE ABA ETHICS 2000 COMMISSION'S RECOMMENDATIONS.**



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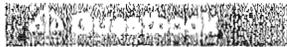
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**COMMITTEE ON LEGAL  
ETHICS AND PROFESSIONAL  
RESPONSIBILITY**

March 10, 1993

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INQUIRY 193-51

Inquirer represents a client who, it is alleged, became blind because of the malpractice of an eye doctor. A claim was filed with the basic coverage insurance carrier which, believing that the value of the claim exceeded the basic insurance coverage, notified the director of the Medical Professional Liability Catastrophe Loan Fund in accordance with 40 P.S. 1301.702(c). The claim is being evaluated by the fund and Inquirer is anticipating a settlement offer. However, the client has suddenly died of a cause unrelated to the alleged malpractice.

Inquirer's question is whether under the Rules of Professional Conduct he must promptly inform the Fund of the client's death. It is Inquirer's opinion that his client's case will be damaged by revealing the death at this stage.

The pertinent Rules are 3.4(a) and 4.1.

Rule 3.4 Fairness to Opposing Party and Counsel, provides:

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 a document or other material having potential evidentiary value or assist another party to do any such act;

Failing to report the fact of the client's death does not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value...". The death is a matter of public record, available to anyone who takes the trouble to look for it.

"A general operating principle for American litigators is that evidence known to them is private and proprietary. A party or lawyer who learns of evidence has no general professional or legal obligation to reveal it either to an adversary or to the fact finder. Such information is considered to be the product of the effort, or the plain luck, of the knowing party and, at least in a prima facie sense, "belongs" to the party whose luck, effort, and resources unearthed it. The evidence can, of course, be revealed when deployed in a hearing or trial for the benefit of the lawyer's client. But neither lawyer nor client

is under any obligation to come forward unbidden with information that is unknown to the other side, even if the other side will surely lose its case in the absence of knowledge of that evidence. The other side must find its own admissible evidence and cannot in any way rely on a duty of the opposing party to volunteer favorable evidence."

Wolfram, Modern Legal Ethics, § 12.3.2, pp. 639-40.

Supporting cases are cited in footnote 32, p. 640, which concludes, "But cf., e.g., Toledo Bar Ass'n v. Fell, 51 Ohio St. 2d 33, 364 N.E. 2d 872 (1977)...". A copy of the opinion at 364 N.E. 2d 872 is attached.

While the Fell case bears a superficial resemblance to the present situation, the Court's brief opinion makes clear that the case was decided under the broad language of the DR 1-102(A) and DR 7-102(A) of the Code of Professional Responsibility. Inquirer's conduct is regulated by the more specific language of Rule 3.4(a) of the Rules of Professional Conduct. Further, in the Fell case the respondent's "primary motive in withholding such information was to gain for himself a fee to which he was not entitled, but yet received."

Rule 4.1 Truthfulness in Statements to Others, provides:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Comment states:

Misrepresentation:

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

The above-quoted Comment on 4.1(a) that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts", confirms the view expressed by Wolfram, *supra*. Rule 4.1(b), requiring disclosure to avoid aiding and abetting a criminal or

fraudulent act of the client, has no application to the present inquiry. Death is not a crime or fraud.

Inquirer was advised, however, that since the fact of the client's death will be relevant if the matter proceeds either to settlement or suit, inquirer should consider the full implications of Rules 3.4(a) or 4.1(a).

**CAVEAT:**

THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. IT CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT. MOREOVER, THIS IS THE OPINION OF ONLY ONE MEMBER OF THE COMMITTEE AND IS NOT AN OPINION OF THE FULL COMMITTEE.

**Virginia State Bar  
Professional Regulation**

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Date: 11/21/05

To: Mark Hanson

FAX #: 701-280-0762

From: Michelle L. Townsend, Paralegal

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Remarks:

A client authorized an attorney to settle his personal injury case within a range of values. A demand was made and a counteroffer was received from the insurer. Following receipt of the counteroffer, the client died and the administrator of the estate authorized the attorney to accept the last settlement offer which was within the range authorized by the client.

