

No. 426A16

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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THE NORTH CAROLINA STATE BAR	)	
	)	<u>From Disciplinary</u>
v	)	<u>Hearing Commission</u>
	)	No. 13DHC11
DAVID C. SUTTON, Attorney	)	No. COA15-1198
	)	

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NOTICE OF APPEAL  
(Constitutional Question)  
(Filed 21 November 2016)  
and  
MOTION TO DISMISS APPEAL  
(Filed 30 November 2016)

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SUPREME COURT OF  
NORTH CAROLINA

NOV 21 2016

FILED

No. 426A16

DISCIPLINARY HEARING COMMISSION

SUPREME COURT OF NORTH CAROLINA

North Carolina State Bar, )

Plaintiff, )

)

v. )

)

David C. Sutton, )

Defendant. )

From the DHC of the NC  
State Bar in Wake Co.  
(No. 13 DHC 11)

NOTICE OF APPEAL BASED ON CONSTITUTIONAL QUESTIONS PURSUANT  
TO N.C. GEN. STAT. § 7A-30(1) & N.C.R. APP. P. 14

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant, David C. Sutton, hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals and its opinion dated 18 October 2016, with mandate of 7 November 2016, via N.C.R. App. P. 32. The NC COA opinion in case number 15-1198 upheld the 5-year suspension of the Defendant's law license in the Order of Discipline from the Disciplinary Hearing Commission of the N.C. State Bar. Virtually all of the issues raised on appeal arise under key provisions of the Constitutions of the United States and the State of North Carolina.

The opinion from the North Carolina COA **must** be reversed because it is a ruling that says lawyers in North Carolina charged with disciplinary offenses do not have ANY due process right to a hearing on their constitutional rights, in this case

freedom of speech, prior to having their law licenses taken away from them.

Actually, the COA opinion says that the Defendant does not even have the right to a hearing AFTER his law license is taken! It is a fundamental precept that is often quoted by the United States Supreme Court that one must have a hearing before a property deprivation occurs to comply with due process. If followed, the COA opinion provides a blueprint for the circumventing the Constitutional rights of every lawyer and every citizen who appears before a state agency.

Constitutional question I. per N.C.G.S. § 7A-30(1), that "the Disciplinary Hearing Commission ("DHC") of the N.C. State Bar is not in any branch of North Carolina's Constitutional government, is not allocated to any principal department in the executive branch of government and therefore lacks any judicial authority, rendering its Order of Discipline against the Defendant null and void" is an issue that directly involves a substantial question under the Constitution of the State of North Carolina as follows, and this Constitutional issue was timely raised in the tribunal as shown below:

Though the Defendant raised the issue in great detail, the Court of Appeals did not answer the most basic question put before it: What is the Constitutional basis for the judicial authority of the DHC of the N.C. State Bar. (See Appellant's

Initial Brief pg 29, Issue V. and pg 7 of Appellant's Substitute Reply Brief, Issue V.) If as the Defendant contends, the DHC is not actually endowed with the authority to perform judicial functions, then the action against him is void ab initio. The Defendant specifically raised this issue to the DHC (R p 1232, 1326). Without hearing, it simply ignored the issue or just said "DENIED."

The DHC is either in the legislative branch or the executive branch or the judicial branch of government -- or it is not in government. There is no fourth option - if the DHC has judicial authority. Yet that third option is exactly the position of the Bar when it openly professes that the Bar is "independent" of state government and it would be unnecessary and actually harmful if the Bar had real government oversight. This is despite the fact that Article III, § 11 of the North Carolina Constitution mandated that *all administrative agencies* must be subsumed within the executive branch of government by July of 1975.

The Court of Appeals' opinion agrees with the Bar that the DHC need not be in any branch of government in order to exercise its vast judicial powers. This is a radical and clearly erroneous departure from our Constitutional system of governance. The COA quotes the last sentence in Article III, § 11 which says "quasi-judicial" agencies "need not be allocated"

within the executive branch of government to refute the Defendant's position on appeal.

Quasi-judicial entities, which is what the DHC used to be when all of its decisions were stayed upon notice of appeal, do not have the power to take property absent the involvement of the judicial branch. N.C.G.S. § 84-28, as amended by chapter 167, SB 60. This was obviously the intent of the legislature when it created the DHC and required it to consist of 40% non-lawyers. N.C.G.S. § 84-28.1 Moreover, each disciplinary case must be decided by one non-lawyer. Non-lawyers cannot, under the NC Constitution be judges. The practicing lawyers, who compose the other 60% of the DHC, cannot be judges because it is a criminal offense in North Carolina for judges to practice law.

