

**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

IN THE MATTER OF §
JAMES MICHAEL O'BRIANT, § **CAUSE NO. 56273**
STATE BAR CARD NO. 00788875 §

FIRST AMENDED PETITION FOR RECIPROCAL DISCIPLINE

TO THE BOARD OF DISCIPLINARY APPEALS:

Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), brings this action against Respondent, James Michael O'Briant, (hereinafter called "Respondent"), showing as follows:

1. This action is commenced by Petitioner pursuant to Part IX of the Texas Rules of Disciplinary Procedure. Petitioner is also providing Respondent a copy of Section 7 of this Board's Internal Procedural Rules, relating to Reciprocal Discipline Matters.
2. Respondent is a member of the State Bar of Texas and is licensed and authorized to practice law in Texas. Respondent may be served with a true and correct copy of this First Amended Petition for Reciprocal Discipline at James Michael O'Briant, c/o Suzanne Raggio Westerheim, 10027 Larchbrook, Circle, Dallas, Texas 75238.
3. On or about July 21, 2014, a Formal Complaint (Exhibit 1) was filed with the Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 14-78-GA.

4. On or about November 24, 2014, a Stipulation for Consent Order of Discipline (Exhibit 2) was filed with the State of Michigan Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 14-78-GA.

5. On or about November 25, 2014, an Amended Formal Complaint (Exhibit 3) was filed with the Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 14-78-GA.

6. On or about February 9, 2015, an Amended Stipulation for Consent Order of Discipline (Exhibit 4) was filed with the State of Michigan Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 14-78-GA.

7. On or about February 24, 2015, a Report of Ingham County Hearing Panel #4 (Exhibit 5) was filed with the State of Michigan Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 14-78-GA.

8. On or about February 24, 2015, an Order of Suspension and Restitution (By Consent) (Exhibit 6) was filed with the State of Michigan Attorney Discipline Board in a matter styled, *Grievance Administrator, Attorney Grievance Commission, Petitioner, v. James M. O'Briant, P41556, Respondent*, Case No. 14-78-GA, that states in pertinent part as follows:

...IT IS FURTHER ORDERED that respondent's license to practice law in Michigan is suspended for one year, effective January 1, 2015....

9. In the Report of Ingham County Hearing Panel #4, the Panel found that, in four separate legal matters, Respondent neglected the matters, in violation of MRPC1.1(c); failed to seek the lawful objectives of his clients, in violation of MRPC1.2(a); and failed to act with reasonable diligence and promptness, in violation of MRPC1.3. In three of those four legal matters, Respondent failed to keep his clients reasonably informed about the status of their matters, in violation of MRPC 1.4(a); and failed to explain the matters to the extent reasonably necessary to permit this clients to make informed decisions regarding their representation, in violation of MRPC 1.4(b). In one of those four matters, Respondent failed to take reasonable steps to protect his client's interests upon termination of the representation, in violation of MRPC 1.16(d). In a fifth legal matter, Respondent entered into a business transaction with his client where: a) the terms were not fully disclosed and transmitted to the client in writing; and b) the client did not consent thereto in writing, in violation of MRPC 1.8(a)(1) and (3). The panel further found that Respondent engaged in professional misconduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, and was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(2) and (3).

Copies of the Formal Complaint, Stipulation for Consent Order of Discipline, Amended Formal Complaint, Amended Stipulation for Consent Order of Discipline, Report of Ingham County Hearing Panel #4, and Order of Suspension and Restitution, are attached hereto as Petitioner's Exhibits 1 through 6, and made a part hereof for all intents and purposes as if the

same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits 1 through 6 at the time of hearing of this cause.

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

Respectfully submitted,

Linda A. Acevedo
Chief Disciplinary Counsel

Rebecca (Beth) Stevens
Assistant Disciplinary Counsel
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711
Telephone: 512.427.1350
Telecopier: 512.427.4167
Email: bstevens@texasbar.com




Rebecca (Beth) Stevens
Bar Card No. 24065381
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that upon receipt of the Order to Show Cause from the Board of Disciplinary Appeals, I will serve a copy of this First Amended Petition for Reciprocal Discipline and the Order to Show Cause on James Michael O'Briant by U.S. Mail, Certified, Return Receipt Requested as follows:

James Michael O'Briant
c/o Suzanne Raggio Westerheim
10027 Larchbrook Circle
Dallas, Texas 75238



Rebecca (Beth) Stevens

INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Effective February 19, 2015

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SECTION 1: GENERAL PROVISIONS

Rule 1.01 Definitions

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

Rule 1.02 General Powers

Under TRDP 7.08, BODA has and may exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining disciplinary proceedings. But TRDP 15.01 applies to the enforcement of a judgment of BODA.

Rule 1.03 Additional Rules in Disciplinary Matters

Except as varied by these rules and to the extent applicable, the TRCP, TRAP, and TRE apply to all disciplinary matters before BODA, except for appeals

from classification decisions, which are governed by TRDP 2.10 and by Section 3 of these rules.

Rule 1.04 Appointment of Panels

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

Rule 1.05 Filing of Pleadings, Motions, and Other Papers

- (a) **Electronic Filing.** All documents must be filed electronically. Unrepresented persons or those without the means to file electronically may electronically file documents, but it is not required.
 - (1) **Email Address.** The email address of an attorney or an unrepresented party who electronically files a document must be included on the document.
 - (2) **Timely Filing.** Documents are filed electronically by emailing the document to the BODA Clerk at the email address designated by BODA for that purpose. A document filed by email will be considered filed the day that the email is sent. The date sent is the date shown for the message in the inbox of the email account designated for receiving filings. If a document is sent after 5:00 p.m. or on a weekend or holiday officially observed by the State of Texas, it is considered filed the next business day.
 - (3) It is the responsibility of the party filing a document by email to obtain the correct email address for BODA and to confirm that the document was received by BODA in legible form. Any document that is illegible or that cannot be opened as part of an email attachment will not be considered filed. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from BODA.

(4) **Exceptions.**

- (i) An appeal to BODA of a decision by the CDC to classify a grievance as an inquiry is not required to be filed electronically.
- (ii) The following documents must not be filed electronically:
 - a) documents that are filed under seal or subject to a pending motion to seal; and
 - b) documents to which access is otherwise restricted by court order.
- (iii) For good cause, BODA may permit a party to file other documents in paper form in a particular case.

(5) **Format.** An electronically filed document must:

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

must, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

Rule 1.06 Service of Petition

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

Rule 1.07 Hearing Setting and Notice

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

hearing, and to present any preliminary motions or matters. Immediately following the docket call, the Chair will set and announce the order of cases to be heard.

Rule 1.08 Time to Answer

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

Rule 1.09 Pretrial Procedure

(a) Motions.

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

- (b) **Pretrial Scheduling Conference.** Any party may request a pretrial scheduling conference,

or BODA on its own motion may require a pretrial scheduling conference.

- (c) **Trial Briefs.** In any disciplinary proceeding before BODA, except with leave, all trial briefs and memoranda must be filed with the BODA Clerk no later than ten days before the day of the hearing.

- (d) **Hearing Exhibits, Witness Lists, and Exhibits Tendered for Argument.** A party may file a witness list, exhibit, or any other document to be used at a hearing or oral argument before the hearing or argument. A party must bring to the hearing an original and 12 copies of any document that was not filed at least one business day before the hearing. The original and copies must be:

- (1) marked;
- (2) indexed with the title or description of the item offered as an exhibit; and
- (3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

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

Rule 1.10 Decisions

- (a) **Notice of Decisions.** The BODA Clerk must give notice of all decisions and opinions to the parties or their attorneys of record.
- (b) **Publication of Decisions.** BODA must report judgments or orders of public discipline:
 - (1) as required by the TRDP; and
 - (2) on its website for a period of at least ten years following the date of the disciplinary judgment or order.
- (c) **Abstracts of Classification Appeals.** BODA may, in its discretion, prepare an abstract of a classification appeal for a public reporting service.

