IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
MICHAEL WAYNE BLUM,	)	**Supreme Court #SC95595**
	)	
Respondent.	)	

INFORMANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

POINT RELIED ON

I. IN RESPONSE TO POINT I. OF RESPONDENT'S BRIEF:

RESPONDENT'S REQUEST FOR REMAND SHOULD BE DENIED BECAUSE THE DISCIPLINARY HEARING PANEL PROPERLY USED ITS DISCRETION DURING DISCOVERY IN RULING:

A. DOCUMENTS (IF ANY) UNRELATED TO THE MICHAEL BLUM INVESTIGATION AND INVOLVING THE INVESTIGATION (IF ANY) OF MR. BLUM'S LAW PARTNER ARE NOT DISCOVERABLE PURSUANT TO THE PROVISIONS OF RULE 5.31, AND

B. DOCUMENTS PREPARED IN ANTICIPATION OF TRIAL AND AFTER THE FILING OF THE INFORMATION IN THIS CASE WERE WORK PRODUCT PROTECTED BY THE QUALIFIED WORK PRODUCT PRIVILEGE.

ARGUMENT

I. IN RESPONSE TO POINT I. OF RESPONDENT'S BRIEF:

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B. DOCUMENTS PREPARED IN ANTICIPATION OF TRIAL AND AFTER THE FILING OF THE INFORMATION IN THIS CASE WERE WORK PRODUCT PROTECTED BY THE QUALIFIED WORK PRODUCT PRIVILEGE.

Respondent argues this case should be remanded to a different Disciplinary Hearing Panel because the Panel denied Respondent's discovery request. This matter was decided before trial when the Chair on August 10, 2015 denied Respondent's Motion to Compel (Record 115). (Respondent's motion is at pages 103-106 of the Record).

Informant's position was set forth in Informant's Response to Respondent's Motion to Compel filed on August 4, 2015 (Record 107-113). Informant's argument from that response is set forth in full in the following paragraphs numbered 1-17:

1. Respondent's motion has two areas of discussion, one the confidentiality of documents under Rule 5.31 and the other the discoverability of work product under Rule 56.01. The response will be submitted in two parts.

Rule 5.31

2. Request No. 2 of Respondent's First Request for Production of Documents requests a complete copy of all documents or interviews relating to the law firm of Blum and Ray, regardless of the case or investigation in which the documents were prepared or obtained. Any documents from any case other than the present one clearly are prohibited from discovery in this case by Supreme Court Rule 5.31. Subsection 5.31(a)(1) states that all proceedings and the records of all proceedings under Rule 5 shall be confidential except as otherwise provided in Rule 5.31. In this case there is no exception to the general confidentiality provision in any other portion of Rule 5.31.

3. Subsection 5.31(b) discusses when documents become public in an actual disciplinary case, such as the matter currently pending before this Court. Thus subsection (b) does not involve any other matter or investigation. Likewise, subsection 5.31(c) discusses the issuance of protective orders and the closing of records after disposition in a pending case, i.e. the current Blum case. It has no applicability to any other disciplinary proceeding or investigation. Subsection (e) discusses the dissemination of disciplinary information after sanction and is not relevant to this discussion.

4. The only remaining provision of Rule 5.31 is subsection (d). Within that subsection, 5.31(d)(1) clearly states that confidential records of the case may be inspected

only by the advisory committee, chief disciplinary counsel, members of a regional disciplinary committee conducting an investigation, the person complained against or that person's duly authorized representative, unless otherwise ordered by the Court. Any investigation of any attorney other than the Respondent, even if such an investigation had taken place, thus cannot be disclosed.

5. Subsection 5.31(d)(3) lists five possible scenarios where the Chief Disciplinary Counsel **may** make otherwise confidential records available (emphasis added). The word "may" makes the provision of such records totally discretionary with the Chief Disciplinary Counsel in those limited instances.

6. Each of the five discretionary areas where the Chief Disciplinary Counsel may make otherwise confidential records available are for the assistance of others in the investigation process. The entities are:

A) the Commission on Retirement, Removal and Discipline relating to possible judicial violations of Rule 2;

B) the Board of Law Examiners when related to the qualifications of an applicant for admission;

C) lawyer disciplinary authorities in other jurisdictions relating to possible violations;

D) law enforcement agencies when the confidential records could pertain to possible criminal conduct; and

E) other persons as reasonably necessary to perform duties under this Rule 5.

7. Respondent attempts to claim that 5.31(d)(3)(E) turns a discretionary duty into an obligation to disclose information about investigations involving other attorneys. The intent and purpose of (E) is nothing of the sort. It is to assist the Chief Disciplinary Counsel in investigation by permitting the Chief Disciplinary Counsel to disclose confidential information as necessary to conduct investigations. Without the discretionary ability to share such information it would be impossible for any investigation to be concluded.

8. The trust account violations charged against Respondent Blum all arise from money transferred by Mr. Blum, from checks Mr. Blum drafted and negotiated, and/or from money Mr. Blum failed to properly deposit in his trust account. Mr. Blum's recitation of the non-delegable duty with regard to the client trust account leads us only to Mr. Blum's door because he was the only person handling the trust account monies at issue in this proceeding. He has the bank records at issue. His actions, as evidenced by those records and as otherwise established before the DHP, implicate no one but Mr. Blum. Respondent's attempts to blame Mr. Ray should not be countenanced.