The legal definition of a quasi-judicial entity is a body that can find facts whereas a judicial body has the jurisdiction to adjudicate the rights of parties that appear before it. It is because they lack actual judicial power that quasi-judicial bodies need not be supervised by one of the three branches of government. The COA's reasoning turns the Constitution on its head conferring upon lay people who have no governmental supervision the same powers granted to elected judges in Article IV of North Carolina's Constitution. The COA opinion gives the DHC more power than administrative agencies that are properly

allocated though they are specifically given limited judicial authority in Article IV, § 3.

Moreover, the COA opinion says the DHC has "concurrent" jurisdiction with the judicial branch over matters of lawyer discipline which erroneously implies that the DHC has equal jurisdiction with the General Courts of Justice. Administrative agencies with executive branch oversight are the only exception to supreme and exclusive powers of the judicial branch. See Article IV, § 3. The COA provides no authority for completely ignoring the clear provisions of North Carolina's Constitution. Arguably, the COA's opinion gives DHC members more power than Article IV judges because elected judges can be voted out of office or impeached. There is no similar provision for removal of DHC members and they do not answer to the Judicial Standards Commission.

When DHC disciplinary orders were given the force and effect of law in 1987, the DHC obtained judicial powers and in order for it to exercise even the limited judicial functions of an administrative agency, it had to be allocated within the executive branch of government. For whatever reason the legislature did not allocate the DHC when it legislatively conferred judicial power. As a result, its judicial functions became repugnant to the Constitution of North Carolina.

An entity with no clear judicial authority that has no clear limit on that authority is bound to abuse it. That is precisely what happened below. During appellate oral argument, Bar Counsel argued that there was literally no limit to the DHC's jurisdiction. The COA's opinion erroneously affirms this unconstitutional grab of judicial power.

Constitutional question II. - N.C.G.S. § 7A-30(1), that "the DHC of the N.C. State Bar is not in the judicial branch of North Carolina's government and that properly constituted administrative agencies are prohibited by separation of powers from ruling on the Constitutional issue of freedom of speech and as a result the DHC lacked jurisdiction to adjudicate the Defendant's motions on freedom of speech thereby rendering the Order of Discipline null and void" is an issue that directly involves a substantial question under the Constitution of the State of North Carolina as follows, and this Constitutional issue was timely raised in the tribunal as shown below:

The Defendant raised the First Amendment/freedom of speech of the United States Constitution issue both specifically and repeatedly in at least 13 pleadings, motions to dismiss, briefs and memoranda, and even a motion to compel the DHC to rule on the First Amendment issue, but he was never given a hearing or a ruling from the DHC on the issue. Not a single word was uttered except "DENIED". (R pp 35, 159, 284, 328, 470, 735, 937, 953,

1009, 1118, 1156, 1214 and 1541) This is why the COA opinion makes no reference to how the First Amendment was handled by the DHC. The DHC ignored it altogether.

Absent some personal animus against freedom of speech, the only logical explanation for the total absence of any reference to the First Amendment by the DHC is that the DHC itself believed that it lacked jurisdiction to adjudicate the issue. Only actual courts may engage in constitutional jurisprudence.

The NC State Bar and the DHC are not in the judicial branch. "Concurrent" jurisdiction over lawyer discipline with the judicial branch would make no sense if the DHC was already in the judicial branch. Thus, the DHC obviously adopted the position that it was akin to regular administrative agencies - which may not delve into constitutional jurisprudence. See Article III, § 11; Article IV, §§ 1 and 3 and Article I, § 6 of the NC Constitution.

The Defendant specifically argued to the DHC via written motion that the State Bar/DHC lacked authority to adjudicate constitutional rights. (R p 1326) The DHC denied that motion with the single word "DENIED." The Defendant explicitly raised this issue on appeal. See Appellant's Initial Brief pg 29, Issue V. and pg 7 of Appellant's Substitute Reply Brief, Issue V.

The Court of Appeals opinion does not address this issue at all. This is noteworthy because remand is not an option if the



DHC does not have the authority to adjudicate the issue.

Likewise, it is impossible to waive appellate review of an issue which could not have been reached by the DHC in the first instance.