Rule 1.11 Board of Disciplinary Appeals Opinions

- (a) BODA may render judgment in any disciplinary matter with or without written opinion. In accordance with TRDP 6.06, all written opinions of BODA are open to the public and must be made available to the public reporting services, print or electronic, for publishing. A majority of the members who participate in considering the disciplinary matter must determine if an opinion will be

written. The names of the participating members must be noted on all written opinions of BODA.

- (b) Only a BODA member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this rule, in hearings in which evidence is taken, no member may participate in the decision unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.
- (c) A BODA determination in an appeal from a grievance classification decision under TRDP 2.10 is not a judgment for purposes of this rule and may be issued without a written opinion.

Rule 1.12 BODA Work Product and Drafts

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

Rule 1.13 Record Retention

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

Rule 1.14 Costs of Reproduction of Records

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

Rule 1.15 Publication of These Rules

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

SECTION 2: ETHICAL CONSIDERATIONS

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

- (a) A current member of BODA must not represent a party or testify voluntarily in a disciplinary action or proceeding. Any BODA member who is subpoenaed or otherwise compelled to appear at a disciplinary action or proceeding, including at a deposition, must promptly notify the BODA Chair.
- (b) A current BODA member must not serve as an expert witness on the TDRPC.
- (c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

Rule 2.02 Confidentiality

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

Rule 2.03 Disqualification and Recusal of BODA Members

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

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

SECTION 3: CLASSIFICATION APPEALS

Rule 3.01 Notice of Right to Appeal

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

Rule 3.02 Record on Appeal

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

SECTION 4: APPEALS FROM EVIDENTIARY PANEL HEARINGS

Rule 4.01 Perfecting Appeal

- (a) **Appellate Timetable.** The date that the evidentiary judgment is signed starts the appellate timetable under this section. To make TRDP 2.21 consistent with this requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21.
- (b) **Notification of the Evidentiary Judgment.** The clerk of the evidentiary panel must notify the parties of the judgment as set out in TRDP 2.21.
 - (1) The evidentiary panel clerk must notify the Commission and the Respondent in writing of the judgment. The notice must

contain a clear statement that any appeal of the judgment must be filed with BODA within 30 days of the date that the judgment was signed. The notice must include a copy of the judgment rendered.

- (2) The evidentiary panel clerk must notify the Complainant that a judgment has been rendered and provide a copy of the judgment, unless the evidentiary panel dismissed the case or imposed a private reprimand. In the case of a dismissal or private reprimand, the evidentiary panel clerk must notify the Complainant of the decision and that the contents of the judgment are confidential. Under TRDP 2.16, no additional information regarding the contents of a judgment of dismissal or private reprimand may be disclosed to the Complainant.
- (c) **Filing Notice of Appeal.** An appeal is perfected when a written notice of appeal is filed with BODA. If a notice of appeal and any other accompanying documents are mistakenly filed with the evidentiary panel clerk, the notice is deemed to have been filed the same day with BODA, and the evidentiary panel clerk must immediately send the BODA Clerk a copy of the notice and any accompanying documents.
- (d) **Time to File.** In accordance with TRDP 2.24, the notice of appeal must be filed within 30 days after the date the judgment is signed. In the event a motion for new trial or motion to modify the judgment is timely filed with the evidentiary panel, the notice of appeal must be filed with BODA within 90 days from the date the judgment is signed.
- (e) **Extension of Time.** A motion for an extension of time to file the notice of appeal must be filed no later than 15 days after the last day allowed for filing the notice of appeal. The motion must comply with Rule 1.09.

Rule 4.02 Record on Appeal

- (a) **Contents.** The record on appeal consists of the evidentiary panel clerk's record and, where necessary to the appeal, a reporter's record of the evidentiary panel hearing.
- (b) **Stipulation as to Record.** The parties may designate parts of the clerk's record and the reporter's record to be included in the record

on appeal by written stipulation filed with the clerk of the evidentiary panel.

(c) Responsibility for Filing Record.

(1) Clerk's Record.

- (i) After receiving notice that an appeal has been filed, the clerk of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk's record.
- (ii) Unless the parties stipulate otherwise, the clerk's record on appeal must contain the items listed in TRAP 34.5(a) and any other paper on file with the evidentiary panel, including the election letter, all pleadings on which the hearing was held, the docket sheet, the evidentiary panel's charge, any findings of fact and conclusions of law, all other pleadings, the judgment or other orders appealed from, the notice of decision sent to each party, any postsubmission pleadings and briefs, and the notice of appeal.
- (iii) If the clerk of the evidentiary panel is unable for any reason to prepare and transmit the clerk's record by the due date, he or she must promptly notify BODA and the parties, explain why the clerk's record cannot be timely filed, and give the date by which he or she expects the clerk's record to be filed.

(2) Reporter's Record.

- (i) The court reporter for the evidentiary panel is responsible for timely filing the reporter's record if:
 - a) a notice of appeal has been filed;
 - b) a party has requested that all or part of the reporter's record be prepared; and
 - c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.
- (ii) If the court reporter is unable for any reason to prepare and transmit the reporter's record by the due date, he

or she must promptly notify BODA and the parties, explain the reasons why the reporter's record cannot be timely filed, and give the date by which he or she expects the reporter's record to be filed.

(d) Preparation of Clerk's Record.

(1) To prepare the clerk's record, the evidentiary panel clerk must:

- (i) gather the documents designated by the parties' written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);
- (ii) start each document on a new page;
- (iii) include the date of filing on each document;
- (iv) arrange the documents in chronological order, either by the date of filing or the date of occurrence;
- (v) number the pages of the clerk's record in the manner required by (d)(2);
- (vi) prepare and include, after the front cover of the clerk's record, a detailed table of contents that complies with (d)(3); and
- (vii) certify the clerk's record.

(2) The clerk must start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page.

(3) The table of contents must:

- (i) identify each document in the entire record (including sealed documents); the date each document was filed; and, except for sealed documents, the page on which each document begins;
- (ii) be double-spaced;

- (iii) conform to the order in which documents appear in the clerk's record, rather than in alphabetical order;
 - (iv) contain bookmarks linking each description in the table of contents (except for descriptions of sealed documents) to the page on which the document begins; and
 - (v) if the record consists of multiple volumes, indicate the page on which each volume begins.
- (e) **Electronic Filing of the Clerk's Record.** The evidentiary panel clerk must file the record electronically. When filing a clerk's record in electronic form, the evidentiary panel clerk must:
- (1) file each computer file in text-searchable Portable Document Format (PDF);
 - (2) create electronic bookmarks to mark the first page of each document in the clerk's record;
 - (3) limit the size of each computer file to 100 MB or less, if possible; and
 - (4) directly convert, rather than scan, the record to PDF, if possible.
- (f) **Preparation of the Reporter's Record.**
- (1) The appellant, at or before the time prescribed for perfecting the appeal, must make a written request for the reporter's record to the court reporter for the evidentiary panel. The request must designate the portion of the evidence and other proceedings to be included. A copy of the request must be filed with the evidentiary panel and BODA and must be served on the appellee. The reporter's record must be certified by the court reporter for the evidentiary panel.
 - (2) The court reporter or recorder must prepare and file the reporter's record in accordance with TRAP 34.6 and 35 and the Uniform Format Manual for Texas Reporters' Records.
 - (3) The court reporter or recorder must file the reporter's record in an electronic format by emailing the document to the email address designated by BODA for that purpose.
 - (4) The court reporter or recorder must include either a scanned image of any required signature or "/s/" and name typed in the space where the signature would otherwise
- (6) In exhibit volumes, the court reporter or recorder must create bookmarks to mark the first page of each exhibit document.
- (g) **Other Requests.** At any time before the clerk's record is prepared, or within ten days after service of a copy of appellant's request for the reporter's record, any party may file a written designation requesting that additional exhibits and portions of testimony be included in the record. The request must be filed with the evidentiary panel and BODA and must be served on the other party.
- (h) **Inaccuracies or Defects.** If the clerk's record is found to be defective or inaccurate, the BODA Clerk must inform the clerk of the evidentiary panel of the defect or inaccuracy and instruct the clerk to make the correction. Any inaccuracies in the reporter's record may be corrected by agreement of the parties without the court reporter's recertification. Any dispute regarding the reporter's record that the parties are unable to resolve by agreement must be resolved by the evidentiary panel.
- (i) **Appeal from Private Reprimand.** Under TRDP 2.16, in an appeal from a judgment of private reprimand, BODA must mark the record as confidential, remove the attorney's name from the case style, and take any other steps necessary to preserve the confidentiality of the private reprimand.

