STATE OF WISCONSIN IN SUPREME COURT

In the Matter of Disciplinary Proceedings

Against Steven d. Johnson, Attorney at Law,

Office of Lawyer Regulation,

Complainant,

-and-

Steven D. Johnson,

Respondent.

DECISION AND ORDER ON PARTIAL SUMMARY JUDGMENT

Case No. 2022AP11-D

NATURE OF THE CASE

This is a disciplinary action filed by the Wisconsin Supreme Court--Office of Lawyer Regulation (hereinafter "OLR"). The matter is scheduled for a Final Pretrial on August 30, 2022 and a hearing on September 13, 2022. Before me is a Motion For Partial Summary Judgment filed by OLR and opposed by the Respondent (hereinafter "Johnson."). The Motion has been fully briefed by both parties.

This matter was commenced by the filing of a Complaint on January 3, 2022. The Complaint addresses three OLR Matters concerning Johnson (Matter Nos. 2020MA348, 2020MA346 and 2020MA1113 respectively). Counts 1-3 of the Complaint pertain to Matters 2020MA348 and 346; Counts 4-5 pertain to 2020MA1113. 2020MA1113 involves Johnson's representation of Dontell Petty (hereinafter "Petty") and the Motion For Partial Summary Judgment relates to that Matter as alleged in Counts 4-5. Counts 1-3 are not the subject of this Partial Summary Judgment Notion and are not relevant to this Decision.

Counts 4 and 5 pertain to the signing and filing of a Defendant's Waiver of Preliminary Examination (hereinafter "Waiver") in Winnebago County Case No. 2020-CT-482. Petty was charged with Felony Hit and Run Involving Injury and represented by Johnson. On October 9, 2020, Petty electronically signed the Waiver at a meeting with one of the paralegals at Johnson's office. The Waiver also indicates it was electronically signed by Johnson on that same date. Above the statement indicating it was electronically signed by Johnson is a paragraph stating Johnson had personally explained and

discussed the Waiver with his client and had answered his client's questions to the best of his ability. The paragraph further asserts Johnson believed his client understood his right to a Preliminary Examination and the charges and penalties he was facing. The paragraph concluded with a statement that Johnson personally observed Petty sign and date the Waiver. Above "Electronically signed by" are the name, address, phone and Fax numbers for Johnson's law office. Below that language is Johnson's name and State Bar Number. The County Clerk of Circuit Court file-stamped the Waiver on the same date as the electronic signatures.

On October 12, 2020, both Johnson and Petty appeared via Zoom videoconference before a Circuit Court Commissioner. The Commissioner asked Johnson how they were going to proceed and Johnson replied a Waiver of the preliminary hearing had been filed. The Commissioner then engaged in a colloquy with Petty. The Commissioner asked Petty if he reviewed the Waiver with his attorney and Petty responded that he had not yet done so but went through it at Johnson's office the prior week with one of Johnson's paralegals. Petty also told the Commissioner he sent Johnson's secretary a copy of the Waiver. The Commissioner adjourned the hearing to afford Johnson an opportunity to discuss the Preliminary Hearing with Petty.

In Count 4, OLR asserts Johnson violated SCR 20:1.4(b) by failing to discuss Petty's waiver of Preliminary Examination with him prior to having Petty sign the Waiver. In Count 5, OLR asserts Johnson violated SCR 20:3.3(a)(1) by filing Petty's Waiver of Preliminary Examination in which Johnson attested he had personal discussions with Petty when he had not. OLR contends it is entitled to Summary Judgment regarding each of those Counts.

