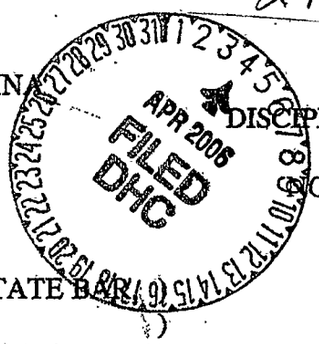
2161



STATE OF NORTH CAROLINA

COUNTY OF WAKE

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
05 DHC 37

THE NORTH CAROLINA STATE BAR,

Plaintiff,

vs.

SCOTT BREWER and KENNETH HONEYCUTT, Attorneys,

Defendants.

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

THIS MATTER was considered at a hearing on January 5, 2006, and continuing on January 20, 2006, by a hearing committee composed of F. Lane Williamson, Chair, and members Carlyn G. Poole and Donald Willhoit. Carolin Bakewell and Katherine E. Jean represented the Plaintiff, The North Carolina State Bar. James B. Maxwell represented Defendant Scott Brewer. Charles B. Brooks II represented Defendant Kenneth Honeycutt.

The hearing addressed the motions to dismiss the State Bar's complaint contained in the Defendants' responsive pleadings. For the reasons set out below, the hearing committee grants the Defendants' first motion to dismiss, treating it as a motion for partial summary judgment, based upon an analysis of the State Bar's rule of limitations, 27 N.C.A.C. 1B, Sec. .0111(e), and dismisses the first and second claims for relief as time-barred. The hearing committee also grants in part the Defendants' fourth motion to dismiss based upon the failure of the third claim for relief to state a claim upon which relief can be granted, and dismisses the third claim for relief. The result is a final order of dismissal of the State Bar's complaint. Although the other grounds for the Defendants' motions are in effect rendered moot, the hearing committee nevertheless has ruled

upon the remaining grounds for the Defendants' motions, and denies each of them.

NATURE OF THE COMPLAINT

The State Bar filed its complaint on August 30, 2005. The allegations of the complaint relate to the conduct of Honeycutt as District Attorney and Brewer as Assistant District Attorney during and after the prosecution of Jonathan Gregory Hoffman in 1996 for first degree murder in connection with the shotgun slaying of Danny Cook, a Marshville jewelry store owner. The detailed allegations of the State Bar's complaint allege a course of conduct by the Defendants to conceal from Hoffman's defense counsel and from the trial court the full extent of concessions made to Johnell Porter, a cousin of Hoffman's, who testified at Hoffman's trial that Hoffman had confessed to robbing and murdering Cook.

The terms of the alleged deal with Porter were:

1. Assistance in Federal Sentencing Hearing: In exchange for Porter's truthful testimony in the first degree murder trial of Hoffman, Honeycutt agreed to make certain that the federal judge sentencing Porter on his federal bank robbery guilty plea would know of Porter's assistance in the Hoffman trial.

2. Federal Immunity: In exchange for Porter's truthful testimony in the first degree murder trial of Hoffman, the United States Attorney's Office would give Porter immunity for all federal crimes except murder that he might have committed whether he had been charged or not prior to November 7, 1995, the date on which the bank robbery for which he had pled guilty occurred.

3. Assistance with South Carolina sentencing: In exchange for Porter's truthful testimony in the first degree murder trial of Hoffman, Porter would receive assistance from various law enforcement officers or district attorneys in having an unserved sentence arising out of the state court in South Carolina run concurrently with any sentence he might receive on his federal bank robbery charges to which he had pled guilty in April of 1996.

4. State immunity: In exchange for Porter's truthful testimony in the first degree murder trial of Hoffman, Porter would receive immunity from any and all criminal charges pending or not yet charged in Mecklenburg County, North Carolina.

5. Reward Fund: In exchange for Porter's truthful testimony in the first degree murder trial of Hoffman, Honeycutt would assist Porter in his efforts to benefit financially from the reward fund that had been established by friends and relatives of the victim, Danny Cook.

The complaint alleges that Honeycutt and Brewer revealed only the first condition of the agreement to Hoffman's counsel, that they concealed from Hoffman's counsel and the trial court the remaining terms of the deal, that they concealed notes relating to interviews with Porter, that they falsely represented to the trial judge that they had revealed all concessions made to Porter, that they produced an altered copy of a to-do list that followed a typed set of notes regarding a meeting with Porter, that they allowed Porter to testify falsely at trial concerning the concessions made to him and that they falsely represented to the jury in closing argument that the only concession made to Porter in exchange for his testimony was the agreement to report his substantial assistance to the federal court. The complaint further alleges that Honeycutt and Brewer violated both direct orders of the trial judge to turn over statements of and notes relating to Porter and the general duty of prosecutors under the United States Supreme Court case of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny to disclose to Hoffman's attorneys all exculpatory and impeachment material in their files and the files of their investigating agents.

The complaint alleges in the first claim for relief that the actions of the Defendants constitute grounds for discipline pursuant to N.C.G.S. § 84-28(b)(2) and numerous rules of the former Rules of Professional Conduct in effect as of 1996 (now superseded by the Revised Rules of Professional Conduct)[1], proscribing dishonesty, fraud, deceit or misrepresentation (Rule

[1]See the correlation tables at pp. 150-55 of the North Carolina State Bar Lawyer's Handbook (2005) comparing the Rules of Professional Conduct in effect at the time of the matters alleged in the complaint with the 1997 and 2003 versions of the Revised Rules of Professional Conduct.

1.2(c)), conduct prejudicial to the administration of justice (Rule 1.2(d)), failure to disclose potentially exculpatory and/or mitigating evidence (Rule 7.3(4)), fraud on the tribunal (Rule 7.2(b)(2)), knowingly making a false statement of fact (Rule 7.2(a)(4)), concealing or knowingly failing to disclose that which an attorney is required by law to reveal (Rule 7.2(a)(3)) and disregarding a ruling of a tribunal (Rule 7.6(a)).

The second claim for relief in the State Bar's complaint alleges that the Defendants deliberately avoided inquiring into whether Porter had been granted any concession or immunity by the federal government, and that such deliberate avoidance of inquiry violated Rules 7.3 and 1.2(d) of the former Rules of Professional Conduct.

The third and final claim in the complaint alleges that the Defendants, despite having knowledge of immunity given to Porter by the federal government by virtue of the attendance by Honeycutt at Porter's federal sentencing hearing in November 25, 1996 and the receipt by the Defendants no later than February 2001 of an immunity letter from the federal prosecutor to Porter's attorney Aaron Michel dated October 21, 1996, continued to oppose Hoffman's motion for appropriate relief and failed to acknowledge that Hoffman was entitled to a new trial pursuant to *Brady v. Maryland* until April 2004, when Honeycutt conceded at a court hearing that a *Brady* violation had occurred and that Hoffman was entitled to a new trial. The third claim for relief alleges that these actions constituted a violation of Revised Rules of Professional Conduct 3.1 and 8.4(d).

NATURE OF THE DEFENDANTS' MOTIONS TO DISMISS

Each of the Defendants included four motions to dismiss with his answer. The motions of each Defendant are substantially identical. The grounds for the motions are as follows:

▸ First Motion to Dismiss – that the first and second claims for relief in the complaint are time-barred by virtue of the application of the State Bar's limitations rule, 27 N.C.A.C. 1B, Sec. .0111(e).