Rule 4.03 Time to File Record

- (a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from,

disregard materials filed late, or apply presumptions against the appellant.

(b) **If No Record Filed.**

- (1) If the clerk's record or reporter's record has not been timely filed, the BODA Clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days. The BODA Clerk must send a copy of this notice to all the parties and the clerk of the evidentiary panel.
- (2) If no reporter's record is filed due to appellant's fault, and if the clerk's record has been filed, BODA may, after first giving the appellant notice and a reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter's record for a decision. BODA may do this if no reporter's record has been filed because:
 - (i) the appellant failed to request a reporter's record; or
 - (ii) the appellant failed to pay or make arrangements to pay the reporter's fee to prepare the reporter's record, and the appellant is not entitled to proceed without payment of costs.

(c) **Extension of Time to File the Reporter's Record.** When an extension of time is requested for filing the reporter's record, the facts relied on to reasonably explain the need for an extension must be supported by an affidavit of the court reporter. The affidavit must include the court reporter's estimate of the earliest date when the reporter's record will be available for filing.

(d) **Supplemental Record.** If anything material to either party is omitted from the clerk's record or reporter's record, BODA may, on written motion of a party or on its own motion, direct a supplemental record to be certified and transmitted by the clerk for the evidentiary panel or the court reporter for the evidentiary panel.

Rule 4.04 Copies of the Record

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

Rule 4.05 Requisites of Briefs

- (a) **Appellant's Filing Date.** Appellant's brief must be filed within 30 days after the clerk's record or the reporter's record is filed, whichever is later.
- (b) **Appellee's Filing Date.** Appellee's brief must be filed within 30 days after the appellant's brief is filed.
- (c) **Contents.** Briefs must contain:
 - (1) a complete list of the names and addresses of all parties to the final decision and their counsel;
 - (2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;
 - (3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;
 - (4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;
 - (5) a statement, without argument, of the basis of BODA's jurisdiction;
 - (6) a statement of the issues presented for review or points of error on which the appeal is predicated;
 - (7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;
 - (8) the argument and authorities;
 - (9) conclusion and prayer for relief;
 - (10) a certificate of service; and
 - (11) an appendix of record excerpts pertinent to the issues presented for review.
- (d) **Length of Briefs; Contents Included and Excluded.** In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of the jurisdiction,

signature, proof of service, certificate of compliance, and appendix. Briefs must not exceed 15,000 words if computer-generated, and 50 pages if not, except on leave of BODA. A reply brief must not exceed 7,500 words if computer-generated, and 25 pages if not, except on leave of BODA. A computer-generated document must include a certificate by counsel or the unrepresented party stating the number of words in the document. The person who signs the certification may rely on the word count of the computer program used to prepare the document.

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

Rule 4.06 Oral Argument

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

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

Rule 4.07 Decision and Judgment

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

Rule 4.08 Appointment of Statewide Grievance Committee

If BODA remands a cause for further proceedings before a statewide grievance committee, the BODA Chair will appoint the statewide grievance committee in accordance with TRDP 2.27. The committee must consist of six members: four attorney members and two public members randomly selected from the current pool of grievance committee members. Two alternates, consisting of one attorney and one public member, must also be selected. BODA will appoint the initial chair

who will serve until the members of the statewide grievance committee elect a chair of the committee at the first meeting. The BODA Clerk will notify the Respondent and the CDC that a committee has been appointed.

Rule 4.09 Involuntary Dismissal

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

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

SECTION 5: PETITIONS TO REVOKE PROBATION

Rule 5.01 Initiation and Service

- (a) Before filing a motion to revoke the probation of an attorney who has been sanctioned, the CDC must contact the BODA Clerk to confirm whether the next regularly available hearing date will comply with the 30-day requirement of TRDP. The Chair may designate a three-member panel to hear the motion, if necessary, to meet the 30-day requirement of TRDP 2.23.
- (b) Upon filing the motion, the CDC must serve the Respondent with the motion and any supporting documents in accordance with TRDP 2.23, the TRCP, and these rules. The CDC must notify BODA of the date that service is obtained on the Respondent.

Rule 5.02 Hearing

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

SECTION 6: COMPULSORY DISCIPLINE

Rule 6.01 Initiation of Proceeding

Under TRDP 8.03, the CDC must file a petition for compulsory discipline with BODA and serve the

Respondent in accordance with the TRDP and Rule 1.06 of these rules.

Rule 6.02 Interlocutory Suspension

- (a) **Interlocutory Suspension.** In any compulsory proceeding under TRDP Part VIII in which BODA determines that the Respondent has been convicted of an Intentional Crime and that the criminal conviction is on direct appeal, BODA may suspend the Respondent's license to practice law by interlocutory order. In any compulsory case in which BODA has imposed an interlocutory order of suspension, BODA retains jurisdiction to render final judgment after the direct appeal of the criminal conviction is final. For purposes of rendering final judgment in a compulsory discipline case, the direct appeal of the criminal conviction is final when the appellate court issues its mandate.
- (b) **Criminal Conviction Affirmed.** If the criminal conviction made the basis of a compulsory interlocutory suspension is affirmed and becomes final, the CDC must file a motion for final judgment that complies with TRDP 8.05.
 - (1) If the criminal sentence is fully probated or is an order of deferred adjudication, the motion for final judgment must contain notice of a hearing date. The motion will be set on BODA's next available hearing date.
 - (2) If the criminal sentence is not fully probated:
 - (i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or
 - (ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.
- (c) **Criminal Conviction Reversed.** If an appellate court issues a mandate reversing the criminal conviction while a Respondent is subject to an interlocutory suspension, the Respondent may file a motion to terminate the interlocutory suspension. The motion to terminate the interlocutory suspension must have certified copies of the decision and mandate of the reversing court attached. If the CDC does not file an opposition to the termination within ten

days of being served with the motion, BODA may proceed to decide the motion without a hearing or set the matter for a hearing on its own motion. If the CDC timely opposes the motion, BODA must set the motion for a hearing on its next available hearing date. An order terminating an interlocutory order of suspension does not automatically reinstate a Respondent's license.

SECTION 7: RECIPROCAL DISCIPLINE

Rule 7.01 Initiation of Proceeding

The Commission for Lawyer Discipline may initiate an action for reciprocal discipline by filing a petition with BODA under TRDP Part IX and these rules. The petition must request that the Respondent be disciplined in Texas and have attached to it any information concerning the disciplinary matter from the other jurisdiction, including a certified copy of the order or judgment rendered against the Respondent.

Rule 7.02 Order to Show Cause

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

Rule 7.03 Attorney's Response

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

SECTION 8: DISTRICT DISABILITY COMMITTEE HEARINGS

Rule 8.01 Appointment of District Disability Committee

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

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

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

Rule 8.02 Petition and Answer

- (a) **Petition.** Upon being notified that the District Disability Committee has been appointed by BODA, the CDC must, within 20 days, file with the BODA Clerk and serve on the Respondent a copy of a petition for indefinite disability suspension. Service may be made in person or by certified mail, return receipt requested. If service is by certified mail, the return receipt with the Respondent's signature must be filed with the BODA Clerk.
- (b) **Answer.** The Respondent must, within 30 days after service of the petition for indefinite disability suspension, file an answer with the BODA Clerk and serve a copy of the answer on the CDC.
- (c) **Hearing Setting.** The BODA Clerk must set the final hearing as instructed by the chair of the District Disability Committee and send notice of the hearing to the parties.

