

BROWN BAG SEMINAR

Thursday, March 19, 2015

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

2nd Floor Conference Room

(use elevator near Starbucks)

1 CLE (including .4 ethics)

Presented by

Craig Eley

Manager of Director's Office
Prehearing Administrative Law Judge
Colorado Division of Workers' Compensation

Sponsored by the Division of Workers' Compensation

Free

This outline covers ICAP and appellate decisions issued from

February 14, 2015 through March 13, 2015

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-917-915-03

IN THE MATTER OF THE CLAIM OF

THOMAS DENNIS,

Claimant,

v.

FINAL ORDER

NABORS DRILLING USA,

Employer,

and

AMERICAN ZURICH INSURANCE
COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated September 16, 2014, that found the claimant's injury to be compensable pursuant to Colorado law. We dismiss the respondents' petition to review without prejudice for lack of a final order.

The claimant was injured while working for the respondent employer in Utah on December 3, 2011. The respondents acknowledged the injury to be work related and have paid temporary disability and medical benefits pursuant to a Utah claim. The claimant contended Colorado also had jurisdiction to award benefits in the claim and requested a hearing. A hearing was convened in the matter on August 19, 2014. At the outset of the hearing the parties stipulated the only issue presented to the ALJ for consideration was that of the application of Colorado jurisdiction to the matter. After review of the parties' documentary exhibits and the testimony of the witnesses, the ALJ concluded the claim was subject to Colorado law. The ALJ found the claimant had sent to the employer an application for employment from his home in Fruita, Colorado. The claimant was contacted shortly thereafter by the employer's human resources administrator. The administrator was calling from Casper, Wyoming, to the claimant while he was in Canon City, Colorado. The ALJ determined the administrator offered the claimant a job in that August, 2011 telephone call. The claimant was required to report for work in Casper where he would be required to pass a physical exam and a drug screen. The claimant did so and was then assigned by the employer to a job site in

Parachute, Colorado. Several weeks later, the claimant was reassigned to Utah where he sustained his left ankle injury.

The ALJ surmised the last act necessary to complete the contract of hire occurred in Colorado in August, 2011, when the claimant accepted the employer's job offer over the telephone. Accordingly, referencing § 8-41-204 C.R.S., the ALJ determined the claimant was entitled to benefits pursuant to the laws of Colorado as an employee "hired" in this state. No benefits were actually ordered.

The respondents have petitioned to review the ALJ's order, arguing that the ALJ erred in ruling that the claimant was hired in Colorado rather than in Wyoming.

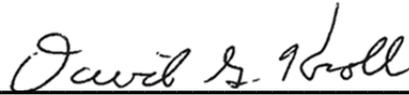
Section 8-43-301(2), C.R.S., provides that a party may petition to review any order which "requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty." Orders which do not award or deny benefits or penalties are interlocutory and not subject to immediate review. *Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). Further, we previously have held that orders determining only compensability are interlocutory. *See Cheney v. Coca Cola*, W.C. Nos. 4-854-583, 4-873-873, (July 9, 2012); *Harley v. Life Care Centers*, W.C. No. 4-810-998 (May 20, 2011); *Gonzales v. Public Service Co. of Colorado*, W.C. No. 4-131-978 (May 14, 1996). Under these principles, our jurisdiction is purely statutory. *See Gardner v. Friend*, 849 P.2d 817 (Colo. App. 1992). The absence of a final, reviewable order is fatal to our jurisdiction. *See Buschmann v. Gallegos Masonry, Inc.*, 805 P.2d 1193 (Colo. App. 1991).

Here, the ALJ addressed the limited issue of whether the work injury claim was compensable under Colorado law. The order does not require the respondents to pay any particular disability or medical benefit as a result of that determination. Additionally, the parties stipulated that all other issues are preserved for future hearings or resolution. Tr. (August 19, 2014) at 5. Under these circumstances the ALJ's order is not final and reviewable and the respondents' petition to review must be dismissed without prejudice. *McNeley v. AMS Staffing*, W.C. No. 4-511-838 (October 14, 2004); *Thomas v. Four Corners Health*, W.C. No. 4-484-220 (December 17, 2002); *Canales v. City and County of Denver*, W.C. Nos. 4-476-907, 4-476-906 & 4-356-910 (July 10, 2002).

IT IS THEREFORE ORDERED that the respondents' petition to review the ALJ's September 16, 2014, order is dismissed without prejudice.

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INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

THOMAS DENNIS
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CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

_____ 3/4/2015 _____ by _____ RP _____ .

THE MINTZ LAW FIRM, Attn: LANE N. COHEN, ESQ., 605 PARFET STREET, #102,
LAKEWOOD, CO, 80215 (For Claimant)

CLIFTON & BOVARNICK, P.C., Attn: JAMES R. CLIFTON, ESQ, 789 SHERMAN STREET,
SUITE 500, DENVER, CO, 80203 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-897-030-02

IN THE MATTER OF THE CLAIM OF

MISTY KEEL, dependent of JOHN ERIC KEEL,
and RILEY COOPER KEEL,

Claimants,

v.

FINAL ORDER

TRANSPORTATION TECHNOLOGY SERVICES,

Employer,

and

ACE AMERICAN INSURANCE COMPANY
CARRIER NO 494C186588-6,

Insurer,
Respondents.

The claimants seek review of an order of Administrative Law Judge Allegretti (ALJ) dated October 16, 2014, that re-calculated the interest due and owing on past due Colorado death benefits. We affirm.

This matter previously was before us. In an order dated April 1, 2014, we remanded the matter to the ALJ to re-calculate the applicable interest due and owing on past due Colorado death benefits. On October 16, 2014, the ALJ entered her Order on remand and re-calculated the interest. She ordered the respondents liable for 8% interest pursuant to §8-43-410(3), C.R.S. on the total amount of \$41,841.08 of past due Colorado death benefits.

The ALJ previously found that the deceased employee was killed on October 27, 2010, in a Colorado industrial accident. At that time, the deceased and his wife and son were residents of Mississippi. A claim for workers' compensation benefits initially was brought in the state of Mississippi for the decedent's death. The respondents admitted the claim under Mississippi's Workers' Compensation Code, and began paying benefits commencing on October 28, 2010. The respondents admitted for a compensation rate of \$337.58.

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The claimants, the wife and son of the deceased, later made a claim for death benefits under Colorado's Workers' Compensation Act. A hearing ultimately was held before ALJ Friend on the claimants' claim. On April 3, 2013, ALJ Friend determined that Colorado had jurisdiction over the claimants' claim. ALJ Friend, however, did not determine the decedent's average weekly wage under Colorado law, the equitable division of death benefits between the claimants, or offsets for the receipt of Social Security benefits or for workers' compensation benefits paid under the Mississippi claim.

On September 3, 2013, the respondents filed a Fatal Case - General Admission in Colorado. The respondents admitted for the maximum temporary total disability rate of \$1,216.00 for a weekly compensation rate of \$810.67.

On September 20, 2013, the respondents filed a Fatal Case - Amended General Admission, admitting for death benefits under Colorado's Workers' Compensation Act. The Amended General Admission took a 50% offset for the receipt of Mississippi workers' compensation benefits in the amount of \$168.79 per week from the date of the incident to the filing of the Amended General Admission, and a Social Security offset in the amount of \$190.38 per week since the date of the incident forward. The Social Security offset was computed based on each claimant receiving Social Security benefits totaling \$825.00 per month. Thus, per the Amended General Admission, the respondents admitted for a weekly rate of \$451.50 per week in Colorado death benefits. Multiplying the \$451.50 weekly rate by the 148 week period from October 28, 2010, through August 28, 2013, yielded a total amount of \$66,822 in past due Colorado death benefits. The Amended General Admission also admitted for benefits from August 29, 2013, and ongoing at a weekly rate of \$620.29.

It is undisputed that between the day after the decedent's death and the filing of the respondents' General Admission in Colorado, the respondents paid the claimants a total of \$49,961.84 under Mississippi's Workers' Compensation Code. The respondents also paid 8% interest on \$16,860.16, or the difference between the workers' compensation benefits that actually were paid to the claimants under Mississippi's Workers' Compensation Code (\$49,961.84), and the workers' compensation benefits that they assert should have been paid under Colorado's Workers' Compensation Act (\$66,822.00).

Thereafter, the claimants, the wife and son of the deceased, filed an application for hearing listing the following as issues to be heard: amount of Colorado death benefits for which the insurer is liable, offsets of Social Security Survivor benefits, and Mississippi worker's compensation death benefits.

Prior to the hearing, the claimants filed a summary judgment motion, arguing that the respondents miscalculated past-due and ongoing death benefits, miscalculated the amount of interest due and owing on past-due death benefits, and miscalculated the Social Security offset by using 52 weeks rather than 52.14 weeks for the number of weeks in a year. The respondents filed a cross-motion for summary judgment, arguing that they corrected the Social Security offset, and they filed an Amended General Admission reflecting the correct offset. The respondents further argued they correctly calculated death benefits and interest.

The ALJ subsequently granted the respondents' cross-motion for summary judgment, determining that the respondents correctly calculated the amount of interest due and owing to the claimants on the past due death benefits. The ALJ found that between the day after the decedent's death and the respondents filing of their General Admission in Colorado, the respondents paid the claimants \$49,961.84 under Mississippi's Workers' Compensation Code. The ALJ found that since the claimants would have received \$66,822 for the same time period under Colorado's Workers' Compensation Act, the claimant lost use of \$16,860.16. The ALJ further found that the respondents correctly paid the claimants 8% interest on the \$16,860.16. The ALJ also determined the respondents correctly calculated the Social Security offset as being \$190.38 per week.

The claimants appealed to the Panel. We remanded the matter for the ALJ to recalculate interest due on past due Colorado death benefits. We determined that the 8% interest in §8-43-410(2), C.R.S. should be applied to the amount of Colorado death benefits that were due and owing to the claimants and not paid by the respondents. Using the ALJ's findings, we concluded that this amount totaled \$41,841.08. In our order, we also determined that the claimants were not entitled to recover full duplicate benefits under both Colorado's Workers' Compensation Act and Mississippi's Workers' Compensation Code.

On remand, the ALJ entered an order ruling that the respondents were liable for 8% interest on Colorado death benefits totaling \$41,841.08. Per our remand, the ALJ calculated this amount as follows:

Colorado death benefits: \$620.29 per week x 148 weeks =	\$91,802.92
Mississippi benefits paid:	-\$49,961.84
	<hr/>
Total Colorado benefits on which to pay 8% interest:	=\$41,841.08

Using the Colorado Division of Workers' Compensation Benefits Calculator Program, with a beginning date of unpaid benefits of October 28, 2010, and an ending date of unpaid benefits of August 28, 2013, as well as a bi-weekly benefit amount of \$565.54, the total amount of interest accrued equals \$5,052.02.

I.

The claimants again have appealed. Throughout their brief in support, the claimants have raised numerous arguments that are difficult to understand. The claimants appear to argue that the ALJ exceeded her authority when she ordered that they were not entitled to recover full duplicate benefits under Mississippi's Workers' Compensation Code and Colorado's Workers' Compensation Act. The claimants argue that they never sought full duplicate benefits from both Mississippi's Workers' Compensation Code and Colorado's Workers' Compensation Act. The claimants also contend that under §8-42-114, C.R.S. of Colorado's Workers' Compensation Act and under the Mississippi Workers' Compensation Code, they can recover concurrent workers' compensation benefits. The claimants argue that under the United States Supreme Court case in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 286, 100 S. Ct. 2647, 2663, 65 L. Ed. 2d 757 (1980), the Full Faith and Credit Clause of the United States Constitution does not require any state to subordinate its own compensation policies to those of another state. Thus, the claimants contend that since the \$49,961.84 in death benefits was paid first in Mississippi, the respondents do not get a credit for that payment. Since the Colorado claim was second, or successive, the claimants contend that the respondents were obligated from the date of the decedent's death to pay the Colorado benefits reduced only by the Social Security offset and an offset for 50% of the Mississippi payments via §8-42-114, C.R.S.

Section 8-42-114, C.R.S., the statutory provision governing offsets for death benefits paid to dependents of a deceased worker under Colorado's Workers' Compensation Act, provides as follows:

In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages. . . In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits. (emphasis added)

We initially note that neither the Panel nor the Colorado appellate courts have interpreted the pertinent provision of §8-42-114, C.R.S. regarding death benefits payable from the workers' compensation act of another state. Consequently, the principles of statutory construction require that we construe the statute to give effect to its legislative purpose. *Grogan v. Lutheran Medical Center, Inc.*, 950 P.2d 690 (Colo. App. 1997). To discern the legislative intent, we must first give the words in the statute their plain and ordinary meanings. A forced, subtle, or strained construction of the statute should be avoided if the language is simple and the meaning is clear. *Snyder Oil Co. v. Embree*, 862 P.2d 259 (Colo. 1993); *Grogan v. Lutheran Medical Center, Inc.*, *supra*. Where the statute is part of a comprehensive legislative scheme, the statute must be considered in relation to the other provisions to give effect to all its parts as well as the legislative intent. *See Gonzales v. Advanced Components*, 949 P.2d 569 (Colo. 1997); *DeJiaco v. Industrial Claim Appeals Office*, 817 P.2d 552 (Colo. App. 1991).

It is true, as the claimants argue, that §8-42-114, C.R.S. permits successive awards from both Colorado and the workers' compensation act of another state. In holding that successive awards do not violate the Full Faith and Credit Clause of the United States Constitution, the United States Supreme Court stated as follows:

We therefore would hold that a State has no legitimate interest within the context of our federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its work[ers'] compensation law in the first instance. The Full Faith and Credit Clause should not be construed to preclude successive work[ers'] compensation awards.

Thomas v. Washington Gas Light Co., 48 U.S. at 284; *see also* U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). Further, in Larson's Workmen's Compensation Law, Vol. 9, §141-1, it provides as follows:

More than one statute can apply to a single compensable injury, so long as each state has a relevant interest in the case. Successive awards can be made in different states, deducting the amount of the first award from the second.

Thus, to the extent the claimants argue that we previously ordered, and that the ALJ ordered on remand, that they are not entitled to recover any benefits under the Mississippi's Workers' Compensation Code, neither the ALJ nor we have the authority to make such a determination. Rather, our authority and the ALJ's authority arise under Colorado's Workers' Compensation Act, §8-43-201, C.R.S. And, as noted above, it is

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clear that under §8-42-114, C.R.S., successive awards may be granted, including an award under Mississippi's Workers' Compensation Code. *See* Miss.Code Ann. §§ 71-3-25 & 71-3-109(1); *see also Mandle v. Kelly*, 92 So.2d 246 (Miss. 1957).

The claimants' argument is premised on the phrase in §8-42-114, C.R.S. providing that death benefits granted by the workers' compensation act of another state shall be reduced by an amount equal to 50% of those benefits. The claimants argue that this statute means an award previously made in the context of another state's claim cannot be given credit for more than 50% of its sum towards an employer's obligation to pay higher Colorado benefits for the same employee's death. We perceive that the claimants misapprehend the effect of the Full Faith and Credit requirement and the application of §8-42-114, C.R.S. As noted, the *Thomas v. Washington Gas Light Co.* case provides that art. IV, § 1, does not prevent a state from providing a supplemental award of benefits to a dependent claimant proceeding in two states with connections to an employee's death. However, the state providing the supplemental award must give "credit" to another state's award. This prevents a double recovery which would be the result if "no" credit was extended to that award. Accordingly, the ALJ in this matter was required to conclude the respondents' payment made previously following their admission in Mississippi must be credited to the supplemental payment made in this case pursuant to the Colorado Workers' Compensation Act. This is also the principle set forth in the Restatement, Conflict of Laws, § 403: "Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act [of a second state], ... but the amount paid on a prior award will be credited on the second award."

Section §8-42-114, C.R.S. applies the 50% reduction similarly to awards from other states and to awards pursuant to the Social Security Act. The purpose for exacting only a 50% reduction is to provide a claimant an incentive to pursue Social Security benefits. The claimant thereby is able to secure additional funds and the employer/insurer can obtain some relief from the cost of the claim. By applying the same offset to Social Security benefits and to workers' compensation death benefits in the same sentence, the legislature viewed these funds as possessing some common features. They are both other sources of monies paid to compensate for the same loss. As applied to workers' compensation death benefits, the offset also seeks to provide the same incentive to a claimant to pursue a second, higher, claim for death benefits from another state. In the process, the claimant and the insurer/employer may realize the same advantage as in the case of Social Security benefits. The 50% offset provision of the §8-42-114, C.R.S., therefore, would apply to the situation where a claim was perfected in Colorado and another claim was pursued in a second state with higher benefits leading to a supplemental award. That supplemental award would lead to a reduction in the benefits

payable under the Colorado act to the extent of 50% of the additional award payable from the second state.

The claimants' argument here would frustrate that goal. If, as argued, §8-42-114, C.R.S. was to serve as a waiver of Colorado's grant of Full Faith and Credit to another state's award of death benefits, and substitute only a 50% credit for that award instead of a full credit, the effect would be to encourage a double recovery with no reduction of any sort in the cost of the claim for the employer/insurer. It would, in fact, serve solely to increase the benefits and the costs by the same factor. The claimants would have the legislature, in the same sentence, achieve a balance of additional benefits and savings in the case of Social Security benefits and a significant imbalance in regard to other states' workers' death benefits.

The claimants' contention is also dependent on a specific chronological order in which awards are obtained in different states. It relies, in effect, on a race to the court house. Pursuant to the claimants' position, if the dependents had achieved a grant of death benefits first in Colorado, there would have been no 50% offset of Mississippi benefits because they had not yet been awarded. However, if the claimants had then gone to Mississippi to obtain a second award of death benefits, they would have failed because Mississippi would have extended Full Faith and Credit to the Colorado award and offset the Colorado benefits entirely. The net effect then, would be an award of death benefits only in the amount set forth in the Colorado law. However, the claimants assert that if the "successive" awards were reversed, and Mississippi death benefits were obtained first, the claimants would achieve a full award of Colorado benefits and an award of one half of Mississippi's. According to the claimants' analysis, by creatively timing their claims, in many cases claimants would receive more in death benefits than the deceased employee was paid in wages.

In adjusting benefits between other states and the Social Security Act, the order of awards has not been of significance. Most often, the claimant receives an award of Social Security benefits after workers' compensation benefits have begun. However, an employee eligible for Social Security retirement benefits even prior to his work injury will also see those benefits offset. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Furthermore, even when the workers' compensation statutes of two states apply to an injury, Colorado holds that its law applies from the date of injury, and not the date a claim was filed or the date of an award. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565(Colo. App. 1987); *Garrard v. United Airlines*, W.C. No. 4-475-678 (March 25, 2002). The concept then, of awards "successive" in time is of little importance.

There are additional difficulties with the claimants' argument that since Mississippi was the first state to award benefits and Colorado was the second, this means that they are entitled to supplemental benefits by giving credit to only 50% of the Mississippi benefits against their Colorado benefits. A similar situation was addressed by the Mississippi Supreme Court in *Southland Supply Co. v. Patrick*, 397 So. 2d 77 (Miss. 1981), and in the case relied upon by the claimants in their brief in support, *Martin v. L & A Contracting*, 162 So.2d 870 (Miss. 1964). In both cases, the Mississippi Supreme Court described the operation of Mississippi law when a claim for benefits originates in Mississippi and is then subject to a second, higher benefit, claim in a second state. In *Southland Supply*, the claimant was initially paid by the employer pursuant to Mississippi's worker's compensation code at the rate of \$63 per week. The claimant then requested benefits of \$85 per week pursuant to the Louisiana workers' compensation law because his injury occurred in Louisiana while on assignment by the employer. The Court ruled the claimant could maintain that claim and receive the higher benefits provided pursuant to Louisiana law "subject to credit for any amounts paid under the Mississippi act." *Southland Supply Co. v. Patrick*, 397 So.2d at 79. The net result was that the claimant achieved nothing pursuant to the Mississippi claim, but instead, received his benefits pursuant to Louisiana law. The Mississippi claim was subsumed, in effect, by the Louisiana claim and nothing was payable due to the Mississippi award. The *Martin* decision similarly held that two awards may be obtained from different states but what is required is "deducting the amount of the first award from the second." *Martin v. L & A Contracting*, 162 So.2d at 872.

Here, §8-42-114, C.R.S. only allows a 50% offset for benefits "payable" after an "award" is granted under another state's worker's compensation act. The sequence or timing of the awards is inconsequential, and the amounts of an award and the amounts "payable" are not interchangeable. *Hurtado v. CF & I Steel Corp.*, 168 Colo. 37, 449 P.2d 819 (1969) (benefits may be 'payable' even in the absence of an award). Section 8-42-114, C.R.S. states the benefits are to be "payable" when construing the application of the 50% offset. Section 8-42-114, C.R.S. prevents a windfall that dependents may receive when they are allowed to collect two awards for the same employee's death. *Cf. Hoffman v. Hoffman*, 872 P.2d 1367 (Colo. App. 1994)(purpose of the social security offset is to prevent injured worker or dependents from receiving duplicate benefits). Pursuant to Mississippi law, however, the second, higher benefits Colorado claim is "subject to any amounts paid under the Mississippi act." This is a dollar for dollar offset. *See Southland Supply Co. v. Patrick, supra; Martin v. L & A Contracting, supra; Larson's Workmen's Compensation Law*, Vol. 9, §141-1. Thus, Mississippi's death benefits are subtracted from the total of Colorado's death benefits, and the remainder is what the claimants are entitled to recover. Since there is a complete credit for the Mississippi

payments, as they are lower than Colorado's benefits, there are no Mississippi benefits payable. Consequently, the 50% offset in §8-42-114, C.R.S. does not apply. Thus, the claimants' argument notwithstanding, they are not entitled to recover full Colorado death benefits minus only 50% of the Mississippi benefits. This occurs because there is now no award from another state that is "payable" to the dependents. Section 8-42-114, C.R.S.