▸ Second Motion to Dismiss – that portions of the first claim for relief and all of the second and third claims for relief are barred based upon certain findings of fact and one of the conclusions of law in an order by Superior Court Judge W. Erwin Spainhour granting Hoffman's post-conviction motion for appropriate relief.

▸ Third Motion to Dismiss – that the second claim for relief fails to state a claim upon which relief can be granted in that, even if the allegations of deliberately avoiding inquiry are true, the allegations do not constitute a violation of the State Bar's ethical rules.

▸ Fourth Motion to Dismiss – (1) that the second and third claims for relief are procedurally deficient and violate the Defendants' procedural due process rights in that the allegations of the claims were not contained in either the "letter of notice" or "substance of grievance" sent to each Defendant; and (2) that the third claim for relief fails to state a claim upon which relief can be granted in that, even if the allegations of continuing to oppose Hoffman's MAR after having knowledge of Porter's federal immunity deal are true, the allegations do not constitute a violation of the State Bar's ethical rules.

The hearing committee addresses the grounds for each motion below.

DISCUSSION

FIRST MOTION TO DISMISS

State Bar Rule .0111(e), 27 N.C.A.C. 1B, Sec. .0111(e) (hereafter "Rule .0111(e)") establishes a limitations period for the filing of grievances, and presently reads as follows:

> Grievances must be instituted by the filing of a written or oral grievance with the North Carolina State Bar Grievance Committee or a district bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, whichever is later. Notwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filed with the Grievance Committee at any time.

This rule is in the nature of a statute of limitations in that it serves to limit the time within which a grievance may be commenced after the accrual of the alleged offense. It is distinct from a statute of repose, which sets a fixed time limit after the commission of an act beyond which a claim will not be recognized. *See Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988), concerning this distinction.

Rule .0111(e) establishes limitation periods for three classes of grievances:

(1) A presumptive period of six years from the accrual of the offense;

(2) "Six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, whichever is later," for grievances alleging fraud by the lawyer or an offense the discovery of which has been prevented by concealment by the lawyer; and

(3) no limitation for grievances which allege felonious criminal conduct.

For the purpose of their motions, Defendants acknowledge that the grievances against them fall within class (2). In a memorandum submitted following the January 5, 2006 hearing in this matter, the State Bar contended for the first time that the claims in the complaint allege "felonious criminal conduct," and therefore should be considered as claims of the third class subject to no limitations period.

The consideration of the limitations rule necessarily entails a review of matters outside the scope of the bare allegations of the complaint. We therefore treat the first motion to dismiss as a motion for partial summary judgment under N.C.R.C.P. 56(c) rather than as a motion to dismiss under N.C.R.C.P. 12(b)(6). [2] The parties have submitted various materials to the hearing

[2]Rule .0114(n), 27 N.C.A.C. 1B, Sec. .0114(n), provides that pleadings and proceedings before a Disciplinary Hearing Commission hearing committee will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure.

committee, and have stipulated that we may consider them for purposes of the pending motions without the necessity for further authentication or proof. These include affidavits prepared specifically for this hearing and affidavits, pleadings, transcripts, correspondence and other documents arising from the trial and post-conviction proceeding in the criminal case against Mr. Hoffman, *State of North Carolina v. Jonathan Gregory Hoffman,* 95-CRS-15695 (Union County).

The following is a timeline of events relevant to the limitations issue:

- November 1995
  Danny Cook is murdered.

- December 1995
  Hoffman is charged with the murder of Danny Cook.

- October 21, 1996 through November 13, 1996
  Hoffman is tried and convicted of first degree murder.

- August 2, 1999
  Hoffman's post-conviction attorneys file a motion for appropriate relief ("MAR") seeking to set aside his conviction. Among the grounds cited are an alleged failure to disclose the extent of concessions made to Porter.

- December 6, 2000
  Hoffman's post-conviction attorneys file an amendment to the MAR containing additional allegations and evidence concerning the alleged failure to disclose the extent of concessions made to Porter.

- February 13, 2001
  Hoffman's post-conviction attorneys file a second amendment to the MAR containing additional allegations and evidence concerning the alleged failure to disclose the extent of concessions made to Porter, including the immunity letter dated October 21, 1996, from Assistant United States Attorney Brian Whisler to Aaron Michel, Porter's attorney on the federal bank robbery charge. The letter is attached as Exhibit 1 to the affidavit of Michel submitted with the amendment. Michel's affidavit also recounts a meeting on October 17, 1996 with Porter, Whisler, Honeycutt, Brewer and others where Porter's desire for immunity was discussed. A second affidavit of Michel dated September 12, 2003 submitted with the third amendment to the MAR describes this meeting in more detail.

- January 29, 2002
  One of Hoffman's post-conviction attorneys, Robert Hale, makes a phone call to the State Bar and speaks with Deanna Brocker, Assistant Ethics Counsel. Ms. Brocker's affidavit does not set forth the substance of her conversation with Mr. Hale, but she does state that Mr. Hale did not mention the names of the other attorneys involved in the situation and she did not treat the call as a report of misconduct. She further states in her affidavit that she treated the conversation with Mr. Hale as confidential pursuant to 27 N.C.A.C. 1D, Sec. .0103(b), and did not report it to anyone employed by the Office of Counsel of the State Bar.

- October 9, 2003
  Hoffman's post-conviction attorneys file a third amendment to the MAR containing additional allegations and evidence concerning alleged failure to disclose the extent of concessions made to Porter, and also containing additional allegations that the State presented false evidence at trial by failing to correct Porter's false testimony concerning concessions promised to him in exchange for his testimony, and arguing the false evidence during closing argument to the jury.

- November 3, 2003
  Donald H. Jones, Director of Investigation of the State Bar, reads an article regarding the Hoffman case published in the November 2, 2003 Raleigh *News and Observer*, and opens a grievance file on Honeycutt.

- December 18, 2003
  Jones opens a grievance file on Brewer.

- April 26, 2004
  Superior Court Judge W. Erwin Spainhour holds a hearing on Hoffman's MAR.

- April 30, 2004
  Judge Spainhour enters an order granting the MAR based upon the non-disclosure of Porter's federal immunity agreement, vacating Hoffman's conviction and granting him a new trial.

- August 30, 2005
  The State Bar files its complaint against Brewer and Honeycutt before the Disciplinary Hearing Commission.

The contentions of the parties and the undisputed facts in connection with the application of Rule .0111(e) to the allegations of the first and second claims for relief may be summarized as follows:

- Indisputably, Rule .0111(e) provides that there are three possible deadlines for the expiration of the limitations period for grievances alleging fraud or concealment: (1) six years after the accrual of the offense; (2) one year from discovery by the aggrieved party; (3) one year from discovery by the State Bar counsel. Disagreement arises concerning the phrase in the rule"whichever is later." The Defendants interpret the phrase to refer to either "six years from the accrual of the offense" or "one year after discovery of the offense," by either the aggrieved party or by the State Bar counsel so that the discovery by either triggers the one-year extension. The State Bar in its initial response argued that in cases involving fraud or concealment by the accused attorney, the aggrieved party must file a grievance within 6 years of the misconduct or within one year after discovery of the misconduct, whichever is later, while the State Bar counsel has one year from the date she learns of the misconduct in which to file a grievance. After the hearing committee informed the parties that it was rejecting the State Bar's argument, the State Bar counsel made the alternative argument that grievances involving fraud or concealment are not barred until the latest of (1) six years after accrual of the offense or (2) one year from discovery by the aggrieved party or (3) one year from discovery by the State Bar counsel.