Rule 8.03 Discovery

- (a) **Limited Discovery.** The District Disability Committee may permit limited discovery. The

party seeking discovery must file with the BODA Clerk a written request that makes a clear showing of good cause and substantial need and a proposed order. If the District Disability Committee authorizes discovery in a case, it must issue a written order. The order may impose limitations or deadlines on the discovery.

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

Rule 8.04 Ability to Compel Attendance

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

Rule 8.05 Respondent's Right to Counsel

- (a) The notice to the Respondent that a District Disability Committee has been appointed and the petition for indefinite disability suspension must state that the Respondent may request appointment of counsel by BODA to represent him or her at the disability hearing. BODA will reimburse appointed counsel for

reasonable expenses directly related to representation of the Respondent.

- (b) To receive appointed counsel under TRDP 12.02, the Respondent must file a written request with the BODA Clerk within 30 days of the date that Respondent is served with the petition for indefinite disability suspension. A late request must demonstrate good cause for the Respondent's failure to file a timely request.

Rule 8.06 Hearing

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

Rule 8.07 Notice of Decision

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

Rule 8.08 Confidentiality

All proceedings before the District Disability Committee and BODA, if necessary, are closed to the public. All matters before the District Disability Committee are confidential and are not subject to disclosure or discovery, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court of Texas.

SECTION 9: DISABILITY REINSTATEMENTS

Rule 9.01 Petition for Reinstatement

- (a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. The petitioner must serve a copy of the petition on the CDC in the manner required by TRDP 12.06. The TRCP apply to a reinstatement proceeding unless they conflict with these rules.
- (b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has

a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.

- (c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may make all or any part of the record of the proceeding confidential.

Rule 9.02 Discovery

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

Rule 9.03 Physical or Mental Examinations

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

Rule 9.04 Judgment

If, after hearing all the evidence, BODA determines that the petitioner is not eligible for reinstatement, BODA may, in its discretion, either enter an order denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the

petitioner provides additional proof as directed by BODA. The judgment may include other orders necessary to protect the public and the petitioner's potential clients.

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

Rule 10.01 Appeals to the Supreme Court

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

STATE OF MICHIGAN

Attorney Discipline Board

In Re JAMES M. O'BRIANT, P 41556,

Case No. 14-78-GA

Respondent.

_____ /

CERTIFICATE OF RECORDS

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

FORMAL COMPLAINT

In testimony whereof, I have set my hand and affixed the seal of the Attorney Discipline Board this 4th day of June, 2015.



Julie Loiselle



Attorney Discipline Board

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Grievance Administrator,
Attorney Grievance Commission,

Petitioner,

Case No. 14-78-GA

v

James M. O'Briant, P41556,

Respondent.

Formal Complaint

Petitioner, upon information and belief, states the following:

1. Respondent, James M. O'Briant, P-41556, was licensed to practice law in Michigan in 1988, and by virtue of said license is a member of the State Bar of Michigan who is subject to the jurisdiction of the Michigan Supreme Court and the Attorney Discipline Board in matters of discipline for professional misconduct.
2. Respondent last maintained an office for the practice of law in the County of Ingham, State of Michigan.
3. As an attorney subject to the rules and regulations of the Michigan Supreme Court, Respondent is subject to the standards for discipline set forth in MCR 9.104.

4. On or about January 27, 2009, Mark Hartman was convicted of one count of unlawful imprisonment and one count of threatening a witness. He was sentenced to serve 5 to 15 years in prison.

5. On November 11, 2010, Respondent was retained to assist Mark Hartman in investigating possible claims against the correctional facility for injuries sustained by Mr. Hartman during incarceration. Respondent was also retained for the purpose of obtaining post-conviction relief in the form of either a petition for writ of habeas corpus or a motion for relief from judgment.

6. Respondent was paid a total of \$52,181.18.

7. After some preliminary investigation, Respondent determined that a legal malpractice action should be filed against Mr. Hartman's prior criminal attorney Kevin Banyon.

8. During the winter of 2011, Respondent repeatedly promised to deliver a copy of a draft motion for relief from judgment to Mr. Hartman. Respondent never provided any draft motion to Mr. Hartman.

9. On February 24, 2011, Respondent filed a complaint on behalf of Mr. Hartman alleging legal malpractice. The complaint was captioned *Mark Hartman v. Kevin Banyon*, Berrien County Circuit Court, Case No. 2011-00058-NM.

10. On February 17, 2012, the complaint was dismissed following an order granting the plaintiffs' motion for summary disposition.

11. Pursuant to MCR 2.119(F), Mr. Hartman had 21 days to file a motion for reconsideration of the dismissal.

12. On March 12, 2012, Respondent filed a belated motion for reconsideration.

13. Also on March 12, 2012, the court entered an order denying the motion for reconsideration.

14. Because Respondent did not file a timely motion for reconsideration, under MCR 7.204(A)(1) Mr. Hartman had 21 days from the date of the order of dismissal (February 17, 2012) to file a claim of appeal.

15. On April 9, 2012, Respondent filed a belated claim of appeal.

16. On April 30, 2012, the claim of appeal was dismissed because it was not timely filed.

17. Because of the delay in drafting and filing the motion for relief from judgment, Mr. Hartman eventually terminated the representation and retained new counsel to file for relief.

18. In August 2012, Mr. Hartman's successor counsel Martin Tieber contacted Respondent on multiple occasions to obtain a copy of the deposition of Judge Wiley, which was taken during the pendency of the civil action.

19. Respondent failed to provide a copy of the transcript to Attorney Tieber.

20. Attorney Tieber was subsequently able to obtain his own copy of the transcript. A Petition for Writ of Habeas Corpus was filed by Attorney Tieber on September 21, 2012.

21. By reason of the conduct described in this Complaint, Respondent has engaged in the following misconduct:

- a) neglect of a legal matter, in violation of MRPC 1.1(c);
- b) failure to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- c) failure to act with reasonable diligence and promptness, in violation of MRPC 1.3;
- d) failing to take reasonable steps to protect the client's interests upon termination of the representation, in violation of MRPC 1.16(d)
- f) conduct that is a violation of the Michigan Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4);
- g) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- i) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

22. Each of the acts and omissions set forth above constitute a separate breach by Respondent of his duty to conduct himself at all times, both personally and professionally, in conformity with the standards imposed upon members of the Bar as conditions for the privilege of practicing law in this State.

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

Dated: 7/21/2014

Robert E. Edick

ROBERT E. EDICK (P-25432)
Deputy Administrator
Attorney Grievance Commission
535 Griswold, Suite 1700
Detroit, Michigan 48226
(313) 961-6585

STATE OF MICHIGAN

Attorney Discipline Board

In Re JAMES M. O'BRIANT, P 41556,

Case No. 14-78-GA

Respondent.

CERTIFICATE OF RECORDS

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

STIPULATION FOR CONSENT ORDER OF DISCIPLINE/WAIVER

In testimony whereof, I have set my hand and affixed the seal of the Attorney Discipline Board this 4th day of June, 2015.



Julie Loiselle



State Of Michigan
Attorney Discipline Board

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Grievance Administrator,
Attorney Grievance Commission,

Petitioner,

ADB Case No. 14-78-GA

v

James M. O'Briant, P-41156,

Respondent.

/

Stipulation For Consent Order Of Discipline

Petitioner and Respondent, pursuant to MCR 9.115(F)(5), stipulate and agree as follows:

1. An Amended Formal Complaint shall be filed in the above-referenced matter.
2. Respondent admits the factual allegations of professional misconduct set forth in the Amended Formal Complaint.
3. An order of discipline suspending Respondent for one year shall be entered against Respondent.
4. The suspension shall take effect on January 21, 2015.
5. By April 21, 2015, Respondent shall pay restitution as follows:
Barbara Kleaveland- \$5,000
Elizabeth Pierce- \$10,000
Michelle Barlund Smith- \$3,000

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6. Respondent shall not be eligible to petition for reinstatement until restitution is paid in full.