II.

Next, the claimants argue that the ALJ erred in determining that they only are entitled to recover 8% interest on Colorado death benefits totaling \$41,841.08. The claimants contend that in permitting the respondents to offset the entire amount of Mississippi benefits paid, the ALJ's order amounts to a double offset contrary to §8-42-114, C.R.S. The claimants also assert that the ALJ's order allowing 8% interest on Colorado death benefits totaling only \$41,841.08 is in violation of §8-43-410, C.R.S. The claimants argue that they instead are entitled to interest on \$66,822, which they claim is the total amount of Colorado death benefits due and owing, offset for both Social Security benefits and 50% of the Mississippi Workers' Compensation death benefits. We do not agree.

Section 8-43-410(2), C.R.S. provides as follows regarding interest on an award of workers' compensation benefits:

Every employer or insurance carrier of an employer shall pay interest at the rate of eight percent per annum upon all sums not paid upon the date fixed by the award of the director or administrative law judge for the payment thereof or the date the employer or insurance carrier became aware of an injury, whichever date is later. . . .

Interest is a statutory right and applies automatically on the date payment is due. *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987). The date payment is due is the date on which the claimant becomes entitled to the benefits, and not necessarily the date of the ALJ's order. *Subsequent Injury Fund v. Industrial Claim Appeals Office*, 899 P.2d 220 (Colo. App. 1994).

Here, under §8-43-410(2), C.R.S., 8% interest accrues upon benefits not paid when due. Because the respondents were allowed a credit for the payment of Mississippi benefits, and the Mississippi benefits were timely paid, the amount for which the 8% was to be calculated was required to be reduced by the \$49,961 previously paid through the Mississippi claim. *See Garrard v. United Airlines, supra* (temporary benefits paid under an Illinois claim construed as Colorado temporary benefits when applying the combined benefits cap in § 8-42-107.5). The claimants' argument notwithstanding, this does not allow for the respondents to take a double offset. As explained above, the amount of

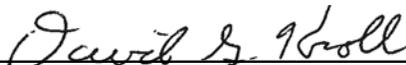
Colorado death benefits does not allow for the respondents to take a 50% offset for Mississippi workers' compensation benefits paid. That is, since Full Faith and Credit requires a complete credit for the Mississippi payments, as they are lower than Colorado's benefits, there are no Mississippi benefits payable. Consequently, the 50% offset in §8-42-114, C.R.S. does not apply. Again, these figures are as follows:

Colorado death benefits: \$620.29 per week x 148 weeks =	\$91,802.92
Mississippi benefits paid:	-\$49,961.84
	<hr/>
Total Colorado benefits on which to pay 8% interest:	=\$41,841.08

The claimants also argue that there is no credit to be applied to the Colorado claim, the Mississippi case law notwithstanding. Again, they contend that is due to the "successive" nature of the claims. Because the Mississippi claim was first in time, the claimants essentially argue that the Mississippi claim therefore eschews the credit described by the Mississippi decisions and requires no credit other than the 50% offset referenced in the statute. The claimants calculate a total of \$91,802 is owed to them pursuant to the Colorado claim. They assert there is no credit for the \$49,961 paid first in Mississippi. The only credit is the 50% reduction set forth in §8-42-114, C.R.S. or \$24,980. Subtracting this amount from \$91,802, would leave \$66,822 upon which the claimants argue the 8% interest is to be calculated. However, as explained above, that interpretation would be inconsistent with Colorado's application of its law from the date of injury, and edit out the term "payable" from the statute. It would also ignore the requirement for Full Faith and Credit. The benefits paid to the claimants are all calculated pursuant to the Colorado claim. Thus, the 8% was correctly ordered to be calculated by subtracting the previously paid \$49,961 from the \$91,802, leaving a sum of \$41,841.

IT IS THEREFORE ORDERED that the ALJ's order dated October 16, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

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CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

3/4/2015 by RP .

KILLIAN, DAVIS, RICHTER & MAYLE P.C., Attn: ERIN C. BURKE ESQ, J .KEITH
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PLESKO, ESQ., 5600 QUEBEC ST, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-923-057-01

IN THE MATTER OF THE CLAIM OF

JAMES KITTLESON, through his
Surviving spouse, BECKY ROLD

Claimant,

v.

FINAL ORDER

CITY AND COUNTY OF DENVER,

Employer,

and

SELF-INSURED,

Insurer,
Respondents.

The respondent seeks review of an order of Administrative Law Judge Cannici (ALJ) dated July 29, 2014, that ordered the claim compensable and that awarded death benefits based upon an average weekly wage of \$1,406.70. We affirm the order in regard to compensability and death benefits but remand the issue of the average weekly wage for additional findings.

The claimant (referenced as the deceased, James Kittleson) worked for the respondent as a fire fighter since 1979. In 2004, the claimant chose to participate in the respondent's Deferred Retirement Option Program. Pursuant to this election, the claimant agreed to retire within four years and did so in April, 2008. The parties agreed that at the time the claimant retired he was in good health and spent the next several years traveling, camping, gardening, and working on his house. The claimant then developed symptoms of illness and on June 10, 2011, was diagnosed with Acute Myeloid Leukemia (AML). Despite undergoing medical treatment he died at age 60 on May 30, 2013. His widow, Becky Rold, brought this claim for death benefits.

The parties agreed the statutory prerequisites for the application of § 8-41-209 C.R.S. were present. These included circumstances wherein the claimant had been employed for a minimum of five years as a firefighter, that a physical exam at the time he became a firefighter did not reveal evidence of illness from cancer and that he

subsequently became ill from a cancer of the brain, skin, digestive system, hematological system, or genitourinary system. AML is a cancer of the hematological system.

Section 8-41-209 provides for a presumption that the cancer was a result of the claimant's firefighter employment. However, the presumption will not apply if the employer or insurer "shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job."

The medical evidence presented by the parties focused largely on the extent to which the claimant sustained exposure to benzene. Benzene was acknowledged by the three medical expert witnesses as associated with the development of AML. Benzene is found in gasoline and diesel fuel and is also present in tobacco smoke.

The respondent presented the testimony of Dr. Noel Weiss. Dr. Weiss referenced the article by Grace LeMasters, PhD., *et. al.*, *Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies*, 48 J. Occup. Environ. Med. 1189 (November, 2006), which identified the types of carcinogenic substances to which firefighters are potentially exposed. The list included benzene. The LeMasters article found that leukemia was a cancer for which firefighters bore an increased rate of incidence. The rate of increase was adjudged in the article to be 14% above that for non-firefighters. However, Dr. Weiss noted the claimant sustained an exposure to benzene from a non-occupational source. He pointed to the claimant's smoking habit of one pack per day for 15 years until he stopped in 1983. After that date, the claimant smoked cigars for another sixteen years until 1999. Dr. Weiss also noted the claimant was exposed to ionizing radiation in conjunction with hip replacement surgery in February of 2008. Such radiation has also been linked to leukemia. The doctor described other studies pertinent to the link between smoking and the onset of leukemia. Factoring in the circumstance that the claimant had ceased smoking several years prior to his diagnosis of AML, Dr. Weiss believed the claimant had a 30% to 80% increased risk of developing AML above that of the non-smoking population.

The respondent also called as a witness Dr. Robert Sklaroff. Dr. Sklaroff reviewed three studies of the connection between smoking and AML. The Kroll study concluded there was a 42% increase in the chance of developing such a cancer among smokers. The Paqualetti report deduced there was a significant association between tobacco smoking and an AML condition. The Bjork study resolved that there was an 80% to 95% increased risk that smokers would become afflicted with AML.

The claimant submitted the testimony of Dr. Annyce Mayer. Dr. Mayer had examined the claimant on June 25, 2012, had taken an occupational history and examined his prior medical records. Dr. Mayer was not persuaded the claimant's smoking had a large impact on his incidence of AML. She referenced a study by Musselman, et. al., which demonstrated how smoking became a much reduced risk factor once smoking ceased. Dr. Mayer found the claimant's exposure to benzene from gasoline encountered as a firefighter a more likely cause of his AML. Dr. Mayer observed that the claimant was located in a fire house which was proximate to both Interstate 25 and to Interstate 70. As a result, the claimant was called upon to deal with numerous spills of gasoline and diesel fuel. The claimant was required to crawl under vehicles to stop fuel spills by inserting plugs or epoxy paint. His gloves would become saturated, as would his protective suit and often fuel splashed into his face. Many times he needed to dig temporary dikes to contain fuel openly running from a vehicle. The claimant typically responded to fuel spills 20 times per year during his 34 year career. In addition, Dr. Mayer pointed out that benzene is detected in 90% of fires fought by firefighters. Dr. Mayer concluded the claimant's exposure to benzene from occupational sources was a far more significant risk to the development of AML than was the claimant's dated exposure to tobacco smoke.

The ALJ found that while the testimony of Drs. Weiss and Sklaroff was significant evidence to establish the claimant's non-occupational smoking was a risk factor for the origination of AML, the ALJ found persuasive the testimony of Dr. Mayer that was consistent with the statutory presumption the AML cancer was derived from the claimant's firefighting duties. The ALJ also found that the evidence of Dr. Weiss and Dr. Sklaroff was not sufficiently persuasive to show the risks presented by tobacco use qualified as an alternative cause of the claimant's AML. Accordingly, the ALJ found the claimant's death represented a compensable claim and entitled Ms. Rold to an award of death benefits.

The ALJ noted that § 8-42-114 specifies a death benefit beneficiary is to receive 66.6% of the deceased's average weekly wage (AWW) which should not exceed 91% of the state AWW applicable to the date of death, and not less than 25% of the applicable maximum per week. As of the date of the claimant's diagnosis and death he was retired and was receiving no wages. The ALJ found the state AWW as of the date of death on May 30, 2013, was \$932.82. Ninety one per cent of that amount is \$848.87, and 25% of this maximum would be \$212.22. The ALJ resolved that this amount would not constitute a fair approximation of the claimant's wage loss "during his lengthy employment with Employer." Consequently, the ALJ cited the discretionary authority

provided in § 8-42-102(3) to calculate the claimant's AWW to be \$1,406.70, which was his rate of pay with the respondent employer on the date before he retired in 2008.

On appeal, the respondent contends the ALJ committed error in finding that the presumption in § 8-41-209(2)(a) was not overcome and in calculating the applicable AWW to be the claimant's wage rate prior to his retirement.

I.

The respondent contends on appeal that the ALJ improperly rejected the evidence of cancer risks posed by non-occupational sources as discussed by Dr. Weiss and by Dr. Skarloff. It argues the legal conclusion of the ALJ that "although the risks from smoking as detailed by Drs. Weiss and Skarloff are significant, the risks do not constitute a cause," is inconsistent with the holding of the Court of Appeals in *Town of Castle Rock v. Industrial Claim Appeals Office*, _ P.3d _, (Colo. App. No. 12CA2190, July 3, 2013), *cert. granted*, (October 15, 2013). We disagree and find the ALJ did rule in accordance with *Town of Castle Rock*.

The nature of the evidence necessary to overcome the presumption of work relatedness posed by § 8-41-209(2)(a) has been the subject of two potentially varying decisions from the Court of Appeals. In *City of Littleton v. Industrial Claim Appeals Office*, _ P.3d_, (Colo. App. No. 10CA1494, November 1, 2012), *cert. granted*, (October 15, 2013), the Court found the respondent employer had not overcome the presumption in the statute because the employer did not establish either that (1) the firefighter's occupational exposure 'could' not cause his cancer, or (2) that the occupational exposure 'did' not cause his cancer.

City of Littleton dealt with a claim of brain cancer. The evidence revealed there was very little known about environmental causes, or even risk factors, for brain cancer. The Court found that in the case of such a paucity of evidence, the employer had not established a non-occupational cause for the cancer. However, the corresponding lack of evidence to show that firefighting did cause the brain cancer was not consequential because the statutory presumption served to link the cancer to the claimant's work exposure.

In *Town of Castle Rock v. Industrial Claim Appeals Office*, *supra*, a different panel of the Court determined the second option discussed in *City of Littleton* (that the occupational exposure did not cause the cancer) might be shown through "evidence of risk factors" rather "than definitive causal links." This evidence would be sufficient if it

indicated “that a claimant’s injury more likely than not arose from a source outside the workplace.” In other words, to satisfy the *City of Littleton* test, a respondent could seek to overcome the presumption and show the occupational exposure did not cause the employee’s cancer by introducing evidence that the cancer was caused by another source. However, ‘cause’ could be found through evidence showing the ‘likelihood’ of a cause and not necessarily a scientifically undisputed cause. The fact finder therefore, should consider evidence of ‘risk factors’ attributed to both firefighting exposure and to other non-occupational exposures, weigh those risk factors and determine whether the employee’s cancer “more likely than not arose from a source outside the workplace.”

The *Town of Castle Rock* case dealt with skin cancer. The evidence revealed much more was known in regard to the various risk factors pertinent to that condition. Therefore, the employer’s evidence that the employee had sustained significant exposure to sunlight from non-occupational activities and that he also suffered from a genetic predisposition to skin moles, both of which were skin cancer risk factors, could serve to overcome the statutory presumption as evidence of a cause of the cancer distinct from work conditions. If found persuasive, this evidence could establish that occupational exposure ‘did not’ cause the cancer.

The *Town of Castle Rock* Court further observed that requiring an employer to establish that a cancer specifically was caused by a source outside the workplace, creates a “nearly insurmountable barrier” over which most employers would not be able to climb, since the precise cause of most cancers cannot be determined.

Here, the ALJ found persuasive the testimony of Dr. Mayer referencing research which showed the impact of smoking to greatly lessen once smoking cessation had occurred. The ALJ also found persuasive Dr. Mayer’s explanation that it was the claimant’s firefighting exposure to benzene which was the most pronounced. Her description of gasoline soaked gloves and fuel splashing into the claimant’s face was seen as a necessarily significant exposure to benzene. Dr. Mayer quantified the amount of this exposure by citing the claimant’s estimate that he responded to 20 calls involving fuel leaks each year over his 34 year tenure. This would amount to 680 calls to mitigate fuel leaks during that time. The ALJ did note that the evidence presented by Dr. Weiss and Dr. Skarloff was significant to show non occupational risks for the development of AML through smoking. While the ALJ stated “the risks [of smoking] do not constitute a cause,” this finding is a summation of his conclusion that the comparison of risk factors from firefighting versus those from smoking was not persuasive that a cause for the AML was more likely than not to be non-occupational. We find this analysis by the ALJ to be consistent with the decisions in both *City of Littleton* and in *Town of Castle Rock*.

We may not alter the ALJ's factual findings if substantial evidence supports them. § 8-43-301(8). *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). The findings of the ALJ are supported by substantial evidence. This is principally the reports and testimony of Dr. Mayer. We do not find cause to amend those findings.

II.

The respondent challenges the finding of the ALJ in regard to the AWW by arguing the ALJ did not endeavor to arrive at a fair approximation of the claimant's wage loss at the time of death. Instead, it is asserted the ALJ used as the AWW the wage rate in existence before the claimant retired from his firefighting job. Because the claimant voluntarily retired, and was then healthy for several years prior to his AML diagnosis, the respondent argues the claimant's wage rate prior to retirement, and years before his death, cannot accurately reflect his future wage loss. Insofar as the ALJ relied on the discretion provided him by § 8-42-102(3), the respondent urges us to find the ALJ abused his discretion. Instead of using the claimant's wage rate prior to his retirement, the respondent takes the position the AWW should be fixed at the minimum figure specified in § 8-42-114. We agree the ALJ did not make findings appropriate to justify his discretion when calculating the AWW. However, instead of requiring the application of the minimum weekly award provided in § 8-42-114, we remand the matter to the ALJ for additional findings.

As noted above, § 8-42-114 states death benefits are calculated by multiplying the deceased employee's average weekly wage by two thirds. There is a provision for deriving a maximum award (91% of the state AWW) and a minimum award (25% of the applicable maximum). Section 8-41-209(1) specifies that the firefighter incurred cancer conditions described in that section are considered an occupational disease. The date of injury for an occupational disease is the date of the onset of disability. The onset of disability occurs when the occupational disease impairs the claimant's ability effectively and properly to perform his or her regular employment, or render the claimant incapable of returning to work except in a restricted capacity. *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991). In *Henderson v. RSI, Inc.* 824 P.2d 91 (Colo. App. 1991), the deceased employee expired due to cancer resulting from occupational exposure to asbestos. The claimant's last exposure to asbestos occurred in 1977. The claimant was in good health at that time and he continued working in other fields and saw his income increase. He was diagnosed with lung cancer in 1983 and died in 1990. The court noted the date of onset for the employee's injury was in 1983. Therefore, the

AWW to be applied to the claim pursuant to § 8-42-102(2), referencing the wages received at the “time of injury,” was to be calculated based on the employee’s wages received in 1983. This sequence of events is parallel to those in this case. The claimant was healthy at the time of his last injurious exposure and did not suffer any functional disability until several years later when he was diagnosed with AML in 2011. Accordingly, the application of § 8-42-102(2) to this matter would require the AWW to be based upon the wages earned by the claimant at the time of his diagnosis in 2011.

However, §8-42-102(3) grants the ALJ substantial discretion to modify the AWW if, for any reason, the method prescribed in § 8-42-102(2) will not fairly compute the wage in view of the particular circumstances of the case. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). The overall objective in calculating the AWW is to arrive at a “fair approximation of the claimant’s wage loss and diminished earning capacity.” *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). An abuse of discretion is not shown unless the ALJ’s determination of the AWW is “beyond the bounds of reason,” as where it is unsupported by the evidence or contrary to applicable law. *Pizza Hut v. Industrial Claim Appeals Office, supra*.

In his order, the ALJ noted the claimant had no earnings in 2011. The ALJ also observed that the claimant had been retired for five years as of the time of his death. In his findings of fact, the ALJ surmised the claimant was in good health when he retired and he voluntarily elected to retire in 2008. Ms. Rold testified that between 2008 and 2011, the claimant participated in extensive travel, in camping trips, and in the gutting and remodeling of their house. The claimant also performed volunteer work. However, he was never further employed, nor did he seek employment after retirement. He did undergo a total hip replacement a few months prior to retirement.

The ALJ reasoned that applying the minimum award specified in § 8-42-114 would “not constitute a fair approximation of claimant’s wage loss during his lengthy employment with Employer.” Instead, the ALJ resolved that “claimant’s AWW at the time of his retirement or \$1,406.70 constitutes a fair approximation of the wage loss and diminished earning capacity.” Without more, we cannot determine why the ALJ feels the minimum award is inadequate or why wages earned prior to the claimant’s voluntary withdrawal from the labor market are a fair approximation of future wage loss.

The ALJ cited as support two prior decisions of the Panel. However, those cases are not useful in the circumstances of this case. In *Pettigrew v. Union Carbide Corp.*, W.C. No. 4-422-345 (April 5, 2000), the deceased employee died from silicosis after receiving exposure at work. It was found that the employee’s retirement from his mining

job was caused by his silicosis. In that situation, we deemed it reasonable to base the AWW on the employee's wages earned prior to retirement. There was a 'but for' relationship between the occupational disease and the wage loss measured by the last wages received. In this case, there is no similar evidence that the occupational disease led to the claimant's retirement. The claimant decided in 2004 to elect to retire within four years as required by the respondent's DROP retirement plan. That was seven years prior to his diagnosis of AML and any loss due to disability. The *Pettigrew* case is therefore not illuminating in regard to this matter.

In *Thielsen v. Rockwell International Co.*, W.C. No. 4-263-037 (May 28, 1997), we set aside a determination by an ALJ that had also calculated the AWW as represented by the wages the deceased employee received prior to his retirement from the employer's job. The employee died from beryllium disease due to work exposures in 1995, eleven years subsequent to his retirement. On remand, the ALJ concluded the AWW should instead, be based upon the rate of the employee's pension and Social Security benefits. We affirmed this determination by noting the amounts of these benefits were tied to some degree to the length and pay rate of the employee's employment and they reflected the economic loss the employee's dependents would actually experience due to the employee's death. However, our determination that the calculation of the AWW using preretirement wages was in error cannot be seen as support for the ALJ's contrary result in this case.