UNDISPUTED FACTS

There are a number of undisputed facts contained in documents filed in association with the Partial Summary Judgment Motion. Those documents are as follows:

(a) Affidavit of Kim M. Kluck, Assistant Litigation Counsel for OLR
(b) Petty's Waiver of Preliminary Examination dated 10/9/20 (Exhibit 2 attached to OLR's Motion)
(c) Transcription of Digital Audio Recording of hearing before the Commissioner on October 12, 2020 (hereinafter "Transcript")

(d) Johnson's Responses to OLR's First Set of Request to Admit signed by Johnson's attorney on March 22, 2022 (Exhibit B attached to OLR's Motion)
(e) Affidavit of Attorney Steven Johnson dated June 27,2022 (attached to Johnson's Memorandum in Opposition to OLR'S Motion For Partial Summary Judgment

The undisputed facts relevant and material to this Motion are as follows:

1. Johnson represented Petty in the above-referenced Winnebago County felony matter.
2. The Waiver of Preliminary Examination form (Exhibit 2) is a true and correct copy.
3. Johnson did not personally explain and discuss with Petty all the matters mentioned in said Waiver prior to Petty signing it on October 9, 2020.
4. Johnson did not personally explain and discuss with Petty all the matters mentioned in said Waiver prior to Johnson signing it on October 9, 2020.
5. Johnson did not personally explain and discuss with Petty all the matters mentioned in said Waiver prior to the hearing before the Commissioner on October 12, 2020.
6. Johnson did not personally witness Petty sign and date said Waiver.
7. The transcript of the October 12, 2020 proceeding before the Commissioner is a true and correct copy.
8. Said transcript accurately reflects statements made by Johnson and the Commissioner.

LEGAL STANDARD

In their Memoranda, both parties accurately set forth the applicable legal standards regarding Summary Judgment in this type of proceeding. In Wisconsin, the rules of civil procedure are applied to lawyer disciplinary proceedings. SCR 22.16(1). This includes the ordinary Summary Judgment procedure. *See generally Disciplinary Proceedings Against Selmer*, 227 Wis. 2d 85, 595 N.W. 2d 373 (1999). Wis. Stat. Sec. 802.08(1) provides that a party may move for summary judgment within 6 months of the filing of the summons and complaint or within the time established by a scheduling order. The instant Motion was filed on June 14, 2022 and the Scheduling Order required all dispositive motions be filed by June 20, 2022. The motion is timely.

Sec. 802.08(2) provides that judgment shall be granted as a matter of law where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that here is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." After being satisfied that the Complaint states a claim, the magistrate next examines the Answer to determine whether it presents a material issue of fact. *Grams v. Boss,* 97 Wis. 2d 332,

338, 294 N.W. 2d 473 476-477 (1980). I conclude both the Complaint and Answer satisfy those requirements.

The court next examines the moving party's submissions to determine whether they have made a *prima facie* case for summary judgment and if so, then looks to the opposing party's submissions to determine whether any material facts are in dispute. *Boss, Id.* When reflecting on summary judgment motions, courts consider evidentiary facts in the record true if they are not contested by other proof. *L.L.N. v. Clauder,* 209 Wis. 2d 674, 684, 563 N.W. 2d 434, 439 (1997).

Essentially, summary judgment is only appropriate if evidentiary facts indicate that "the law resolving the issue is clear." *Rady v. Lutz*, 150 Wis. 2d 643, 647, 444 N.W. 2d 58 (Ct. App. 1989). Any reasonable doubt whether a genuine issue of material fact exists shall be resolved in favor of the nonmoving party, and the moving party has the burden of proving there is no issue of material fact and they are entitled to judgment as matter of law. *Burdick Hunter of WI, Inc. v. Hamilton,* 101 Wis. 2d 460,470, 304 N.W. 2d 752 (1981). The mere assertion of an alleged factual dispute does not defeat an otherwise properly supported summary judgment motion. It must be established that there is a genuine issue of material fact. *Baxter v. DNR,* 165 Wis. 2d 298, 312, 477 N.W. 2d 648 (Ct. App. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S, 242, 247-248 (1986)). If there is no genuine issue of material fact, summary judgment must be rendered. Wis. Stat. Sec. 802.08(2).