7. AGC File No. 1837-12 (Michelle Barlund-Smith as to James O'Briant) and AGC File No. 1070-13 (Barbara Kleaveland as to James O'Briant) shall be closed administratively upon the issuance of the order of discipline.

8. This consent discipline is consistent with the ABA Standards, specifically Standard 4.42.

9. The following mitigating factors under ABA Standard 9.32 apply: 9.32(c) personal or emotional problems related to the ill health of his father; 9.32(d) good faith effort to make restitution; 9.32(e) full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings; and remorse.

10. The following aggravating factors apply under ABA Standard 9.22: 9.22(a) prior disciplinary offenses; 9.22(c) a pattern of misconduct; 9.22(d) multiple offenses; and, 9.22(i) substantial experience in the practice of law.

11. The order of discipline shall be a final order and may be entered without further notice to the parties.

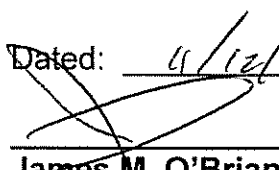
12. Respondent acknowledges that he understands his rights, as contained in the accompanying Waiver, and that he freely, knowingly, and voluntarily waives these rights pursuant to this Stipulation.

13. Respondent hereby agrees to pay the State Bar of Michigan a sum to be assessed, pursuant to MCR 9.128, to represent the basic administrative costs and actual expenses of the Attorney Grievance Commission and/or Attorney Discipline Board in the investigation, prosecution, and adjudication of this matter.

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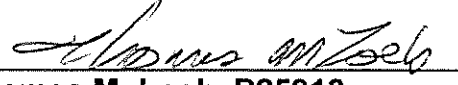
14. The parties agree that this Stipulation is subject to the approval of a hearing panel of the Attorney Discipline Board and that should the panel reject the terms of this Stipulation, it shall be null and void and not binding on either party.

Dated: 11/12/14



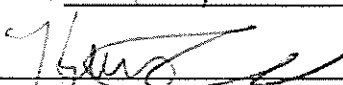
James M. O'Briant, P-41156
Respondent
PO Box 1083
East Lansing, MI 48826
(517)614-8201

Dated: 11/17/14



Thomas M. Loeb, P25913
Counsel for Respondent
32000 Northwestern Hwy., Ste. 170
Farmington Hills, MI 48334
(248)851-2525

Dated: 11/24/14



Kimberly L. Uhuru, P-61966
Senior Associate Counsel
Attorney Grievance Commission
535 Griswold, Ste. 1700
Detroit, MI 48226
(313)961-6585

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State of Michigan
Attorney Discipline Board

**Grievance Administrator,
Attorney Grievance Commission,**

Petitioner,

ADB Case No. 14-78-GA

v

James M. O'Briant. P41156,

Respondent.

_____ /

Waiver

James M. O'Briant, being duly sworn, states as follows:

1. That I submit this Waiver in connection with the accompanying Stipulation for Consent Order of Discipline.
2. That I have been advised, and I understand:
 - a. That I have a right to a hearing concerning the allegations of the formal complaint; and,
 - b. That the allegations in the formal complaint must be proven by the Grievance Administrator by a preponderance of the evidence; and,
 - c. That I have the right to retain counsel to defend the merits of the allegations; and,
 - d. That I have the right to offer evidence in mitigation of the allegations; and,

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e. That I am entitled to all other rights recited in Subchapter 9.100 of the Michigan Court Rules and the Constitutions of the State of Michigan and of the United States.

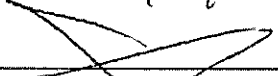
3. That I knowingly, consciously, and freely waive any and all rights that I have in connection with the formal complaint filed in this matter.

4. That I have not ingested any substances of any kind within the last twenty-four hours that would impair my ability to understand the nature or purpose of these proceedings.

5. That I waive any right of appeal or review of the discipline to be imposed pursuant to the Stipulation for Consent Order of Discipline executed in this matter; provided, that this waiver does not preclude an appeal based on a claim that the discipline imposed differs from that provided for in the Stipulation.

6. That I understand every provision in this Waiver and my signature appears knowingly and voluntarily hereon.

Dated: 11/12/14



James M. O'Briant, P41156
Respondent
PO Box 1083
East Lansing, MI 48826
(517)614-8201

STATE OF MICHIGAN

Attorney Discipline Board

In Re JAMES M. O'BRIANT, P 41556,

Case No. 14-78-GA

Respondent.

_____ /

CERTIFICATE OF RECORDS

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

AMENDED FORMAL COMPLAINT

In testimony whereof, I have set my hand and affixed the seal of the Attorney Discipline Board this 4th day of June, 2015.



Julie Loiselle

Exhibit
3

Attorney Discipline Board

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**Grievance Administrator,
Attorney Grievance Commission,**

Petitioner,

ADB Case No. 14-78-GA

v

James M. O'Briant, P41156,

Respondent.

Amended Formal Complaint

Petitioner, upon information and belief, states the following:

1. Respondent, James M. O'Briant, P-41156, was licensed to practice law in Michigan in 1988, and by virtue of said license is a member of the State Bar of Michigan who is subject to the jurisdiction of the Michigan Supreme Court and the Attorney Discipline Board in matters of discipline for professional misconduct.
2. Respondent last maintained an office for the practice of law in the County of Ingham, State of Michigan.
3. As an attorney subject to the rules and regulations of the Michigan Supreme Court, Respondent is subject to the standards for discipline set forth in MCR 9.104.

Count One

4. On or about November 10, 2010, Respondent was retained to file an action against the City of Hancock related to injuries suffered by David Kerttu when police responded to a radio call at Mr. Kerttu's residence.

5. On February 18, 2011, Respondent filed a complaint and jury demand on behalf of Mr. Kerttu captioned, *David Kerttu v. City of Hancock, Officer Brent Isaacson, and Officer Robert Stites*, Case No. 2:11-cv-00064-RHB, United States District Court, Western District of Michigan.

6. On December 29, 2011, the plaintiffs filed a motion for summary judgment.

7. On January 26, 2012, the parties filed a stipulation extending Respondent's time to answer the motion until March 1, 2012.

8. Respondent did not file an answer to the summary disposition motion.

9. On March 16, 2012, Respondent stipulated to dismiss Ms. Kerttu's claims with prejudice.

10. A stipulated order of dismissal with prejudice was entered by the court on March 19, 2012.

11. The dismissal was without Mr. Kerttu's knowledge or consent.

12. By reason of the conduct described in this Count One of this complaint, Respondent has engaged in the following misconduct:

- a) neglect of a legal matter, in violation of MRPC 1.1(c);

- b) failure to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- c) failure to act with reasonable diligence and promptness, in violation of MRPC 1.3;
- d) failing to keep a client reasonably informed about the status of a matter, in violation of MRPC 1.4(a);
- e) failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);
- f) conduct that is a violation of the Michigan Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4);
- g) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- h) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

Count Two

13. On or about January 27, 2009, Mark Hartman was convicted of one count of unlawful imprisonment and one count of threatening a witness. He was sentenced to serve 5 to 15 years in prison.

14. On November 11, 2010, Respondent was retained to assist Mark Hartman in investigating possible claims against the correctional facility for injuries sustained by Mr. Hartman during incarceration. Respondent was also retained for the purpose of obtaining post-conviction relief in the form of either a petition for writ of habeas corpus or a motion for relief from judgment.

15. Respondent was paid a total of \$52,181.18.

16. After some preliminary investigation, Respondent determined that a legal malpractice action should be filed against Mr. Hartman's prior criminal attorney Kevin Banyon.

17. During the winter of 2011, Respondent repeatedly promised to deliver a copy of a draft motion for relief from judgment to Mr. Hartman. Respondent never provided any draft motion to Mr. Hartman.

18. On February 24, 2011, Respondent filed a complaint on behalf of Mr. Hartman alleging legal malpractice. The complaint was captioned *Mark Hartman v. Kevin Banyon*, Berrien County Circuit Court, Case No. 2011-00058-NM.

19. On February 17, 2012, the complaint was dismissed following an order granting the plaintiffs' motion for summary disposition.