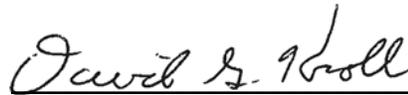
In *Gurule v. Royalgold, Inc.*, W.C. No. 4-696-191 (January 25, 2008), we set aside the ALJ's calculation of the AWW pursuant to § 8-42-102(3). The ALJ had used the claimant's wages earned at the time of the last injurious exposure to silica dust which had led to the employee's occupational disease of silicosis. The employee had worked elsewhere after his retirement from the employer's mining job and had earned a higher wage before becoming disabled from further work. Because the ALJ had failed "to identify factual circumstances in support of the general conclusion that the AWW [from the employer's mining job] fairly approximates the claimant's wage loss" we remanded the matter to the ALJ for specific findings and a new determination of the AWW. The same result is appropriate in this matter. Death benefits are not interchangeable with a general damages award in wrongful death litigation. They are designed to replace to the extent of two thirds the loss of income dependents suffer due to the work induced death of the employee. The ALJ therefore, must make findings which identify "the claimant's wage loss and diminished earning capacity." The ALJ may find the claimant's preretirement wages correspond to this loss, but the analysis should indicate why the claimant can be seen as having had a reasonable expectation for achieving that level of earnings except for his death. If not, the ALJ may rely on other evidence indicating wage

loss such as retirement or disability income or vocational information corresponding to the loss of wage earning opportunities. *See, Foster v. Ralph Foster & Sons*, W.C. No. 3-101-998 (August 23, 1993).

Accordingly, we affirm the ALJ's decision insofar as it finds the claimant's death to be compensable and awarded the claimant's widow death benefits. We remand the matter to the ALJ for further findings in regard to the average weekly wage. At his discretion, the ALJ may conduct further evidentiary proceedings pertinent to the remand.

IT IS THEREFORE ORDERED that the ALJ's order issued July 29, 2014, is affirmed as to the finding of compensability and remanded regarding the issue of the average weekly wage as discussed above.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

JAMES KITTLESON
W. C. No. 4-923-057-01
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CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

_____ 2/24/2015 _____ by _____ RP _____ .

LAW OFFICE OF O'TOOLE AND SBARBAO, P.C., Attn: NEIL D. O'TOOLE, ESQ., 226 W. 12TH AVENUE, DENVER, CO, 80204 (For Claimant)
CITY AND COUNTY OF DENVER, Attn: CHRISTIAN M. LIND, ESQ., ASSISTANT CITY ATTORNEY, 201 W. COLFAX AVE., DEPT 1108, DENVER, CO, 80202 (For Respondents)
ALJ CANNICI, % OFFICE OF ADMINISTRATIVE COURTS, ATTN: RONDA MCGOVERN or GABRIELA CHAVEZ, 1525 SHERMAN STREET, 4TH FLOOR, DENVER, CO 80203

Court of Appeals No. 14CA1003
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-862-486

DATE FILED: March 12, 2015
CASE NUMBER: 2014CA1003

Brian Kilpatrick,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Goodwill Industries of
Denver, and Pinnacol Assurance,

Respondents.

ORDER AFFIRMED

Division I
Opinion by JUDGE TAUBMAN
Terry and Richman, JJ., concur

Announced March 12, 2015

Chris Forsyth Law Office, LLC, Christopher Forsyth, Denver, Colorado, for
Petitioner

Cynthia H. Coffman, Attorney General, Emmy A. Langley, Assistant Attorney
General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondent Goodwill Industries of
Denver and Pinnacol Assurance

¶ 1 In this workers' compensation action, we reject the principal argument of claimant, Brian Kilpatrick, that his right to equal protection of the law was violated because district court judges must disclose their financial contributions, while workers' compensation prehearing administrative law judges (PALJs), and administrative law judges (ALJs) and members of the Industrial Claim Appeals Office (Panel) do not. Because we conclude that those ALJs and Panel members are required to disclose their financial contributions, we further conclude that claimant's right to equal protection was not abridged.

¶ 2 Claimant seeks review of a final order of the Panel affirming the decision of an ALJ that had denied his petition to reopen. The ALJ found neither a mistake of fact nor a change of condition meriting reopening. We conclude that substantial evidence supports the ALJ's reopening determination, reject claimant's other arguments for setting aside the Panel's order, and therefore affirm.

I. Background

¶ 3 Claimant sustained an admitted, compensable injury to his left wrist in June 2011 while pulling a pallet in the course and

scope of his employment with employer, Goodwill Industries of Denver. An MRI taken in August 2011 revealed a tear of the ligaments and tissues in his wrist. Dr. Mitchell Fremling performed an endoscopic TFCC debridement and “distal ulnar shortening” surgery of the left wrist about two weeks after the tear was discovered.

¶ 4 Claimant continued to complain of pain in his wrist post-surgery. In December 2011, a different doctor, Dr. Jason Rovak, gave claimant a steroid and lidocaine injection in his wrist to ease his pain complaints. However, the wrist injection did not relieve claimant’s symptoms. After the unsuccessful injection, Dr. Rovak noted that he did not have any further treatment options “to offer this patient” nor any interventions that he felt “confident will address his discomfort.”

¶ 5 In March and April 2012, through Dr. Fremling and his authorized treating physician (ATP), Dr. David Yamamoto, claimant sought authorization for a second surgery to shorten the ulnar bone of his left wrist. Employer’s insurer, Pinnacol Assurance, denied the request. Dr. Fremling then observed that he had nothing more

“to offer this patient.”

¶ 6 Soon after, Dr. Yamamoto placed claimant at maximum medical improvement (MMI) as of June 27, 2012, with a fifteen percent scheduled impairment of the left upper extremity. Dr. Yamamoto noted, “I am not in favor of further surgery as his failure to improve with the recent diagnostic injection coupled with his somewhat fragile psychological state and pain complaints make him in my opinion a poor surgical candidate.”

¶ 7 Two other physicians, who were retained by employer, Dr. Jonathon Sollender and Dr. Brian Lambden, agreed that a second ulnar-shortening surgery was neither reasonable nor necessary and would not relieve claimant’s symptoms. Indeed, Drs. Sollender and Lambden opined that claimant did not present with a “positive ulnar” bone structure — in which the ulna is longer than the radius — and, consequently, ulnar shortening surgery would be of no benefit to him.

¶ 8 Employer filed a final admission of liability (FAL) based on Dr. Yamamoto’s MMI determination and scheduled impairment rating of the left upper extremity. It is undisputed that claimant neither

requested a division-sponsored independent medical examination (DIME) nor otherwise objected to the FAL. The FAL therefore became final and unappealable.

¶ 9 In late 2012 and early 2013, Dr. Yamamoto referred claimant to another physician, Dr. David Conyers, because claimant continued to complain of pain in his left wrist. Despite not finding “a structural abnormality . . . to explain his continued symptoms,” and X-rays showing “that the ulnar shortening [was] adequate . . . [and that] claimant had “an ulnar neutral slightly ulnar negative” presentation, Dr. Conyers recommended further arthroscopy to examine the wrist. He therefore submitted a request for authorization for the procedure to employer’s insurer, Pinnacol Assurance. Later, upon reviewing MRI films of claimant’s left wrist, Dr. Conyers opined that, contrary to other physicians’ interpretations, claimant was actually ulnar positive and would benefit from further ulnar shortening surgery. Pinnacol nevertheless denied the request.

¶ 10 Subsequently, in February 2013, Dr. Yamamoto signed a statement indicating he agreed with Dr. Conyers’ surgery

recommendation, and noted that claimant “should be off MMI.” Several months later, in August 2013, Dr. Yamamoto signed a statement apparently intending to rescind his June 2012 MMI determination by checking a box next to the following statement drafted by claimant’s counsel:

In addition to my report of February 12, 2013, wherein I rescinded the MMI date of June 27, 2012, I would clarify that, in retrospect, I was mistaken to place [claimant] at MMI on that date. Based on subsequent reports by Dr. David Conyers, [claimant] needs further treatment before he reaches MMI. It was a mistake to place [claimant] at MMI on June 27, 2012, and I have rescinded that determination.

Based on these statements, as well as the report of Dr. Conyers, claimant petitioned to reopen his claim, arguing that Dr. Yamamoto erred by placing him at MMI in June 2012, and that his condition had changed.

¶ 11 As part of the ensuing litigation, claimant served employer with an interrogatory inquiring whether anyone working for or associated with Pinnacol or employer’s counsel had given any gifts “of monetary value” to anyone working for the prehearing unit of the Division of Workers’ Compensation, the Office of Administrative

Courts, or the Panel. After employer declined to provide the information on the grounds that the request was overly burdensome and harassing, claimant moved to compel. He argued that because he could not obtain the information “automatically” through public financial disclosure, his discovery request was the “only way to obtain this information.” However, claimant’s discovery request was denied.

¶ 12 A hearing on claimant’s reopening request later proceeded without the requested discovery. After listening to claimant’s and Dr. Sollender’s testimony, reading the transcripts of the depositions of Drs. Yamamoto, Lambden, and Conyers, and reviewing the documentary evidence submitted by the parties, the ALJ denied claimant’s request to reopen. Relying on the opinions of Drs. Sollender and Lambden, the ALJ was not persuaded that either a mistake had been made or that claimant’s condition had changed. She also found that Dr. Yamamoto’s opinion was “equivocal” and concluded that he had not rescinded his MMI determination. Finally, she rejected Dr. Conyers’ recommendation for additional surgery, concluding that his reliance on the MRI was inconsistent

with the opinions of Drs. Sollender, Lambden, Rovak, and Fremling, who concurred that ulnar variance should be determined by X-ray, not MRI. The Panel affirmed the ALJ's denial and dismissal of claimant's petition to reopen.

¶ 13 Claimant now appeals. He raises a number of arguments on appeal, which can be summarized as follows: (1) he was entitled to discovery pertaining to any financial contributions Pinnacol or its employees made to PALJs, ALJs, or Panel members; (2) the lack of financial information about PALJs, ALJs, and Panel members violates his right to equal protection under the law; (3) the ALJ was bound by Dr. Yamamoto's February and August 2013 notes stating that claimant was no longer at MMI; (4) substantial evidence does not support the ALJ's determination that Dr. Yamamoto did not rescind his June 2012 MMI determination; and (5) the ALJ made numerous evidentiary errors requiring reversal and remand, including (a) denying his request for sanctions for employer's alleged failure to disclose MRI films; (b) considering other physicians' MMI opinions even though the ALJ was bound by Dr. Yamamoto's February and August 2013 notes apparently rescinding

MMI; (c) permitting employer's counsel to question employer's expert about an opinion that allegedly was not disclosed; (d) imposing an impossible burden on claimant's counsel by inquiring what documents he claimed had not been disclosed; and (e) denying his request to call employer's counsel as a witness even though she "repeatedly testified" during the hearing and in deposition.

II. Preservation of Claimant's Arguments

¶ 14 We first address employer's contention that numerous arguments asserted here by claimant were not preserved for our review. Employer argues that claimant failed to object to certain evidence, failed to make offers of proof, and failed to seek review of the denial of his motion to compel before either the ALJ or the Panel, all of which constituted waiver of these arguments on appeal. However, our review of the record reveals that claimant repeatedly objected to testimony and evidence, and discussed his positions at length with the ALJ. In general, an objection adequately preserves an issue for appellate review "so long as it calls the court's attention to the specific point it addresses." *See Vaccaro v. Am. Family Ins. Grp.*, 2012 COA 9, ¶ 52. We note, too, that claimant challenged the

denial of his motion to compel in his brief in support of his petition to review before the Panel.

¶ 15 Nor are we persuaded that the PALJ’s decision had to be reviewed by the ALJ to preserve the issue for appellate review. We know of no such rule. To the contrary, “rulings of a PALJ are binding on the parties. No provision stays interlocutory orders entered by a PALJ pending review by an ALJ.” *Kennedy v. Indus. Claim Appeals Office*, 100 P.3d 949, 950 (Colo. App. 2004). While it is true that a PALJ’s order “*may* be addressed at the subsequent hearing,” and that an ALJ has authority to override a PALJ’s ruling, the statute authorizing PALJs to decide certain issues does not make ALJ review a prerequisite for appellate review. *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246, 1254 (Colo. 1998) (emphasis added); *Dee Enters. v. Indus. Claim Appeals Office*, 89 P.3d 430, 441 (Colo. App. 2003); § 8-43-207.5, C.R.S. 2014. The only authority cited by employer that explicitly supports its position is a Panel decision. *See Quinn v. Tire Centers, LLC*, (W.C. No. 4-712-600, Oct. 9, 2007). However, we are “not bound by the Panel’s decisions in other workers’ compensation cases.” *Olivas-Soto v. Indus. Claim*

Appeals Office, 143 P.3d 1178, 1180 (Colo. App. 2006).

Consequently, we will address claimant's arguments.

III. Disclosure of Financial Ties Between Pinnacol, ALJs and Panel Members

¶ 16 Claimant first alleges errors and abuses of discretion by the ALJ for denying his discovery request pertaining to Pinnacol's financial disclosures. He argues that workers' compensation litigants are treated inequitably as compared to litigants in district court because workers' compensation litigants do not have access to PALJs', ALJs', and Panel members' financial disclosures. We are not persuaded that any error occurred that violated claimant's right to equal protection.

A. Facts Pertaining to Financial Disclosures

¶ 17 Claimant posed the following interrogatory to employer:

Please detail anything of monetary value that has been provided by Pinnacol Assurance or Ruegsegger, Simons, Smith & Stern, or any board member, partner or shareholder thereof, to any employee, staff or member of the Prehearing Unit of the Division of Workers' Compensation, Office of Administrative Courts or the Industrial Claim Appeals Office within the last five years, including, but not limited to, gift cards, trips, checks, gifts, etc.

Employer objected to this interrogatory on the ground that it was overly broad, ambiguous, irrelevant, and harassing. Claimant moved to compel the requested discovery. A PALJ agreed with employer that the request was not relevant and was “over-burdensome.” He therefore denied claimant’s motion to compel.

B. No Abuse of Discretion to Deny Discovery

¶ 18 An ALJ is justified in using his or her discretion in the discovery process “to protect a party from discovery requests that would cause annoyance, embarrassment, oppression, or undue hardship or expense.” *Sheid v. Hewlett Packard*, 826 P.2d 396, 398 (Colo. App. 1991). An ALJ abuses his or her discretion only if the evidentiary ruling “exceeds the bounds of reason.” *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993) (quoting *Rosenberg v. Bd. of Educ. of Sch. Dist. # 1*, 710 P.2d 1095, 1098-99 (Colo. 1985)).

¶ 19 Claimant argues that employer should have been required to produce records of any financial ties between Pinnacol and its employees and the ALJs or other employees of the division of workers’ compensation because “the questions were reasonably

calculated to lead to the discovery of admissible evidence.” Citing *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003, 1013 (Colo. 1988), claimant argues that the ALJ misapplied the standard by failing to weigh the competing interests of his right to know if ALJs and Panel members are receiving any funds from Pinnacol, its employees, or its attorneys against employer’s and Pinnacol’s right to be free from harassing and burdensome discovery requests. However, claimant’s reliance is misplaced.

¶ 20 The PALJ in this case held a hearing at which the parties articulated reasons for and against production. He therefore heard and weighed these factors before denying claimant’s discovery request. Moreover, unlike the plaintiffs in *Belle Bonfils*, who could not prosecute their claims without reviewing the requested documents, claimant here has not demonstrated that his case hinges on information these requested financial records may reveal. To the contrary, the disclosure of the financial records of hundreds of Pinnacol employees has no direct bearing on claimant’s request to reopen his claim. Indeed, claimant made no offer of proof to the PALJ, the ALJ, or to us that the interrogatory was reasonably

calculated to lead to the discovery of admissible evidence. Nor did he offer to narrow his request to the PALJ and ALJ in his case. While such evidence could be relevant if there were a basis to believe that an ALJ in this case accepted potentially inappropriate gifts, claimant has made no such showing and has not demonstrated any basis for believing that such gifts were made.

¶ 21 Claimant also fails to articulate how the PALJ’s ruling “exceeded the bounds of reason.” *See Coates, Reid & Waldron*, 856 P.2d at 856. Nor does he explain why imposing the proposed document production and interrogatory response requirement on employer is outweighed by the mere possibility of discovering an inappropriate financial tie. *See Sheid*, 826 P.2d at 398. Absent a showing that the discovery request would lead to the production of admissible evidence, the ALJ properly concluded that the request was overly broad. Therefore, we cannot say that the PALJ abused his discretion in denying claimant’s request. *See id.*

C. No Equal Protection Violation for Denial of Request to Produce Financial Records

¶ 22 Claimant next contends that the denial of his request for Pinnacol’s financial records violated his right to equal protection

under the law. In particular, he argues that workers' compensation litigants are unfairly hampered in their pursuit of claims because, unlike litigants pursuing actions in district courts, workers' compensation litigants do not have access to PALJs', ALJs' or Panel members' financial disclosures. Litigants pursuing actions in "courts of record" can obtain from the secretary of state a "written disclosure" of the income, capital gains, financial interests, property interests, and business associations, among other information, of "each justice or judge of a court of record." § 24-6-202(1), (2), C.R.S. 2014. Claimant argues that there is no comparable disclosure mandate applied to PALJs, ALJs and Panel members, and that this disparity violates his Fourteenth Amendment guarantee of equal protection under the law.

¶ 23 Employer argues that an executive order issued in 2001 and discussed in *Youngs v. Industrial Claim Appeals Office*, 2012 COA 85M, ¶ 62, imposed a duty on "all administrative law judges [to] adhere to the Colorado Code of Judicial Conduct." Executive Order No. D 008 01, Strengthening Colorado's Administrative Justice System (May 29, 2001).

¶ 24 Colorado Code of Judicial Conduct (C.J.C.) Rule 3.15 provides that:

- (A) A judge shall publicly report the source and amount or value of:
 - (1) compensation received for extrajudicial activities as permitted by Rule 3.12;
 - (2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items does not exceed the statutory amount specified in Title 24, Article VI of the Colorado Revised Statutes; and
 - (3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A).

Thus, employer argued that the executive order subjects all ALJs and Panel members to the financial reporting requirements outlined in the C.J.C. Employer contends that, contrary to the assumption underlying claimant's position, workers' compensation claimants should have access to the same financial disclosure information as is available to civil litigants in courts of record. Accordingly, employer reasons, claimant cannot establish any equal protection violation.

¶ 25 We granted claimant’s request for supplemental briefing on this issue. Based on our review of the parties’ and the Panel’s supplemental briefs on this issue, we agree with employer and the Panel that section 24-6-202 does not violate the Equal Protection Clause.

1. Governing Law

¶ 26 “The threshold question in an equal protection challenge is whether the legislation results in dissimilar treatment of similarly situated individuals.” *Pepper v. Indus. Claim Appeals Office*, 131 P.3d 1137, 1140 (Colo. App. 2005), *aff’d on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006). “To violate equal protection provisions, the classification must arbitrarily single out a group of persons for disparate treatment from other persons who are similarly situated.” *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 265 (Colo. App. 2004).

¶ 27 Claimant argues that we should apply a strict scrutiny standard in reviewing “the lack of public financial disclosures for judges who hear and decide workers’ compensation cases.” He contends that because the right to a fair hearing is fundamental,

the lack of public disclosure of ALJ's and Panel member's financial records is only permissible if it promotes a compelling state interest in the least restrictive manner possible. The Panel asserts that we should apply a rational basis standard of review because section 24-6-202 does not affect a fundamental right or adversely affect a suspect class. We need not determine which standard applies here, because we conclude that workers' compensation claimants and district court litigants are not subject to disparate treatment.

2. Analysis

¶ 28 Here, claimant challenges the constitutionality of PALJs, ALJs, and Panel members presiding over workers' compensation claimants when these officers, unlike judges who derive their powers from Article VI of the Colorado Constitution, are not required to disclose their financial records. We are not persuaded by claimant's contentions for three reasons.

¶ 29 First, the C.J.C., by its own terms, applies broadly "to all full-time judges," which it defines as "anyone who is authorized to perform judicial functions, including an officer such as a magistrate, referee, or *member of the administrative law judiciary.*"

C.J.C. Application I(A), (B) (emphasis added). The C.J.C. thus unambiguously and expressly applies to PALJs, ALJs, and Panel members, contrary to claimant's assertion.

¶ 30 Second, section 24-30-1003(4)(a), C.R.S. 2014, provides that ALJs appointed pursuant to this section shall be subject to the standards of conduct set forth in the C.J.C. We agree with claimant, employer, and the Panel that this statute unambiguously requires workers' compensation ALJs to comply with the financial disclosure provisions contained in section 3.15 of the C.J.C.

¶ 31 Third, the Panel concedes, based on *Youngs*, ¶¶ 58-60, that the executive order applies to the Panel. Since the Panel is charged with interpreting the statutes and regulations governing the Division of Workers' Compensation, we defer to the Panel's "reasonable interpretations" of its own regulations, and only set aside the Panel's interpretation "if it is inconsistent with the clear language of the statute or with the legislative intent." *Zerba v. Dillon Cos.*, 2012 COA 78, ¶ 37 (quoting *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998)). We conclude that this principle similarly applies to its interpretation of the

executive order. Accordingly, in light of the Panel's admission that the disclosure rules apply to it and the ALJs, workers' compensation claimants have access to financial disclosure information similar to that available to civil litigants pursuing claims in district court. We therefore conclude that claimant has not been treated differently from other civil litigants, and has not established an equal protection violation.