It is not improper, given the above, for the attorney not to disclose the death of his client to the insurance company absent a direct inquiry from the insurance company regarding the client's health. The committee opines that in order to avoid an appearance of impropriety, the attorney should disclose the death of his client at the time he accepts the offer of settlement and let the opposing side know that the client authorized the range for settlement prior to his death and that the estate's administrator has also authorized the settlement. [DR 1-102(A)(4)]

Committee Opinion

July 31, 1987

Index Items

Insurance - Settlement Offer



June 24, 1987

VSB/LEGAL ETHICS	
Received	Rec. 6/26/87 Sent 6/26/87
Staff	<u>MLR</u>
Committee	<u>HeTtELL</u>
Special Draft	<u>7/16/87</u>
Chairman's Draft	<u>7/27/87</u>
Publication Date	_____
Summary & Index	_____

Michael L. Rigsby  
 801 East Main Street  
 10th Floor, Ross Building  
 Richmond, VA 23219

Dear Mr. Rigsby:

This is a written request for a legal ethics opinion relating to an attorney's duty to disclose facts to an adverse party.

The question presented, in general form, is as follows: Where a client dies after having authorized an attorney to settle a case for them within a given range, and where there is no misrepresentation of fact, may an attorney accept an existing settlement offer from an adverse party without revealing to the adverse party the death of the client prior to acceptance of the offer? A more detailed discussion of the questions follows.

In the given case, client had authorized the attorney to settle a personal injury case within a range of values. A demand was made while the client was living and a counter-offer was received from the insurer. After receipt of the counter-offer, the client died. Subsequent to the client's death, the client's mother qualified as administrator of the estate and contacted the attorney and authorized acceptance of the last settlement offer of the insurer. This offer was also within the range of values authorized by the client. Under these facts, is the attorney required to disclose the death of the client prior to acceptance of the last offer of the insurer? No representation has been made at all to the insurer since the communication of the last offer.

In this regard, it should be noted that not to accept the offer would not be in the best interests of the client

Michael L. Rigsby  
June 24, 1987  
Page Two

(now the administrator of the estate). In this regard, I examined disciplinary rule 7-102 and have also discovered legal ethics opinion 486. This opinion seems to imply that there is no duty to correct a factual error of a tribunal where no representations had been made.

I would appreciate it if you would present this request for a legal ethics opinion for me. Thanking you for your cooperation and assistance, I am

Sincerely,

RBC:rbm

STATE OF NORTH DAKOTA     )  
  )ss.     **AFFIDAVIT OF SERVICE**  
COUNTY OF CASS             )

BRENDA JO BRUNELLE, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Fargo, North Dakota, not a party to nor interested in the action, and that she served the attached:

**RESPONDENT WILLIAM P. HARRIE'S SUPPLEMENTAL BRIEF**

**RESPONDENT WILLIAM P. HARRIE'S SEPARATE APPENDIX**

On:

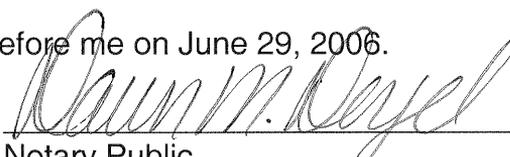
**Brent J. Edison**  
**Assistant Disciplinary Counsel**  
**Disciplinary Board of the Supreme Court**  
**P.O. Box 2297**  
**Bismarck, ND 58502-2297**

Via E-Mail at **bedison@nd.gov** on June 29, 2006 a true and correct copy thereof.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.

  
\_\_\_\_\_  
BRENDA JO BRUNELLE

**SUBSCRIBED AND SWORN** to before me on June 29, 2006.

  
\_\_\_\_\_  
Notary Public