Constitutional question III. - N.C.G.S. § 7A-30(1), that "the DHC of the N.C. State Bar violated the due process clause of the 14<sup>th</sup> Amendment to the US Constitution and the Law of the Land provision in the North Carolina Constitution by taking the Defendant's property (his law license for 5 years) prior to adjudicating his First Amendment motions for freedom of speech - and affirmatively preventing any lawful court from reaching the issue - which render the Order of Discipline void" is an issue that directly involves a substantial question under the Constitutions of both the United States and State of North Carolina as follows, and this Constitutional issue was timely raised in the tribunal as shown below:

The statements contained in the North Carolina Court of Appeals opinion are tantamount to a ruling that it is legal for agencies in the State of North Carolina to violate the Defendant's due process rights. For example, the COA opinion tells us that the First Amendment/freedom of speech issue was raised below to the DHC by the Defendant. It then tells us indirectly that the DHC did not provide any written ruling on what restrictions the First Amendment places upon government

regulation of attorney speech and it tells us that the DHC took the Defendant's bar license nonetheless. Together those facts constitute a patent violation of due process and the law of the land. Unfortunately, the NC COA goes farther and pronounces, without any supportive case law remotely having anything to do with freedom of speech or the facts of this case, that this Defendant, who was not given a First Amendment hearing BEFORE his law license was taken is not entitled to have one AFTERWARDS either! By treating the freedom of speech in such a cavalier fashion, the COA reduces the First Amendment to mere flowery words.

A right without a remedy is no right at all. See *Marbury v. Madison* (cite omitted) The due process clause found in the 14<sup>th</sup> Amendment to the US Constitution and the Law of the Land provision in Article I, § 19 of the NC Constitution require that constitutional issues be fully addressed before property is taken away. There are no cases anywhere that say what happened in this case would pass constitutional muster anywhere.

As stated, the record contains over a dozen pleadings that raised the freedom of speech issue to the DHC. Nevertheless, the DHC refused to even grant defendant a hearing on the issue and it refused to provide any ruling except the single word, "DENIED".

This specific issue regarding the denial of due process was raised by the Defendant on appeal in Issue number three in both his initial appellate brief and in his substitute reply brief. He raised this particular due process issue directly to the DHC in his motion to compel the DHC to rule on the First Amendment (R p 1361) but it too was DENIED.

Due process is not outcome determinative. The Court of Appeals opinion completely ignores the issue that lawyers have a right to a hearing on motions based upon freedom of speech and it is clearly erroneous.

Constitutional question IV. - N.C.G.S. § 7A-30(1), that "the ethics prosecution against the defendant violated his right to freedom of speech under First Amendment to the US Constitution and as a result the DHC's Order of Discipline must be reversed" is an issue that directly involves a substantial question under the Constitution of the United States as follows, and this Constitutional issue was timely raised in the tribunal as shown below:

The N.C. COA website provides guidelines for writing appellate briefs which require that the appropriate "standard of appellate review" be provided for each issue raised on appeal. The Rules of Appellate Procedure prohibit references to matters that are not contained in the record. The defendant followed those rules and those guidelines and put forth a standard of

review for the freedom of speech issue and limited his references to the record on appeal. However, there is no standard of review for unwritten rulings with unwritten legal conclusions and unwritten factual findings.

The COA opinion completely ignores the standard of review for the DHC's ruling on freedom of speech and First Amendment in tacit recognition that there was no ruling to review - which means the defendant must prevail.

Bar Counsel was forced to argue that the DHC's First Amendment ruling was "inherent". This alone is sufficient for reversal because it is the duty of a reviewing court to review only the written rulings, conclusions and findings contained in a trial court's order or judgment. If the trial court fails to perform its duty, no matter the reason, it is the duty of the appellate courts to reverse the trial court's order or judgment. Further, appellate courts may not make findings or conclusions for the trial court even when the record would be sufficient to permit it to do so. The defendant performed his duty. The Court of Appeals did not. It was clearly erroneous for the COA to abandon its proper function as a court of appellate review. If the COA had performed its function as a court of appellate review properly, the defendant would have prevailed.

As stated, the record is replete with references to the First Amendment motions filed by the defendant and how freedom

of speech would specifically apply to the facts and ethical rule violations alleged in this case. (R pp 35, 159, 284, 328, 470, 735, 937, 953, 1009, 1118, 1156, 1214 and 1541) However, the DHC did not grant the defendant a hearing on those motions and Bar Counsel's position both at trial and on appeal was that it did not need to proffer any legitimate or compelling governmental interest in regulating the defendant's speech whether it was inside or outside any courtroom.

Bar Counsel drafted the Order of Discipline. They omitted even the vaguest reference to the First Amendment or any governmental interest or any standard of First Amendment scrutiny or whether the ethics rules were overly broad or narrowly tailored to address a legitimate or compelling governmental interest or whether they were unconstitutional as applied in this case or whether upon balancing the government's interest against the intrusions upon protected speech, they were found to be minimal or anything at all that should be contained in a case with over 100 references to the First Amendment. Therefore, any discussion of this type on appeal would be outside the record in addition to be highly speculative.