- There is no genuine dispute that the offenses alleged in the grievances insofar as they encompass the first and second claim for relief accrued no later than November 13, 1996, the date of the conclusion of the Hoffman trial.

- There is no genuine dispute that the aggrieved party Hoffman through his post-conviction counsel discovered the alleged offenses no later than February 13, 2001, the date of the second amendment to the MAR setting forth all of the alleged non-disclosures. Even if some additional evidence came to the attention of Hoffman's post-conviction counsel between then and October 9, 2003, the date of the third amendment to the MAR, documentary evidence relating to the third amendment to the MAR demonstrates conclusively that all of the evidence in the third amendment was known to Hoffman's post-conviction counsel by at least September 12, 2002, the date they took the deposition of Brian Whisler, the Assistant United States Attorney who had written the immunity letter to Porter's attorney. The third amendment to the MAR recites at page 4 that "(t)his Third Amendment is based primarily upon information obtained by counsel pursuant to Judge Helms' May 1, 2001 Discovery Order and the September 12, 2002 deposition of AUSA Brian L. Whisler." An affidavit filed in the Hoffman criminal case by Robert Hale, dated September 29, 2003, states that he reviewed documents pursuant to Judge Helms' May 1, 2001 discovery order on May 7, 2001. These documents include the notes of conversations and meetings referred to in the State Bar's complaint and attached to it as Exhibits 1 through 4. Therefore, the absolutely latest date that can be considered for discovery of the offenses by Hoffman's counsel is September 12, 2002, the date of Whisler's deposition, almost fourteen months before the State Bar opened its grievance file on Honeycutt. While we conclude that Hoffman's post-conviction counsel had sufficient knowledge of the alleged ethical offenses by Brewer and Honeycutt at least by the time of the filing of the second amendment to the MAR on February 13, 2001, even if we deem

the date of accrual from the standpoint of discovery by the aggrieved party to be the date of Whisler's deposition, this date still does not fall within one year of the filing of either of the grievances.

- There is no genuine dispute that State Bar counsel Carolin Bakewell through her agent Donald H. Jones discovered the alleged offenses on November 3, 2003, and not before. The Defendants originally contended that the State Bar received notice of the alleged offenses through the phone call by Robert Hale to Assistant Ethics Counsel Deanna Brocker referred to in the timeline, but acknowledged at the hearing that Ms. Brocker's affidavit conclusively rebutted this contention. In addition, as a matter of law, notice to Ms. Brocker would not be imputed to Carolin Bakewell, who holds the office of the counsel of the North Carolina State Bar referred to in Rule .0111(e). State Bar Rule .0102(5). 27 N.C.A.C. 1B, Sec. .0102(15) (defining "Counsel" as "the counsel of the North Carolina State Bar appointed by the Council" and Rule .0104 (referring to "a" counsel) make it clear that the word "counsel" in Rule .0111(e) refers specifically to the one person who has been appointed as the State Bar counsel, and not generally to attorneys employed by the State Bar.

- Consequently, the three possible deadlines for the expiration of the limitations period for grievances underlying the first and second claims for relief are: November 12, 2002 (six years from accrual); February 12, 2002 (one year from discovery by the aggrieved party); and November 2, 2004 (one year from discovery by the State Bar counsel).

A. The Ambiguity of Rule .0111(e)

Under either interpretation of the rule by the State Bar, the deadline date would be November 2, 2004, one year from discovery by the State Bar counsel. We must agree with the State Bar's construction of the phrase "whichever is later" to conclude that the grievances were timely filed on November 3, 2003 and December 18, 2003. We cannot do so without either editing the text of the rule to substitute the word "latest" for "later" (alternatively, "and" for "or") or else hold that the limitations period may run in less than the presumptive six years; that is, we must either rewrite the rule or embrace an anomaly.

At the hearing on January 5, 2006, each side in the spirit of advocacy argued that its interpretation reflects the clear meaning of the rule. In a post-hearing memorandum, the State Bar

now "concedes that the Rule is not a model of clarity." The hearing committee finds that the rule is a model of ambiguity. *See Employment Security Commission v. Blue Ridge Broadcasting Corporation,* 42 N.C. App. 702, 705-06, 257 S.E.2d 640, 642, *cert. denied*, 298 N.C. 805, 262 S.E.2d 4 (1979) ("Petitioner has argued that the difficulty in interpreting this statute derives from its technical nature; we are of the opinion that the difficulty derives from poor draftsmanship . . . . "). The phrase "whichever is later" in Rule .0111(e) may be interpreted in two ways: the task of the hearing committee is to determine which interpretation more likely reflects the intent of the State Bar in adopting the rule.

Where a rule is ambiguous, we must interpret it to give effect to the intent of the rulemaking body. *E.g., Frye Regional Medical Center, Inc. v. Hunt* , 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). There is no "legislative history" relating to the enactment of Rule .0111(e) reflecting the intent of the State Bar. As noted in the State Bar's supplemental memorandum, prior to the adoption of Rule .0111(e) in 1994 there was no time limit for the filing of a grievance. It is reasonable to assume that the State Bar adopted a limitations rule for the same purpose the legislature has enacted statutes of limitations – "to afford security against stale claims." *Trexler v. Pollock*, 135 N.C. App. 601, 607, 522 S.E. 2d 84, 88 (1999), *review denied*, 351 N.C. 480, 543 S.E. 2d 510 (2000). Even if we assume such was the general intent of the State Bar, this is of little help in resolving the specific issue of construction.

Counsel for the Defendants have argued that the State Bar's interpretation is flawed as a matter of policy because it could result in some grievances alleging fraudulent concealment never being barred, so long as they do not come to the attention of the State Bar counsel. The State Bar has, however, clearly expressed an intent in the last sentence of Rule .0111(e) that no limitations

period applies to grievances alleging "felonious criminal misconduct."[3] Therefore, the argument that the State Bar must not have intended to exempt certain grievances from the limitations rule is not persuasive.

A policy argument in favor of the State Bar's position is that the State Bar as the regulatory body charged with the protection of the public should be afforded the opportunity to pursue a grievance against a lawyer even where the aggrieved party chooses not to do so, so that the State Bar must have meant that the limitations period would not run until the State Bar counsel has notice of the conduct and an opportunity to decide whether to pursue a grievance.[4] This reasoning applies equally well to all potential lawyer grievances, however, and it seems incongruous that the State Bar would have made a distinction on this basis for some types of grievances, but not for others.