If the court has doubts as to the existence of a genuine issue of material fact, those doubts should be resolved against the moving party. Inferences that can be drawn from the underlying facts should be viewed in the light most favorable to the party opposing Summary Judgment. *Grams, Id.*

ANALYSIS

There are undisputed facts pertaining to both counts 4 and 5. There are also disputed facts pertaining to each count. Each Count must be analyzed separately as they involve alleged violations of two distinct Supreme Court Rules.

Count 4: Violation of SCR 20:1.4 (b) Communication

SCR 20:1.4 is captioned "Communication". Subsection (b) provides as follows:

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

It is undisputed Johnson did not personally explain anything about a Waiver of a Preliminary Examination to his client. It is also undisputed that his client met with Johnson's paralegal before signing the Waiver. The initial paragraph of Petty's Waiver provides, in relevant part, as follows: "The defendant makes this waiver *with the advice of his attorney* and pursuant to sections 970.03-.05 and 971.01 of the Wisconsin Statutes." (Emphasis added). OLR has clearly established a *prima facie* case that Johnson violated SCR 20:1.4 (b). Johnson must therefore establish there are material facts in dispute which entitle him to a trial. *Schultz v. Industrial Coils, Inc.,* 125 Wis. 2d 520, 521, 373 N.W..2d 74,74 (Ct. App. 1985).

The only facts Johnson offers are set forth in his Affidavit. They are as follows:

(a) Defendants routinely waive their rights to a preliminary examination because the prosecutor has a low burden of proof (probable cause to believe the defendant committed a felony.)
(b) He typically met personally with clients to review such a Waiver, but due to Covid 19, most hearings and meetings were held remotely
(c) His office was still adjusting to the new process in October, 2020 and he had not updated his form pleadings to reflect that new process
(d) He did not personally review the waiver form with Petty prior to the October 12 hearing
(e) He instructed a paralegal on his staff to meet with Petty and review the Waiver
(f) He "was satisfied" Petty understood the Waiver and the rights he was waiving
(g) He did not realize Petty had signed an "outdated form" that did not reflect what had occurred until he went to court. Johnson states this was "an unintentional error."
(h) He told the Commissioner that Petty's rights had been explained to him
(i) Based on past practice, he expected the Commissioner would send him and Petty into a Zoom breakout room to confer privately if the Commissioner was not persuaded Petty fully understood his rights and the Waiver
(j) After the Commissioner adjourned the hearing, he "conferred "with Petty and both of them confirmed they had reviewed the Waiver at the adjourned hearing

Before determining whether Johnson has established whether there are material facts in dispute, I must address whether he has demonstrated a defense which would defeat OLR's claim he violated SCR 20:1.4 (b). "To prevail on summary judgment, the defendants must show a defense which would defeat the plaintiff.'" *Elfers v. St. Paul Fire Marine Ins. Co.,* 214 Wis. 2d 499, 503 (Ct. App. 1997,

citing *Rach v. Kleber,* 123 Wis. 2d 473, 479, 367 N.W. 2d 824, 827 (Ct. App. 1985) (quoting *In re Estate of Johnson,* 113 Wis. 2d 126, 129-30, 334 N.W. 2d 574, 576-77(Ct. App. 1983)). If the defendant raises a defense that could defeat OLR's claim, the "final step, then, is to review the record to see if a material fact is in dispute. *Elfers, Id, citing Rach,, supra* at 479.

Johnson appears to raise three theories of defense that would defeat OLR's claim in Count 4. Firstly, he argues the Supreme Court Rule does not require Johnson to meet *personally* with his client or explain things *personally*. Secondly, he argues his paralegal could fulfill his responsibilities. Finally, he argues it is OLR's responsibility to prove Petty did not receive the necessary information to make an informed decision. Each of those will be addressed separately.

Personal Contact: It is true SCR 20:4.1 (b) does not require a lawyer to meet personally with his or her client to explain a matter. While the Rule does not require personal contact, it provides, in relevant part, as follows: "A lawyer *shall explain a matter . . " to* his or her client. (Emphasis added). There is not a scintilla of evidence in this record that Johnson *explained anything at all* to Petty about the waiver of his right to a Preliminary Examination. Johnson does not claim he had any conversations about this Waiver with Petty; not by phone, Zoom or any other form of communication. Johnson also does not assert he somehow explained the Waiver in writing. He only admits his paralegal met with Petty. The issue of personal contact does not provide a defense that would defeat OLR's claimed violation of SCR 20:1.4 (b).