9. Informant has provided the documents to Respondent from this investigation. Respondent is not entitled to know information about any other attorney, if in existence, absent a waiver from that attorney. Respondent appears to seek information regarding

attorney Lawrence Ray. If Respondent wanted any such information, Respondent should have obtained a waiver from Mr. Ray waiving any confidentiality.

Work Product

10. Request No. 1 of Respondent's First Request for Production of Documents directed to Informant requests a complete copy of all documents obtained or prepared in the course of investigation. Informant provided all documents prior to the filing of the Information. In its privilege log Informant listed documents not provided after the filing of the Information, those documents being notes from interviews in preparation for trial. (Record 101-102). Those documents should not be discoverable under the circumstances of this case.

11. Rule 5.15(c) states that hearings shall be in accordance with the rules of this Court. Document discovery in general is governed by Supreme Court Rule 56.01(b)(3). That subsection says a party may obtain discovery of documents prepared in anticipation of litigation only upon a showing that the party seeking discovery has substantial need of the materials and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

12. As stated in *In re: Board of Registration for the Healing Arts vs. Spinden*, 798 S.W.2d 472 (Mo. App. W.D. 1990), a case cited by Respondent:

> trial preparation materials are qualifiedly immune from discovery. To be protected from discovery, trial preparation materials must be (1) documents or tangible things, and (2) prepared by or for a party or that party's

> representative, and (3) prepared in anticipation of litigation or for trial. Rule 56.01(b)(3). Thus, if one of these requirements is not met, the materials are discoverable. If all of the requirements are met, trial preparation materials may be discovered only if the party seeking discovery shows a substantial need for the items **and an inability to get the substantial equivalent without undue hardship**. (Emphasis added)

Id. at 477.

13. Materials not disclosed were prepared in anticipation of litigation and contained in interviews post filing of the Information in this case. Thus they have qualified immunity from discovery. As such, there then is a two-pronged test to determine whether the materials should be discoverable. One is a showing of substantial need and the other is an inability to get the substantial equivalent without undue hardship.

14. Putting aside the "substantial need" issue, the Respondent had ample opportunity to obtain substantially equivalent information. The withheld notes from Chelsey Hannigan and Serena Hendrickson pertain to Counts XVII and XIX of the First Amended Information. The notes from Matthew Rossignol pertain to Count XX of the First Amended Information. The notes from Mary Knehans pertain to Count XVIII of the First Amended Information. Respondent had ample notice those individuals would be witnesses in the case.

15. The First Amended Information was filed on March 4, 2015. Respondent Blum already had been served pursuant to the initial Information and should have received

the First Amended Information within a few days of its filing. Respondent's counsel entered her appearance on March 11, 2015. Thus Respondent and counsel have known of the identities of witnesses Chelsey Hanneken, Serena Hendrickson, Matthew Rossignol and Mary Knehans since the middle of March.

16. There is no indication in any way that Respondent made any effort to contact, interview, depose or otherwise obtain information from any of these individuals. Instead Respondent, long after the case was set for hearing, simply sought to obtain Informant's notes from interviews with these witnesses in preparation for trial. While discovery rules should be liberally construed, the Informant notes that all complaint materials from Chelsey Hanneken, Serena Hendrickson, Matthew Rossignol and Mary Knehans previously were provided to Respondent without formal discovery request as per the Informant's normal discovery policy. The *Spinden* case does not suggest that last minute requests for documents should be granted.

17. Given that all complaint records were provided to Respondent, given that the notes withheld were taken after the filing of the Information in anticipation of trial, and given that the Respondent apparently made no independent effort to obtain information from the aforesaid individuals since March, it is reasonable to expect that Informant's notes taken in anticipation of trial should be considered qualified work product and not discoverable in this case.

Respondent in his Brief suggests that Informant's notes from meeting with witnesses before trial and after the filing of an Information equate with the *Spinden* reports

prepared during the course of an investigation and statements taken during the investigation. The notes Respondent seeks are post-Investigation. The notes were taken after the Information was filed and in preparation for the hearing. Respondent argues Informant's witness notes in preparation of the trial are documents in the regular course of business. These notes can only be said to be in the regular course of business to the extent any lawyer's trial preparation is in the regular course of business. These notes were prepared expressly in conjunction with trial preparation for witnesses, unlike the *Spinden* doctor reports. In addition, as stated above, Respondent and Counsel had ample opportunity to interview and/or depose all witnesses for months during the discovery process yet failed to do so.

In *Spinden* the trial court had ruled that the materials in question were discoverable. The Court of Appeals, in affirming that decision, stated "The propriety of discovery is within the trial court's discretion and will not be disturbed except for abuse of discretion." 798 S.W.2d 478. The Disciplinary Hearing Panel, in particular Presiding Officer Virginia Fry, did not abuse its discretion in denying Respondent's Motion to Compel.

CONCLUSION

The Disciplinary Hearing Panel correctly and within its discretion denied Respondent's Motion to Compel because Rule 5.31 does not permit discovery of another attorney's file, absent waiver from that attorney, and because Informant's notes with witnesses in preparation of trial had qualified work product immunity from discovery pursuant to the Rules of 56.01.

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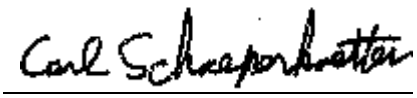
Chief Disciplinary Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2016, a true and correct copy of the Informant's foregoing Reply Brief was served on Respondent and Respondent's counsel via the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief that this reply brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 2,208 words, according to Microsoft Word, which is the word processing system used to prepare this Reply Brief.

Carl Schaeperkoetter