

2. Between 1994 and 1996, Respondent represented Dr. Kyzer in certain confidential disciplinary complaints brought against him by doctors, nurses, hospital employees and others. The complaints included allegations of verbally abusive and harassing behavior by Dr. Kyzer to female nurses and employees. During the course of this representation, Respondent obtained substantial confidential information about Dr. Kyzer, as evidenced not only by Dr. Kyzer's testimony, but also by Respondent's billings to Dr. Kyzer, which reference, among other things, Respondent's review of "Dr. Kyzer's 33 page history/factual memorandum."

3. During the time Respondent represented Dr. Kyzer, he was also a friend of Dr. Kyzer's sister, Deborah Ivy. In 1996 or 1997, Respondent assisted Ms. Ivy in a matter involving her personal medical care. In a letter dated August 8, 1996, Respondent announced to Dr. Kyzer that he was withdrawing as Dr. Kyzer's counsel "due to a conflict that has arisen." Respondent did not provide Dr. Kyzer with a detailed explanation of the reasons for his withdrawal, but did state that "he could no longer represent [Dr. Kyzer] and maintain his relationship with Ms. Ivy."

4. In 1999, Dr. Kyzer voluntarily surrendered his medical license due to "personal health reasons." The proceedings related to the surrender of Dr. Kyzer's license are deemed confidential proceedings by Alaska statute. Respondent did not represent Dr. Kyzer in connection with the surrender of his license.

5. Dr. Kyzer, Deborah Ivy and other members of the Kyzer family held mutual interests in certain business entities, including the Kyzer Group, the Kyzer Group Partnership, and the Calais Company. These entities held interests in various assets, including valuable real estate in and around mid-town Anchorage. Beginning no later

than 1996, friction developed between Ms. Ivy and Dr. Kyzer concerning the manner in which these various investments were being managed and maintained. These differences of opinion manifested themselves, in part, in personal confrontations between Dr. Kyzer and Ms. Ivy at business meetings. In 1997, at Respondent's suggestion, Ms. Ivy hired attorney Charles E. Cole to provide her with legal advice, and also allegedly to "protect" her from what she felt was aggressive, abusive, and threatening behavior by Dr. Kyzer against her, particularly at Calais Company annual meetings, which Mr. Cole attended with Ms. Ivy after he was hired.

6. In 2005, these business disputes erupted into a series of lawsuits, involving claims and counterclaims by various parties alleging, initially, mishandling of various business assets and failure to provide information regarding the business operations. In addition to these disputes, claims were subsequently filed among the Kyzer siblings (1) in connection with the disposition of a substantial family inheritance upon the death of the family matriarch, Ethel Kyzer, in November 2005, and (2) in connection with a trust formed to hold certain Kyzer family real property. Ms. Ivy's interests were, for the most part, directly adverse to Dr. Kyzer's interests in each of these matters. Ms. Ivy's various attorneys in these matters included Phillip Weidener, Charles Cole and Respondent. Dr. Kyzer's attorneys in these matters included John Thorsness, Steven O'Hara and William Bankston. Most of these matters were settled in a global settlement between the parties dated July 1, 2008.

7. On July 27, 2005, Mr. Shea signed an engagement letter formally undertaking to represent Ms. Ivy in the "DDK Suit." The letter stated that Respondent would be providing "[a]ssistance to [Ms. Ivy] and [her] [c]ounsel Charles E. Cole in [l]itigation."

Although the letter was dated July 27, 2005, it acknowledged that some legal services had been previously performed by Respondent in the matter “prior to . . . [agreement] . . . on [his] hourly rate.” As to the nature of the representation, the letter made clear that Respondent’s job was to “assist Mr. Cole and [Ms. Ivy] in meeting, countering and destroying [Dr. Kyzer’s] vicious actions and allegations.” The letter went on to state that Dr. Kyzer’s “vicious history of assaultive behavior on you emotionally and physically has been and is being documented by me,” and that such documentation was “vital for [Ms. Ivy’s] and Mr. Cole’s analysis.” At no time prior to undertaking his representation of Ms. Ivy did Respondent seek, or receive, Dr. Kyzer’s informed consent to the representation.

8. After undertaking his representation of Ms. Ivy, and consistent with the mandate described in his engagement letter, Respondent proceeded to seek out evidence of past “assaultive behavior” by Dr. Kyzer. Among other things, he wrote to licensing officials at the Alaska State Medical Board and the Business and Professional Licensing Division of the Division of Corporations for the State of Alaska, requesting copies of all investigative and complaint files regarding Dr. Kyzer. When he was advised that such records would not be released in full, Respondent accused state officials of having “hidden [Dr. Kyzer’s] history of assaultive bully conduct.”