The State Bar in its supplemental memorandum has urged the hearing committee to give "great consideration" to the State Bar's own construction of the disputed rule, citing the principle that the interpretation adopted by those who administer the law in question is relevant, and indeed may be entitled to "great weight." *Frye, supra; MacPherson v. Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973). Here, however, counsel for the State Bar admitted at the hearing on January 20, 2006 that this is the only case before the Disciplinary Hearing Commission where

---

[3]As discussed below, we conclude that the amendment to Rule .0111(e) adding this sentence was not properly adopted. Nevertheless, it stands as an expression of the State Bar's intent.

[4] Indeed, the circumstances of this case illustrate this point. Michael Howell, one of Hoffman's post-conviction attorneys, has been quoted in a Raleigh *News & Observer* article, dated January 12, 2006, to the effect that Hoffman's counsel did not complain to the State Bar prior to a ruling on Hoffman's MAR out of concern that it would not be in Hoffman's interest to pursue a grievance against Honeycutt with the State Bar while they were trying to secure his agreement to the relief requested in the MAR.

this issue has ever arisen, although the limitations question has arisen on several occasions at the Grievance Committee level. Therefore, no customary interpretation of the rule has been established, and this argument amounts to little more than saying the State Bar's interpretation is correct merely because it says so. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988), declining to give deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "to what appears to be nothing more than an agency's convenient litigating position."

In the absence of any direct indication of the State Bar's intent in adopting the rule, or of any compelling policy argument favoring one interpretation over the other, the hearing committee must focus on the text of the rule itself. The State Bar has cited in its supplemental memorandum a case from Pennsylvania interpreting a similarly-worded limitations rule for the proposition that the word "later" in the qualifying phrase "whichever is later" should be interpreted as meaning "latest" where, as here, there are three possible triggering events for the commencement period. In *Commonwealth v. Hilfiger*, 419 Pa. Super. 450, 615 A.2d 452 (1992), the court construed 42 Pa. Cons. Stat. Ann. § 553(a):

> (a) General rule – Except as provided in subsection (b) or (c), proceedings for summary offenses under Title 75 (relating to vehicles) must be commenced within 30 days after the commission of the alleged offense or within 30 days after the discovery of the commission of the offense or the identity of the offender, whichever is later, and not thereafter.

In a footnote, the Pennsylvania court held as follows:

> Subsection (a) is somewhat poorly drafted. The initial clause describes three optional happenstances which cause the statute to begin to run. Unfortunately, the modifying cause, "whichever is later," is comparative in form. With three or more options, the

> superlative form, "whichever is latest," should more properly have been employed. The use of the comparative is confusing because it implies a choice between two options rather than among three. Nevertheless, we have previously considered this section to present three happenstances from which the limitation period could begin to run rather than two. *See Commonwealth v. Larson* , 299 Pa. Super. 252, 445 A.2d 550 (1982).

419 Pa. Super. at 455, 615 A.2d at 454, n.3.

The hearing committee does not find *Hilfiger* to be persuasive. In effect, the opinion rewrites the Pennsylvania statute to substitute the superlative form "latest" for the comparative form "later." Neither *Hilfiger* nor the *Larson* opinion cited in the footnote provide any rationale for doing so. We are called upon to interpret a disputed rule – not to rewrite it. *Lex scripta est.* The State Bar deliberately used the word "later," which can refer only to two occurrences: we must decide which two they are.

Hilfiger is the only case brought to our attention involving the interpretation of statutory language similar to Rule .0111(e). There is also a more general principle of construction referred to in case law as "the doctrine of the last antecedent" that appears on initial review to support the State Bar's interpretation. In *HCA Crossroads Residential Centers, Inc. v. N.C. Department of Human Resources*, 327 N.C. 573, 575, 398 S.E.2d 466, 469 (1990), the North Carolina Supreme Court noted that:

> By what is known as the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote.

See also State v. Jernigan, 7 N.C. 12, 18 (1819)("As a rule of legal construction, it stands thus, *Proximo antecedenti fiat relatio, nisi impediatur sententia* . . . ."); *Novant Health, Inc. v. Aetna*

U.S. Healthcare Corp., 2001 N.C.B.C. 4, NCBC Lexis (N.C.Bus.Ct. 2001). Under this principle, "whichever is later" should be deemed to apply to the last antecedent phrase preceding it; *i.e.*, "one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel."

As noted in *HCA*, however, the doctrine "is not an absolute rule, . . . but merely one aid to the discovery of legislative intent." 327 N.C. at 578, 398 S.E.2d at 469. The application of the rule here leads to the anomalous result of the six year limitations period being shortened should both the aggrieved party and the State Bar counsel discover the offense less than five years from the accrual of the offense. It appears to the hearing committee that whatever the State Bar meant to say, the intent of the discovery provision of Rule .0111(e) was to extend under certain circumstances the six-year limitations period, but in no event to shorten it. For this reason, we hold that the disputed language of Rule .0111(e) should be interpreted to mean that for grievances where the discovery provision applies, the limitations period expires upon the later of six years from the accrual of the offense or one year from the discovery of the offense by either the aggrieved party or the State Bar counsel. The limitations period thus expired no later than November 12, 2002, six years following the conclusion of the Hoffman trial and approximately one year prior to the filing of the grievances against the Defendants.

B. The Exception for Felonious Criminal Misconduct

The State Bar made the contention for the first time in its supplemental memorandum following the January 5, 2006 hearing that portions of its complaint allege felonious criminal misconduct – specifically the crimes of obstruction of justice and subornation of perjury – for which there is no limitations period. The hearing committee concludes that it cannot consider this

argument, for the reason that the sentence of Rule .0111(e) relied upon by the State Bar was never properly enacted according to the dictates of N.C.G.S. § 84-21, the enabling statute governing the State Bar's rulemaking authority.

The final sentence of Rule .0111(e) as it appears in the 2005 edition of the *Lawyer's Handbook* published by the State Bar states that "(n)otwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filled with the Grievance Committee at any time." On its face, this sentence exempts a grievance that alleges the commission of a felony from any limitations period.

The State Bar's complaint does not expressly charge that the alleged conduct of the Defendants constitutes "felonious criminal conduct." Customarily, when the State Bar contends that conduct by a lawyer constitutes a crime, counsel for the State Bar specifically allege the essential elements of the crime in a manner that would pass scrutiny as a criminal indictment. Furthermore, Rule 8.4(b) of the Revised Rules of Professional Conduct (Rule 1.2 of the superseded Rules of Professional Conduct) defines the commission by a lawyer of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" as "professional misconduct." Again, the State Bar customarily cites this rule in disciplinary complaints alleging criminal misconduct. The complaint in this action, however, is devoid of any such allegations.

Nevertheless, the test of the sufficiency of the complaint under a Rule 12(b)(6) motion to dismiss is not whether a claim is properly labeled. Rather, it is whether the factual allegations taken as true state a claim upon which relief can be granted under some legal theory, whether or not the complaint explicitly references the name of the legal theory. *Arroyo v. Scottie's*

Professional Window Cleaning, Inc., 120 N.C. App. 154, 461 S.E.2d 13 (1995), *review dismissed*, 343 N.C. 118, 468 S.E. 2d 58 (1996); *Harris v. NCNB National Bank*, 85 N.C. App. 669, 355 S.E.2d 838 (1997). Therefore, the issue is not whether the complaint specifically pleads felonious criminal misconduct by the Defendants. It does not. The issue under the Rule .0111(e) exception is whether the complaint contains allegations that describe what may be characterized as "felonious criminal misconduct." Arguably, it does.[5] This issue is rendered moot, however, by our threshold conclusion that the last sentence of Rule .0111(e) was never properly enacted according to the procedure mandated by the Legislature in N.C.G.S. § 84-21, and therefore the amendment purportedly adopting the exception for "felonious criminal conduct" is void and of no effect.