¶ 32 Because we have accepted the Panel's concession that the executive order applies to both it and workers' compensation ALJs and PALJs, we need not address claimant's contention that the executive order is unconstitutional. In any event, we note that claimant's challenge to the executive order, if successful, would invalidate the basis for Panel members to provide financial disclosures, and would thus be contrary to his obtaining such disclosures.

¶ 33 Claimant next alleges that "an equal protection violation results" because "each justice or judge of a court of record" is subject to the financial reporting requirements of section 24-6-202, which is broader and more onerous than the reporting

requirements enumerated in C.J.C. 3.15. While we acknowledge that the statute and the rule do not require the same financial disclosures, we conclude that no equal protection violation results because both require disclosure of gifts of the type claimant's request for production of documents suggests are of most concern to him — the disclosure of any gifts an ALJ or Panel member may receive from an insurer.

¶ 34 At oral argument, claimant argued in the alternative that even if the executive order effectively applies the C.J.C.'s financial disclosure requirements to "member[s] of the administrative law judiciary," such disclosures have not been made to date and information detailing gifts to PALJs, ALJs, and Panel members is not available to workers' compensation litigants. In addition, he observed that no implementing regulations have been adopted identifying an individual or agency to whom such disclosures should be made. Even if claimant's statement is correct, claimant's remedy is with the Division of Workers' Compensation, or the Office of Administrative Courts, not with this court.

¶ 35 Last, to the extent claimant questions the efficacy of previous

opinions of this court in his supplemental brief, we refer to our order of December 30, 2014, limiting the scope of supplemental briefing and expressly denying the motion for supplemental briefing to the extent claimant sought to revisit these earlier opinions. Accordingly, we decline to address these arguments raised now in claimant's supplemental brief.

¶ 36 Because section 24-30-1003(4)(a) and the executive order require PALJs, ALJs, and Panel members to disclose their financial records and gifts, the premise upon which claimant's allegation of an equal protection violation rests is fatally flawed. Accordingly, we conclude that claimant has not established that his right to equal protection has been violated.

IV. Dr. Yamamoto's MMI Determination

¶ 37 Claimant alleges that the ALJ erred by rejecting Dr. Yamamoto's apparent retraction of his MMI determination. He argues that the ALJ was bound by the retraction and erred in concluding otherwise. We disagree.

A. ALJ Was Not Bound to Accept MMI Retraction

¶ 38 Claimant argues that under *Blue Mesa Forest v. Lopez*, 928

P.2d 831 (Colo. App. 1996), Dr. Yamamoto’s retraction of MMI was binding on the ALJ. In *Blue Mesa*, an ALJ determined that the claimant’s ATP “had effectively retracted his first opinion concerning MMI and had adopted” the opinion of a specialist that the claimant had reached MMI nine months later than the ATP’s initial MMI determination. *Id.* at 833. Claimant contends that because the facts here mirror those in *Blue Mesa*, the same outcome is mandated.

¶ 39 However, this analysis ignores procedural distinctions between this case and *Blue Mesa* and ignores *Blue Mesa*’s holding that when an ATP issues conflicting MMI reports, “it is for the ALJ to resolve the conflict, and the ALJ may do so without requiring the claimant to obtain an IME.” *Id.* In *Blue Mesa*, unlike here, the ALJ found that the ATP *had* retracted his earlier MMI determination, a finding that the Panel and a division of this court both affirmed. Thus, when Dr. Yamamoto signed a statement seeking to retract his earlier MMI determination, it was within the ALJ’s discretion to accept or reject that retraction. Contrary to claimant’s interpretation of *Blue Mesa*, the ALJ was not bound to accept one of

Dr. Yamamoto's reports over another. *See id.*

¶ 40 In addition, as the Panel points out, Dr. Yamamoto's June 2012 MMI determination became final and unappealable because claimant admittedly did not challenge employer's FAL.

Once the treating physician has determined the claimant to be at MMI, the employer or insurer may file an FAL. § 8-42-107.2(2)(a)(I)(A), [C.R.S. 2014]. Unless the claimant requests the selection of an independent medical examiner within thirty days, the treating physician's findings and determinations are binding on all parties and on the Division. § 8-42-107.2(2)(b).

Williams v. Kunau, 147 P.3d 33, 36 (Colo. 2006). Because claimant did not object to employer's FAL or seek a DIME, Dr. Yamamoto's June 2012 MMI determination became final and binding on the parties and the ALJ. This procedural posture distinguishes *Blue Mesa* from the facts currently before the court and renders *Blue Mesa's* outcome inapposite.

B. Substantial Evidence Supported the ALJ's MMI Finding

¶ 41 The ALJ found that Dr. Yamamoto's "opinions were equivocal" and that he had "rescinded his determination that [c]laimant reached MMI then . . . recanted the rescis[s]ion." Consequently, the

ALJ concluded that Dr. Yamamoto had not made a mistake in his original MMI determination that would warrant reopening.

¶ 42 Reopening is permitted on several grounds, including mistake. See § 8-43-303(1), C.R.S. 2014. “The ground of ‘mistake’ as used in [section 8-43-303] means any mistake, whether of law or fact.” *Ward v. Azotea Contractors*, 748 P.2d 338, 341 (Colo. 1987). A mistake in diagnosis may be “sufficient to justify reopening.” *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 273 (Colo. App. 2005).

¶ 43 The party attempting to reopen a claim “shall bear the burden of proof as to any issues sought to be reopened.” § 8-43-303(4). Thus, claimant bore the burden of demonstrating that a mistake meriting reopening had occurred. See *Jarosinski v. Indus. Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002); *City & Cnty. of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164 (Colo. App. 2002).

¶ 44 An ALJ has broad discretionary authority to determine whether a claimant has met his burden of proof justifying reopening. See *Renz v. Larimer Cnty. Sch. Dist. Poudre R-1*, 924 P.2d 1177, 1181 (Colo. App. 1996). Indeed, section 8-43-303 states

simply that an ALJ “may” reopen a claim if a change in condition or mistake is demonstrated. The statutory reopening authority granted ALJs is thus “permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ.” *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002). An ALJ’s decision to grant or deny a petition to reopen may therefore “be reversed only for fraud or clear abuse of discretion.” *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *see also Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) (“In the absence of fraud or clear abuse of discretion, the ALJ’s decision concerning reopening is binding on appeal.”).

¶ 45 Here, the record supports the ALJ’s determination that Dr. Yamamoto’s revised opinion was “equivocal,” that he had not rescinded his MMI determination, and that no mistake had been made meriting reopening. In his deposition, Dr. Yamamoto testified that, in retrospect, claimant “was not at MMI” in June 2012. However, he also testified that (1) claimant’s condition remained unchanged, with “pain in exactly the same place” in September

2013 as it had been in June 2012 when Dr. Yamamoto initially placed claimant at MMI; (2) no surgeon opined that surgery would have been appropriate in June 2012; (3) he “wish[ed he] would have sent [claimant] to [a different surgeon for consult] in June 2012”; and, most notably, (4) he *declined* to characterize his June 2012 MMI determination as “a mistake.”

¶ 46 These facts support the ALJ’s conclusion that Dr. Yamamoto equivocated about MMI and did not rescind his June 2012 MMI determination. We therefore perceive no “fraud or clear abuse of discretion” in the ALJ’s finding that Dr. Yamamoto had not rescinded his MMI determination and was not mistaken in placing claimant at MMI in June 2012. *See Wilson*, 747 P.2d at 651. Consequently, we find no fraud or abuse of discretion in the ALJ’s denial of claimant’s reopening request or the Panel’s affirmance thereof. *See Heinicke*, 197 P.3d at 222.

V. Challenges to Evidentiary Rulings

¶ 47 Finally, claimant challenges a number of the ALJ’s evidentiary rulings. He essentially argues that employer abused the discovery process by failing to disclose evidence and testimony to be

presented, both by experts and by counsel. He argues that as a result of these abuses, he was unprepared and surprised by the evidence presented at the hearing, and that employer should have been sanctioned for its actions. He contends that these alleged abuses warrant setting aside the ALJ's and Panel's orders. We disagree.

A. No Sanctions Required for Failure to Disclose MRI

¶ 48 Claimant first contends that the ALJ erred by initially ruling that employer “could not present MRI films or testimony about the films due to non-disclosure by” employer, but later “reversing” herself. He argues that because “the films and testimony” were originally excluded, he “did not have the incentive or opportunity to cross-examine Dr. Sollender regarding the authenticity of the films” and did not lay any foundation to place the MRI films into evidence. He further claims that because Dr. Sollender testified about the films, “the case was tried by unfair surprise.” We disagree.

¶ 49 Our review of the record shows that the ALJ never admitted the MRI films. She ruled that she did not “even need to see that,” and that the MRIs were not in evidence. We have found no

indication, and claimant has not pointed us to any, where this ruling was reversed. We therefore see no basis for claimant's argument that the ruling was "reversed" and "surprised" him.

¶ 50 In addition, contrary to claimant's contention, the ALJ did not bar testimony concerning the MRIs. Rather, she repeatedly noted that testimony regarding the films was admissible and would be considered. She twice stated, "We . . . have the testimony" about MRI films, that she would "not strik[e] this witness's testimony or disregard[] it," and that she would not impose "any sanctions against [employer] for any alleged failure to respond to discovery, especially when there's been no motion to compel [and] no indication that a prehearing conference was requested in this matter." In light of the ALJ's actual ruling, we reject claimant's contention that he was unfairly prejudiced or surprised by the alleged "reversal" of her ruling.

¶ 51 Claimant nonetheless contends that the alleged failure to disclose mandated the imposition of a sanction against employer. However, "[u]nder section 8-43-207(1), C.R.S. 20[14], the ALJ is vested with wide discretion in the conduct of evidentiary

proceedings.” *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895, 897 (Colo. App. 2009). Therefore, we will not set aside an ALJ’s evidentiary ruling concerning sanctions absent a showing that the ALJ abused his or her discretion in issuing an order. *See Sheid*, 826 P.2d at 399 (“The appellate standard of review governing sanctions under C.R.C.P. 37 is whether the tribunal that imposed the sanction abused its discretion.”).

¶ 52 Here, we perceive no basis for concluding that the ALJ’s evidentiary ruling regarding the admissibility of the MRIs and testimony about the MRIs exceeded the bounds of reason or misapplied the law. *See Coates, Reid & Waldron*, 856 P.2d at 856. Accordingly, we conclude that the ALJ did not abuse her discretion when she denied claimant’s request for sanctions for employer’s alleged failure to disclose the MRI films.

B. Remaining Alleged Evidentiary Violations

¶ 53 Claimant’s remaining evidentiary contentions assert various abuses of discretion by the ALJ. Claimant contends that the ALJ abused her discretion by (1) admitting Dr. Sollender’s MMI opinion; (2) permitting Dr. Sollender to testify beyond the scope of employer’s

disclosures; (3) imposing “an impossible burden” on claimant by demanding that he identify which documents were allegedly not disclosed; and (4) allowing employer’s counsel to testify as a witness but prohibiting claimant from cross-examining her. We perceive no abuse of discretion in any of these rulings.

¶ 54 As noted above, “[e]videntiary decisions are firmly within an ALJ’s discretion, and will not be disturbed absent a showing of abuse of that discretion.” *Youngs v. Indus. Claim Appeals Office*, 2013 COA 54, ¶ 40; *see also Ortega*, 207 P.3d at 897. As we have noted, “[a]n abuse of discretion occurs when the ALJ’s order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law.” *Heinicke*, 197 P.3d at 222.

1. MMI Opinions of Dr. Sollender

¶ 55 We know of no statute, case law, or rule that prohibits the admission of expert testimony concerning MMI when MMI is in dispute. We have already concluded that Dr. Yamamoto’s testimony, reports, and notes concerning MMI conflicted. Consequently, the ALJ was not “bound” by Dr. Yamamoto’s February and August 2013 notes. Moreover, if the ALJ was

“bound” by any MMI determination, it was the June 2012 MMI date and impairment rating because claimant did not challenge employer’s FAL based on Dr. Yamamoto’s June 2012 report. *See Williams*, 147 P.3d at 36. Accordingly, we reject claimant’s contention that the ALJ abused her discretion by admitting Dr. Sollender’s MMI opinion.

2. Scope of Dr. Sollender’s Testimony

¶ 56 Claimant also contends that Dr. Sollender’s testimony exceeded the scope of employer’s disclosures. But, we have reviewed employer’s extensive interrogatory responses and extensive summation of Dr. Sollender’s anticipated testimony and conclude that the disclosure broadly incorporated the scope of his testimony. Short of providing claimant with an anticipated verbatim transcript of what Dr. Sollender was going to say, we are hard-pressed to discern what additional disclosure claimant believes he was entitled to receive.

3. Imposition of Burden to Identify Missing Documents

¶ 57 Similarly, we find no abuse of discretion in the ALJ’s asserted expectation that claimant’s “counsel . . . know things he could not

possibly know,” when the ALJ asked claimant’s counsel for clarification as to what documents he believed were missing and had not been disclosed. We do not find this question unreasonable in light of employer’s counsel’s statement that all relevant documents had been produced and that claimant neither moved to compel the production of “missing” documents nor requested a prehearing conference. Essentially, the ALJ was asking claimant’s counsel to explain what documents he thought were missing, to assist her in determining whether employer had violated its discovery obligations. We therefore conclude that the ALJ’s questions were not inappropriate.

4. Testimony by Employer’s Counsel

¶ 58 Lastly, claimant argues that employer’s counsel “repeatedly testified” at the hearing, but that he was deprived of the opportunity to cross-examine her. He claims he had “no other way [to] impeach Dr. Sollender regarding the conversations the former had with [employer’s] counsel.” Nevertheless, claimant’s counsel did not question Dr. Sollender about conversations he may have had with employer’s counsel. The statement he points to in support of his

claim that employer's counsel was "testifying" appears to be no more than a question posed by examining counsel to a witness. We perceive nothing inappropriate in either the question posed or the ALJ's overruling of claimant's objection.

VI. Conclusion

¶ 59 Accordingly, we reject claimant's equal protection challenge, and we conclude that the ALJ neither erred nor abused her discretion in issuing her rulings in this case. Because substantial evidence supports the ALJ's decision denying claimant's request to reopen his claim, we will not set aside the Panel's decision affirming it. *See Heinicke*, 197 P.3d at 222.

¶ 60 The order is affirmed.

JUDGE TERRY and JUDGE RICHMAN concur.

COLORADO COURT OF APPEALS

2015 COA 21

Court of Appeals No. 13CA2230
Adams County District Court No. 12CV1105
Honorable Edward C. Moss, Judge

Ryan Monell,
Plaintiff-Appellant,
v.
Cherokee River, Inc.,
Defendant-Appellee.

ORDER AFFIRMED IN PART, REVERSED IN
PART, AND CASE REMANDED WITH DIRECTIONS

Division V

Opinion by JUDGE ASHBY
Román and Terry, JJ., concur

Announced February 26, 2015

Benson & Case, LLP, John Case, Kari Jones, Denver, Colorado, for Plaintiff-Appellant

Stuart D. Morse & Associates, LLC, Stuart D. Morse, Matthew J. Bayma, Greenwood Village, Colorado, for Defendant-Appellee

¶1 Plaintiff, Ryan Monell, appeals from the district court's orders (1) dismissing his negligence claims against defendant, Cherokee River, Inc. (CRI), for failure to state a claim pursuant to C.R.C.P. 12(b)(5); and (2) awarding CRI attorney fees for litigating the merits and its motion for fees and costs. We conclude that when the scope of an entity's contracted business and work is clear, specifically applying the "regular business" test is unnecessary, and we therefore affirm the court's dismissal of the negligence claims. We also conclude that the court's fee award for litigating the merits was proper, but the court should not have awarded fees for litigating the fees and costs motion. Accordingly, we affirm in part, reverse in part, and remand with directions.

I. Background

¶2 As alleged in Monell's first amended complaint, the operative pleading, CRI was hired to construct a steel building on a landowner's property. CRI subcontracted part of the construction of the building to N.J. Liming, which employed Monell. While Monell was working on constructing the building in close proximity to high voltage overhead electrical lines, electricity arced from the lines and electrocuted him, causing severe burns, shock, and temporary stoppage of his heart.

¶3& Monell sought and received workers' compensation benefits for his injury from N.J. Liming. He then filed suit against the landowner, the companies that furnished the electricity and maintained the electrical lines, and CRI. Monell asserted two negligence claims against CRI and various other torts against the other defendants.

¶4& CRI moved to dismiss the claims against it for failure to state a claim, arguing that it was immune from any tort liability because it was Monell's statutory employer under section 8-41-401, C.R.S. 2014 (statutory employer immune from tort liability for workplace injury if the injured worker collected workers' compensation benefits for the injury). The district court agreed and dismissed the negligence claims against CRI. The claims against the other defendants were also dismissed.

¶5& CRI then moved for attorney fees and costs, requesting fees under section 13-17-201, C.R.S. 2014 (mandating attorney fee award when a defendant obtains dismissal under C.R.C.P. 12(b)). The court awarded CRI fees and costs related to defending the tort action and litigating the fees and costs motion.

¶6& Monell appeals the dismissal of his claims against CRI and the fee award.

II. Motion to Dismiss

¶7& Monell argues that the court erred by dismissing his negligence claims against CRI because the complaint did not establish that CRI was his statutory employer and therefore immune from tort liability. We review *de novo*, *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010), and disagree.

¶8& When evaluating a motion to dismiss for failure to state a claim, a court, with certain exceptions not applicable here, may consider only those matters stated in the complaint. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). A court may grant such a motion if, accepting the allegations as true and viewing them in the light most favorable to the plaintiff, the facts as alleged cannot, as a matter of law, support a claim for relief. *Bly*, 241 P.3d at 533.

A. Applying the Regular Business Test was Unnecessary Here

¶9& Monell first argues that the court erred by making a statutory employer determination without specifically applying the regular business test as set forth in *Finlay v. Storage Tech. Corp.*, 764 P.2d 62 (Colo. 1989). We conclude that because the complaint established that CRI qualified as Monell's statutory employer under section 8-41-401(1)(a)(I), the court was not required to specifically apply the regular business test in these circumstances.

¶10 Colorado's workers' compensation statute immunizes employers from tort liability for a workplace injury if the injured worker collects workers' compensation benefits. See § 8-41-401(1), (2); *Finlay*, 764 P.2d at 63. This immunity attaches not only to the employer through which the worker obtained workers' compensation benefits, but also to any other employer that qualifies as a statutory employer. See § 8-41-401(1), (2); *Finlay*, 764 P.2d at 63.

¶11 Section 8-41-401(1)(a) defines a worker's statutory employer as any company "engaged in or conducting any business by leasing or contracting out any part or all of the work thereof" to a subcontractor that employs the worker. Consequently, whether an entity is a statutory employer depends on whether the subcontractor's worker was injured while engaged in activity that was part of the "business" or "work thereof" that the entity contracted out to the subcontractor.

¶12 The scope of a potential statutory employer's contracted business and work can be unclear. When it is, determining whether an employee's injury occurred while performing work that was within that scope may be difficult. Before our supreme court's opinion in *Finlay*, courts had attempted to define the scope of an employer's contracted business and work by applying the "regular business" test. This test asked "whether the work contracted out [was] part of the 'regular business' of the alleged employer." *Finlay*, 764 P.2d at 64. In *Finlay*, the supreme court refined the test to "whether the work contracted out [was] part of the employer's 'regular business' as defined by its total business operation." *Id.* at 67. The supreme court also instructed that when conducting this inquiry, "courts should consider the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer." *Id.*

¶13 However, nothing in *Finlay* changed the purpose of the regular business test: to determine whether a particular activity was within the scope of a potential statutory employer's business and work that it contracted out to a subcontractor. Because the regular business test is a tool that courts use to define the scope of an entity's contracted "business" and "work" when that scope is *unclear*, the regular business test is superfluous when the scope of an entity's contracted business and work *is* clear (if it is equally clear that a particular activity falls within that scope). See *Cowger v. Henderson Heavy Haul Trucking Inc.*, 179 P.3d 116, 119 (Colo. App. 2007) (The regular business test "is a means for determining whether a business is a statutory employer . . . in accordance with[] § 8-41-401(1)(a)."). Here, because the scope of the contracted business was clear and the work Monell was doing when he was injured was clearly within that scope, the district court was not required to apply the regular business test.

¶14 Monell's amended complaint alleged that (1) CRI was hired to "manufacture and erect a steel building ("Building"); (2) "N.J. Liming was a subcontractor of the defendant [CRI] in the construction of the Building"; and (3) Monell was working for N.J. Liming and was injured "while . . . working on the construction of the Building." Applying the regular business test here was unnecessary because the amended complaint itself alleged that Monell was injured while doing an activity that was within the scope of CRI's business and work. It alleged that constructing the building was (1) what CRI was hired to do, (2) what CRI subcontracted out to N.J. Liming, and (3) what Monell was doing when he was injured while working for N.J. Liming.