Use of Paralegal: Johnson argues his obligation to explain the matter to Petty was satisfied by having his paralegal meet with Petty, OLR correctly points out that the Waiver explicitly states it is being done "*with the advice of his attorney.*" (Emphasis added). Even the most competent paralegal does not meet the definition of an attorney. And as OLR correctly points out, the Wisconsin Supreme Court defines the practice of law as "the application of legal principles and judgment with regard to the circumstances or objectives of another person." specifically including "giving advice or counsel to others as to their legal rights." SCR 23.01(1). The clear language of SCR 20:1.4 (b) ("A **lawyer")** and the Waiver form **("with the advice of his attorney")** (emphasis added) are consistent with each other and meet the definition of the practice of law set forth in SCR 23.01(1).

Neither party cites any authority regarding whether delegating the explanation of a Preliminary

Examination waiver to a paralegal satisfies the requirements of SCR 20:1.4 (b). I have not uncovered any during my independent research of this issue. Absent a clear lack of authority, I conclude delegating this responsibility to a paralegal does not satisfy the Sec. 20:1.4(b) requirement that a **lawyer explain** the matter to his or her client. The use of a paralegal does not constitute a defense which would defeat Count 4 of OLR's Complaint.

If my conclusion is erroneous, and this constitutes a defense as required by *Elfers,* the final step is to review the record to determine whether Johnson has established material facts in dispute which entitle him to a trial on Count 4.

The record is devoid of *any* information about (a) the qualifications or training of the paralegal involved (b) the extent to which the paralegal *explained* anything about the contents of the Waiver form and (c) whether the paralegal provided *advice* to Petty. SCR 20:1.4 (b) explicitly requires *the matter be explained.* The Waiver form explicitly states Petty's right to a Preliminary Examination is being done *with the advice of his attorney.* The only fact Johnson offers associated with the paralegal's involvement is ". . . a paralegal on my staff did meet with him and reviewed the waiver per my instructions. . ." *Affidavit of Steven Johnson dated June 27, 2022, par. 7.* Even that statement is vague: what specifically was "per Johnson's instructions"? Was the meeting at the instruction of Johnson or did the paralegal follow Johnson's instructions when reviewing the form with Petty, or both? And Johnson offers nothing about the training and experience of the paralegal regarding the procedures at a Preliminary Examination, the consequences of waiving it, or how the paralegal answered Petty's questions (if any). Johnson states he typically met with his clients in person to review waivers prior to Covid-19. *Affidavit of Johnson, supra, at par. 5.* He apparently understood that was his responsibility and he has provided no information as to how he trained or supervised a paralegal to perform the service he had typically performed. Nor has he presented any information as to how it was specifically done with Petty. It is Johnson's responsibility to offer facts to support his assertion that the paralegal who met with Petty explained the matter to him "to the extent reasonably necessary to permit Petty to make an informed decision regarding" the Waiver. This is required by SCR 20:1.4 (b).

Whether Petty's waiver was informed: Johnson appears to argue that if Petty's waiver of his right to a Preliminary Examination actually resulted in Petty making an informed decision, Johnson did

not violate SCR 20:1.4 (b). Johnson asserts he "was satisfied that Mr. Petty understood the waiver and the rights he was waiving." *Johnson Affidavit supra, at par. 8.* Johnson does not state whether he formed that opinion at the first hearing on October 12 or at the adjourned hearing when Johnson had actually reviewed the form with Petty. It is the first hearing that forms the basis of Count 4. Johnson also fails to provide any information as to the basis of his belief.