The North Carolina State Bar is an agency of the State of North Carolina, created by the Legislature in 1933. N.C.G.S. § 84-15. As a state agency, the State Bar has such powers as the Legislature has granted to it in Article 4 of Chapter 84 of the General Statutes. N.C.G.S. § 84-15, *et seq.* The government of the State Bar is vested in an elected State Bar Council. N.C.G.S. § 84-17. The Council has the general power to regulate the professional conduct of licensed lawyers, N.C.G.S. § 84-23(a), and specifically to exercise disciplinary jurisdiction "under such rules and procedures as the Council shall adopt as provided in G.S. 84-23." N.C.G.S. § 84-28(a).

---

[5]Although the hearing committee need not make a conclusion in this regard in light of our holding that the amendment to Rule .0111(e) adding the last sentence was never properly enacted, we note that in fairness to the Defendants we would require that the State Bar amend its complaint to set forth specifically the "felonious criminal conduct" it relies upon before ruling on this aspect of the Defendants' motion to dismiss.

The procedure for the adoption and amendment of rules and regulations by the State Bar Council is set forth in N.C.G.S. § 84-21, which reads in its entirety as follows:

> The rules and regulations adopted by the Council under this Article may be amended by the Council from time to time in any manner not inconsistent with this Article. Copies of all rules and regulations and of all amendments adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by the North Carolina Supreme Court upon its minutes, and published in the next ensuing number of the North Carolina Reports and in the North Carolina Administrative Code: Provided, that the court may decline to have so entered upon its minutes any rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article.

The statute mandates that in addition to being adopted by the Council, an amendment to a State Bar rule must be:

(1) certified to the Chief Justice of the North Carolina Supreme Court;

(2) entered by the Supreme Court in its minutes;

(3) published in the next ensuing number of the North Carolina Reports; and

(4) published in the North Carolina Administrative Code.

All of the required steps to enact the amendment to Rule .0111(e) passed by the Council in 1998 were followed, with the exception that it was never published in the North Carolina Reports. Though the failure to publish was an oversight, it is an oversight that renders the amendment ineffective.[6]

---

[6]The following describes how this situation came to the attention of the hearing committee. During the first hearing on January 5, 2006, counsel for Honeycutt mentioned that the exception for "felonious criminal conduct" was not part of Rule .0111(e) in 1996 when Hoffman was tried, but was added later by an amendment to Rule .0111(e). Upon receiving the State Bar's supplemental memorandum on January 11, 2006 setting forth the argument based upon the last sentence of Rule .0111(e), the chair of the hearing committee searched the North Carolina Reports in an attempt to determine the date of the amendment to verify that it was passed prior to the expiration of the

According to the affidavit of Christie Speir Cameron, Clerk of the North Carolina Supreme Court, the amendment to Rule .0111(e) adding the last sentence was approved by the Supreme Court by order dated December 30, 1998 and ordered published in the North Carolina Reports, but that "[t]he amendment . . . was not published in the North Carolina Reports, owing to an unintentional oversight."

It is axiomatic that a governmental agency only has such powers as the legislative body has granted to it through enabling legislation, and in performing its rulemaking function an agency must follow the procedure prescribed by statute. The United States Supreme Court affirmed this principle recently in *Gonzales v. Oregon,* 126 S.Ct. 904, 916 (2006).

Counsel for the State Bar at the continued hearing on January 20, 2006 argued that the

---

limitations period that the hearing committee had determine applied to this action; *i.e.,* prior to November 12, 2002. Once an action is barred by a statute of limitations, it cannot be revived by repeal or amendment of the statute, but a limitations period may be extended for an already existing claim so long as it is not already barred prior to the effective date of the extension. *Jewell v. Price.* 264 N.C. 459, 142 S.E.2d 1 (1965). The history note to Rule .0111(e) appearing in the North Carolina State Bar Lawyer's Handbook indicates that the only such amendment was on October 1, 2003, which would have been too late to apply to this case. The North Carolina Administrative Code does list the purported amendment of December 30, 1998, *see* 27 N.C.A.C. 1B, Sec. .0111, which if effective would apply here, since as of that date the limitations period had not run. On January 11, Dottie Miani, the Clerk of the Disciplinary Hearing Commission, faxed to the chair a copy of a page from the State Bar's quarterly magazine indicating that the North Carolina Supreme Court had approved the amendment to rule .0111(e) on December 30, 1998, as well as other amendments to State Bar Rules not at issue here. The hearing committee chair still could not locate any publication of the rule in the North Carolina Reports, and asked counsel for the State Bar to investigate further. On January 12 counsel for the State Bar wrote a letter to the hearing committee chair stating that they had contacted Christie Speir Cameron, the Clerk of the North Carolina Supreme Court, and that Ms. Cameron had "determined that none of the rule amendments approved by the Court on December 30, 1998 were sent to the printer for publication, owing to a clerical oversight at the Court." On January 13, Ms. Cameron executed an affidavit reciting these facts and indicating that the amendment would be published in the next North Carolina Reports with an explanatory note. The chair of the hearing committee then ordered that the hearing be reconvened on January 20, 2006, primarily for the purpose of considering the State Bar's argument regarding the amendment to Rule .0111(e).

hearing committee should find the amendment to be valid because the statutory procedure had been substantially complied with, citing N.C.G.S. § 150B-18, a provision of the North Carolina Administrative Procedure Act which states that a rule of an administrative agency "is not valid unless it is adopted in substantial compliance with this Article." The Administrative Procedure Act, Chapter 150B of the North Carolina General Statutes, sets forth the general statutory framework for administrative rulemaking and adjudicatory procedures for North Carolina state agencies. Although the State Bar is not expressly exempted from the Administrative Procedure Act,[7] N.C.G.S. § 84-21 establishes a separate rulemaking procedure for the State Bar than that set forth in the Administrative Procedure Act. The Administrative Procedure Act itself acknowledges the unique nature of the State Bar's rulemaking. N.C.G.S. § 150B-21.21(a). The North Carolina Supreme Court has held that the directions of N.C.G.S. § 84-21 "must govern over the general rule-making provisions of the APA." *Bring v. State Bar*, 348 N.C. 655, 660, 501 S.E.2d 907, 910 (1998).

N.C.G.S. § 84-21 says nothing about the validity of the adoption of a rule in "substantial compliance" with its mandate. *Bring, supra,* the only reported case dealing with the validity of a State Bar Rule, appears to hold that publication in the North Carolina Reports is necessary for proper adoption of a State Bar rule. In response to a challenge to a rule of the Board of Law Examiners requiring that an applicant for admission to practice must graduate from a Council-approved law school, the Court stated:

> The Board's rules, including Rule .0702, were submitted to this

---

[7]Agencies listed in N.C.G.S. § 150B-1(c) are fully exempt from the Administrative Procedure Act, and those listed in 150B-1(d) are exempt from the Act's rulemaking provisions.