20. Pursuant to MCR 2.119(F), Mr. Hartman had 21 days to file a motion for reconsideration of the dismissal.

21. On March 12, 2012, Respondent filed a belated motion for reconsideration.

22. Also on March 12, 2012, the court entered an order denying the motion for reconsideration.

23. Because Respondent did not file a timely motion for reconsideration, under MCR 7.204(A)(1) Mr. Hartman had 21 days from the date of the order of dismissal (February 17, 2012) to file a claim of appeal.

24. On April 9, 2012, Respondent filed a belated claim of appeal.

25. On April 30, 2012, the claim of appeal was dismissed because it was not timely filed.

26. Because of the delay in drafting and filing the motion for relief from judgment, Mr. Hartman eventually terminated the representation and retained new counsel to file for relief.

27. In August 2012, Mr. Hartman's successor counsel Martin Tieber contacted Respondent on multiple occasions to obtain a copy of the deposition of Judge Wiley, which was taken during the pendency of the civil action.

28. Respondent failed to provide a copy of the transcript to Attorney Tieber.

29. Attorney Tieber was subsequently able to obtain his own copy of the transcript. A Petition for Writ of Habeas Corpus was filed by Attorney Tieber on September 21, 2012.

30. By reason of the conduct described in this Count Two Complaint, Respondent has engaged in the following misconduct:

- a) neglect of a legal matter, in violation of MRPC 1.1(c);
- b) failure to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- c) failure to act with reasonable diligence and promptness, in violation of MRPC 1.3;
- d) failing to take reasonable steps to protect the client's interests upon termination of the representation, in violation of MRPC 1.16(d)
- e) conduct that is a violation of the Michigan Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4);
- f) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- g) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

Count Three

31. On December 14, 2010, Terence Anderson retained Respondent to file a legal malpractice action against Mr. Anderson's former attorney Rodney Williams.

32. On March 11, 2011, Respondent filed a complaint for malpractice captioned *Terence Anderson v. Rodney Williams*, Ingham County Circuit Court Case No. 11-000305-NM.

33. On or about November 28, 2011, Mr. Williams filed an *in pro per* motion for summary disposition.

34. Respondent failed to answer the motion for summary disposition or appear at the hearing on the motion.

35. The motion was subsequently granted.

36. On December 27, 2011 Respondent filed an objection to the motion for summary disposition and a request for a re-hearing of the motion.

37. The parties subsequently stipulated that the motion would be reheard at a later date.

38. On August 16, 2012, a case evaluation was conducted in the case.

39. The case evaluators unanimously decided that there was no cause of action against Mr. Williams.

40. On September 4, 2012, the court set a hearing on the motion for summary disposition previously filed by Mr. Williams.

41. The motion was scheduled to be heard on October 3, 2012.

42. On October 3, 2012, Respondent filed a stipulation and order to dismiss the case with prejudice.

43. The dismissal was without Mr. Anderson's knowledge and consent.

44. By reason of the conduct described in this Count Three of this complaint, Respondent has engaged in the following misconduct:

- a) neglect of a legal matter, in violation of MRPC 1.1(c);
- b) failure to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- c) failure to act with reasonable diligence and promptness, in violation of MRPC 1.3;
- d) failure to keep a client reasonably informed of the status of a matter, in violation of 1.4(a);
- e) failure to explain a matter to a client to the extent necessary to permit the client to make informed decisions regarding the representation, in violation of 1.4(b);
- f) conduct that is a violation of the Michigan Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4);
- g) conduct that is prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1);
- h) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- i) conduct that is contrary to justice, in violation of MCR 9.104(3).

Count Four

45. In 2011, Respondent was retained on a contingent fee basis to file wrongful death actions on behalf of the estates of Dan Ryan and Teresa Kinney.

46. On May 15, 2012, Respondent filed an action on behalf of both estates and various other plaintiffs. The action was captioned *William O'Connor et. al. v. Enbridge Energy*, Case No. 12-1539-NO, Calhoun County Circuit Court.

47. On September 7, 2012, defendant served discovery requests on Respondent, including 26 interrogatories, 22 requests for productions of documents, and authorizations for the release of medical, insurance, employment and social security records.

48. Responses to the discovery requests were due on October 5, 2012.

49. Respondent failed to file responses to the discovery requests.

50. The parties subsequently stipulated to extend the time for Respondent to respond until November 6, 2012.

51. Respondent again did not file a response to the discovery requests.

52. The plaintiff then filed a motion to dismiss with prejudice due to Respondent's failure to provide discovery responses.

53. On February 7, 2013, the court entered a stipulated order requiring full and complete responses to the discovery requests by February 7, 2013.

54. Respondent failed to file discovery responses on behalf of both estates, as well as twelve other plaintiffs.

55. On March 26, 2013, Respondent signed a stipulated order dismissing the claims of both estates with prejudice as result of the failure to answer discovery requests.

56. On April 1, 2013, the court entered a stipulated order dismissing the claims.

57. The personal representatives of the estates of Dan Ryan and Teresa Kinney were not informed of the dismissal of the cases and did not consent to dismissal.

58. By reason of the conduct described in this Count Four of this complaint, Respondent has engaged in the following misconduct:

- a) neglect of a legal matter, in violation of MRPC 1.1(c);
- b) failure to seek the lawful objectives of a client, in violation of MRPC 1.2(a);
- c) failure to act with reasonable diligence and promptness, in violation of MRPC 1.3;
- d) failing to keep a client reasonably informed about the status of a matter, in violation of MRPC 1.4(a);
- e) failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);

- f) conduct that is a violation of the Michigan Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4);
- g) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- h) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

Count Five

59. Respondent was retained in April 2012 by Kevin Van Havel to represent Mr. Van Havel on criminal charges related to possession of marijuana.

60. While the criminal representation was pending, Respondent and Mr. Havel agreed that Mr. Van Havel would travel from Michigan to Texas for the purpose of starting a bulldozing business with Respondent.

61. Respondent and Mr. Van Havel agreed that Respondent would provide start-up funds for the business and Mr. Van Havel would provide labor and be paid \$30/hr.

62. No written business agreement was made.

63. In May 2012, Mr. Van Havel traveled to Texas to start the business, which was called Dirt Works, LLC. Respondent gave Mr. Van Havel gas money and paid his trailer lot fee for the first week.

64. Mr. Van Havel's wife Nicki Van Havel stayed in Michigan and worked as a legal assistant in Respondent's Michigan office.

65. In September 2012, Respondent and Mr. Van Havel agreed to rent a bulldozer for the purpose of taking construction jobs.

66. Ms. Van Havel subsequently rented a bulldozer and charged the rental fee (approximately \$5,500) to her credit card.

67. After renting the bulldozer, Mr. Van Havel used it for a construction project at Respondent's father's home.

68. Respondent and Mr. Van Havel were unable to win bids for other construction jobs and no further work was performed with the bulldozer.

69. On November 24, 2014, Mr. Van Havel entered a guilty plea on one of his pending drug charges. The remaining two charges were dismissed.

70. On December 5, 2012, Mr. Van Havel was sentenced to probation.

71. Following the conclusion of the criminal case, Mr. and Mrs. Van Havel requested that Respondent reimburse them for the cost of the bulldozer rental fee.

72. Respondent refused to reimburse the costs and claimed Mr. Van Havel owed attorney fees for the criminal matter.

73. By reason of the conduct described in this Count Five of this complaint, Respondent has engaged in the following misconduct:

- a) entering into a business transaction with a client where: 1) the terms are not fully disclosed and transmitted to the client in


writing, and 2) the client did not consent thereto in writing.

- b) conduct that is a violation of the Michigan Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4);
- c) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,
- d) conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

74. Each of the acts and omissions set forth above constitute a separate breach by Respondent of his duty to conduct himself at all times, both personally and professionally, in conformity with the standards imposed upon members of the Bar as conditions for the privilege of practicing law in this State.