Even if I were to accept at face value Johnson's unsupported belief in what Petty understood, his argument that a client's understanding of a matter provides a defense to a claimed violation of SCR 20:1.4 (b) fails. It is true that a client must be the recipient of information ". . .to the extent necessary to permit the client to make informed decisions about the representation." *SCR 20;1.4 (b).* But the clear opening language of the Rule cannot be ignored: " *A lawyer shall explain a matter . . .*" as described above. The Rule must be read as a whole. A client's informed decision must be based on his *lawyer's* explanation. A client may decide to independently research a matter, discuss it with friends or family, rely on his own prior experience, observe other court proceedings, watch television shows, etc. But that does not relieve an attorney of his or her obligation to explain the matter to the client.

Johnson also appears to argue two other facts that might constitute a defense to Count 4. The first is that he believed the Commissioner would not proceed with the waiver if the Commissioner did not think Petty was making an informed decision. The second argument is that Petty executed an informed Waiver at an adjourned hearing. The Transcript of the October 12 hearing reveals the following.:

When the Commissioner asked Johnson how they were "going forward," Johnson said "My client after being explained the rights to a preliminary hearing would be prepared to waive his right . . and we have filed a waiver in that regard. " *Transcript,p. 2, ll. 5-11.* The Commissioner immediately asked Petty if he understood what Johnson was referring to when he talked about waiving a preliminary hearing. Petty responded "Yes, sir." *Transcript, ll. 12-15.* The next question from the Commissioner was whether Petty had reviewed the two page form with Johnson. Petty replied "Not yet, but like I went to his office last week and (inaudible) one of his paralegals and everything and all. I sent his secretary a copy of that, too, yes, I did." *Transcript,p. 2 ll 16-21.* The next question from the Commissioner was "So the waiver of the preliminary examination, did you discuss that with Mr.

Johnson?" *Transcript, p. 3, ll. 22-24.* Petty replied "No sir. I met with one of his paralegals Friday last week. " *Transcript, p. 2, l. 25 and p. 3, l. 1.* The Commissioner immediately proposed to adjourn the hearing "so you (Johnson) can talk with Mr. Petty about the preliminary hearing" and Petty immediately stated "Okay." *Transcript, p. 3, ll2-5.* The Commissioner then inquired of Johnson whether October 29 would work and Johnson and the District attorney agreed to that date.

I recognize Petty responded in the affirmative when asked if he understood what Johnson was "referring to when he talks about a waiver of a preliminary hearing." *Transcript, p. 2, ll. 12-15.* The Commissioner then asked whether Petty had reviewed it with his attorney and adjourned the hearing with the agreement of Johnson. Johnson did not at any time ask permission of the Court to present evidence that Petty was making an informed decision regarding this waiver, nor did Johnson ask the Commissioner to make further inquiry of Petty.

The Commissioner was willing to allow Johnson additional time to do what SCR 20:1.4 (b) required him to do: *explain the matter to his client.* That does not relieve Johnson of his responsibility to do so *before* filing a Waiver form with the Court and advising the Court they would be proceeding with that Waiver. The Commissioner independently engaging in a colloquy with Petty to determine his understanding of his waiver does not relieve Johnson of his own responsibility to explain the matter to the degree reasonably necessary to permit Petty to make an informed decision. Any other conclusion would simply encourage attorneys to ignore their responsibility to explain matters to their clients and transfer their responsibility to the magistrate.

While it is not dispositive of this issue, I also note the Commissioner appears to have shared my opinion that, even if Petty somehow had sufficient information to make an informed decision regarding the waiver, Johnson was required to discuss it with his client. The Commissioner did not inquire further of Petty what he understood about his rights and his waiver of them. Instead, he immediately ended his colloquy with Petty and proposed to adjourn the hearing. Both Petty and Johnson agreed to the adjournment for the purpose of Johnson discussing the preliminary hearing with Petty. Johnson readily agreed to do what he should have done prior to the October 12 hearing: explain the matter to his client.