> Court as required by *N.C.G.S.* § *84-21* and published at volume 326, page 810 of the North Carolina Reports. This complies with the statutory requirement. Rule .0702 was properly adopted.

This holding implies that if the disputed rule had not been published in the North Carolina Reports then the statutory requirement would not have been complied with, and the rule would not have been properly adopted. *See American Standard, Inc. v. U.S.*, 220 Ct. Cl. 411, 602 F.2d 256, 267 (Ct. Cl. 1979) (Under the federal Administrative Procedure Act, a substantive rule is invalid if notice of proposed rulemaking is not published in the Federal Register in accordance with the notice requirements of the Act.)

Even if the hearing committee were inclined to consider "substantial compliance" with the statute to be sufficient for valid adoption of the rule, it does not necessarily follow that we should find such substantial compliance to be present here. We do not see a compelling basis to conclude that the publication requirement is any less fundamental than any of the other requirements enumerated in N.C.G.S. § 84-21. While an innocent failure to publish the amendment in the North Carolina Reports may seem like a mere technicality, it is no more so than the requirement in Article II, Section 22 of the North Carolina Constitution, that no legislative bill shall become law unless it "shall be read three times in each house."

The Legislature has established the procedure for the rulemaking by the State Bar and the Supreme Court has held that the procedure must be followed: there is no authority for a hearing committee of the Disciplinary Hearing Commission to disregard these directions and ignore what we must conclude was a fatal error in the adoption of the purported 1998 amendment to Rule .0111(e).

Having concluded that the application of Rule .0111(e) time-bars the State Bar's first and

second claims for relief, the Defendants' first motion to dismiss is granted, and the first and second claims for relief in the complaint are dismissed with prejudice.

SECOND MOTION TO DISMISS

The Defendants' second motion to dismiss is directed toward the first, second and a portion of the third claim for relief in the State Bar's complaint. The motion is predicated upon the alleged preclusive effect of certain findings of fact and one conclusion of law in an order dated April 30, 2004, entered by the Honorable W. Erwin Spainhour arising out of a hearing on Hoffman's MAR on April 26, 2004, to the effect that the Defendants had no knowledge of Porter's federal immunity deal. Since consideration of this motion necessarily entails an examination of materials from the Hoffman criminal case that do not appear on the face of the complaint, the hearing committee treats this motion as one for partial summary judgment under Rule 56(c). We conclude that Judge Spainhour's findings are not binding upon us either as a matter of subject matter jurisdiction or through application of the preclusion doctrines of *res judicata* or collateral estoppel, and therefore deny this motion.

Defendants contend that the following findings of fact and conclusion of law contained in Judge Spainhour's order are binding upon the Disciplinary Hearing Commission, and bar prosecution by the State Bar of the Defendants on any claims of professional misconduct arising from allegations relating to the grant of federal immunity given to Porter in exchange for his testimony against Hoffman as contained in the letter of October 21, 1996, from Assistant United States Attorney Brian Whisler to Porter's attorney Aaron Michel:

(Findings of Fact)

10. Neither District Attorney Honeycutt nor Assistant District

Attorney Brewer sought, requested, or participated in any discussion regarding the federal immunity agreement.

11. AUSA Whisler did not inform District Attorney Honeycutt or Assistant District Attorney Brewer of the fact of the federal immunity agreement.

. . .

21. AUSA Whisler did not inform District Attorney Honeycutt, Assistant District Attorney Brewer, or any other State official, of the existence of the federal immunity letter, and that Whisler has stated, under oath, that he believed he had no reason to inform them.

. . . .

(Conclusion of Law)

4. Based upon the agency relationship existing between the federal government and the State, knowledge of the federal immunity agreement, entered into by AUSA Whisler and Porter's attorney Aaron Michel is, as a matter of law, imputed to the District Attorney and Assistant District Attorney who prosecuted this case even though AUSA Whisler did not inform the State of the agreement or involve the State in any aspect of the negotiation process. (emphasis added)

The Defendants acknowledge that the State Bar and the courts of North Carolina have concurrent jurisdiction over attorney discipline. The jurisdiction of the State Bar is statutory (see the discussion relating to N.C.G.S. § 84-23, *supra*), whereas the courts have the inherent power to discipline attorneys who appear before them. *Gardner v. State Bar*, 316 N.C. 285, 287-88, 341 S.E. 2d 517, 519 (1986). The State Bar Council has adopted 27 N.C.A.C. 1B, Sec. .0102(c)(5), a rule that states explicitly:

> It is the position of the North Carolina State Bar that no trial court has the authority to preempt a North Carolina State Bar disciplinary proceeding with a pending civil or criminal court proceeding involving attorney conduct, or to dismiss a disciplinary proceeding

pending before the North Carolina State Bar.

In *State Bar v. Randolph*, 325 N.C. 699, 386 S.E. 2d 185 (1989), the Supreme Court held that a superior court judge had no jurisdiction to dismiss a grievance pending before the State Bar. Judge Spainhour's order therefore cannot preempt the jurisdiction of the State Bar to bring this disciplinary proceeding. His order should be given preclusive effect here if and only if the requirements of either *res judicata* or collateral estoppel are satisfied.

Res judicata and collateral estoppel are closely related doctrines, and have been the subject of general discussion in numerous North Carolina appellate court cases. *See, e.g., Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 15-16, 591 S.E.2d 870, 878-880 (2004); *Thomas McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 427-35, 349 S.E.2d 552, 556-60 (1986). *Res judicata* is often referred to as "claim preclusion," while collateral estoppel is often referred to as "issue preclusion." *Whitacre Partnership, supra.*

The essential elements for the application of *res judicata* are as follows:

> (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suits, and (3) an identity of the parties or their privies in the two suits.

Hogan v. Cone Mills Corporation; 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985); *Caswell Realty Associates I, L.P. v. Andrews Company, Inc.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 611 (1998).

None of the elements for *res judicata* are present here. The order of Judge Spainhour is not a final judgment in *State v. Hoffman*, and indeed as of the entry of this order Hoffman is still awaiting retrial. The causes of action and the parties are clearly not identical, the one being a criminal prosecution and the other being a disciplinary action against the erstwhile prosecutors of

the criminal defendant.

The consideration of collateral estoppel requires more discussion. The elements necessary for application of collateral estoppel are as follows:

> The requirement for the identity of issues to which collateral estoppel may be applied have been established by this court as follows: (1) the issues must be the same as those involved in the prior action; (2) the issues must have been raised and actually litigated in the prior action; (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2001)[8]

As for *res judicata*, none of the elements of collateral estoppel are satisfied here. Fundamentally, the reason is because the duty of a prosecutor under *Brady* to disclose exculpatory and impeachment evidence in a criminal case applies without regard to whether the prosecutor has personal knowledge of the existence of the evidence, whereas a violation of ethical rules generally requires proof of such knowledge.