Nonetheless, the defendant made the point very specifically on appeal that there is no case law in North Carolina supporting the State Bar or the DHC's authority to discipline lawyers for speech related ethical offenses. Nor was there any case law that

provided any limiting instructions regarding the interpretation of any of the NC State's Bar Rules of Ethics vis-à-vis the First Amendment.

The defendant also noted that the United States Supreme Court's case law does not provide a single instance where any disciplinary action brought by any state bar entity based upon lawyer speech had withstood any First Amendment challenge. The defendant specifically argued to the COA that whatever the First Amendment's protections are, they must surely extend to the defendant's private phone calls, letters and private conversations on his own property (all of which were the basis of claims against the defendant). The arguments just outlined are quite specific, but the defendant also referred to his trial brief in his initial appellate brief which contains an extensive application of the First Amendment. (R p 1009)

The Bar's flat out refusal to provide any governmental interest alone was sufficient for the defendant to prevail on the issue of freedom of speech. Once the defendant raised the constitutional issue squarely via written motion, the burden fell onto the Bar either to establish that the First Amendment did not apply or that the Bar's interest outweighed any intrusive effect upon the First Amendment. The Bar simply refused to do it and the DHC refused to ask them to do it. Thus, on the basis of what is contained in the record, the defendant

must prevail on the issue of freedom of speech. He raised it and the government did not rebut it.

It is the Bar and the DHC, not the defendant, who deprived the Court of Appeals of any meaningful First Amendment analysis and it was clearly erroneous for the Court of Appeals to rule that the defendant waived appellate review. The defendant is the only one that did what he was supposed to do.

Constitutional question V. - N.C.G.S. § 7A-30(1), that "by improperly ruling that N.C.G.S. § 11-1 required the defendant to make an election between firing his co-counsel and representing himself by himself without the assistance of counsel or to hire counsel without being allowed to perform any legal functions, was a violation of due process under the 14<sup>th</sup> Amendment to the US Constitution and the Law of the Land and Open Courts Provisions of the North Carolina Constitution, Article I, §§ 18,19 which had the effect of denying the defendant a fair trial and requires reversal" is an issue that directly involves a substantial question under the Constitutions of the United States and the State of North Carolina as follows, and this Constitutional issue was timely raised in the tribunal as shown below:

The DHC ruled the N.C.G.S. § 11-1 required that the defendant make an election between representing himself by himself, without the assistance of counsel or hiring counsel but

not be permitted to assist his counsel in any formal capacity like taking a deposition or signing a motion or questioning a witness. (R p 98) The latter was prohibitively expensive. The defendant responded that the clear meaning of the statute contradicted any such interpretation. To illustrate, N.C.G.S. § 11-1 says a civil litigant may appear pro se or by attorney. However, the Bar and the DHC's position was that N.C.G.S. § 11-1 requires that any lawyer who represents himself or herself may not be permitted to also appear by attorney. However, unless the attorney who represents himself voluntarily surrenders his law license, he will be in violation of the statute because he or she will be representing him or herself and also appearing by attorney at the same time. The defendant put this position in writing to the DHC but the DHC ruled against him.

As a result, the defendant had to fire his co-counsel and represent himself by himself from February of 2013 until September of 2014 while driving back and forth from Greenville to Raleigh and attempting to manage a solo law practice while the Bar was permitted to utilize its entire legal staff. The Bar always used two attorneys and at times four attorneys. Allowing the Bar to gang up on the defendant this way made it impossible for him to stand on equal footing against the entire legal staff of the NC State Bar.



The N.C. COA opinion says the defendant did not provide case law to support his position that a lawyer representing himself can appear as his own co-counsel without violating N.C.G.S. 11-1. When a statute's meaning is clear, as is the case here, neither the DHC nor the Court of Appeals is allowed to give it an illogical interpretation which gives one party an unfair advantage over the other. Once the DHC made this ruling, this matter lost all pretense of fairness. Moreover, Court of Appeals places an impossible burden on the defendant. It appears to have ruled against him on this issue (Issue number 4 on appeal) because he was unable to produce a case which says that the DHC's interpretation of the statute is incorrect. So, unless someone else has been treated this badly before, the defendant was always lose on appeal because there will not be any case law the first time the issue arises.