According to Johnson's Affidavit, he "conferred" with Petty prior to the adjourned hearing, filed

a Waiver at that hearing and both he and Petty confirmed they had reviewed it. This does not relieve Johnson of his obligation to do so *prior to the* October 12 hearing. I see no provision in SCR 20:1.4 (b) for a "mulligan." Count 4 pertains to Johnson's actions associated with the October 12 hearing, not the adjourned hearing.

It is also worth noting a magistrate has additional responsibilities when an unrepresented defendant indicates he or she wants to waive the right to a preliminary examination. Section CR 9-5 of the Wisconsin Judicial Benchbook refers the magistrate to SM- 31 of the Wisconsin Jury Instructions. SM-31 is captioned **WAIVER OF PRELIMINARY EXAMINATION** and the prefatory language reads: THE FOLLOWING IS RECOMMENDED FOR USE WHEN A DEFENDANT WITHOUT COUNSEL WISHES TO WAIVE THE PRELIMINARY EXAMINATION. IT WILL ALSO BE NECESSARY TO CONDUCT A WAIVER OF COUNSEL INQUIRY. SEE SM-30." The Jury Instructions Committee (hereinafter "Committee") recommends the following colloquy for the magistrate:

"Since you are charged with a felony, you are entitled to a preliminary examination if you want one, or you may waive it. A preliminary examination is not a trial, but it is a step in the proceedings against you. Witnesses will be called by the State to testify against you and you have right to cross-examine them. You will also have the right to present evidence. You are entitled to the assistance of a lawyer if you want one.

The purpose of the preliminary examination is to determine whether probable cause exists. Probable cause means facts, together with reasonable inferences from those facts, which lead a reasonable person to conclude that a felony has probably been committed and that you probably committed it. If the court finds that that there is probable cause to believe that you did commit a felony, you will be required to stand trial. If the court does not find probable cause, the charges will be dismissed or reduced or the state may refile."

The magistrate then asks the defendant: (a) Do you understand that? (b) Has anyone made any promise or threat to you to get you to waive the preliminary examination? and (c) Do you want a preliminary examination? *WI JI CRIMINAL SM-31.* It appears this recommended colloquy would satisfy the mandate of SCR 20:1.4 (b) that a matter be explained to the extent reasonably necessary to permit a person to make informed decisions. SCR 20:1.4 (b) provides the *lawyer shall explain* a matter in such a fashion.

One of the Comments to SM-31 indicates it is undoubtedly the wise practice to reflect the waiver on the record, but "the inquiry ought to be quite brief when the defendant is represented by counsel."

WI JI-CRIMINAL, id, par. 4. The most logical interpretation of that recommendation is that the magistrate can rely on the attorney to explain "the matter" to his or her client in a manner similar to that recommended for the magistrate by the Committee. That interpretation is supported by Johnson's own Waiver form Petty signed. Johnson admits he personally used that form extensively in the past and that he had the ability to "update" it. The seven paragraphs in Johnson's form provided Petty with the same type of information recommended in SM-31.

Before concluding the discussion of Count 4, I would like to address three cases cited by both parties in letters dated July 7, 2022, and July 15, 2022. OLR acknowledged an incorrect legal argument in its original Partial Summary Judgment Memorandum and Johnson was afforded an opportunity to respond. In their letters, both parties rely on the following cases but reach different conclusions as to their applicability. All three cases involve violations of SCR 20:1.4 (b).

In *Disciplinary Proceedings Against Stokes,* 190 Wis. 2d 480, 526 N.W, 2d 501 (1995), Stokes failed to file an appellate docketing statement because he believed the appeal had no merit. He did not discuss his no-merit opinion or procedures with his client.

In *Office of Lawyer Regulation v. Jaconi* , 2003 WI 137, 267 Wis. 2d 1, 671 N.W. 2d 1, Jaconi faced 20 counts of professional misconduct. Count 7 was an alleged violation of 20:1.4 (b). Jaconi represented a client regarding municipal citations for OWI related offenses. He met with her and spoke with her on the phone but did not adequately explain her plea options to her.