Suppression of favorable evidence violates *Brady* even if done inadvertently and without the knowledge of the prosecutor. *Giglio v. U.S.*, 405 U.S. 150, 154 (1972). *See generally, Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003). Rule 7.2(4) of the Rules of Professional Conduct (now Rule 3.8(d) of the Revised Rules of Professional Conduct) cited by the State Bar in the complaint provides that the prosecutor in a criminal case shall:

---

[8]Cases also state that there must be a final judgment in the prior action. *Chaplain v. Chaplain*, 101 N.C. App. 557, 559, 400 S.E.2d 121, 122, *review denied*, 328 N.C. 570, 403 S.E. 2d 508 (1991); *Phipps v. Paley*, 90 N.C. App 170, 173, 368 S.E. 2d 21, 24, *review denied*, 323 N.C. 175, 373 S.E.2d 114 (1988). Although technically there is not yet a final judgment in the Hoffman criminal case, we deem Judge Spainhour's MAR order to be a final order in regard to those matters at issue here for purposes of analyzing the collateral estoppel issue.

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense . . . .(emphasis added)

The ethical rule is thus narrower in scope in this respect than the due process rules of *Brady* and its progeny. *See R. Rosen, "Disciplinary Sanctions Against Prosecutors for Brady Violation: A Paper Tiger,"* 65 N.C.L. Rev. 693, 712-15 (1987). *But see, State Bar v. David Hoke and Debra Graves,* 04 DHC 15, finding a violation of Rule 3.8(d) based upon a nondelegable legal duty of a prosecutor to know the contents of his file, rather than actual knowledge.[9]

The parties to the Hoffman MAR hearing – and even Judge Spainhour himself – explicitly recognized that whether the prosecutors knew of the Whisler letter was immaterial to the inquiry of whether a *Brady* violation entitling Hoffman to a new trial had occurred.

The transcript of the hearing reflects that Honeycutt stated to the court:

> it is my opinion that justice demands and all fairness requires that Jonathan Gregory Hoffman be awarded a new trial based on the Brady violation, which, as you know, does not require a proof of fault on behalf of anyone.

---

[9]The ethical duty to disclose is broader than the *Brady* due process standard in that ethical rules – including Rule 3.8(d) – do not include a materiality requirement. *See R. Rosen, supra,* 65 N.C.L. Rev. at 714. Materiality in the *Brady* context means that the undisclosed evidence might have affected the outcome of the trial. *U.S. v. Agurs,* 427 U.S. 97, 104 (1976); *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Therefore, an immaterial – but intentional – nondisclosure of exculpatory evidence by a prosecutor could be found to be a violation of the ethical rule and still not violate *Brady*. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Agurs, supra,* 427 U.S. at 110.

(Tr. of April 26, 2004 MAR hearing, p. 5)(emphasis added)[10]

Following the hearing, Robert Hale, one of Hoffman's post-conviction attorneys, sent a cover letter to Judge Spainhour enclosing a proposed order and noting that the prosecution had conceded that a new trial was required under *Brady* "based on imputed knowledge, specifically the agency relationship between the state and federal governments." The letter further states:

> In light of the parties' position that imputed knowledge of the federal immunity deal is sufficient to satisfy the demands of Brady, we believe that it would be unnecessary and inappropriate for the order to address the issue of whether or not the District Attorney's office had actual knowledge of the immunity deal. This issue remains controverted between the parties.

Judge Spainhour's conclusion of law number 3 in his April 30, 2004 order following the MAR hearing states that "(r)elief under *Brady* does not require actual knowledge by the government."

It is thus apparent that the knowledge of Brewer and Honeycutt of the Whisler letter was not actually litigated in connection with the Hoffman MAR hearing, that the issue of their knowledge was neither material nor relevant to the granting of a new trial to Hoffman, and that the conceded agency relationship between the federal and state prosecutors rendered Judge Spainhour's determination that Brewer and Honeycutt had not been informed of Porter's federal immunity deal neither necessary nor essential to his order.

In short, Judge Spainhour's findings and conclusions bearing upon Honeycutt and Brewer's knowledge of the federal immunity agreement cannot be the basis for collateral estoppel, and are

---

[10]The April 26, 2004 MAR hearing transcript also reveals that the issue of what the prosecutors knew and when they knew of the Whisler letter was not "actually litigated" in any meaningful sense. The transcript is all of ten pages long, the bulk of which consists of Honeycutt addressing the court. He was not under oath and was not subject to cross-examination by Hoffman's counsel. Brewer was not present at the hearing, having long since departed the district attorney's office to became a district court judge.

not binding here. The Defendants' second motion to dismiss is therefore denied.

THIRD MOTION TO DISMISS

The Defendants' third motion to dismiss is directed toward the second claim for relief in the complaint. The thrust of the second claim for relief is set forth in paragraph 55, alleging that "Brewer and Honeycutt deliberately avoided inquiring into whether Porter had been granted concessions or immunity agreements by the United States government." The hearing committee treats this motion as a pure Rule 12(b)(6) motion, and concludes that this allegation, deemed to be true, is sufficient to allege a violation of former Rule 1.2(d) (present Rule 8.4(d)), and – based upon Disciplinary Hearing Commission precedent – a violation of former Rule 7.3(4) (now Rule 3.8(d)).

While the specific ethical rule relating to the disclosure of exculpatory evidence by a prosecutor (formerly Rule 7.3(4), now Rule 3.8(d), addressed in the discussion above relating to Defendants' second motion to dismiss) literally applies only to evidence or information "known to the prosecutor," there are cases interpreting a prosecutor's duty under *Brady* to encompass an obligation to make a reasonably diligent inquiry to determine whether exculpatory or impeachment evidence exists. *See, e.g., U.S. v. Perdomo*, 929 F.2d 967 (3d Cir. 1991); *U.S. v. Osorio*, 929 F. 2d 753 (1st Cir. 1991), *U.S. v. Auten*, 632 F.2d 478 (5th Cir. 1980); *U.S. v. Burnside*, 824 F. Supp. 1216 (N.D. Ill. 1993). As stated in *Auten*, "(i)f disclosure was excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government." Furthermore, the Disciplinary Hearing Commission in the case of *State Bar v. David Hoke and Debra Graves*, 04 DHC 15, concluded that prosecutors violated their disclosure duty under Rule

3.8(d) in failing to produce exculpatory witness interview reports based upon a legal duty to know the contents of the investigative files, even in the absence of sufficient proof that the prosecutors had actual knowledge of the inteview reports. We are persuaded that the adoption by a prosecutor of a "head in the sand" attitude toward his *Brady* obligation, as is alleged in the second claim for relief, would violate the ethical rules cited by the State Bar. We therefore deny Defendants' third motion to dismiss.

FOURTH MOTION TO DISMISS

The Defendants' fourth motion to dismiss is in substance two motions. The first is a procedural due process attack based upon the assertion that the allegations of the second and third claims for relief in the State Bar complaint were not contained in either the Letter of Notice or the Substance of Grievance sent to each Defendant by the Grievance Committee of the State Bar Council. The second motion – though not expressly framed as such – challenges the legal sufficiency of the allegations of the third claim for relief asserting that the Defendants violated Rules 3.1 and 8.4(d) "(b)y continuing to oppose Hoffman's motion for appropriate relief after February 2001" and "(b)y failing to concede that Hoffman was entitled to a new trial pursuant to *Brady* until April 2004." The hearing committee treats these as two separate motions. We deny the first and grant the second, with the result that the third claim for relief is dismissed with prejudice.

