

**KENNETH PAUL REISMAN****Public Reprimand No. 2013-21****Order (public reprimand) entered by the Board on October 9, 2013.****SUMMARY**¹

The respondent received a public reprimand with conditions for the conduct described below.

In November of 2006, the respondent was retained to represent a company (ASI) and an employee of ASI in defending civil claims brought in superior court by the former employer of the employee and a competitor of ASI (hereafter NSA). The employee had resigned from NSA effective September 29, 2006, and begun employment with ASI on October 1, 2006. Without NSA's permission, the employee brought to ASI a NSA laptop computer that he had used in his employment at NSA. Between October 1 and October 23, 2006, the employee transferred some files from the NSA laptop to an ASI laptop. He then used a scrubbing program to delete all files from the NSA laptop and returned it to NSA on October 23, 2006.

On November 15, 2006, the superior court entered a temporary restraining order in part barring the employee from disposing of or using NSA trade secrets or confidential information. Also, he was ordered to return to NSA all information that he deleted from the NSA laptop and transferred to any other device. The employee denied to the respondent that he had transferred any NSA information to any other device. On December 6, 2006, the respondent filed an answer and counterclaims to the litigation, and he denied that any proprietary or other confidential information of NSA was uploaded and given to ASI.

On November 17, 2006, unbeknownst to the respondent, the employee used a scrubbing program to delete some NSA files from the ASI computer. On March 7, 2007, NSA's counsel advised the respondent by e-mail that NSA would be filing a motion to gain access to his clients' computers and that the respondent was obligated to inform the employee and ASI to preserve any documents "that relate to the case," including any on the employee's ASI laptop. Following receipt of this e-mail, the respondent took no action and did not advise employee or his employer not to delete relevant files from the ASI laptop.

¹Compiled by the Board of Bar Overseers based on the record of proceedings before the board.

On March 27, 2007, NSA filed a motion to compel production of ASI's computers for forensic examination. On April 12, 2007, again without the respondent's knowledge but on the same day as a hearing on discovery issues, the employee used a scrubbing program to delete files from his ASI computer. After the hearing, the court on April 13 ordered that NSA's forensic expert be given access to the employee's ASI computer. After a further hearing on May 2, 2007, the court amended the order to allow the hard drive to be copied but to limit the expert's examination of the copy to any NSA proprietary or confidential files copied to the computer in September or October 2006.

Following the April 12 order, the employee advised the respondent that there were confidential documents and information of ASI, unrelated to NSA, on his laptop that should not be disclosed to NSA or its expert. Without inquiring further as to the specific nature or content of these documents but believing that ASI confidential information was not relevant to the litigation, the respondent advised the employee that he could scrub such confidential information from his laptop.

Due to his lack of experience in electronic discovery, the respondent failed to appreciate that the order of April 13, 2007, required the entire hard drive to be preserved for the NSA expert, not just documents obtained from NSA. The respondent advised the employee that he should scrub files unrelated to NSA without first conferring with experienced counsel or conducting research as to his client's legal obligations and without any attempt to confirm that the materials to be deleted were as represented.

On May 8, 2007, the day before the expert's examination of the computer, the employee scrubbed additional files from the ASI computer. On December 6, 2007, after the series of deletions came to the attention of NSA and the court, the court issued a memorandum and order finding that the employee had engaged in spoliation of evidence. The court declined to enter a default judgment against the employee as requested, but granted the plaintiff additional discovery and access to the ASI computer for whatever additional analysis that the plaintiff could perform. In October 2010, the respondent withdrew from the representation of the employee and his employer, and successor counsel entered an appearance.

The respondent's advice to his client scrub certain files from the hard drive of a laptop in contravention of a court order constituted unlawful obstruction of another party's access to evidence, in violation of Mass. R. Prof. C. 3.4(a). The respondent's failure to adequately communicate to his client his obligations under the court order and the potential prejudice of altering property subject to the court order was conduct in violation of Mass. R. Prof. C. 1.4. Finally, the respondent's conduct of handling a matter that he was not competent to handle without adequate research or associating with or conferring with experienced counsel, and without any attempt to confirm the nature and content of the proposed deletions, was conduct in violation of Mass. R. Prof. C. 1.1.

In aggravation, the respondent's condoning the alteration of the hard drive had the potential to prejudice the plaintiff's pursuit of discovery, and the client was found to have engaged in spoliation. Much of the spoliation, however, took place prior to the respondent's advice, and the trial court ultimately found that even assuming that client transferred confidential information to ACI, the plaintiff did not prove that the client's conduct caused any damages to NSA. In mitigation, the respondent was relatively inexperienced in the relevant area of discovery practice.

This matter came before the board on a stipulation of facts and disciplinary violations and a joint recommendation for discipline by public reprimand with attendance within one year at two CLE programs, one on electronic discovery and one on ethics and law office management. On September 23, 2013, the board accepted the parties' recommendation and imposed a public reprimand subject to the conditions.