In *Office of Lawyer Regulation v. Hartigan,* 2005 Wis 3, 277 Wis. 2, 341, 690 N.W. 2d 831, Hartigan agreed to represent a prison inmate at her parole hearing. He twice arranged to meet with her at the prison but did not show up. He discussed other matters with his client but did not discuss the parole hearing and she represented herself.

OLR correctly asserts each of these cases contain facts similar to those in the instant case: failure to adequately explain a matter to a client. Johnson attempts to distinguish these cases because they were not contested. Stokes pled no contest to the facts, Jaconi entered into a stipulation with OLR regarding the facts, and Hartigan did not appear at his hearing and witnesses testified. It is important to note the procedural posture of the instant case: a Motion for Partial Summary Judgment. None of the cited cases share that posture and the stipulated nature of the facts in those cases

therefore do not appear particularly relevant to my decision. If stipulated facts are relevant, I have already noted the stipulated facts in the instant case. For Summary Judgment, I am required to determine: (1) whether OLR has made a *prima facie* case on Count 4, (2) whether Johnson has established a defense to defeat OLR's claim, and if so, (3) whether the record in this matter contains a material issue of disputed fact.

In summary, I conclude Johnson has not presented a defense which would defeat OLR's *prima facie* case on Count 4. If I am incorrect in that regard, I disagree with Johnson that OLR has the responsibility to prove Petty did not have sufficient information to make an informed decision. Because OLR has established a *prima facie* case it is Johnson's responsibility to offer disputed issues of material fact. I conclude Johnson has failed in that regard.

Count 5: Violation of SCR 20:3.3 (a) (1): Candor Toward the Tribunal

SCR 20.3 is captioned Candor Toward the Tribunal. Subsection (a) (1) provides as follows:

> **(a) A lawyer shall not knowingly**
> **(1) make a false statement of fact or law to a tribunal or fail to correct a false Statement of material fact or law previously made to the tribunal by the lawyer**

It is undisputed the Waiver contains the following language below Petty's signature:

> I, Steven Daniel Johnson, state that I am the attorney for the defendant, that I have personally explained and discussed all the matters mentioned in this Waiver of Preliminary Examination with my client, and that I have answered, to the best of my ability, all of his questions regarding this waiver. I believe that my client understands his right to a preliminary examination, the charges indicated above, and the potential penalties for those charges. I further state that I personally observed Dontell J. Petty sign and date this waiver.

Below this language is the date 10/9/20 and it indicates is was "Electronically signed by: Atty. Steven Daniel Johnson. As noted earlier, it was file-stamped by the Clerk of Court that same date. It is undisputed Johnson did not personally explain any of the matters mentioned in the Waiver, answer Petty's questions to the best of his ability or personally observe Petty sign and date the Waiver. It is also

undisputed one of Johnson's paralegals met with Petty. Petty told the Commissioner he met with a paralegal and sent Johnson's secretary a copy of the Waiver. The record contains no further information regarding the claimed discussions, answers to questions and Petty's signature.

It is also undisputed that Johnson told the Commissioner ". . .*we* have filed a waiver in that regard." (Emphasis added). *Transcript,* -p. 2, l. 11. Johnson therefore concedes facts sustaining a violation of Subsection (1) but relies on the "knowledge" requirement of Subsection (a) to defeat OLR's claim that forms the basis of Count 5.

I will apply the same Summary Judgment methodology to Count 5. Johnson does not appear to disagree with the conclusion that OLR has established a *prima facie* case regarding Sub. (a)(1): making a false statement of fact to the tribunal. The Waiver is electronically signed by Johnson, he told the Commissioner "we" filed it, and the statements above Johnson's signature are false.

It is unclear whether Johnson agrees OLR has also made a *prima facie* case regarding whether Johnson made said false statements "knowingly." I conclude the undisputed facts in this case establish a *prima facie* case that Johnson made the statements knowingly.

SCR 20:1.0(g) defines "knowingly" as follows:

> "Knowingly, "known," or "knows" denotes actual knowledge of the act in question. A person's knowledge may be inferred from circumstances.