A. Procedural Due Process

Counsel for the Defendants at the hearing in this matter indicated that they did not wish to argue the procedural due process issue, although they were not formally withdrawing the motion based upon it. Indeed, the argument is meritless. In *State Bar v. Braswell*, 67 N.C.

App. 456, 458, 313 S.E.2d 272, 274, *review denied*, 311 N.C. 305, 317, S.E. 2d 681 (1984), the North Carolina Court of Appeals held that there is no requirement that a letter of notice even be sent to an attorney prior to filing a complaint against the attorney before the Disciplinary Hearing Commission, and that "(t)he filing of a formal complaint satisfies defendant's right to be informed of and respond to the charges against him." The Defendants here thus have no basis to complain that their due process rights were violated:[11] The State Bar's complaint is sufficient notice of the charges against them.

B. The Legal Sufficiency of the Third Claim for Relief

The third claim for relief is based upon the proposition that the failure of the Defendants to concede that Hoffman was entitled to a new trial after they indisputably became aware of the Whisler immunity letter constitutes an independent violation of Rule 3.1, even if the Defendants were unaware of the letter at the time of the Hoffman trial in November of 1996. In relevant part, Rule 3.1 states that:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Implicit in this claim is the notion that reversal of Hoffman's conviction was inevitable, and consequently the Defendants had a continuing duty after the Hoffman trial to refrain from resisting Hoffman's claim in the MAR that he was entitled to a new trial. While we cannot inquire on a

---

[11]A letter of notice is a letter from the chairperson of the Grievance Committee to a respondent attorney in connection with the initial investigation of a grievance directing the attorney to respond to the grievance. 27 N.C.A.C. 1B, Sec. .0112(c). A "substance of grievance" is a summary of the grievance that typically accompanies the letter of notice.

motion to dismiss into the question of whether a reversal was "inevitable," the hearing committee can make a determination of whether the Defendants had a legal duty to refrain from opposing Hoffman's MAR.

Rule 3.1 applies to an attorney in the role as advocate. Comment [1] to Rule 3.1 expressly refers to the "advocate." Paragraph 59 of the State Bar's complaint explicitly alleges that the Defendants "through counsel" continued to oppose Hoffman's motions for appropriate relief. The complaint does not allege that the Defendants as counsel continued to oppose Hoffman's MAR. The Defendants' attack on the third claim for relief is based in part on the fact that they did not act as advocates in the Hoffman post-conviction proceedings. As is customary in state court post-conviction proceedings in capital cases, the State was represented by the Office of the North Carolina Attorney General, specifically Special Deputy Attorney General Jill Cheek. She alone signed the State's answer to Hoffman's third amendment to his MAR. [12] While Honeycutt appeared for the State in a "second chair" role, Brewer did not participate in the MAR proceedings at all. If the third claim for relief sufficiently states an ethical violation against Honeycutt and Brewer, then logically Ms. Cheek – and even the Attorney General himself – are equally culpable.

The allegation in paragraph 59 of the complaint that Brewer and Honeycutt continued to oppose Hoffman's MAR "through counsel" (presumably Ms. Cheek) and the Defendants' "advice of counsel" defense in response to this allegation are both off the mark. Ms. Cheek did not

---

[12]While we decide this motion on the basis of Rule 12(b)(6) and do not consider these matters outside the pleadings as essential to the hearing committee's ruling, we point them out to give context to our reasoning.

represent Brewer and Honeycutt: she represented the State of North Carolina. Brewer and Honeycutt were not her clients. The real question is whether Rule 3.1 imposes vicarious ethical liability upon Brewer and Honeycutt for the State's conduct of the defense of the MAR proceedings. We do not see a basis for such a holding.

The success of this gambit depends upon whether the claim can be analogized to the continuing professional duty concept first formulated in medical malpractice cases, and later recognized as at least potentially applicable to attorney malpractice claims by the North Carolina Supreme Court in *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784 (1994). Under this doctrine, if a lawyer has a continuing contractual duty to a client in connection with a matter, then the statute of limitations will not be deemed to run for a completed act of malpractice so long as the lawyer is under a contractual duty to rectify the mistake. While discussed in the case law, it has never actually been applied to extend the statute of limitations in any reported case involving legal malpractice, as recently noted in an unpublished opinion of the North Carolina Court of Appeals. *Norman Home Furnishings, Inc. v. Mayo*, 2006 N.C. App. Lexis 241 (N.C. App., Feb. 7, 2006). Neither has there been any suggestion that it could apply outside the attorney-client relationship, and of course there was no such relationship between Hoffman and the Defendants here. The complaint must stand or fall on whether the State Bar can avoid the bar of its limitations rule for an alleged ethical violation that accrued no later than Hoffman's trial in November of 1996 – not whether some new and distinct ethical duty devolved upon the Defendants when the full extent of Porter's federal immunity deal came to light as a matter of public record by at least February of 2001.

Having concluded that the third claim for relief fails to state a claim upon which relief can

be granted, we grant the Defendants' fourth motion for relief directed toward the legal sufficiency of this claim, and dismiss the third claim for relief with prejudice.

CONCLUSION

The dismissal of the first and second claims for relief on limitations grounds and the dismissal of the third claim for relief for failure to state a claim mean that the State Bar's complaint is dismissed in its entirety without reaching the merits. The hearing committee is acutely aware that this result pleases no one – including the Defendants, who have forcefully denied any wrongdoing but nevertheless remain under a cloud of unresolved charges against them. The allegations of the first two claims in the complaint describe serious prosecutorial misconduct, which if proven through the clear, cogent and convincing evidentiary standard applied in disciplinary proceedings would undoubtedly merit severe sanctions. That such misconduct may go undisciplined is difficult to accept.

We are also mindful of the negative consequences dismissal without a full evidentiary hearing may have on the public's confidence and that of lawyers themselves in the capacity of the legal profession to regulate itself, especially in light of the controversy surrounding another recent Disciplinary Hearing Commission decision involving allegations of prosecutorial misconduct, *State Bar v. David Hoke and Debra Graves*, 04 DHC 15.

Nevertheless, we cannot allow these concerns to dissuade us from reaching the conclusion that the applicable law compels dismissal of the State Bar's complaint. As Justice Bobbitt wrote in *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957), limitations rules "are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action." As strong as the urge may be to find an exception to the bar of Rule .0111(e)

and proceed to a hearing on the merits, to do so without legal justification would be a failure to carry out faithfully the adjudicatory function entrusted to us.

NOW, THEREFORE, based upon the foregoing, it is HEREBY ORDERED that the Defendants' first motion to dismiss is granted, their second and third motions to dismiss are denied, their fourth motion to dismiss is granted in part and denied in part, and the State Bar's complaint is dismissed with prejudice.

Signed by the Chair with the consent of the other hearing committee members, this the 4th day of April, 2006.

F. Lane Williamson
Chair, Disciplinary Hearing Committee