Constitutional question VI. - N.C.G.S. § 7A-30(1), that "the failure to provide defendant with any notice of the unproven aggravating factors that the Bar used to enhance his punishment despite his repeated requests and motions for same, and given that the defendant had not had received previous Bar discipline, constituted a violation of notice requirements and the due process clause of the 14<sup>th</sup> Amendment to the US Constitution and this had the effect depriving the defendant of any meaningful opportunity to defend himself against the

unproven aggravating factors, some of which also constituted violations of the First Amendment requires reversal of the Order of Discipline" is an issue that directly involves a substantial question under the Constitution of the United States as follows, and this Constitutional issue was timely raised in the tribunal as shown below:

The defendant repeatedly asked the Bar and the DHC via written motions (R p 419) that he be notified of the aggravating factors to be use against him to determine his punishment. His written motions analogized the aggravating factors in criminal punishment schemes to Bar punishment and based his motions on notice requirements and due process. The DHC denied all motions. The N.C. COA Opinion also denied the defendant's written motions apparently on the basis that he had no case directly on point. However, the COA Opinion did not reach the legal issue of whether due process requires that the N.C. State Bar to provide notice to a lawyer (who had never been disciplined before) though the aggravating factors determine whether the punishment is a reprimand or a disbarment. Since the defendant NEVER been disciplined and had not been convicted of any crime nor ever been held in contempt or sanctioned by any Court, none of the usual factors for severe punishment applied to the defendant.

It was not until the Order of Discipline was entered that the defendant received notice of the allegations of aggravating

factors - which was the same time he found out he was guilty of the allegations. There was literally no opportunity for the defendant to defend himself against allegations that were never presented to him. The Bar conceded that the defendant was not informed and merely said it was not feasible to provide notice of aggravating factors and that the law does not require it. The defendant provided U.S. Supreme Court case law which says a lawyer must be provided notice of the charges against him and be given a meaningful opportunity to defend those charges. The N.C. COA Opinion was clearly erroneous.

Most of the aggravating factors also involved protected lawyer speech, specifically including paragraphs 8,9, and 10 of the Order of Discipline (R p 1652) which turned the defendant's efforts to enforce his rights to free speech into aggravating factors. However, these First Amendment violations were more pronounced because the defendant could not file motions or call witnesses as he had no knowledge of the new, unproven allegations of aggravating factors/conduct. It was clearly erroneous to require the defendant to defend himself against new, unproven charges without notice.

In the event the Court finds the constitutional questions above to be substantial, petitioner intends to present the following issues in its brief for review as they were presented to the NC COA and are intertwined with the other issues

presented and were decided erroneously by the NC COA and/or were not addressed at all:

Issue VII. Subject matter jurisdiction is lacking because the complaints are not signed by GCC and the rules for amendments and consolidation were violated rendering all acts void ab initio.

Issue VIII. The punishment must be reversed because no findings were made by DHC.

Issue IX. Findings/Conclusions without support in record/ not supported by clear and convincing evidence/whole record test and the order based on such findings must be reversed.

This the 21<sup>st</sup> day of November, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
David C. Sutton, Pro Se  
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Notice of Appeal has been served upon all counsel of record by electronic means at their email address of record and by depositing a copy of same, first-class postage prepaid, in the United States Mail, addressed as follows:

Carmen Bannon and David Johnston  
Deputy Counsels for Plaintiff  
North Carolina State Bar  
PO Box 25908

Raleigh NC 27611  
and via electronic mail

This the 21<sup>st</sup> day of November, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
David C. Sutton

NO. 426A16

DISCIPLINARY HEARING COMMISSION  
OF THE NORTH CAROLINA STATE BAR

SUPREME COURT OF NORTH CAROLINA

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**FILED**

NOV 30 2016

THE NORTH CAROLINA STATE BAR, )  
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Plaintiff-Appellee )  
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vs. )  
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DAVID C. SUTTON, Attorney, )  
 )  
Defendant-Appellant )

SUPREME COURT OF  
NORTH CAROLINA

From Wake County  
No. 13 DHC 11

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PLAINTIFF-RESPONDENT'S MOTION TO DISMISS DEFENDANT-PETITIONER'S  
NOTICE OF APPEAL

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Appellee, the North Carolina State Bar,  
respectfully submits the following motion to dismiss Defendant-  
Appellant's Notice of Appeal filed with this Court on 22  
November 2016. The State Bar requests dismissal of Defendant's  
appeal because it does not involve any substantial  
constitutional question entitling Defendant to review by this  
Court. In support of its request that the appeal be dismissed,  
Plaintiff shows as follows:

INTRODUCTION AND PROCEDURAL HISTORY

On 13 November 2014, following 14 days of hearing, the Disciplinary Hearing Commission of the North Carolina State Bar (DHC) entered an Order of Discipline suspending Defendant's law license for five years, with the opportunity for a stay of the final two years if Defendant complies with certain conditions. Defendant appealed the DHC's order to the Court of Appeals, where oral argument was heard on 25 April 2016, and an opinion was filed on 18 October 2016. The opinion of the Court of Appeals unanimously affirmed the decision of the DHC. N.C. State Bar v. Sutton, No. COA15-1198, 2016 WL 6080419 (N.C. Ct. App. Oct. 18, 2016) (hereafter "COA Slip Op."). Defendant filed notice of appeal to this Court on 22 November 2016.