¶15 Monell's reliance on *Cowger* is misplaced and does not alter our conclusion. We agree with Monell that, pursuant to *Cowger* and *Finlay*, to qualify for statutory employer immunity both sections 8-41-401(1)(a) (defining statutory employer) and -401(2) (statutory employer immune if subcontractor maintains workers' compensation insurance) must be satisfied. But, as explained above, the regular business test is not the only way to satisfy the requirements of section 8-41-401(1)(a). And we conclude that the allegations in the first amended complaint establish that CRI met the requirements of both sections 8-41-401(1)(a) and -401(2).

¶16 Because the facts, when viewed in the light most favorable to Monell, establish that he was injured while doing the same work that CRI was hired to do and subcontracted out to N.J. Liming, the court properly concluded that CRI was Monell's statutory employer and therefore immune to tort liability for his injury.

B. Other Arguments

¶17 Monell argues that we should reverse the court's dismissal order for two additional reasons. First, he argues

that section 8-41401 and statutory employer immunity are inapplicable here because he was an independent contractor, not an employee, of N.J. Liming. As CRI points out and Monell concedes in his reply brief, Monell has raised this issue for the first time on appeal. Therefore, we do not address it. See *JW Constr. Co., Inc. v. Elliott*, 253 P.3d 1265, 1271 (Colo. App. 2011).

¶18 Second, he argues that the court erred by citing to his original complaint in the dismissal order, not the first amended complaint (the operative pleading). However, we have conducted our review based on the facts as alleged in the first amended complaint and have concluded that dismissal was proper. See *Blood v. Qwest Servs. Corp.*, 224 P.3d 301, 329 (Colo. App. 2009) (appellate court can affirm on any ground supported by the record).

III. Attorney Fees

¶19 Section 13-17-201 provides that when a tort claim is dismissed pursuant to a defendant's C.R.C.P. 12(b) motion, the "defendant shall have judgment for his reasonable attorney fees in defending the action." Because the court properly dismissed Monell's claims pursuant to C.R.C.P. 12(b)(5), CRI was entitled to attorney fees. Even so, Monell argues that the court's fee award was erroneous for other reasons.

A. Third Party Payment of Fees

¶20 Monell emphasizes that section 13-17-201 states that the "defendant shall have judgment for his reasonable attorney fees." § 13-17-201 (emphasis added). According to Monell, because CRI's insurer, not CRI, paid the attorney fees, CRI has incurred no attorney fees that he could pay and CRI's insurer is ineligible for a fee award because it is not a defendant in the case. We review the interpretation of the statute de novo, see *Fischbach v. Holzberlein*, 215 P.3d 407, 409 (Colo. App. 2009), and disagree with Monell.

¶21 We must read a statute to give effect to its purpose and intent, and we must avoid interpretations that nullify that purpose and intent. See *Hale v. Erickson*, 23 P.3d 1255, 1257 (Colo. App. 2001). The purpose of section 13-17-201 is to "discourage the institution or maintenance of unnecessary tort claims." *Kennedy v. King Soopers Inc.*, 148 P.3d 385, 388 (Colo. App. 2006). Whether a plaintiff is penalized by having to pay a fee award to the defendant or the third party who actually paid the fees is irrelevant to the statute's purpose. See *Hale*, 23 P.3d at 1257 (holding that a defendant whose costs were paid by a third party may be awarded costs pursuant to a cost award statute intended to penalize a non-settling plaintiff because whether the defendant or a third party paid those costs is irrelevant to the statute's purpose).

¶22 Moreover, Monell's interpretation of the statute would encourage, not discourage, plaintiffs to pursue meritless tort claims where the defendant's fees are being paid by a third party because neither the defendant nor the third party would be eligible to receive a fee award. Because such an interpretation would undermine the purpose of the statute, we reject it and conclude that CRI should have been awarded fees pursuant to section 13-17-201.¹

¶23 As CRI points out and Monell acknowledges, this conclusion is consistent with the rule in other contexts that a party entitled to recover fees and costs from an opponent may do so regardless of whether an insurer or other third party actually paid those fees and costs. See *Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, 198 P.3d 1213, 1217 (Colo. App. 2008) ("Though [a third party] paid [the prevailing party's] attorney fees and litigation costs, [the prevailing party] is nevertheless entitled to seek recovery of those fees and costs [pursuant to prevailing party fee and cost award provision in contract] from any party liable therefor."); *Hale*, 23 P.3d at 1257 (same rule in the context of statute awarding "defendant" actual costs from a non-settling plaintiff).

¶24 Based on our conclusion that CRI was eligible to receive a fee award pursuant to section 13-17-201, we need not address the district court's alternative reasoning based on the collateral source rule.

B. Fee Award for Litigating Motion for Fees and Costs

¶25 Monell also argues that the court erred by awarding fees for litigating the fees and costs motion because section 13-17-201 authorizes an award of fees incurred "in defending the action," and CRI's fees and costs motion was not part of defending the negligence claims. We agree.

¶26 A defendant is not entitled to fees for litigating a section 13-17-201 motion for fees unless the plaintiff's defense to the motion is substantially frivolous, substantially groundless, or substantially vexatious pursuant to section 13-17-101, C.R.S. 2014.² See *Foxley v. Foxley*, 939 P.2d 455, 460 (Colo. App. 1996) (The holding that fees may not be awarded for litigating a section 13-17-102 fee request unless the defense to that motion lacked substantial justification was "necessarily applicable to fees requested under § 13-17-201."); see also *Little v. Fellman*, 837 P.2d 197, 204 (Colo. App. 1991) (In a case where it awarded fees for litigating the merits pursuant to section 13-17-102, the court noted that "[a]lthough this court has upheld the award of attorney fees incurred in a hearing on attorney fees, as a predicate to such award, there must be a determination that the defense of such a motion lacked substantial justification."), *overruled on other grounds by In re Marriage of Aldrich*, 945 P.2d 1370 (Colo. 1997). The district court did not find that Monell's defense to CRI's fees and costs motion was substantially frivolous, groundless, or vexatious, nor does CRI argue that it was. Therefore, we reverse the court's order awarding CRI attorney fees for litigating the fees and costs motion.

C. Appellate Attorney Fees

¶27 Finally, CRI requests attorney fees on appeal. We grant CRI its reasonable fees relating to its defense of the

dismissal order, see *Wark v. Bd. of Cnty. Comm'rs*, 47 P.3d 711, 717 (Colo. App. 2002) (“A party who successfully defends [a C.R.C.P. 12(b)(5)] dismissal order is also entitled to recover reasonable attorney fees incurred on appeal.”), but deny its request for fees relating to its defense of the court’s fee award. On remand, the district court shall determine the amount of reasonable attorney fees allocable to defending the dismissal.

IV. Conclusion

¶28 The order granting the motion to dismiss and the fee award for litigating it are affirmed. The fee award for litigating the fees and costs motion is reversed and the case is remanded to the district court for an award of reasonable attorney fees incurred defending the dismissal order, but not the fee award, on appeal.

JUDGE ROMÁN and JUDGE TERRY concur.

¹ We express no opinion about whether CRI must transmit all or part of the fee award to its insurer because that issue is not before us.

² We emphasize that this proposition is limited to motions for fees pursuant to section 13-17-201. See *Stresscon Corp. v. Travelers Prop. Cas. Co. of Am.*, 2013 COA 131, ¶125 (expressly rejecting the comparison of fees on fees awards made pursuant to section 10-31116(1), C.R.S. 2014, and section 13-17-102).

These opinions are not final. They may be modified, changed or withdrawn in accordance with Rules 40 and 49 of the Colorado Appellate Rules. Changes to or modifications of these opinions resulting from any action taken by the Court of Appeals or the Supreme Court are not incorporated here.

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Supreme Court

No. 2014-148-M.P.
(DSC-2012-04)
(Dissent begins on page 37)

In the Matter of Keven A. McKenna. :

Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

OPINION

PER CURIAM. This attorney disciplinary matter comes before this Court pursuant to a recommendation of the Disciplinary Board of the Rhode Island Supreme Court (board) that the respondent, Keven A. McKenna, be suspended from the practice of law for a period of one year. Article III, Rule 6(d) of the Supreme Court Rules of Disciplinary Procedure for Attorneys provides in pertinent part:

“If the [b]oard determines that a proceeding * * * should be concluded by a public censure, suspension or disbarment, it shall submit its findings and recommendations, together with the entire record, to this Court. This Court shall review the record and enter an appropriate order.”

We directed the respondent to appear before this Court at its conference on June 11, 2014, to show cause why he should not be disciplined. Having heard the representations of the respondent and this Court’s Disciplinary Counsel, and having reviewed the entire record, we conclude that cause has not been shown and that the imposition of discipline is appropriate. We adopt the recommendation of the board that the respondent be suspended from the practice of law for a period of one year, with said period of suspension to become effective thirty days from the date of this opinion.

I

Procedural History

On November 5, 2012, Chief Disciplinary Counsel brought disciplinary charges against respondent, alleging violations of several of the Supreme Court Rules of Professional Conduct. The petition asserted four counts: count 1 alleged that respondent violated Article V, Rules 3.3, 7.1, 7.5, and 8.4(c) of the Supreme Court Rules of Professional Conduct by engaging in the unauthorized practice of law as a limited liability entity in violation of this Court's order of February 23, 2011; count 2 alleged that respondent violated Rules 3.3 and 8.4(c) by failing to disclose his income to the United States Bankruptcy Court for the District of Rhode Island (Bankruptcy Court), misrepresenting his interest in a receivable to that court, and by engaging in conduct that amounted to a lack of candor, dishonesty, and misrepresentation to the bankruptcy trustee; count 3 alleged that respondent violated Article V, Rule 1.19 of the Supreme Court Rules of Professional Conduct by failing to provide records requested by Assistant Disciplinary Counsel¹ through a subpoena and by failing to keep records as mandated by Rule 1.19; and count 4 alleged that respondent violated Rule 3.3 and Article V, Rule 3.5(d) of the Supreme Court Rules of Professional Conduct by engaging in conduct during proceedings in the Workers' Compensation Court and Bankruptcy Court that demonstrated a lack of candor, as well as an attempt to disrupt those tribunals.

On December 11, 2012, respondent filed an answer to the petition, stating that the "answers to the Petition for Disciplinary Action are hereby set forth in the attached Federal Court Complaint." The federal complaint, brought against Chief Disciplinary Counsel, Assistant Disciplinary Counsel, and the Chair of the board, alleged multiple constitutional violations and

¹ The Supreme Court appointed an Assistant Disciplinary Counsel to investigate this matter.

sought to “temporarily, preliminarily, and permanently restrain” the board from enforcing the provisions of the Rules of Professional Conduct. In the federal complaint, respondent argued that this Court has no authority to regulate “non court room [sic] and non-attorney client activities of R.I. [a]ttorneys * * * .” The United States District Court for the District of Rhode Island (District Court) dismissed the complaint, holding that abstention was required under Younger v. Harris, 401 U.S. 37 (1971), because the relief respondent sought would require federal interference in an ongoing state judicial proceeding. McKenna v. Gershkoff, 2013 WL 3364368 at *1-*2 (D.R.I. July 3, 2013) (not officially reported).

The respondent also filed numerous motions with the board, seeking to avoid the board’s review of this matter by alleging multiple constitutional violations. A three-member panel of the board (the panel) convened and conducted eight hearings on this matter between February 18, 2013 and October 16, 2013. The panel heard testimony from respondent, attorney Kevin Heitke (who, for a time, represented respondent’s professional corporation in Bankruptcy Court), Sheila Bentley McKenna (respondent’s wife), attorney Thomas Quinn (Chapter 11 trustee in respondent’s professional corporation’s bankruptcy case), and Daniel Marks (a client of respondent). Numerous exhibits were admitted, including the transcript of the hearings in Workers’ Compensation Court that provided the genesis of the proceedings now before this Court.

II

Facts

The following facts are gleaned from the voluminous record of the board’s proceedings. In May 2009, respondent was practicing law under the duly licensed entity “Keven A. McKenna, P.C.” (the PC). Also in May 2009, an employee of the PC, Sumner Stone, filed a claim for

workers' compensation benefits, alleging a work-related injury. Because the PC was unable to provide proof that it carried workers' compensation insurance as required by statute, a pretrial order was entered that ordered it to make weekly compensation payments to Stone. The respondent, on behalf of the PC, refused to make the payments, arguing that this order violated his due process rights. Over the course of several months and a dozen hearings, respondent made multiple motions to dismiss and repeatedly asked the Chief Judge of the Workers' Compensation Court, who was presiding over the hearings, to recuse himself. Each motion was argued, and all of the motions were denied. Despite the denials, respondent continued to press the same arguments at virtually every hearing.

The respondent repeatedly argued that he was being denied his right to a full hearing on the merits; however, the entire course of the proceedings in the Workers' Compensation Court consisted of the disposition of his own motions and of the employee's motions relating to respondent's failure to comply with the pretrial order. After presiding over the numerous hearings, the Chief Judge observed that respondent was "simply using the procedures of this court to delay and harass." Eventually, the Chief Judge dismissed respondent's claim for trial, due to the fact that respondent refused to make payments as required by the pretrial order. Thus, the pretrial order became the court's final order.

While the Workers' Compensation Court transcripts are replete with examples of respondent's apparent contempt for the court and the proceedings as a whole, we highlight a few particularly illustrative excerpts:

“[Respondent]: I would like to enter an order on that, that you’re denying me a right to a speedy civil trial * * * .

“* * *

“[Respondent]: I will drag this on forever.

“* * *

“[Respondent]: I have filed, and I will file again a motion to recuse you because I’m suing you personally for due process rights, violations, and that is a requirement for you to recuse yourself, assign it to another judge. * * * This is a rump court proceeding. You’re aiding and abetting a criminal getting benefits * * * .

“* * *

“[Respondent]: [Stone is] making a mockery of this court, Your Honor, because of your dislike for me. You will not give me a trial. I’m going to ask for a trial on this one, you’re not going to give it to me. You’re just going to continue this thing on with the hope that you will be generating money.

“* * *

“The Court: Mr. McKenna, are you alleging, first of all, you’re not denying that you have not made payments; is that correct?

“[Respondent]: I’m not going to answer that question. You’re not the prosecutor, Your Honor.

“* * *

“[Respondent]: That’s why we don’t want judges doing administrative function. [sic] We don’t like judges pandering to attorneys and nonprofit corporations like you do with [opposing counsel] * * * .”

During the ninth day of hearings, respondent, while testifying as a witness, refused to admit familiarity with the pretrial order that had been the subject of the previous eight hearings.

Opposing counsel then attempted to confirm the address of respondent’s house:

“[Opposing Counsel]: Mr. McKenna, where do you live?

“[Respondent]: In a house.

“[Opposing Counsel]: Can you tell me the address of your house?

“[Respondent]: No.

“* * *

“[Respondent]: I don’t have a house.

“[Opposing Counsel]: Where, well, you just said you did. You just said - -

“[Respondent]: I did not. I live in a house.

“[Opposing Counsel]: You live in a house. What is the address of that house that you live in?

“[Respondent]: Actually, I don’t think it has an address, it has a post-office box.

“[Opposing Counsel]: Does your house, is your house on a street anywhere?

“[Respondent]: No.

“[Opposing Counsel]: It’s not? Is it on an avenue?

“[Respondent]: No.

“[Opposing Counsel]: Is it on a court?

“[Respondent]: No.

“[Opposing Counsel]: Well, if I was to come and visit you, how would I get there?

“[Respondent]: You would have to get directions from me.”²

In December 2009, the Workers’ Compensation Court entered an order finding respondent in contempt for his refusal to make payments to Stone as required by the pretrial order. The respondent appealed from this order. After temporarily staying the order, this Court declined to hear the appeal and remanded the matter to the Workers’ Compensation Court, noting that respondent had not claimed an inability to comply with the order. The respondent next sought a stay of the order from the United States District Court and the Superior Court and, after failing to receive the stay, he filed a motion with the Workers’ Compensation Court claiming an inability to meet the payment obligations “due to circumstances beyond his control, including but limited [sic] to a priority U.S. I. R.S. [sic] [levy] of [\$]171,000 upon his bank account.”

On January 25, 2010, the day before the hearing on his motion in the Workers’ Compensation Court, respondent filed a Chapter 11 bankruptcy petition on behalf of the PC and then presented that filing to the court during the hearing on his motion, arguing that it automatically stayed any action by the Workers’ Compensation Court. The Chief Judge noted that respondent was also named personally in Stone’s claim, and he set a hearing for that same

² It is worth mentioning that in respondent’s answer to the U.S. Trustee’s complaint objecting to discharge in Bankruptcy Court, see infra, respondent provided a street address for his residence.

afternoon on the issue of whether the bankruptcy stay applied to respondent personally. During the break, respondent filed a petition for personal bankruptcy.

Subsequent to the appointment of a Chapter 11 trustee for the PC, respondent applied to this Court for a license to practice law as a limited liability company under the name “The Law Offices of Keven A. McKenna, LLC” (the LLC). On February 23, 2011, because respondent had “made no provision for the transfer of any client files to any other entity, nor ha[d] the PC withdrawn its appearance in any pending cases,” this Court entered an order directing respondent to satisfy the Court that the PC would no longer engage in the practice of law. We stated that, until that time, respondent “may continue to practice law in his individual capacity only and not in any corporate form.” On March 24, 2011, respondent withdrew his application for a license to practice law as an LLC.

Notwithstanding this Court’s order, respondent continued to use a bank account in the name of “Law Offices of Keven A. McKenna, LLC.”³ He deposited checks made payable to the LLC, as well as other checks, and he wrote checks for expenses directly related to the practice of law, including the Supreme Court attorney registration fee, Rhode Island Bar Association dues, and court filing fees. These actions form the basis for count 1, alleging respondent’s violation of Rules 3.3, 7.1, 7.5, and 8.4(c)⁴ by engaging in the unauthorized practice of law as a limited liability entity in violation of this Court’s order.

³ On or around March 24, 2011, respondent changed the name of the bank account to “McKenna Support Services, LLC”; however, he continued to use checks bearing the name “Law Offices of Keven A. McKenna, LLC” after this date.

⁴ Article V, Rule 3.3 of the Supreme Court Rules of Professional Conduct states, in pertinent part: “Candor toward the tribunal. (a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer * * * .”

Rule 7.1 states, in pertinent part: “Communications concerning a lawyer’s services. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”

During the bankruptcy proceedings for the PC, an issue arose regarding legal services that respondent had provided to the Estate of Amelia Carmone for a number of years prior to filing the bankruptcy petition. Despite having accrued a sizable amount of unpaid fees for legal services provided to this client (hereinafter known as the “Wells receivable”⁵), respondent failed to report the existence of this receivable on his initial corporate bankruptcy filing. The respondent filed the required Schedule B disclosure of assets on January 25, 2010, and amended it on May 3, 2010; on neither occasion did he list the Wells receivable. In March 2011, respondent disclosed to the bankruptcy trustee that the Wells receivable amounted to \$63,000 and was uncollectable. During this period of time, respondent had been attempting to purchase the PC’s receivables from the trustee for \$10,000.

On June 7, 2011, respondent appeared in the Probate Court for the Town of Bristol and asserted a lien for attorney’s fees in the amount of \$93,000 against real property owned by the Carmone estate, as well as a petition for approval to sell property located at 10 Hope Street in the Town of Bristol, to satisfy the lien.⁶ Although respondent represented to the bankruptcy trustee that the receivable was largely uncollectable, he did not disclose that there was real property in the estate that could potentially secure the debt. In addition, respondent did not have authority from the trustee to attempt to collect the debt himself. These actions form the basis for count 2, alleging that respondent violated Rules 3.3 and 8.4(c) by failing to disclose his income to the Bankruptcy Court, misrepresenting his interest in a receivable to that court, and by engaging in

Rule 7.5 states, in pertinent part: “Firm names and letterheads. * * * (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.”

Rule 8.4 states, in pertinent part: “Misconduct. It is professional misconduct for a lawyer to: * * * (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation * * * .”

⁵ John Wells was the successor executor of the estate.

⁶ This petition was later withdrawn.

conduct that amounted to a lack of candor, dishonesty, and misrepresentation to the bankruptcy trustee.

On August 4, 2011, the U.S. Trustee filed a complaint objecting to discharge. In his answer to the complaint, respondent neither admitted nor denied a large number of the allegations, including those that were straightforward and clearly within his knowledge; for example, whether he had filed his bankruptcy petition and bankruptcy schedules “under oath” (despite the fact that the petition’s signature page included the language “I declare under penalty of perjury that the information provided in this petition is true and correct” and that the bankruptcy schedules contained similar language); whether he had a “Wells receivable” as property of the PC’s bankruptcy estate; and whether the exhibits to the complaint, viz., copies of his motions in the Bristol Probate Court to collect attorney’s fees for the work performed regarding the Wells receivable, were “true and accurate” copies of his own pleadings.

Subsequent to the U.S. Trustee’s complaint, respondent filed an application for waiver of discharge; the waiver was granted, and the Trustee dismissed the complaint. The respondent’s actions in Bankruptcy Court, as well as his actions during the lengthy Workers’ Compensation Court hearings, form the basis for count 4, alleging that he violated Rules 3.3 and 3.5(d)⁷ by engaging in conduct before both tribunals that demonstrated a lack of candor, as well as an attempt to disrupt these tribunals.