9. In pleadings and letters written by Respondent on Ms. Ivy’s behalf, Respondent argued forcefully that Dr. Kyzer’s alleged treatment of Ms. Ivy was part of a “pattern and practice” of behavior, proved out by similar incidents involving hospital staff, nurses, doctors and patients while Dr. Kyzer was practicing medicine. Written statements made by Respondent along these lines included the following:

(1) David Kyzer, Mr. O'Hara's Bar Rag "friend," was a "very sick doctor" when he surrendered his medical license in 1999. Mr. Kyzer due to his abusive conduct toward his patients, his fellow doctors, nurses and other health care professionals including hospital staff "gave up his license and his right" to practice medicine by this "voluntarily surrender." Mr. Kyzer is still ill. Mr. Kyzer has a serious "mental disability." Mr. Kyzer has focused on his evil hate on Deborah Ivy with abusive judicial stalking. [Ex. 3, at p. 3]

(2) Mr. Kyzer's very "bullying" bizarre behavior is well known by many. He is ill. Mr. Kyzer's former colleagues in the medical profession and former friends are very aware of his unconscionable conduct. They know Mr. Kyzer is "sick" and needs medical care. Mr. Kyzer's "disability" set forth in his "mental health evaluation" is known by professionals. [Ex. 3, at p. 8]

(3) Deborah Ivy and her Mother Ethel Kyzer experienced for years the above intentional bullying of Mr. Kyzer. Mr. Kyzer had a "pattern and practice" prior to February 1999 of focusing on women in the medical profession, business colleagues and family he "perceived" as weak to attack. The medical profession is now protected. Mr. Kyzer has since 1999 intensified his bullying hateful attacks on Ethel Kyzer and Deborah Ivy with litigation. Mr. O'Hara and Mr. Bankston are hatefully "judicially stalking" Deborah Ivy. [Ex. 3, pp. 30-31]

(4) He knew there was no "personnel department" available to report his outrageous conduct [unlike nurses and other medical personnel had available to them at Anchorage hospitals and physicians offices to report David Kyzer's bullying assaultive conduct]. [Ex. 3, at p. 56]

(5) The ongoing threats by Mr. Kyzer are equal to, or more abusive/assultive, than his conduct while he was a licensed physician, with his pattern and practice having grown more intense and threatening. [Ex. 23, at p. 3]

Each of these statements was intended to state or imply that Dr. Kyzer had, in the past, abused medical colleagues, staff and others in the course of his medical practice and that this should be viewed as substantiating Ms. Ivy's claims that Dr. Kyzer was also abusing her.

10. In a pleading dated June 2, 2003, Respondent made the following statement to the Superior Court for the Third Judicial District:

Mr. Kyzer and his counsel are involved in a conspiracy in furtherance of criminal conduct and fraud. Their actions are in bad faith. Neither Mr. Kyzer or his conspirator counsel is protected from their criminal acts in promoting Mr. Kyzer to multiple courts as an individual who is able to perceive, recall and/or relate the truth. [Ex. 8, at p. 20 (emphasis added)]

This Committee finds that Respondent's statements that one or more attorneys representing Dr. Kyzer were involved "in a conspiracy in furtherance of criminal conduct and fraud" or in "criminal acts" are false, and that there was no reasonable basis in law or fact for such assertions.

11. In the course of representing Ms. Ivy, Respondent made various statements and took various actions, the primary purpose and effect of which was to embarrass, demean, offend, intimidate and harm the reputations of Dr. Kyzer and his counsel. These included, but were not limited to, the following:

(1) Describing legitimate legal proceedings undertaken by Dr. Kyzer and his attorneys as "judicial stalking." [Ex. 25, at p. 1, 25; Ex. 8, at p. 19]

(2) Describing David Kyzer and/or his conduct as "satanic," "evil," "terroristic," "POW business torture," "corrupt," "perverted," "predatory," "depraved," and "deranged." [Ex. 8, at pp. 5, 12, 18; Ex. 25, at pp. 2, 3-4, 19, 29, 43, 55; Ex. 7, at pp. 2, 4, 7, and 11]