Defendant filed his Notice of Appeal pursuant to N.C. Gen. Stat. § 7A-30(1) and N.C. R. App. P. 14, contending that he has an appeal of right to this Court because his professional disciplinary case involves a substantial question of constitutional interpretation.

ARGUMENT

Defendant's is not entitled to Supreme Court review for several reasons. As a threshold matter, Defendant has failed to "state with particularity how appellant's rights . . . have been violated," as required by Rule 14(b)(2) of the Rules of Appellate Procedure. Furthermore, Defendant's appeal should be

dismissed because none of the six issues described in the Notice of Appeal amount to a substantial constitutional question entitling him to further appellate review by the Supreme Court.

**I. Defendant Failed to Preserve Two of the Constitutional Issues Described in the Notice of Appeal**

A party who was an appellant in the Court of Appeals is only entitled to present in his brief before this Court assignments of error which he properly presented for review to the Court of Appeals. . . . The potential scope of [Supreme Court] review is limited by the questions properly presented for first review in the Court of Appeals. . . . "The attempt to smuggle in new questions is not approved."

Falls Sales Co. v. Bd. of Transp., 292 N.C. 437, 443, 233 S.E.2d 569, 573 (1977) (internal citations omitted).

**A. Defendant Abandoned the Issue Set Forth in the Notice of Appeal as "Constitutional Question III."**

In section III of his Notice of Appeal, Defendant contends that his right to due process was violated in the DHC proceeding. Not only does "the record belie[] Defendant's assertion that he was denied due process in connection with his disciplinary hearing" (COA Slip Op. at 16), but Defendant abandoned this issue on appeal. Section II(B) of the Court of Appeals' opinion addresses Defendant's claim that he was denied due process of law in the DHC proceedings. The Court of Appeals noted that Defendant failed "to provide any substantive arguments or legal authority" to support his contentions regarding due process violations, and "deem[ed] this issue abandoned." (COA Slip Op. at 16).



B. Defendant Waived His Right to Appellate Review of the Issue Set Forth as "Constitutional Question IV."

In section IV of his Notice of Appeal, Defendant asserts that the entire disciplinary prosecution against him violated his constitutional right to free speech. The Court of Appeals addressed this contention in section II(C) of its opinion, holding that Defendant "waived his right to appellate review of this issue" because he failed "to make any particularized arguments" or "satisfy his burden . . . to show a specific deprivation of his legal rights." (COA Slip Op. at 17) As the Court of Appeals observed, "judicial resolution of such questions may only occur in cases where, unlike here, the issues have been properly presented to the court." (COA Slip Op. at 20).

**II. Defendant's "Constitutional Question V" Has Already Been the Subject of Conclusive Judicial Determination.**

To establish his entitlement to appeal pursuant to N.C. Gen. Stat. § 7A-30(1) and N.C. R. App. P. 14, Defendant must offer "a constitutional question which has not already been the subject of conclusive judicial determination." State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968).

In section V of his Notice of Appeal, Defendant submits that he was denied a fair trial in violation of the State and Federal Constitutions because he was required to make an election between representing himself before the DHC or being

represented by counsel. This issue is governed by N.C. Gen. Stat. § 11-1, which states that a party "may appear either in person or by attorney in actions or proceedings in which he is interested." (emphasis added). In section II(D) of its opinion, the Court of Appeals observed that the Supreme Court "has already construed this provision to mean that a litigant 'has no right to "appear" both by himself and by counsel.'" (COA Slip Op. at 20, quoting Hamlin v. Hamlin, 302 N.C. 478, 482, 276 S.E.2d 381, 384-85 (1981)) The DHC's ruling on this issue was consistent with this Court's prior conclusive determination. Defendant has not, and cannot, offer any legal authority to the contrary.

### **III. The Remaining Issues Raised in Defendant's Notice of Appeal Are Not "Real and Substantial" Constitutional Issues**

Defendant cannot establish that he is entitled to appeal pursuant to N.C. Gen. Stat. § 7A-30(1) and N.C. R. App. P. 14(b)(2) by "[m]ere mouthing of constitutional phrases like 'due process of law'" State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968). Rather, he must demonstrate that the case involves a question of constitutional interpretation that is "real and substantial rather than superficial and frivolous." Id.