On September 12, 2011, Assistant Disciplinary Counsel issued a subpoena to respondent, directing him to produce the records identified in Rule 1.19(a)(1)-(8)⁸ and to testify regarding the

⁷ Rule 3.5(d) states, in pertinent part: “Impartiality and decorum of the tribunal. A lawyer shall not: * * * engage in conduct intended to disrupt a tribunal.”

⁸ Article V, Rule 1.19(a) of the Supreme Court Rules of Professional Conduct requires that:
“A lawyer shall maintain for seven (7) years after the events
which they record:

veracity and completeness of the production. The respondent appeared at the deposition but failed to produce the requested records. Instead, he challenged the authority of Assistant Disciplinary Counsel to issue the subpoena, and he stated that he needed more time. The respondent's failure to comply with the subpoena is the basis of count 3, alleging a violation of Rule 1.19.⁹

“(1) The records of all deposits in and withdrawals from special accounts specified in Rule 1.15 and of any other bank account which records the operations of the lawyer's practice of law. These records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement.

“(2) A record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed.

“(3) Copies of all retainer and compensation agreements with clients.

“(4) Copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf.

“(5) Copies of all bills rendered to clients.

“(6) Copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed.

“(7) Copies of all retainer agreements and closing statements.

“(8) All checkbooks and check stubs, bank statements, pre-numbered cancelled checks and duplicate deposit slips with respect to the special accounts specified in Rule 1.15 and any other bank account which records the operations of the lawyer's practice of law.”

⁹ Rule 1.19(g) provides: “A lawyer who does not maintain and keep the accounts and records as specified and required by this Disciplinary Rule, or who does not produce any such records pursuant to this Rule shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.”

III

Disciplinary Proceedings

A series of eight hearings was conducted before a three-member panel of the board, during which both respondent and Assistant Disciplinary Counsel examined witnesses and entered exhibits into evidence. In addition to challenging the authority of the panel to hear the matter, as well as the authority of this Court to regulate attorneys, respondent argued that there was no basis for sanctions.

Specifically as to count 1, respondent argued that, after the February 2011 order of this Court, he changed the name and purpose of his LLC to “McKenna Support Services, LLC” and used the bank account established under that LLC name to pay his employees, his rent, and his expenses. The respondent argued that the use of the account and the checks bearing the name of the former LLC did not constitute the practice of law, and that he had continued to use these checks as a mere matter of convenience. Regarding count 2, respondent argued that he had made no false statements on his bankruptcy filings, and that he valued the Wells receivable at \$63,000 because “[n]ot all of the estate[’s] billing had been posted” and the unbilled time increased the value to \$93,000. With respect to count 3, respondent argued that he had brought records to the deposition, although he made them available for inspection only, and not for copying. Further, respondent averred that he had invited Assistant Disciplinary Counsel to his law office to inspect the records there, an invitation that was declined. Finally, as to count 4, respondent argued that his actions in Workers’ Compensation Court and Bankruptcy Court are outside this Court’s jurisdiction. He further represented that there was no evidence that he had engaged in conduct intended to disrupt any tribunal.

The panel found that there was clear and convincing evidence that respondent had violated the Rules of Professional Conduct as alleged in counts 1, 2, 3, and 4. Regarding count 1, the panel found that “[r]espondent’s use of the ‘LLC’ designation in his deposit slip/letterhead constitutes a ‘material misrepresentation of fact or law’ and is false and misleading * * * .” Further, the panel found that respondent’s testimony “by which he attempted to justify and/or excuse” these actions was “palpably disingenuous.” As to count 2, the panel found that respondent “engaged in a course of conduct deliberately designed to hide the existence, value and collectability of the Wells Receivable.” This conduct included making false statements of material fact, failing to disclose material facts, and offering evidence that respondent knew to be false.

Regarding count 3, the panel found that respondent admitted that he did not bring all of the records requested to either his deposition or the hearing, and that his invitation to Assistant Disciplinary Counsel to inspect the records at his law office did nothing to mitigate this failure. Because the subpoena directed him to produce the records at the office of Disciplinary Counsel, he was duty bound to do so. As to count 4, the panel found that during the Workers’ Compensation Court proceedings, respondent was “flippant, evasive, dilatory and disruptive.” The panel noted that it was “disturbed by [respondent’s] disrespect” for the judge who was presiding over that hearing, particularly respondent’s repeated refusal to answer simple questions posed by the court, as well as respondent’s employing the threat of a lawsuit to support his motion to recuse that judge. Finally, the panel found that respondent “was deliberately and unnecessarily disruptive and dilatory, disrespectful to the [c]ourt including the judge and opposing counsel, combative, evasive[,] unresponsive, disputatious and pugnacious in both his testimony and in his actions as counsel for himself’ before that court.

The panel rejected respondent's argument that he was being subjected to disciplinary action because of his "controversial positions on constitutional issues." Rather, the panel concluded that "the allegations [were] sufficiently serious to warrant a recommendation for a disciplinary sanction." The panel recommended a one-year suspension from the practice of law. On May 13, 2014, the panel's recommendation was approved and adopted by the board.

IV

Discussion

Pursuant to Article III, Rule 6(d) of the Supreme Court Rules of Disciplinary Procedure for Attorneys, it became our unenviable task to review the record submitted by the board to determine whether a forty-year member of the bar should be disciplined for his conduct. Mindful of the gravity of this proceeding, we undertook a thorough review of the record, particularly the transcripts of the proceedings in Workers' Compensation Court and the hearings before the panel. Because respondent has raised numerous objections based on constitutional arguments, we shall first address these concerns, and we will then discuss the findings of the board.

A

Respondent's Constitutional Claims

Throughout the course of these disciplinary proceedings, respondent has repeatedly asserted claims of constitutional violations.¹⁰ While these claims have been inserted in a piecemeal, repetitive fashion into nearly all of respondent's filings with this Court and with the board, we have parsed them into two general areas of concern: (1) he challenges the authority of

¹⁰ The respondent has filed four substantive motions with this Court: (1) a motion to stay these proceedings pursuant to G.L. 1956 § 9-33-2; (2) a motion to recuse the justices of this Court; (3) a motion to dismiss counts 2 and 4; and (4) a motion to dismiss count 3.

this Court to regulate attorneys, as well as its and the board's jurisdiction over matters of attorney discipline; and (2) he alleges that the proceedings before the board and this Court have violated his procedural due process rights.¹¹ We will address these contentions in turn.¹²

1. This Court's Authority and Jurisdiction

The respondent challenges the authority of this Court to regulate attorneys, as well as its and the board's jurisdiction over matters of attorney discipline. More specifically, respondent contends that this Court's power is limited to appellate jurisdiction over statutory courts and/or that the judiciary's inherent power is limited to adjudicating cases and controversies. He appears to argue that this Court's creation of disciplinary procedures and the disciplinary board, as well as this Court's promulgation of rules of professional conduct, are exercises of legislative power not delegated by the General Assembly and are, therefore, violative of the doctrine of separation of powers.

Contrary to respondent's protestations, "[i]t is well settled that the authority of the Supreme Court to discipline the members of the bar * * * is plenary in nature." In re Lallo, 768 A.2d 921, 924 (R.I. 2001). As this Court explained almost eighty years ago:

¹¹ We note that respondent's motions and memoranda are less than models of clarity, and we have employed our best efforts to decipher and address his various constitutional claims. The following verbatim quote is but one example of the manner in which respondent composed his memoranda submitted to this Court:

"It was a violation of due process to have been civilly prosecuted by a persons appointed by the Supreme Court to prosecute for McKenna for violations created by illegal legislative actions of the R.I. Supreme Court. It was violation of Due Process to have those self-legislated rules enforced by the Judicial Bank and not be enforced by Executive regulatory appointment not appointed by the Governor."

¹² The respondent also appears to claim that the disciplinary process has violated his rights under the First Amendment; however, his discussion of this issue is perfunctory at best, and certainly insufficient to form a cognizable claim for us to address. See Manchester v. Pereira, 926 A.2d 1005, 1015 n.8 (R.I. 2007) (repeating well-established rule that this Court will not substantively address an issue that is not adequately briefed).

“In Rhode Island, at least since the adoption of the State Constitution, [the power to license attorneys and admit them to practice] has been vested in this [C]ourt. The General Assembly has conceded this by section 2, chapter 322, G.L. 1923, wherein it is declared that: ‘The [S]upreme [C]ourt * * * shall by general or special rules regulate the admission of attorneys to practice in all the courts of the state.’¹³ This language has long been accepted by common consent to be declaratory of the power inherent in this [C]ourt to control and supervise the practice of law generally, whether in or out of court. A careful examination of the public laws, even before the adoption of the Constitution, and as far back as the year 1800, fails to reveal an enactment of the General Assembly assuming to regulate the matter by statute. On the other hand, there is ample evidence of the exercise of this power as a matter of course by the Superior Court of Judicature established in 1746-47 which was the predecessor of this [C]ourt until 1798, when it became the Supreme Judicial Court.” Rhode Island Bar Association v. Automobile Service Association, 55 R.I. 122, 129-30, 179 A. 139, 142 (1935).¹⁴

“This broadbased power includes the power to supervise, administrate, discipline, and serve the needs of the public in all facets of the courts.” In the Matter of Almeida, 611 A.2d 1375, 1381 (R.I. 1992), superseded by statute on other grounds, Ryan v. City of Providence, 11 A.3d 68, 73-74 (R.I. 2011). It further includes “the authority to exercise necessary means to regulate and control the practice of law by promulgating and enforcing rules to discipline attorneys.” Id. at 1382. “Since the early days of English common law, it has been widely recognized that courts possess the inherent power to regulate the conduct of attorneys who practice before them and to discipline or disbar such of those attorneys as are guilty of unprofessional conduct.” Howell v. State Bar of Texas, 843 F.2d 205, 206 (5th Cir. 1988); see In re Snyder, 472 U.S. 634, 643 (1985) (“Courts have long recognized an inherent authority to suspend or disbar lawyers. * * * This inherent power derives from the lawyer’s role as an officer of the court which granted

¹³ This statute is now codified at G.L. 1956 § 8-1-2.

¹⁴ This Court went on to explain the historical roots of this institutional structure in common law England. See Rhode Island Bar Association v. Automobile Service Association, 55 R.I. 122, 132-33, 179 A. 139, 143-44 (1935).

admission.”); see also In re Petition of Almond, 603 A.2d 1087, 1087 (R.I. 1992) (“This court is responsible for promulgating rules regulating the practice of law and ethical standards for the conduct of attorneys admitted to the Rhode Island Bar.”).¹⁵

The passage of the separation of powers amendments in 2004 did not in any way dilute, but rather served to solidify and strengthen, this inherent judicial authority. In 2004, article 5 of the Rhode Island Constitution was amended to provide that the powers of the Rhode Island government are distributed into “three separate and distinct departments: the legislative, executive and judicial.” R.I. const., art. 5. “In practice, this doctrine operates to confine legislative powers to the legislature, executive powers to the executive department, and judicial powers to the judiciary * * * .” In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930, 933 (R.I. 2008). Just as “the separation of powers amendments did not, either explicitly or implicitly,¹ limit or abolish the power of the General Assembly in any other area where we have previously found its jurisdiction to be plenary,” see id. at 935-36, the separation of powers amendments reinforced the judiciary’s previously recognized plenary powers, including the power to regulate the practice of law. See State v. Germane, 971 A.2d 555, 590 (R.I. 2009) (separation of powers doctrine prohibits “unwarranted legislative invasion of the judicial power”).

Accordingly, this Court has the authority, as it has had since its inception, to promulgate and enforce rules of conduct and procedure for the regulation of attorneys, as well as to exercise necessary means to regulate and control the practice of law. This includes appointing

¹⁵ See also G.L. 1956 § 8-6-2 (judicial authority to promulgate rules of practice and procedure); G.L. 1956 § 11-27-18 (recognizing right of this Court to regulate and discipline members of the bar); G.L. 1956 § 7-5.1-2(2) (identifying the Supreme Court as the regulatory agency for attorneys at law); G.L. 1956 § 7-16-3.1 (applying § 7-5.1-2(2) to professional limited liability companies).

disciplinary counsel, creating the board to carry out this Court's disciplinary powers, and subpoenaing witnesses and materials in investigations related to attorney misconduct.

Next, respondent claims that the appointment of disciplinary counsel as a "special prosecutor" and use of the subpoena power are exercises of the executive power and violate the separation of powers doctrine, and he also maintains that the General Assembly has not delegated the subpoena power to the Supreme Court.

We can find no legitimate basis for respondent's assertion that the subpoena power is an executive power or that it must be delegated to the judiciary by the General Assembly. See, e.g., State v. Guido, 698 A.2d 729, 734 (R.I. 1997) (recognizing "the subpoena power of the judiciary"); Bartlett v. Danti, 503 A.2d 515, 517 (R.I. 1986) (same); Donatelli Building Co. v. Cranston Loan Co., 87 R.I. 293, 297, 140 A.2d 705, 707 (1958) (recognizing court's inherent power to issue subpoenas); see also Taylor v. Illinois, 484 U.S. 400, 409 (1988) ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence * * * ") (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). The Court, the board, and lawyers licensed to practice in Rhode Island, as officers of the Court, including Disciplinary Counsel, may all properly exercise the judiciary's inherent subpoena power. See In re Snyder, 472 U.S. at 644 (recognizing that "as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes," although "subject to the ultimate control of the court").

Similarly, respondent's contention that this Court's appointment of an Assistant Disciplinary Counsel as a "special prosecutor" is a violation of the separation of powers doctrine—contrary to the advisory opinion in In re House of Representatives (Special Prosecutor), 575 A.2d 176 (R.I. 1990)—is misguided. In that matter, at the request of the House

of Representatives, the five members of this Court issued an advisory opinion, opining that proposed legislation relating to the appointment of special prosecutors by the Chief Justice for crimes involving public officials was unconstitutional. See id. at 176-77, 180. The justices reasoned that, under the principle of separation of powers, the legislation impermissibly encroached upon the power of the judiciary and threatened its independence. See id. at 178-79. It did so by permitting the Chief Justice both to appoint and supervise special prosecutors (which included defining the scope of the special prosecutors' jurisdiction, releasing the special prosecutors' findings to the public, and removing special prosecutors) and to review on appeal any felony prosecutions tried by the special prosecutor. Id. at 179. The justices concluded that these conflicting roles by the Chief Justice "threaten[ed] the institutional integrity of the Judicial Branch." Id. (quoting Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 851 (1986)).

The proposed legislation at issue in In re House of Representatives impermissibly transferred to the judiciary a fundamental executive power—specifically, the "power and discretion to prosecute crimes"—which power is vested in the Office of the Attorney General by the Rhode Island Constitution. See In re House of Representatives, 575 A.2d at 179-80; see also R.I. Const., art. 9, sec. 12. In contrast, the role and function of disciplinary counsel appointed by this Court is a means to carry out an inherent judicial function: the regulation of attorneys. Furthermore, this Court is not, in the context of attorney discipline, jeopardizing its function as the court of last resort of criminal matters. Rather, this Court is the only tribunal with authority over matters of attorney discipline. See In re Commission on Judicial Tenure and Discipline, 916 A.2d 746, 751 (R.I. 2007) (noting that this Court has "steadfastly held" that the authority of this Court to discipline the bar and bench is "plenary and exclusive"). This Court has established

disciplinary procedures that allow initial screening and review by the board, with the assistance of Disciplinary Counsel, in order to safeguard the due process rights of attorneys subject to discipline. Furthermore, in the event an attorney disciplinary proceeding uncovers the possibility that a crime may have been committed, such matters are referred to the Office of the Attorney General to investigate and act on in accordance with its prosecutorial discretion.

The respondent further argues that this Court does not have jurisdiction over attorney conduct outside of the Supreme Court's proceedings and, specifically, that attorney conduct in the Workers' Compensation Court, the Federal Bankruptcy Court, and "professional offices" falls outside of this Court's jurisdiction.

The respondent's contention that this Court's jurisdiction over attorney conduct is limited to actions in the Supreme Court is not warranted in law or fact. Not only would respondent's argument render much of the professional rules of conduct nugatory, it is contrary to the well-established "power inherent in this [C]ourt to control and supervise the practice of law generally, whether in or out of court." Rhode Island Bar Association, 55 R.I. at 129-30, 179 A. at 142 (emphasis added). Especially considering how few attorneys come before the Supreme Court and how infrequent such appearances are by the majority of attorneys who practice in this state, such a rule would utterly prevent this Court from protecting the public from incompetent, unethical, or irresponsible representation. Rather, the ethical standards imposed on attorneys historically have extended—and do still extend—beyond the courtroom. See id. at 134, 179 A. at 144 (in the English colonies, "[a]dmission to the bar meant admission to practice law, and admission to practice law comprehended all the activities of a lawyer in advising and assisting

others in all matters of law both in and out of court”).¹⁶ Indeed, over a century ago, this Court recognized:

“[A]ny conduct which demonstrates a moral condition inconsistent with the proper appreciation and discharge of professional duties and obligations may also form a just basis for disbarment or the imposition of some lesser punishment. In fact, any conduct which would preclude admission to the bar might well justify a disbarment thereafter, whether such conduct be associated with the discharge of strictly professional duties and obligations or clearly separated therefrom.” Crafts v. Lizotte, 34 R.I. 543, 546, 84 A. 1081, 1082 (1912).¹⁷

In accordance with these principles, it is undeniable that this Court may investigate and discipline attorney conduct regardless of where that conduct takes place. Attorneys licensed in Rhode Island are held to the same professional standards whether they are practicing in the Workers’ Compensation Court, in another state court, or in a local federal court. Indeed, this Court has regularly applied Rhode Island’s Rules of Professional Conduct to attorneys practicing in the local federal district court. See, e.g., In the Matter of Schiff, 677 A.2d 422, 423, 425 (R.I. 1996) (suspending attorney from the practice of law for eighteen months for her violation of the Supreme Court Rules of Professional Conduct after she submitted a materially false affidavit to the United States District Court for the District of Rhode Island); In re Petition of Almond, 603 A.2d at 1087, 1090 (denying a federal prosecutor’s petition for waiver of Article V, Rule 3.8 of the Supreme Court Rules of Professional Conduct, which had been based on his contention that

¹⁶ See Rhode Island Bar Association, 55 R.I. at 134-35, 179 A. at 144-45 for an historical and in-depth discussion rejecting the argument that the regulation of lawyers should be limited to conduct occurring in court.

¹⁷ See also Rhode Island Bar Association, 55 R.I. at 135, 179 A. at 144 (quoting the Supreme Court of South Carolina, in In Re Duncan, 65 S.E. 210, 211 (S.C. 1909), as stating that “[i]t is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts”); Anderson v. Bosworth, 15 R.I. 443, 445, 8 A. 339, 341 (1887) (“it is now well settled that the jurisdiction [of the court’s disciplinary power] extends to any matter in which an attorney has been employed by reason of his professional character”).

the rule conflicted with federal rules and standards and was a violation of the supremacy clause of the United States Constitution). Further, attorneys are held to the same ethical standards whether they are practicing in court, in a professional office, at home, on the street, over the phone, in a coffee shop, or anywhere else. There are no geographic or location-specific limitations to an attorney's ethical obligations.

Next, respondent claims that the supremacy clause of the United States Constitution prevents this Court from exercising authority over attorney conduct in federal courts. "In analyzing a claim under the supremacy clause, it is axiomatic that the supremacy clause is relevant only when there is impermissible state interference with federal law." In re Petition of Almond, 603 A.2d at 1090 (citing Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985)). In the instant matter, there is no such interference because the state and federal courts have consistently been in harmony as to the proper ethical conduct of attorneys practicing in their respective courts. For instance, the United States District Court for the District of Rhode Island has adopted the Supreme Court Rules of Professional Conduct (and any additional standards of conduct set forth in its local rules). See Rule 208 of the Local Rules of the United States District Court for the District of Rhode Island. In order to practice in the federal Bankruptcy Court in Rhode Island, an attorney must be in good standing with the bar of the Supreme Court of Rhode Island and must be admitted to practice in the United States District Court for the District of Rhode Island. See Rule 9010-1(a) of the Rules of the United States Bankruptcy Court for the District of Rhode Island. Further, there is no indication that these disciplinary proceedings in any way disrupted the bankruptcy proceedings in federal court, which continued to transpire without interruption from this Court, the board, or Disciplinary

Counsel. Nor has respondent contended that any specific disciplinary charge or applicable Rule of Professional Conduct interferes with a particular federal rule or law.

Accordingly, for the reasons stated above, this Court may exercise jurisdiction over attorney disciplinary matters generally, and over respondent specifically.