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

Dated: 11/25/14



KIMBERLY L. UHURU (P-61966)
Senior Associate Counsel
Attorney Grievance Commission
535 Griswold, Suite 1700
Detroit, Michigan 48226
(313) 961-6585

STATE OF MICHIGAN

Attorney Discipline Board

In Re JAMES M. O'BRIANT, P 41556,

Case No. 14-78-GA

Respondent.

CERTIFICATE OF RECORDS

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

AMENDED STIPULATION FOR CONSENT ORDER OF DISCIPLINE/WAIVER

In testimony whereof, I have set my hand and affixed the seal of the Attorney Discipline Board this 4th day of June, 2015.


Julie Loiselle



State Of Michigan
Attorney Discipline Board

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Grievance Administrator,
Attorney Grievance Commission,

Petitioner,

ADB Case No. 14-78-GA

v

James M. O'Briant, P-41156,

Respondent.
_____ /

Amended Stipulation For Consent Order Of Discipline

Petitioner and Respondent, pursuant to MCR 9.115(F)(5), stipulate and agree as follows:

1. An Amended Formal Complaint shall be filed in the above-referenced matter.
2. Respondent admits to both all factual allegations and all charges of professional misconduct set forth in the Amended Formal Complaint.
3. Paragraph 73(a) of the Amended Formal Complaint, inadvertently omits the rule violation. With regard to that paragraph, Respondent admits to entering into an improper business transaction with a client in violation of MRPC 1.8(a)(1) and (3).
3. An order of discipline suspending Respondent for one year shall be entered against Respondent.
4. The suspension shall take effect on January 21, 2015.
5. By April 21, 2015, Respondent shall pay restitution as follows:

Barbara Kleaveland- \$5,000

Elizabeth Pierce- \$10,000

Michelle Barlund Smith- \$3,000

6. Respondent shall not be eligible to petition for reinstatement until restitution is paid in full.

7. AGC File No. 1837-12 (Michelle Barlund-Smith as to James O'Briant) and AGC File No. 1070-13 (Barbara Kleaveland as to James O'Briant) shall be closed administratively upon the issuance of the order of discipline.

8. This consent discipline is consistent with the ABA Standards, specifically Standard 4.42.

9. The following mitigating factors under ABA Standard 9.32 apply: 9.32(c) personal or emotional problems related to the ill health of his father; 9.32(d) good faith effort to make restitution; 9.32(e) full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings; and remorse.

10. The following aggravating factors apply under ABA Standard 9.22: 9.22(a) prior disciplinary offenses; 9.22(c) a pattern of misconduct; 9.22(d) multiple offenses; and, 9.22(i) substantial experience in the practice of law.

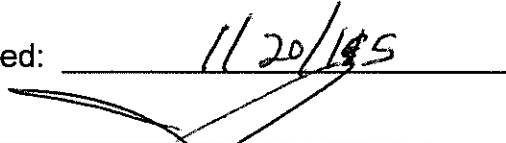
11. The order of discipline shall be a final order and may be entered without further notice to the parties.

12. Respondent acknowledges that he understands his rights, as contained in the accompanying Waiver, and that he freely, knowingly, and voluntarily waives these rights pursuant to this Stipulation.

13. Respondent hereby agrees to pay the State Bar of Michigan a sum to be assessed, pursuant to MCR 9.128, to represent the basic administrative costs and actual expenses of the Attorney Grievance Commission and/or Attorney Discipline Board in the investigation, prosecution, and adjudication of this matter.

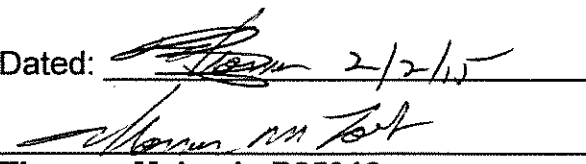
14. The parties agree that this Stipulation is subject to the approval of a hearing panel of the Attorney Discipline Board and that should the panel reject the terms of this Stipulation, it shall be null and void and not binding on either party.

Dated: 11/20/15




James M. O'Brian, P-41156
Respondent
PO Box 1083
East Lansing, MI 48826
(517)614-8201

Dated: 2/2/15



Thomas M. Loeb, P25913
Counsel for Respondent
32000 Northwestern Hwy., Ste. 170
Farmington Hills, MI 48334
(248)851-2525

Dated: 2/9/15



Kimberly L. Uhuru, P-61966
Senior Associate Counsel
Attorney Grievance Commission
535 Griswold, Ste. 1700
Detroit, MI 48226
(313)961-6585

State of Michigan
Attorney Discipline Board

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**Grievance Administrator,
Attorney Grievance Commission,**

Petitioner,

ADB Case No. 14-78-GA

v

James M. O'Briant. P41156,

Respondent.

_____ /

Waiver

James M. O'Briant, being duly sworn, states as follows:

1. That I submit this Waiver in connection with the accompanying Stipulation for Consent Order of Discipline.
2. That I have been advised, and I understand:
 - a. That I have a right to a hearing concerning the allegations of the formal complaint; and,
 - b. That the allegations in the formal complaint must be proven by the Grievance Administrator by a preponderance of the evidence; and,
 - c. That I have the right to retain counsel to defend the merits of the allegations; and,
 - d. That I have the right to offer evidence in mitigation of the allegations; and,

e. That I am entitled to all other rights recited in Subchapter 9.100 of the Michigan Court Rules and the Constitutions of the State of Michigan and of the United States.

3. That I knowingly, consciously, and freely waive any and all rights that I have in connection with the formal complaint filed in this matter.

4. That I have not ingested any substances of any kind within the last twenty-four hours that would impair my ability to understand the nature or purpose of these proceedings.

5. That I waive any right of appeal or review of the discipline to be imposed pursuant to the Stipulation for Consent Order of Discipline executed in this matter; provided, that this waiver does not preclude an appeal based on a claim that the discipline imposed differs from that provided for in the Stipulation.

6. That I understand every provision in this Waiver and my signature appears knowingly and voluntarily hereon.

Dated

1-20-15

James M. O'Briant, P41156
Respondent
PO Box 1063
East Lansing, MI 48826
(517)614-8201

STATE OF MICHIGAN

Attorney Discipline Board

In Re JAMES M. O'BRIANT, P 41556,

Case No. 14-78-GA

Respondent.

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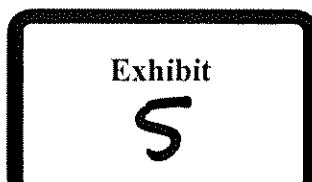
CERTIFICATE OF RECORDS

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

REPORT OF INGHAM COUNTY HEARING PANEL #4

In testimony whereof, I have set my hand and affixed the seal of the Attorney Discipline Board this 4th day of June, 2015.


Julie Loiselle



STATE OF MICHIGAN

Attorney Discipline Board

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GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case No. 14-78-GA

JAMES M. O'BRIANT, P 41156,

Respondent.

REPORT OF INGHAM COUNTY HEARING PANEL #4

PRESENT: Ted W. Stroud, Chairperson
Amy Timmer, Member
George Zulakis, Member

APPEARANCES: Kimberly L. Uhuru, Senior Associate Counsel,
for the Attorney Grievance Commission

Thomas M. Loeb,
for the Respondent

I. PANEL PROCEEDINGS

On July 21, 2014, the Grievance Administrator filed a one-count formal complaint alleging that respondent committed professional misconduct. On November 24, 2014, the parties submitted a stipulation for a consent order of discipline pursuant to MCR 9.115(F)(5), and filed an amended formal complaint, the next day. The amended formal complaint contained five counts alleging that respondent had committed professional misconduct in his representation of five separate clients. On February 9, 2015, the parties filed an amended stipulation which contained respondent's admissions to all factual allegations and charges of professional misconduct contained in Amended Formal Complaint 14-78-GA. The amended stipulation also contains the agreement of the parties that respondent's license to practice law in Michigan be suspended for one year, effective January 21, 2015, and that he pay restitution in the aggregate amount of \$18,000.00 by April 21, 2015. The hearing panel has considered the amended stipulation and has concluded that it is reasonable and is consistent with the goals of these discipline proceedings.

II. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

Based on respondent's admissions, the panel finds that respondent, in four separate legal matters, neglected the matters, in violation of MRPC 1.1(c); failed to seek the lawful objectives of his clients, in violation of MRPC 1.2(a); and failed to act with reasonable diligence and promptness,

in violation of MRPC 1.3. In three of those three of those four legal matters, respondent failed to keep his clients reasonably informed about the status of their matters, in violation of MRPC 1.4(a); and failed to explain the matters to the extent reasonably necessary to permit his clients to make informed decisions regarding their representation, in violation of MRPC 1.4(b). In one of those four matters, respondent failed to take reasonable steps to protect his client's interests upon termination of the representation, in violation of MRPC 1.16(d). In a fifth legal matter, respondent entered into a business transaction with his client where: a) the terms were not fully disclosed and transmitted to the client in writing; and b) the client did not consent thereto in writing, in violation of MRPC 1.8(a)(1) and (3).

The panel further found that respondent engaged in professional misconduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, and was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(2) and (3).

III. REPORT ON DISCIPLINE

The stipulation for consent discipline contains the parties' assertion that a one-year suspension of respondent's license to practice law in Michigan is the appropriate discipline to be imposed under the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards), specifically Standard 4.42 (Lack of Diligence), which states:

Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Additionally, the parties identified the applicable aggravating and mitigating factors under ABA Standards 9.22 and 9.32, respectively. The parties stated that, pursuant to ABA Standards 9.22(a), (c), (d), and (i), the applicable aggravating factors consisted of prior disciplinary offenses; pattern of misconduct; multiple offenses; and substantial experience in the practice of law. Mitigating factors, under ABA Standards 9.32(c), (d), (e), and (l), consisted of personal or emotional problems related to the ill health of respondent's father; good faith effort to make restitution; full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings; and remorse.

The hearing panel, in accordance with the stipulation of the parties, will order that respondent's license to practice law in Michigan be suspended for one year, effective January 21, 2015, and that he pay restitution, by April 21, 2015, as follows:

- | | | | |
|----|------------------------|---|---------------------|
| 1. | Barbara Kleaveland | - | \$ 5,000.00; |
| 2. | Elizabeth Pierce | - | \$10,000.00; and |
| 3. | Michelle Barlund Smith | - | <u>\$ 3,000.00.</u> |

TOTAL		\$18,000.00
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IV. SUMMARY OF PRIOR MISCONDUCT

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

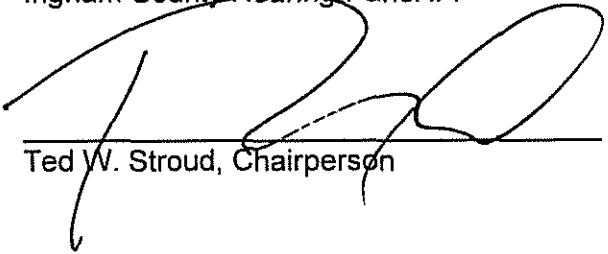
<u>ADB Case No.</u>	<u>Discipline</u>	<u>Effective Date</u>
12-90-GA	Reprimand (By Consent)	03/22/13

V. ITEMIZATION OF COSTS

Attorney Grievance Commission: (See Itemized Statement filed 01/15/15)	\$ 56.47
Administrative Fee	<u>\$ 750.00</u>
TOTAL:	\$ 806.47

ATTORNEY DISCIPLINE BOARD
Ingham County Hearing Panel #4

By:



Ted W. Stroud, Chairperson

DATED: February 24, 2015

STATE OF MICHIGAN

Attorney Discipline Board

In Re JAMES M. O'BRIANT, P 41556,

Case No. 14-78-GA

Respondent.

CERTIFICATE OF RECORDS

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

ORDER OF SUSPENSION AND RESTITUTION (BY CONSENT)

In testimony whereof, I have set my hand and affixed the seal of the Attorney Discipline Board this 4th day of June, 2015.


Julie Loiselle



STATE OF MICHIGAN

Attorney Discipline Board

FILED
ATTORNEY DISCIPLINE BOARD

15 FEB 24 PM 3:38

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case No. 14-78-GA

JAMES M. O'BRIANT, P 41156,

Respondent.

ORDER OF SUSPENSION AND RESTITUTION
(By Consent)

Issued by the Attorney Discipline Board
Ingham County Hearing Panel #4

Ted W. Stroud, Chairperson
Amy Timmer, Member
George Zulakis, Member

The Grievance Administrator and the respondent have submitted an amended stipulation for a consent order of discipline pursuant to MCR 9.115(F)(5). The stipulation contains respondent's admission to the factual allegations and allegations of professional misconduct contained in Amended Formal Complaint 14-78-GA. The parties agreed that respondent's license to practice law in Michigan should be suspended for one year, effective January 21, 2015, and that he should pay restitution in the aggregate amount of \$18,000.00. The panel has reported its findings and conclusions as to misconduct and discipline;

NOW THEREFORE,

IT IS ORDERED that the parties' stipulation for consent order of discipline filed November 24, 2014, is **APPROVED**.

IT IS FURTHER ORDERED that respondent's admissions to the factual allegations contained in Amended Formal Complaint 14-78-GA are **ACCEPTED**.

IT IS FURTHER ORDERED that respondent's license to practice law in Michigan is **SUSPENDED FOR ONE YEAR, EFFECTIVE JANUARY 21, 2015**, (as stipulated by the parties), and until further order of the Supreme Court, the Attorney Discipline Board or a hearing panel, and until respondent complies with the requirements of MCR 9.123(B) and MCR 9.124.

IT IS FURTHER ORDERED that respondent shall, on or before April 21, 2015 pay restitution as follows:

- | | | | |
|----|------------------------|---|---------------------|
| 1. | Barbara Kleaveland | - | \$ 5,000.00; |
| 2. | Elizabeth Pierce | - | \$10,000.00; and |
| 3. | Michelle Barlund Smith | - | <u>\$ 3,000.00.</u> |

TOTAL \$18,000.00

Respondent shall file written proof of payment with the Attorney Grievance Commission and the Attorney Discipline Board within 10 days of the payment of restitution to each person.

IT IS FURTHER ORDERED that respondent shall not be eligible for reinstatement in accordance with MCR 9.123(B) unless respondent has fully complied with the restitution provisions of this order.

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

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

1. the nature and duration of the discipline imposed;
2. the effective date of such discipline;
3. respondent's inability to act as an attorney after the effective date of such discipline;
4. the location and identity of the custodian of the clients' files and records which will be made available to them or to substitute counsel;
5. that the clients may wish to seek legal advice and counsel elsewhere; provided that, if respondent was a member of a law firm, the firm may continue to represent each client with the client's express written consent;
6. the address to which all correspondence to respondent may be addressed.

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

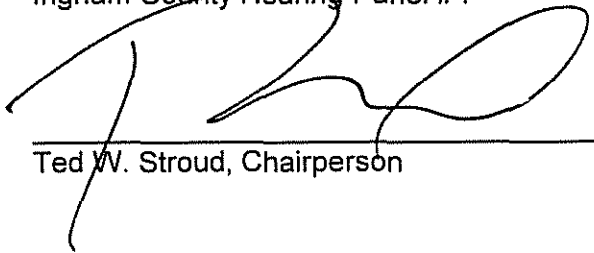
IT IS FURTHER ORDERED that respondent shall, within 14 days after the effective date of this order, file with the Grievance Administrator and the Attorney Discipline Board an affidavit of compliance as required by MCR 9.119(C).

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

IT IS FURTHER ORDERED that respondent shall, on or before March 18, 2015, pay costs in the amount of \$806.47. Check or money order shall be made payable to the Attorney Discipline System and submitted to the Attorney Discipline Board [211 West Fort St., Ste. 1410, Detroit, MI 48226] for proper crediting. (See attached instruction sheet.)

ATTORNEY DISCIPLINE BOARD
Ingham County Hearing Panel #4

By:



Ted W. Stroud, Chairperson

DATED: February 24, 2015