(3) Referring to counsel for Dr. Kyzer as "a disgrace to the legal profession," "unethical and corrupt," "dangerous to the public," "[un]trustworthy, [un]truthful [and] [dis]honest," "fraudulent conspirators," "evil," and "liar[s]," [Ex. 3, at pp. 9-10, 12, 29, 41, 50, 52,], and accusing them of engaging in "Alaska good old boy legal corruption," "perpetuating a fraud on Alaska's judicial system," "intentionally abusing their practice of law", engaging in "unconscionable" and "despicable" conduct, and filing "hateful evil litigation." [Ex. 3, at pp. 22, 37, 56, 59, 67]

(4) Gratuitously (and conspicuously) sending copies of pleadings and correspondence prepared by Respondent to the Federal Bureau of Investigation, the Anchorage Police Department, the Alaska Department of Public Safety, the Alaska State Medical Board and the Alaska Bar

Association in an apparent attempt to intimidate Dr. Kyzer and his counsel.

II. Conclusions of Law

Count One – Conflict Of Interest (ARPC 1.9(a))

The Alaska Bar Association alleges that Respondent violated Rule 1.9(a) of the Alaska Rules of Professional Conduct (“ARPC”).

ARPC 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interest of the former client unless the former client consents after consultation.

This Committee finds that Respondent’s representation of Ms. Ivy in the Calais litigation was “materially adverse” to Dr. Kyzer’s interests. Indeed, those individuals were directly opposing parties in that litigation. Further, although Respondent did not represent Ms. Ivy in the “same” matter in which he had previously represented Dr. Kyzer, this Committee finds that the matters were “substantially related” for purposes of Rule 1.9. The Comment to Rule 1.9 notes that “[t]he scope of a matter for purposes of this rule may depend upon the facts of a particular situation or transaction.The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as changing sides in the matter in question.” *Id.* Here, as this Committee found above, Respondent believed it was in Ms. Ivy’s interest in the litigation to show that Dr. Kyzer’s actions toward her were part of a “pattern and

practice” of abusive conduct dating back to his days as a practicing physician. Viewed in this light, the conflict is clear. While representing Dr. Kyzer, Respondent was charged with defending Dr. Kyzer against charges of abusive conduct. In order to zealously represent Ms. Ivy, however, his job was to prove that the same kind of misconduct, had actually occurred. This Committee views this situation as one in which Respondent can “justly be regarded as changing sides in the matter in question.”

This Committee also finds that the matters were substantially related because, regardless of whether Respondent actually used or disclosed any confidences or secrets he had gained during his representation of Dr. Kyzer, he clearly possessed confidential information which would materially advance Ms. Ivy’s interests in the subsequent litigation. The mere existence of confidential disciplinary complaints alleging abusive conduct by Dr. Kyzer, not to mention any information Respondent may have learned from Dr. Kyzer in defending them, would clearly have assisted Ms. Ivy in proving her assertion that Dr. Kyzer had a past “pattern and practice” of abuse. In light of this common element and Respondent’s possession of material confidential information relating to it, this Committee finds that the two matters were “substantially related.”

In light of the foregoing, and because Respondent failed to obtain Dr. Kyzer’s informed consent prior to representing Ms. Ivy, this Committee finds that Respondent violated ARPC 1.9(a).

Count Two – Disclosure of Confidential Information and Secrets

The Bar Association next asserts that Respondent violated ARPC 1.6(a), 1.8(b) and 1.9(c) by using and disclosing, during the course of his representation of Ms. Ivy,

certain confidences and secrets gained in connection with his representation of Dr. Kyzer. Specifically, the Bar Association alleges that Respondent's repeated references in pleadings and correspondence to Dr. Kyzer's alleged "abusive," "bizarre" or "uncontrollable" conduct toward his fellow doctors, patients, nurses and other health care professionals constituted the use and disclosure of confidences or secrets gained in the course of his representation of Dr. Kyzer. On this point, this Committee find insufficient evidence to support the charge.

In her testimony before this Committee, Ms. Ivy cited several examples of instances in which she had learned, either from personal observation or from independent statements made to her by doctors, hospital personnel and others, that Dr. Kyzer had been verbally abusive to doctors, nurses and hospital personnel. In one instance, she claimed to have personally witnessed Dr. Kyzer shout at a nurse in a bullying and intimidating way. In another, she was told by a doctor claiming to have been present that Dr. Kyzer had yelled and cursed at a doctor in the operating room during a surgical procedure. This Committee found Ms. Ivy's testimony, which was essentially unrebutted by the Bar, credible on this point.