2. Due Process

The respondent raises numerous concerns implicating his procedural due process rights under the federal and state constitutions. First, he contends he was denied his procedural due process right to “present evidence and argue law” and to be heard by the “full board.” Second, he appears to be arguing that, because this Court promulgates and enforces the Rules of Professional Conduct, appoints persons to the board, hires disciplinary counsel, and ultimately determines whether and how to discipline an attorney for misconduct, this amounts to a constitutionally infirm merger of investigatory, prosecutorial, and adjudicatory functions so as to deny respondent procedural due process.¹⁸

Both the federal and state constitutions provide that no person shall be deprived of “life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV; R.I. Const. art. 1, sec. 2. This Court has quoted the United States Supreme Court in explaining that “[t]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.” Germane, 971 A.2d at 574 (quoting Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985)). “The guarantee of procedural due process assures that

¹⁸ The respondent also contends that he was fined by the Workers’ Compensation Court without an evidentiary hearing. This question is not properly before this Court; review of that contention would require a writ of certiorari issued to the Appellate Division of the Workers’ Compensation Court. See G.L. 1956 § 28-35-30; McGloin v. Trammellcrow Services, Inc., 987 A.2d 881, 885 (R.I. 2010).

there will be fair and adequate legal proceedings, while substantive due process acts as a bar against ‘certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.’” Id. (quoting L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 210 (R.I. 1997)).

When addressing procedural due process concerns, this Court “ha[s] previously employed the three-part test articulated by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 * * * (1976).” Germane, 971 A.2d at 574. Under the Mathews test, three factors are to be considered in determining whether a procedure violates due process:

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Germane, 971 A.2d at 574-75 (quoting Mathews, 424 U.S. at 335).

As to the first factor, it is undisputed that respondent’s license to practice law in this state, which has been in place for forty continuous years, is a property interest sufficient to invoke due process protections. See Barry v. Barchi, 443 U.S. 55, 64 (1979); Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 238-39 (1957); see also Mackey v. Montrym, 443 U.S. 1, 10 n.7 (1979).

As to the third factor, it appears respondent does not dispute that the state has an interest in regulating attorneys.¹⁹ Regarding the second factor, the state’s interest in regulating attorneys must be enforced with sufficient procedural safeguards as to protect an attorney’s property interest in his license to practice. “[A]n essential principle of due process is that a deprivation of

¹⁹ The respondent appears to dispute, instead, which government branch has authority to do so; this issue has been addressed supra.

life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.” Germane, 971 A.2d at 579 (quoting Loudermill, 470 U.S. at 542); see In re Ruffalo, 390 U.S. 544, 550 (1968) (an attorney subject to discipline must be afforded fair notice of the charge and a meaningful opportunity to respond).

Although respondent contends that he was not able to “present evidence and argue law” and was denied a hearing by the full board,²⁰ it is indisputable that respondent was given a meaningful opportunity to be heard. A panel of the board convened and conducted eight hearings on this matter over an eight-month period, heard testimony from respondent and other witnesses, admitted numerous exhibits from both Disciplinary Counsel and respondent, and gave respondent the opportunity to present and argue numerous motions. The respondent was also permitted to submit to the board a post-hearing memorandum summarizing his position on the facts and law. Furthermore, due process does not require a hearing before the full board; hearings held before a panel of the board are appropriate to the nature of disciplinary matters. See Barber v. Exeter-West Greenwich School Committee, 418 A.2d 13, 20 (R.I. 1980) (“[d]ue process is a flexible concept and the degree of protection afforded to an individual may vary with the particular situation”). Accordingly, the principle of notice and a hearing has been complied with in this case.

The due process clause also guarantees a hearing before a tribunal that is not “biased or otherwise indisposed from rendering a fair and impartial decision.” La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights, 419 A.2d 274, 283 (R.I. 1980); see Champlin’s Realty Associates v. Tikoian, 989 A.2d 427, 443 (R.I. 2010). “[T]he mere existence of a combination of ‘investigatory, inquisitorial, and adjudicative roles in a single administrative

²⁰ The respondent has not alleged that he did not receive proper notice of the charges or hearing.

body' does not amount to a denial of due process or signify that the agency's structure or operations is subject to constitutional attack." In re Commission on Judicial Tenure and Discipline, 916 A.2d at 750 (quoting La Petite Auberge, Inc., 419 A.2d at 284). The United States Supreme Court has explained that, "in order to challenge an administrative process successfully on the grounds of a combination of incompatible functions, a respondent must show that the procedures 'pos[e] such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" La Petite Auberge, Inc., 419 A.2d at 284 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

This Court has recognized that "the procedures employed in a modern administrative agency that allots 'the prosecutorial function to a staff of attorneys or other personnel who will not participate in the eventual decision, is a common and recommended feature of American administrative enforcement activity.'" In re Commission on Judicial Tenure and Discipline, 916 A.2d at 751 (quoting La Petite Auberge, Inc., 419 A.2d at 284). "[A]cceptable accommodation can be reached between the needs for aggressive enforcement of [the] public-interest * * * and fairness to individual * * * respondents, within the framework of a single agency's organizational processes." La Petite Auberge, Inc., 419 A.2d at 285.

The attorney disciplinary procedures in this state are designed in such a way that complaints against attorneys are addressed fairly in accordance with state and federal law. As discussed above, this Court steadfastly has held that "the authority of this Court to discipline [attorneys] is plenary and exclusive." In re Commission on Judicial Tenure and Discipline, 916 A.2d at 751. The fact that this Court promulgates and enforces attorney disciplinary rules,

appoints board members, and hires disciplinary counsel to enforce these rules is typical of administrative enforcement.²¹

There is absolutely no indication from this Court's Rules of Disciplinary Procedure or the record of the present case that the same individuals are involved in the building of an adversarial case and the deciding of the issues, or that other special circumstances make the risk of unfairness intolerably high. All investigations, whether upon complaint or otherwise, are initiated and conducted by Disciplinary Counsel who presents recommendations to the board but does not participate in the board's decision. See Rule 6(a), (b). Furthermore, the board may commence formal proceedings only after a screening panel finds probable cause to believe the respondent-attorney is guilty of misconduct (although a respondent-attorney may demand formal proceedings as of right). See id. These procedures ensure unbiased review of charges of attorney misconduct while safeguarding against any "risk of actual bias or prejudgment." La Petite Auberge, Inc., 419 A.2d at 285 (quoting Withrow, 421 U.S. at 47).

Additionally, the board's role is restricted to making recommendations to this Court. See Art. III, Rules 4(d)(2) and 6(d) of the Supreme Court Rules of Disciplinary Procedure. Upon a finding of attorney misconduct, it is the responsibility of the board to recommend a sanction, including, but not limited to, public censure, suspension, or disbarment; however, the board's decisions are not final and it lacks enforcement authority. See Rules 4 and 6(d). Because of the board's limited authority, this Court is obligated to review the record and the evidence adduced by the board, in order to enter an appropriate order. See Rule 6(d). Any proceedings before this Court are to be conducted by Disciplinary Counsel, which again ensures the separation of

²¹ See, e.g., G.L. 1956 chapter 17.1 of title 42 and chapter 17.7 of title 42 (creating the state Department of Environmental Management, granting it the power to issue its own rules and regulations and to hire and appoint enforcement personnel, and establishing a process of adjudication of disputed enforcement actions).

adversarial and adjudicatory functions. See id. Accordingly, we are not persuaded by respondent's apparent argument that the procedures utilized result in a merger of investigatory, prosecutorial, and adjudicatory functions such that his right to due process was denied. The respondent's motions to dismiss counts 2, 3, and 4 are therefore denied.

B

Respondent's Motion to Recuse

Next, respondent has moved to recuse the members of this Court, claiming a procedural due process violation and a violation of the Code of Judicial Conduct based on allegations of personal hostility toward—and bias against—him by members of this Court. He asserts three bases for these allegations: (1) Assistant Disciplinary Counsel was appointed by this Court; (2) the chair of the panel that heard respondent's case applied to the Chief Justice to be appointed a magistrate during the course of the disciplinary proceedings; and (3) the members of this Court are "friendly" with a retired Chief Justice, who "[r]eportedly * * * has a bias toward [respondent]."

As mentioned above, the due process clause "entitles a person to an impartial and disinterested tribunal." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). However, "[a] respondent who raises this sort of irregularity must overcome a 'presumption of honesty and integrity in those serving as adjudicators.'" La Petite Auberge, Inc., 419 A.2d at 284 (quoting Withrow, 421 U.S. at 47). "This presumption may be overcome through evidence that 'the same person(s) involved in building one party's adversarial case is also adjudicating the determinative issues' or if 'other special circumstances render the risk of unfairness intolerably high.'" Champlin's Realty Associates, 989 A.2d at 443 (quoting Kent County Water Authority v. State (Department of Health), 723 A.2d 1132, 1137 (R.I. 1999)).

Likewise, Article VI of the Supreme Court Code of Judicial Conduct requires that judges “avoid impropriety and the appearance of impropriety in all of [their] activities” and “perform the duties of judicial office impartially and diligently.” Code of Judicial Conduct Canons 2, 3. Thus, “judicial officers are duty-bound to recuse themselves if they are ‘unable to render a fair or an impartial decision in a particular case.’” Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 185 (R.I. 2008) (quoting Kelly v. Rhode Island Public Transit Authority, 740 A.2d 1243, 1246 (R.I. 1999)). Absent actual bias, the code provides that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned * * * .” Code of Judicial Conduct Canon 3E1. The pertinent inquiry in this regard is whether “a reasonable person might question [the judge’s] ability to remain impartial in hearing the case,” particularly where facts exist “that would prompt a reasonable question in the mind of a well-informed person about the judge’s capacity for impartiality * * * .” In re Bulger, 710 F.3d 42, 46 (1st Cir. 2013).

While judicial officers are obligated to recuse themselves under necessitating circumstances, they “have an equally great obligation not to disqualify themselves when there is no sound reason to do so.” State v. Mlyniec, 15 A.3d 983, 999 (R.I. 2011) (quoting Ryan, 941 A.2d at 185). “The burden is on the party seeking recusal to set forth facts establishing that the justice possesses a ‘personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his [or her] impartiality seriously and to sway his or her judgment.’” Id. (quoting Mattatall v. State, 947 A.2d 896, 902 (R.I. 2008)).

Here, respondent has failed to provide any facts that would demonstrate either bias or the appearance of bias. First, as explained above, this Court’s appointment of Assistant Disciplinary Counsel does not constitute a structural defect in violation of the due process clause; and, for the

same reasons, it does not present an issue of bias warranting recusal. Second, respondent appears to assert that the justices of this Court harbor personal animus towards him because the retired Chief Justice serves the Court in the capacity of an appellate mediator and is “friendly” with members of the Court. Assuming, *arguendo*, that the former Chief Justice has a bias toward respondent, the former Chief Justice’s cordial relationship with the current members of this Court is insufficient to impute bias or the appearance of bias. Similarly, respondent implies that the current Chief Justice of this Court may harbor bias against respondent because a member of the panel had applied to this Court for appointment to a magistrate position during the time when this disciplinary matter was pending.²² This fact alone does not demonstrate bias by the Chief Justice in this proceeding, and respondent has not supported his serious allegations with any additional relevant facts. Instead, he appears content to rest his claims on mere conjecture. As we have previously stated, “[r]ecusal is not in order by a mere accusation that is totally unsupported by substantial fact.” *Mlyniec*, 15 A.3d at 1000 (quoting *State v. Clark*, 423 A.2d 1151, 1158 (R.I. 1980)). We do not take motions for recusal lightly, but in this case respondent has simply failed to establish any facts showing our apparent or actual bias. Accordingly, his motion to recuse the members of this Court is denied.

C

Respondent’s Motion to Stay Pursuant to G.L. 1956 § 9-33-2

In addition to his constitutional objections, respondent has moved this Court to stay the proceedings pursuant to G.L. 1956 § 9-33-2, commonly referred to as the “anti-SLAPP” statute, arguing that “[t]he purpose of the activities of [disciplinary counsel] who was hired by this Court

²² The member of the panel in question was not appointed to the position.

is to chill the free speech rights of Keven A. McKenna as an attorney by having his [sic] suspended from the practice of law for pre-textual minor allegations * * * .”

“The General Assembly enacted the anti-SLAPP statute in order to ‘prevent vexatious lawsuits against citizens who exercise their First Amendment rights of free speech and legitimate petitioning’ under the United States and Rhode Island Constitutions ‘by granting those activities conditional immunity from punitive civil claims.’” Palazzo v. Alves, 944 A.2d 144, 150 (R.I. 2008) (quoting Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 752 (R.I. 2004)). “Section 9-33-2 provides that, when that conditional immunity attaches, it renders ‘the petitioner or speaker immune from any civil claims for statements, or petitions, that were not sham by virtue of being objectively or subjectively baseless.’” Id. (quoting Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208, 1211 (R.I. 2000)).

The purpose and application of the anti-SLAPP statute are wholly inapplicable to attorney disciplinary proceedings. The respondent is not being sued for his exercise of First Amendment rights of free speech; rather, he is the subject of a disciplinary complaint, deriving from his conduct as a licensed attorney, brought by Disciplinary Counsel under the rules of this Court after a thorough investigation. We find no merit in respondent’s claim that this process is somehow being used as a vehicle for chilling his free speech rights, nor in his claim that the anti-SLAPP statute has any applicability to this type of proceeding. Accordingly, we deny respondent’s motion to stay these proceedings pursuant to § 9-33-2.

D

The Disciplinary Board’s Findings

In addressing the board’s findings on the four counts, we begin by noting that no client has brought this complaint, and there is no allegation that respondent ever improperly accessed

any client funds. That is one circumstance that sets this apart from many of the disciplinary cases that make their way to this Court. However, it is the responsibility of this Court to give force and effect to all of the Rules of Professional Conduct. In doing so, we are mindful of the high threshold of ethical conduct expected of members of the bar in this state. Aspiring lawyers are required to pass the Multi-State Professional Responsibility Examination²³ and to successfully undergo a character and fitness interview. Law students customarily take a course in professional ethics, during which they are schooled in the high ethical standards expected of an officer of the court. Newly admitted attorneys are required to take a day-long “Bridge the Gap” course, which focuses heavily on professional ethics. It is our intent that all lawyers hold a healthy respect for the Rules of Professional Conduct, and that they carry forward in their careers the oath they swore upon entering this profession:

“[I] solemnly swear that in the exercise of the office of attorney and counselor [I] will do no falsehood, nor consent to any being done; [I] will not wittingly or willingly promote, sue or cause to be sued any false or unlawful suit; or give aid, or consent to the same; [I] will delay no man’s cause for lucre or malice; [I] will in all respects demean [myself] as an attorney and counselor of this [C]ourt and of all other courts before which [I] may practice uprightly and according to law, with fidelity as well to the court as to [my] client; and that [I] will support the constitution and laws of this state, and the constitution and laws of the United States. So help [me] God.” Article II, Rule 8 of the Supreme Court Rules for Admission of Attorneys and Others to Practice Law.

It is our expectation that newly admitted attorneys will observe adherence to that oath reflected in the practice of the more senior members of the bar.

²³ “Any applicant for the bar examination shall be required to have obtained a Multi-State Professional Responsibility Examination (MPRE) scaled score of 80 in order to be eligible to sit for the Rhode Island bar examination.” Note to Article II, Rule 1 of the Supreme Court Rules for Admission of Attorneys and Others to Practice Law.

We do not question respondent's fidelity to the constitution—even if, from time to time, we disagree with his interpretation of that document. However, the role of attorney demands more. There are dozens of rules that govern professional conduct which, read together, demand a high level of ethics and professionalism from members of this bar. We cannot maintain the integrity of the profession if we ignore persistent, intentional, and repeated violations of the Rules of Professional Conduct. Neither can we hold young attorneys to the standards we have set if we allow more senior, seasoned members of the bar to flout those rules with impunity.

In his brief summarizing the hearings before the panel, respondent stated that “[t]he cliché that lawyers are ‘officers’ of the Supreme Courts [sic] is no more than a cliché.” We beg to differ. An attorney's position as an officer of the court is a sacred trust. “Courts have long recognized an inherent authority to suspend or disbar lawyers. * * * This inherent power derives from the lawyer's role as an officer of the court which granted admission.” In re Snyder, 472 U.S. at 643. An officer of the court is a person “who is charged with upholding the law and administering the judicial system. Typically * * * a judge, clerk, bailiff, sheriff, or the like, but the term also applies to a lawyer, who is obliged to obey court rules and who owes a duty of candor to the court.” Black's Law Dictionary, 1259 (10th ed. 2014). “[T]he courts not only demand [lawyers'] loyalty, confidence and respect but also require them to function in a manner which will foster public confidence in the profession and, consequently, the judicial system.” In re Griffiths, 413 U.S. 717, 723-24 (1973). Benjamin Cardozo, then Chief Justice of the New York Court of Appeals, wrote:

“‘Membership in the bar is a privilege burdened with conditions.’ * * * [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. His co-operation with the court [is] due, whenever justice would be imperiled if co-operation [were]

withheld. * * * He might be censured, suspended, or disbarred for 'any conduct prejudicial to the administration of justice.'" People ex rel. Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928).

The duty of candor, then, is the foundation of a lawyer's profession. That duty is not limited by the dictates of Rule 3.3 of the Rules of Professional Conduct; rather, courts have held that there is a general duty of candor to the court that is broader than the rule. See United States v. Shaffer Equipment Co., 11 F.3d 450, 457 (4th Cir. 1993) ("[W]e are confident that a general duty of candor to the court exists in connection with an attorney's role as an officer of the court."). The basis of this general duty of candor is "the principle that lawyers, who serve as officers of the court, have the first line task of assuring the integrity of the process." Id.

"Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process." Id.

The integrity of the justice system is not served when an attorney, who has been sworn to tell the whole truth in a proceeding, refuses to answer simple, straightforward questions, whether posed by the court or by opposing counsel. Nor is it served by an attorney who disregards an order of this Court, fails to respond to a subpoena, or deliberately misrepresents his assets to a bankruptcy trustee. "The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." Shaffer Equipment Co., 11 F.3d at 457-58.

It is clear that respondent's actions in Workers' Compensation Court were not candid and not directed towards the truth, however literally true some of his responses may have been—e.g.,

“I live in a house.” We are further troubled by respondent’s conduct in Bankruptcy Court. We agree with the board’s conclusion that respondent’s failure to disclose the nature of the Wells receivable, as well as his refusal to admit or deny basic information in his answer to the complaint objecting to discharge, constituted a lack of candor toward the tribunal in violation of Rule 3.3. We also agree with the board’s findings that respondent’s conduct regarding the Wells receivable was dishonest, in violation of Rule 8.4(c). As the board concluded:

“It is unfathomable that the serial misrepresentations and omissions of material fact, as unearthed and presented in this case, and which we find established by clear and convincing evidence, would occur without a mindset purposely predisposed to preventing the disclosure of assets which [respondent] deliberately attempted to hide from creditors, including the Bankruptcy Trustee.”

Furthermore, a reading of the Workers’ Compensation Court transcripts, containing respondent’s painfully repetitive arguments and his steadfast resistance to the procedural boundaries of the proceedings, shows conduct clearly intended to disrupt the tribunal in violation of Rule 3.5(d).

We also agree with the board that respondent’s actions with regard to his use of the name “Keven A. McKenna, LLC” violated Rules 7.1, 7.5, and 8.4(c) of the Rules of Professional Conduct. After receiving an order of this Court explicitly prohibiting respondent from practicing law as an LLC, he continued to use a bank account under the name of the LLC. He deposited checks for legal services into this account, with at least one made out to the LLC. The respondent used this account to pay for expenses specifically associated with the practice of law, including his attorney registration fee, court filing fees, transcript fees, and title search expenses. We note the board’s determination that respondent’s justifications and excuses for these actions were “palpably disingenuous.”

Additionally, we concur with the board's finding that respondent's failure to provide the records requested through Assistant Disciplinary Counsel's subpoena constituted a violation of Rule 1.19. The respondent admitted at his deposition that he had not brought all of the records as requested, seemingly relying on a last-minute motion to quash the subpoena, which was not granted. As explained supra, Assistant Disciplinary Counsel clearly had the authority to subpoena respondent's records, and respondent intentionally failed to comply with this request.

E

Sanction

Chief Justice John Marshall once observed:

“On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the Court itself.” Ex parte Burr, 22 U.S. (9 Wheat.) 529, 530 (1824).

So too, it is the ultimate responsibility of this Court to fashion an appropriate sanction for respondent's violations of the Rules of Professional Conduct. In so doing, we customarily give great weight to the recommendation of the board. See In re Foster, 826 A.2d 949, 953 (R.I. 2003); In re Cozzolino, 811 A.2d 638, 641 (R.I. 2002). Nevertheless, this Court is the final arbiter of professional discipline. In re Foster, 826 A.2d at 953.

We have carefully considered the voluminous record of these proceedings, as well as the recommendation of disbarment by Assistant Disciplinary Counsel, and indeed the judgment of our dissenting colleague that the board's recommendation is inadequate. We commend the

members of the board, and the members of the hearing panel in particular, for their patience in considering respondent's sometimes repetitive arguments and continual challenges to their authority. We are ever aware of the significant role that the board plays in protecting the public and upholding the integrity of the bar and the legal profession.

This Court has often said that "the purposes of discipline are not punishment of the attorney but protecting the public and maintaining the integrity of the profession." In re Scott, 694 A.2d 732, 736 (R.I. 1997). We are satisfied that the board's recommendation of a one-year suspension from the practice of law is warranted in this case and appropriately meets the dual purposes of professional discipline. In our opinion, the record before us clearly illustrates a persistent pattern of obstreperous behavior from 2009 to the present day, and before several courts, that derogates sharply from the ethical standards to which we expect attorneys in this state to adhere. We disagree, however, with the dissent's characterization of a one-year suspension as a mere "slap on the wrist." We do not consider insignificant a one-year hiatus in one's chosen profession with the consequent effect on his or her livelihood.