Johnson acknowledged he had experience with waivers of Preliminary Examinations in his practice, that he typically met with his clients to review waivers in the past and was familiar with the Commissioner's practices regarding such waivers. It is also undisputed Johnson told the Commissioner: ". . . *we* have filed a waiver in that regard.' *Transcript, p. 2, l 11.* As it pertains to establishing a *prima facie* case, Johnson's actual knowledge, *at a minimum,* can be inferred from the circumstances.

I next determine whether Johnson has set forth a potential defense to OLR's claim. He correctly sets forth the knowledge requirement of SCR 20:3.3 and correctly cites case law interpreting that rule. *Office of Lawyer Regulation v. Alia,* 2006 WI 12, 288 Wis. 2d 299, 709 N.W. 2d 399, quoting *Bd. Of Attys. Prof'l Responsibility v. Lucareli,* 2000 WI 55, 235 Wis. 2d 557, 567, 611 N.W. 2d 754, 760. Johnson also

correctly points out that SSCR 20:1.0 (g) requires *actual* knowledge. While that knowledge can be inferred from the circumstances, it must be actual knowledge and constructive knowledge is not sufficient to establish a violation of this Rule. *Office of Lawyer Regulation v. Alia, Id,* quoting *Bd. Of Attys. Prof'l Responsibility v. Lucareli, Id.* Johnson has established a potential defense to OLR's claimed violation of SCR 20:3.3 (a) (1: any false statements made by Johnson was not made "knowingly."

The critical analysis then becomes whether the record in this matter contains a disputed issue of material fact as to Johnson's actual knowledge. There is clearly evidence of Johson's actual knowledge of the false statements in the Waiver. It is Johnson's form that he had admittedly used and personally reviewed with clients in the past. In this case, he instead instructed his paralegal to meet with Petty to complete the Waiver. It was electronically signed by Petty and he told the Commissioner "we" had filed it.

There are also material facts supporting a conclusion Johnson's actions do not demonstrate the requisite actual knowledge. Johnson states he had to adapt his long-standing procedures due to Covid-19 and that his office was still adjusting to this in October 2020. He asserts his form was therefore not updated and states he was unaware of the contents of the form until he appeared in court. I also note the record is devoid of information as to how Johnson's electronic signature was executed and how the document was electronically filed with the Clerk. Johnson stated "we" filed the form, but the record does not reveal who "we" refers to. Johnson's participation in those activities, as opposed to his paralegal, are relevant and material to the actual knowledge requirement. Finally, Johnson claims the filing of the Waiver was an "unintentional error."

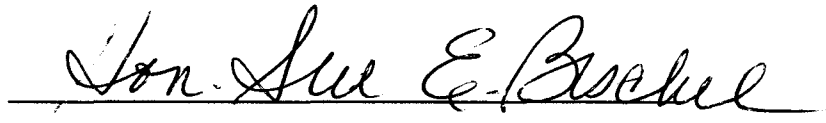
Any doubt I have as to the existence of a genuine issue of material fact must be resolved against OLR. And I am required to review inferences that can be drawn from the underlying facts in the light most favorable to Johnson. *Grams, supra.* I therefore conclude there are disputed issues of material fact as to whether Johnson "knowingly" made a false statement of fact to a tribunal regarding Petty's Waiver filed on October 9, 2020.

CONCLUSIONS AND ORDER

For the foregoing reasons, I find Johnson has not shown a defense that would defeat OLR on Count 4, and further find there is no genuine material fact in dispute on Count 4. Therefore, OLR'S Summary Judgment Motion on Count 4 is **GRANTED.**

I further find that Johnson has shown a defense that would defeat OLR's claim in Count 5 and there exists a genuine issue of material fact as to that Count. Therefore, OLR's Motion for Summary Judgment on Count 5 is **DENIED.**

Dated this 11th day of August, 2022



Hon. Sue E. Bischel

Referee and Reserve Judge