#### **A. Defendant's "Constitutional Question I" is Frivolous.**

In section I of his Notice of Appeal, Defendant argues that the DHC is constitutionally prohibited from exercising judicial powers because—as an administrative agency—it must be allocated to one of the principal departments within the executive branch of government. The Court of Appeals addressed this argument in section II(A) of its opinion (“Constitutionality of the DHC’s Disciplinary Authority”). In that discussion, the court observed that “Defendant provides no authority for this assertion, and we fail to see how it could be supported, given that the same constitutional language he relies upon specifically states that ‘[r]egulatory [and] quasi-judicial . . . agencies may, but need not, be allocated within a principal department.” (COA Slip Op. at 14, quoting N.C. Const. art. III, § 11)(emphasis in original). As the plain language of the constitution makes clear that a regulatory/quasi-judicial agency like the DHC need not be allocated, this proposed issue does not involve a real and substantial question of constitutional interpretation.

In this section of the Notice of Appeal, Defendant further argues that the DHC’s exercise of quasi-judicial powers in adjudicating attorney disciplinary cases impermissibly infringes on the exclusive powers of the judiciary. The Court of Appeals found this contention “meritless,” citing this Court’s prior determination that the courts and the State Bar share concurrent

jurisdiction over attorney discipline, and that concurrent jurisdiction does not undermine the inherent powers of the courts. (COA Slip Op. at 14).

B. Defendant's "Constitutional Question II" is Indistinguishable from "Constitutional Question I"

In section II of his Notice of Appeal, Defendant argues that the DHC lacked jurisdiction to adjudicate any issue related to his constitutional right to free speech, and therefore the Order of Discipline is "null and void." To the extent this issue was raised in the Court of Appeals, it was a component of Defendant's separation of powers argument discussed immediately above: In essence, Defendant contended that if the DHC rules on any constitutional issue that arises in the context of a disciplinary proceeding, it is an unconstitutional encroachment on the powers of the judiciary.

Not once has any North Carolina court found the "encroachment" Defendant perceives. On the contrary, when a direct dispute arose between the State Bar and a court regarding a matter of attorney discipline, this Court reversed a Superior Court order that purported to dismiss a grievance pending with the State Bar. N.C. State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989). In reaching this decision, the Court noted that the State Bar "and the trial courts of this state share concurrent jurisdiction over matters of attorney discipline."

Id. at 701, 386 S.E.2d at 186. This Court has repeatedly examined the disciplinary powers of the State Bar and the DHC and determined that they are harmonious with the powers of the judicial branch. See, e.g., Beard v. N.C. State Bar, 320 N.C. 126, 129, 357 S.E.2d 694, 695-96 (1987); Gardner v. N.C. State Bar, 316 N.C. 285, 287-88, 341 S.E.2d 517, 519 (1986).

As the Court of Appeals determined, Defendant's arguments on the constitutionality of the DHC's adjudicatory authority are "meritless," inconsistent with prior appellate decisions, and do not present any real and substantial question of constitutional interpretation.

C. Defendant's "Constitutional Question VI" is a Matter of Procedure, Not Due Process.

In section VI of his Notice of Appeal, Defendant asserts that he was deprived of due process because he did not receive advance notice of the "aggravating factors that the Bar used to enhance its punishment" during the dispositional phase of the DHC proceedings.<sup>1</sup> The Court of Appeals addressed this issue in section II(G) of its opinion, where it appropriately treated this as a purely procedural question, not one with

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<sup>1</sup> Although Defendant uses the terms "aggravating factors" and "enhanced punishment," those phrases do not appear in the applicable administrative rules, and they inaccurately imply that the DHC process should be treated like criminal sentencing proceedings in which the State has the burden of proving the specific aggravating factors it submits to the jury.

constitutional implications.<sup>2</sup> The court observed that during the dispositional phase in all cases, the DHC is required to consider any evidence relevant to the discipline to be imposed, including a list of factors described in Rule .0114(w) of the State Bar's Discipline and Disability Rules. The text of the Rule "itself gave Defendant notice of the list of factors that the State Bar could rely upon." (COA Slip Op. at 24) Defendant provided no authority "in support of his contention that the State Bar was required to notify him in advance of which particular factors . . . it planned to argue were relevant at the dispositional phase [of his trial.]" (COA Slip Op. at 24) (emphasis in original). Defendant fails to articulate any rationale or cite any legal authority supporting his belief that he was constitutionally entitled to a preview of the State Bar's closing argument in the dispositional phase. In addition to being wholly unsupported, this procedural argument does not present a real and substantial constitutional question entitling Defendant to further appellate review by this Court.

For the foregoing reasons, the State Bar respectfully requests that this Court dismiss Defendant's appeal.

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<sup>2</sup> Section II of the Court of Appeals opinion was captioned "Constitutional and Procedural Arguments." Subsections A, B, and C discussed Defendant's constitutional arguments. The remaining subsections (D through I) addressed alleged procedural errors in the DHC proceedings.