While Respondent's mere possession of material confidential information was sufficient to trigger a violation of ARPC 1.9(c), this will not suffice for the charges alleged here. To prove that Respondent violated ARPC 1.6(a), 1.8(b) or 1.9(c), the Bar Association must show that the information possessed by Respondent was actually used or disclosed by him. See ARPC 1.6(a) ("A lawyer shall not reveal a confidence or secret..."); ARPC 1.8(b) (A lawyer shall not use information to the disadvantage of the client...."); ARPC 1.9(c) ("A lawyer...shall not...use a confidence or secret...or reveal a

confidence or secret...”) (emphasis added). Further, even if confidences or secrets were used (as opposed to disclosed), no violation would have occurred in this case if the information in question had become “generally known” at the time it was used. ARPC 1.9(c). In this case, the information allegedly used or disclosed by Respondent was the alleged fact that Dr. Kyzer had previously abused doctors, nurses or other health care colleagues while practicing medicine. Because the examples cited by Ms. Ivy appear to have been wholly independent of the specific matters in which Respondent represented Dr. Kyzer, this Committee cannot conclude, based on clear and convincing evidence, that Respondent’s general references to Dr. Kyzer’s alleged abuse were based on information gained during his representation of Dr. Kyzer, rather than on the independent, and unprivileged, examples given by Ms. Ivy. Further, Ms. Ivy’s testimony suggests that Dr. Kyzer’s alleged history of abusive conduct (as opposed to the specific complaints in which Respondent represented Dr. Kyzer) may have been “generally known” at the time they were discussed by Respondent in the pleadings and correspondence.

For the foregoing reasons, this Committee concludes that there is insufficient evidence to find that Respondent violated ARPC 1.6(a), 1.8(b), or 1.9(c).¹

Count Three – False Statements of Fact in Court Pleadings

ARPC 3.1 provides, in pertinent part, that “a lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous.” ARPC 3.3 provides that “[a] lawyer shall not ...knowingly make a

¹ One member of this Committee disagrees with the foregoing analysis, and would find that Respondent violated ARPC 1.6(a), 1.8(b) and 1.9(c).

false statement of material fact or law to a tribunal.” Respondent, in his pleading dated June 2, 2008, stated that counsel for Dr. Kyzer were “involved in a conspiracy in furtherance of criminal conduct and fraud,” and that they had engaged in “criminal acts.” This Committee finds that these statements were material, that they were false, and that there was no non-frivolous basis in law or fact for making such assertions. Further, this Committee finds that the statements in question were knowingly made by Respondent. Accordingly, this Committee concludes that Respondent violated ARPC 3.1 and ARPC 3.3(a)(1).

Count Four – Unprofessional Pleadings

ARPC 4.4 provides, in pertinent part, that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person.” The Bar Association alleges that the conduct by Respondent, as described in Finding of Fact Number 11, above, amounts to a violation of this Rule. This Committee agrees.

While particular statements referenced in Finding of Fact Number 11, viewed solely in isolation, might be deemed insufficient to trigger a violation of this Rule, this Committee has no doubt that, when viewed in its entirety, Respondent’s conduct, which was replete with demeaning, offensive, insulting, intemperate, frivolous and outrageous conduct and statements, is sufficient to support a violation of ARPC 4.4.

III. Recommendation

For all of the foregoing reasons, this Committee finds for the Bar Association on Count One, Count Three and Count Four. This Committee finds insufficient evidence to support Count Two of the Bar Association's petition.

IV. Further Proceedings; Appeal Rights

At the February 8-12, 2010 hearing, both parties requested that, assuming this Committee were to find a violation, the question of the appropriate sanction be addressed in a subsequent proceeding. Accordingly, a telephonic status hearing will be held at 9:00 a.m. on Wednesday, April 14, 2010, to select a date and discuss deadlines for that sanctions hearing. The parties will be notified of a call-in number by future written notice from this Committee's chair.

As to both parties' appeal rights, this Committee interprets Bar Rules 22(I) and 25(f) as meaning that appeal rights and deadlines begin only after this Committee issues its future sanctions recommendation.

ALASKA BAR ASSOCIATION
AREA HEARING COMMITTEE

By: 

Gregory A. Miller, Area Hearing Committee
Attorney Member and Chair

By: 

Rick Liotta, Area Hearing Committee
Public Member

By: 

Keith Sanders, Area Hearing Committee
Attorney Member