In an apparent attempt to mitigate his misconduct, respondent reminds us that no client has brought a complaint against him. Unfortunately, that is not particularly relevant; the simple fact is that respondent was representing himself when the conduct that is the basis for the disciplinary action took place. The Rules of Professional Conduct are in place not solely to protect individual clients but also to protect the integrity of the judicial system itself. We would not be true to our duty of safeguarding the integrity of the profession if we were to ignore respondent's conduct.

We do not take lightly the responsibility of crafting a meaningful sanction for this conduct. We are mindful of and take into account the respondent's many years of service to his

clients and the bar, including his participation in the state constitutional convention and his significant pro bono work. The respondent is clearly an intelligent attorney and a passionate advocate. We profoundly hope that, in the future, those attributes will be employed more appropriately.

V

Conclusion

For the reasons stated above, we order that the respondent be suspended from the practice of law for a period of one year, said period of suspension to commence thirty days from the date of this opinion. In order to protect the interests of his current clients, we authorize Disciplinary Counsel to supervise the orderly transfer of the respondent's client matters to new counsel. At the conclusion of this one-year period of suspension, the respondent must apply to this Court for reinstatement pursuant to Article III, Rule 16 of the Supreme Court Rules of Disciplinary Procedure.

Justice Goldberg, concurring in part and dissenting in part. I respectfully dissent from that portion of the majority decision that adopts the recommendation of the Disciplinary Board of the Rhode Island Supreme Court (the board) that the respondent be suspended from the practice of law for a period of one year. I do not undertake this dissent lightly, but do so in accordance with my firm belief that the duty to protect the integrity of this profession rests with this Court and, in light of that responsibility, the sanction adopted by the majority is inadequate and fails to respond to the egregious nature and sheer number of material misrepresentations made by the respondent and, importantly, also ignores the respondent's conduct before the board.

Having carefully reviewed the entire record in this proceeding and in light of the recommendation of disbarment by Assistant Disciplinary Counsel who prosecuted the petition, I cannot agree with such a minimal sanction, which, in my opinion, does little to further any of the Court's well-established goals in imposing attorney discipline. In the face of this egregious misconduct, this sanction does scant justice and overlooks the sad fact that this lawyer of many years refuses or is unable to accept the authority of the Supreme Court over the conduct of attorneys. In my opinion, this sanction amounts to a slap on the wrist.

I begin by noting that, before the board, Assistant Disciplinary Counsel advocated that respondent should be disbarred. The board found, by clear and convincing evidence, that respondent violated the Rules of Professional Conduct in each and every count of the petition. The board also rejected respondent's conspiracy-theory defense and his "unsupported and inflammatory assertions * * * that he [was] being subjected to disciplinary action and/or persecuted because of his controversial positions on constitutional issues," and it concluded that his "arguments and suppositions [were] mere sophistry which [did] nothing to dissuade [the board] from its conclusion."

Next, the board recommended a suspension from the practice of law for a period of one year, but did not set forth any reasoning for this recommendation. The board also failed to address the recommendation of Assistant Disciplinary Counsel that respondent be disbarred. It is this aspect of the board's decision with which I take issue. I join the majority in commending the board, and particularly the members of the panel, for their herculean efforts in this matter and for the fine work of the Court's Assistant Disciplinary Counsel and Deputy Disciplinary Counsel. However, it is this Court's responsibility to impose discipline that responds to the circumstances of the case. See In re Schiff, 677 A.2d 422, 424-25 (R.I. 1996) (refusing to adopt a

recommendation of public censure for an attorney who filed a false fee affidavit and instead imposing an eighteen-month suspension).

In his memorandum to this Court—a copy of which is attached to this opinion as an Addendum—Assistant Disciplinary Counsel acknowledged the board’s recommendation of a one-year suspension; but, nonetheless, in light of respondent’s serial violations of misconduct, he argued “that the severity of [r]espondent’s actions as well as the lack of mitigation factors[,] coupled with his utter disregard for not only this process, but this Court’s authority and the protection of not only the integrity of the profession[,] but the public as well[,] warrants a significant sanction beyond the one (1) year suspension recommended by the [b]oard.” (Emphasis added.) I concur.

It is my belief that, when imposing attorney discipline, this Court should look to the totality of the circumstances, including the proceedings before the board. Indeed, the level of cooperation before the board and respondent’s cooperation with Disciplinary Counsel are factors that generally are brought to this Court’s attention in disciplinary matters.

This was not an easy road for Assistant Disciplinary Counsel. The respondent challenged his authority at every level as an ultra vires appointment by this Court. His integrity was assailed, he was referred to on numerous occasions by respondent as a “hit man for the * * * Supreme Court,” who was hired to “search and destroy” him; and, significantly, he alleged that, as a practicing lawyer, Assistant Disciplinary Counsel could expect favorable advantage because of his service to this Court. Assistant Disciplinary Counsel was sued four times—three times in federal court and once in Superior Court. The level of vilification directed by respondent toward anyone connected with the investigation and prosecution of this case, including the chair of the

panel and the Court's Deputy Disciplinary Counsel and Assistant Disciplinary Counsel, is shocking and should not be overlooked by this Court.

I share Assistant Disciplinary Counsel's concern that, in addition to the unassailable findings of misconduct "demonstrat[ing] a lack of candor amounting to dishonesty in dealing with various tribunals" and respondent's "refusal or inability to recognize his obligations under the Rules of Professional Conduct[.]" respondent also violated a direct order from this Court prohibiting him from practicing law in the corporate form and thereafter engaged in a course of conduct, throughout these proceedings, in which he consistently and blatantly sought to "circumvent this Court's authority over his law practice[.]"

By way of apparent mitigation of respondent's misconduct, the majority notes that respondent has been a member of the bar for many years and has performed pro bono services during that time. This mitigation does not tip the scales for me.

To this day, respondent has failed to produce the documents sought by Assistant Disciplinary Counsel in defiance of a lawfully issued subpoena, on the ground that Assistant Disciplinary Counsel had no authority to issue it. He moved to quash the subpoena, not before this Court, but before the board, the day before the return date. He appeared at the deposition and flatly refused to produce the records. His statement to the board about why he refused to produce the sought-after records is emblematic:

"I did bring the records, I did not give them to him because, as I have said before, he's an employee hired by the Supreme Court who has no authority to do this. And I then filed a lawsuit against him in Federal Court. So I met the request even though I thought he had no statutory or constitutional authority [to] do anything of the kind. He's not an Assistant Disciplinary Counsel. He's a hired gun by the Rhode Island Supreme Court by cont[r]act. He gets paid an hourly fee and he has no authority [to] do depositions or to request subpoenas." (Emphasis added.)

In my opinion, the fact that Assistant Disciplinary Counsel resorted to issuing subpoenas for respondent's bank records is of no moment to this discussion. The respondent should have been suspended from the practice of law for noncompliance with Article V, Rule 1.19 of the Supreme Court Rules of Professional Conduct like every other attorney who fails to comply with Rule 1.19. In no event should respondent be readmitted to the practice of law until he produces all records that were subject to subpoena.

As noted, during the course of these proceedings, respondent filed numerous lawsuits against the Chief Justice, the board, Assistant Disciplinary Counsel, and various court employees challenging the authority of the board and Assistant Disciplinary Counsel. Finally, after hearings that spanned over one year, the board issued its findings and submitted its recommendation to this Court. We issued an order directing respondent to appear before this Court in order to respond to the findings of the board. In response, respondent moved to recuse the members of this Court based on bias, unethical conduct, and a violation of his right to due process. Next, he filed yet another federal lawsuit—his third—seeking to restrain this Court from proceeding. That complaint was entitled “COMPLAINT TO STAY SUSPENSION OF PLAINTIFF FROM PRACTICING [sic] LAW FOR HIS ACTS IN FILING FEDERAL BANKING [sic] PROCEEDING, ANSWERING FEDERAL ADVERSARY PROCEEDURES [sic], CHALLENGING UNCONSTITUTIONAL ACTS IN FEDERAL COURT.” The respondent's rambling discourse in this pleading, as well as his conduct in his appearances before the panel of the board, convince me that he has no insight into his obligations as a member of the bar or the gravity of his dishonesty and attorney misconduct.

In this eleventh-hour salvo, respondent alleged that the Supreme Court was not an adequate or fair forum to hear this matter; that the Court has no authority to suspend respondent

in the absence of a complaint from a client or a judge or the Bankruptcy Trustee; that the Rules of Professional Conduct are “unconstitutional”; and that Assistant Disciplinary Counsel, at the direction of his client, this Court, has undertaken “an otherwise unfounded and unconstitutional pre-textual administrative inquisition of the [p]laintiff’s practice of law to seek possible technical violations of the Rule[s] * * * of Professional Conduct[.]” He alleged that this Court has no authority over lawyers “outside of the walls of the R.I. Supreme Court, and in particular within the U.S. Bankruptcy Court”; and that the appointment of Assistant Disciplinary Counsel was in retaliation for respondent’s exercise of his rights under the First Amendment.

I pause to note that respondent, clearly and unequivocally, has every right to express his opinions about the members of this Court, the constitution, and his version of the separation of powers in this state and the United States; he even is free to amalgamate those doctrines as he often does. See, e.g., In re Application of Roots, 762 A.2d 1161, 1170 (R.I. 2000). Nonetheless, he must comply with the Rules of Professional Conduct.

The respondent was found by the board to have filed numerous motions out of time, which were declared to be specious and designed to delay the tribunal. He continued to file the same motions and make the same arguments ad nauseam. The respondent contended that the numerous allegations in the petition filed by Disciplinary Counsel amounted to “pettifoggery” and “frivolous little things” taken out of context. He also accused, without apparent foundation or good-faith basis, Barbara Margolis, the Court’s Deputy Disciplinary Counsel, of participating in the discussions and deliberations of the board. Ms. Margolis did not attend any deliberations or discussions of the board, and respondent was admonished by the Chair.

On numerous occasions respondent moved the Chair to recuse herself, based on his contention that her evidentiary rulings demonstrated bias. At the conclusion of the hearings

before the board, respondent refused to rest his case. He had no further witnesses to call. When asked if he had any other exhibits to introduce, he stated that he did, but that the Chair would “have to wait until I get them.” When informed that the exhibits were required to be produced later that day, respondent refused to produce any further evidence and refused to rest his case. The Chair declared the evidence closed. The respondent’s actions before the board, in my opinion, amounted to unprofessional conduct in violation of Article III, Rule 6(e) of the Supreme Court Rules of Disciplinary Procedure.¹

The respondent’s conduct, his multitude of lawsuits challenging the authority of this Court, his deceitful behavior and lack of candor—as set forth in the petition and findings of the board—his refusal to cooperate with Disciplinary Counsel, and his disobedience to a lawfully issued subpoena duces tecum, merit a significantly longer period of suspension and an order that respondent must reapply for admission to the bar, must produce the records demanded by the subpoena, and must demonstrate his fitness to practice law, including his obligation to comply with the Rules of Professional Conduct. Unless he is able to do that, respondent should be deemed unfit to practice law.

The respondent’s personal opinions about the current or former members of this Court have no bearing on my opinion in this case, nor do his quixotic ramblings concerning his view of our constitutional structure. The judicial power rests with this Court. The respondent’s view of the state’s separation of powers as including overlapping responsibilities and authority among

¹ Article III, Rule 6(e) of the Supreme Court Rules of Disciplinary Procedure provides:

“Duty to Cooperate. The failure of an attorney whose conduct is the subject of an investigation authorized by these rules to comply with the reasonable orders and requests of either Counsel or the Board shall constitute unprofessional conduct, and any such failure shall be referred forthwith to this Court for such action as it deems appropriate.”

the branches is irrelevant in the context of attorney regulation and discipline. Moreover, respondent's flexible and fluid arguments about this state's constitutional structure do not serve as a shield against his perfidious conduct or block scrutiny by this Court.

In addition to respondent's behavior during the course of this investigation, my concern about the inadequate penalty also extends to the breadth and nature of his misconduct that led to the petition. It is important to note that the petition filed by Disciplinary Counsel did not concern merely one event or proceeding. The violations of the Rules of Professional Conduct did not involve a client or any zealous advocacy by respondent to protect the rights of a client. This disciplinary petition solely dealt with respondent's operation of his law practice and his behavior before the state and federal tribunals concerning his own affairs.

In count 1, the board noted that respondent admitted that he was not insolvent, but he filed two bankruptcy petitions solely to obtain a stay of an order in the Workers' Compensation Court that compelled him to pay money to a former employee. This action was taken in order to impede the Workers' Compensation proceeding. The respondent then filed an application with this Court for permission to practice law as a limited liability company (LLC). This Court issued an order prohibiting respondent from practicing law in any corporate form until he certified that he was no longer practicing law as Keven A. McKenna, PC. He defied this order, changed the name of the corporation to McKenna Support Services, LLC, and continued to practice law under that corporate form. Significantly, practicing law as McKenna Support Services, LLC constitutes the practice of law as an LLC, the very conduct this Court proscribed. The respondent failed to change his bank account, continued to deposit client checks and draw funds for operating expenses from that account, and did so until he was advised that a subpoena had issued for his banking records. He then filed a federal lawsuit seeking to quash that subpoena.

The board found that respondent held himself out as an LLC in violation of an express order from this Court. The board also found respondent's attempts to justify his conduct and "minimize the gravity of his diversion from the applicable disciplinary rules, as palpably disingenuous." (Emphasis added.) Standing alone, this finding warrants further suspension. This Court frequently is asked by Disciplinary Counsel to consider an attorney's lack of candor to Disciplinary Counsel and the board during a disciplinary proceeding.

Count 2 of the petition focused on respondent's unprofessional conduct before the Bankruptcy Court—in failing to disclose income, misrepresenting his interest in a receivable, and engaging in conduct that amounted to a lack of candor and dishonesty—and in his failure to cooperate with the U.S. Trustee's investigation. The respondent failed to report the receivable in his sworn statement to the Bankruptcy Court and to his own attorney. He unilaterally, and without notice to the Bankruptcy Trustee, filed a motion for a whopping attorney's fee and filed an affidavit, in the Town of Bristol Probate Court, designed to place a lien against the probate estate of a former client. He got caught. The U.S. Trustee filed an adversary complaint against him and objected to any discharge. In response to this complaint, respondent proceeded to commit even more violations of the Rules of Professional Conduct, including lack of candor and actions intended to disrupt the proceeding. In his answer to the adversary complaint, respondent refused to admit or deny basic information, including his refusal to admit that copies of his own pleadings were true and accurate copies. He also failed to comply with a subpoena to produce records.

In addressing count 2, the board made a plethora of adverse findings against respondent, including that he "made serial misstatements and misrepresentations regarding his financial affairs, or omitted material facts which he was under an obligation to disclose under sworn

statement in the Bankruptcy Court and in testimony at hearing on the instant [p]etition.” The board set forth seven separate material misrepresentations with respect to this receivable. Additionally, the board found that respondent “engaged in a course of conduct deliberately designed to hide the existence, value and collectability of the Wells Receivable. This course of conduct included the making of false statements of material fact, the failure to disclose material facts and the offering of evidence that the [r]espondent knew to be false.” The board concluded that this conduct simply cannot be countenanced. The board also declared:

“It is unfathomable that the serial misrepresentations and omissions of material fact, as unearthed and presented in this case, and which we find established by clear and convincing evidence, would occur without a mindset purposely predisposed to preventing the disclosure of assets which [respondent] deliberately attempted to hide from creditors, including the Bankruptcy Trustee.”

The board also found that respondent’s conduct was intended to and did disrupt the tribunal. The board also rejected, as ringing hollow, respondent’s tired refrain that neither the board nor this Court has jurisdiction over lawyers in federal court proceedings. See In re Schiff, 677 A.2d at 424 (attorney disciplined for filing false document in United States District Court for the District of Rhode Island).

Count 3 relates to respondent’s unprofessional conduct with respect to a deposition conducted by Assistant Disciplinary Counsel and respondent’s subsequent refusal to maintain records as mandated by Rule 1.19. The respondent was served with a lawfully issued subpoena directing him to appear and bring certain records and to testify with respect to the veracity and completeness of the records produced. He refused to do so. The night before the scheduled deposition, he moved to quash the subpoena on the ground that Assistant Disciplinary Counsel did not have the authority to conduct the disciplinary investigation. The board could discern no

credible authority to support this assertion and found that respondent refused to comply with the subpoena in violation of Rule 1.19 and, further, that he engaged in obstreperous tactics and conduct before the board. This conduct is unacceptable. Attorneys are required to cooperate in any investigation by Disciplinary Counsel or face serious consequences. This Court has not hesitated to respond appropriately when called upon to do so. See In re D'Ambrosio, 29 A.3d 1241, 1241-42 (R.I. 2011) (mem.) (suspending respondent from the practice of law for failure to comply with a duly authorized subpoena directing him to provide financial records to Disciplinary Counsel in connection with a disciplinary complaint); In re Williams, 791 A.2d 486, 486 (R.I. 2002) (mem.) (disbarring an attorney—after an initial suspension—for disregard of the Court's order to comply with subpoenas issued in connection with a disciplinary investigation).

Count 4 brings us to yet another forum, the Workers' Compensation Court, where respondent disrupted the proceedings, failed to exhibit candor, accused the Chief Judge of bias against him, and threatened the Chief Judge, declaring that he was "suing you personally because you're trying to make, take money out of my pocket. I'm going to take money out of your pockets." The board found that respondent was flippant, evasive, dilatory, and disruptive when he refused to disclose his home address to the Workers' Compensation Court, noting that documents he filed in the Bankruptcy Court, the Office of the Secretary of State, and in everyday correspondence included the number and name of the street address he refused to disclose to the court. Additionally, the board found that respondent refused to admit the existence of pretrial orders that were part of the court record and refused to answer straightforward questions and feigned a lack of recollection of his claim for a trial and feigned a lack of understanding of simple questions. The board found that respondent was "deliberately and unnecessarily disruptive and dilatory, disrespectful to the [c]ourt[,] including the judge and opposing counsel,

combative, evasive, unresponsive, disputatious and pugnacious in both his testimony and in his actions as counsel for himself before the Workers' Compensation Court * * *."

Accordingly, based on the numerous, indeed successive and escalating, incidents of dishonesty and unprofessional conduct committed by respondent, all of which related to his conduct as an attorney and officer of this Court, I am of the belief that a suspension of one year does not respond to the seriousness of the violations, their number, or their scope. Although this Court appropriately accords deference to the recommendations of the board, we also pay close attention to the arguments of the Disciplinary Counsel, who have an opportunity to appear before the Court when discipline is recommended. In this instance, although acknowledging the recommendation of Assistant Disciplinary Counsel, the board failed to set forth any discussion of its reasons for rejecting the recommendation and instead recommended a suspension of one year.

In appropriate cases, this Court has elected not to adopt the recommendation of the board. See In re Schiff, 677 A.2d at 424-25 (declining to follow the board's recommendation of a public censure and imposing an eighteen-month suspension for filing a false fee affidavit in federal court); Lisi v. Resmini, 603 A.2d 321, 324 (R.I. 1992) (rejecting the board's recommendation of a sixty-day suspension and ordering a suspension of one year for filing a false jurat). In Carter v. Muka, 502 A.2d 327 (R.I. 1985), this Court initially suspended and, after a lengthy evidentiary proceeding before the full Court—which was necessary because a respondent filed suit against the entire disciplinary board—subsequently disbarred Betty Muka for, among other things, filing unfounded lawsuits with the intent to harass or injure another; knowingly advancing a claim that was unwarranted under existing law; engaging in conduct which was degrading to a tribunal; and knowingly making false accusations against a judge, including vituperative and unsupported accusations against a justice of the Superior Court and other members of the bar. Id. at 328-30.

Although Muka certainly represents an extreme case, this Court's concerns for the rights of individuals who were hauled into court based on Attorney Muka's baseless claims and the rights of litigants in our courtrooms, including her "utter disregard for the requirements of law and the rights of any person who has the temerity to disagree with her[,]” id. at 330, are relevant to this analysis.

In conclusion, it is my opinion that the sanction recommended by the board, and adopted by the majority, is wholly inadequate and, when compared to discipline imposed upon other members of the bar for a single violation of the disciplinary rules, is disparate.

Although I do not, as the majority suggests, consider “a one-year hiatus” from the practice of law to be “insignificant,” I continue to believe that the sanction in this case, for what is serial misconduct involving deceit and dishonesty, is a nominal sanction that does not respond to this Court's goal of maintaining the integrity of this honorable profession.

Furthermore, it is my belief that the respondent should not be readmitted to the practice of law unless and until he produces the records that were the subject of a lawfully issued subpoena. This Court has never overlooked an attorney's refusal to produce records sought by Disciplinary Counsel. We should not do so here.

Accordingly, it is my opinion that the respondent should be suspended from the practice of law for two years and should not be readmitted until he complies with Rule 1.19.