Respectfully submitted this the 30th day of November, 2016.

Carmen H. Bannon

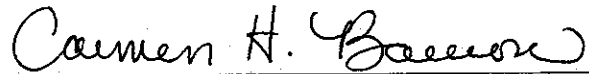
By: Carmen Hoyme Bannon, Deputy Counsel  
The North Carolina State Bar  
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Attorney for Plaintiff-Respondent  
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiff-Appellee's Motion to Dismiss Defendant-Appellant's Appeal was served upon Defendant-Appellant by depositing a copy thereof into the U.S. Mail in a postage prepaid envelope addressed as follows to Defendant:

Mr. David C. Sutton  
1823 Twinberry Ave.  
Clovis, CA 93619

This the 30th day of November, 2016.



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Carmen Hoyme Bannon  
Attorney for Plaintiff-Respondent  
The North Carolina State Bar



IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1198

Filed: 18 October 2016

Disciplinary Hearing Commission of the North Carolina State Bar, No. 13 DHC 11

The NORTH CAROLINA STATE BAR, Plaintiff,

v.

DAVID C. SUTTON, Attorney, Defendant

Appeal by defendant from order entered 13 November 2014 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 25 April 2016.

*The North Carolina State Bar, by Deputy Counsel Carmen Hoyme Bannon and Deputy Counsel David R. Johnson, for plaintiff-appellee.*

*David C. Sutton, pro se, for defendant-appellant.*

DAVIS, Judge.

David C. Sutton ("Defendant") appeals from an order of discipline entered by the Disciplinary Hearing Commission (the "DHC") of the North Carolina State Bar suspending his law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct. In addition to asserting challenges to various constitutional and procedural aspects of his disciplinary proceeding, Defendant argues on appeal that a number of the DHC's findings of fact were not supported by evidence in the record and that several of its legal conclusions were incorrect. After careful review, we affirm.

**Factual Background**

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The State Bar initiated this disciplinary proceeding by filing a complaint on 3 April 2013. At all relevant times, Defendant, who was admitted to the North Carolina Bar in 2001, was engaged in the practice of law and maintained an office in Greenville, North Carolina. Defendant's disciplinary proceeding concerned allegations of misconduct by him that spanned multiple years and involved his representation of clients in a number of different cases.

The matter was assigned to a hearing panel of the DHC on 23 April 2013. After an earlier amended complaint was filed, the DHC permitted the State Bar to file its second amended complaint on 4 December 2014.

Disciplinary proceedings are divided into two phases: (1) the adjudicatory phase, during which the DHC determines whether the defendant has committed misconduct; and (2) the dispositional phase, during which the DHC determines the appropriate sanction for any misconduct that was found to exist. *N.C. State Bar v. Talford*, 356 N.C. 626, 636, 576 S.E.2d 305, 312 (2003). The DHC received evidence and heard arguments in connection with the adjudicatory phase of the proceeding from 5–9 May and 9–11 June 2014. On 8 August 2014, the DHC issued its final findings and conclusions relating to the adjudicatory phase in which it determined that Defendant had committed 28 separate violations of the Rules of Professional

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Conduct.<sup>1</sup>

The allegations against Defendant stemmed from his actions in seven specific matters during the course of his practice of law. The following is an overview of the facts relating to these matters and the accompanying findings of misconduct made by the DHC in connection with each of them.

**I. The Pollard Matter**

Defendant represented Barbara Pollard in a wrongful death lawsuit against her daughter-in-law in connection with the 2005 death of Pollard's son, Stacey Pollard. During Pollard's May 2011 deposition, which was taken by attorney Kathryn Fagan, Defendant repeatedly interjected his own questions and commentary, made sarcastic remarks, coached Pollard on how to respond to particular questions, and answered questions for Pollard. After the deposition had concluded, Defendant stated — in the presence of his client, the court reporter, and a law student in attendance — “Fagan, you know what your problem is? Your problem is that you need a boyfriend or a husband or something. . . . I understand your client goes both ways so . . . maybe you could have a little lickety-lick with her.”<sup>2</sup>

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<sup>1</sup> The DHC had issued an initial version of its findings and conclusions regarding the adjudicatory phase on 18 July 2014. The DHC subsequently released a corrected version of these findings and conclusions on 8 August 2014.

<sup>2</sup> The DHC concluded that these actions violated Rule 3.5(a)(4) (conduct intended to disrupt a tribunal), Rule 8.4(d) (conduct prejudicial to the administration of justice), and Rule 4.4(a) (using means that have no substantial purpose other than to embarrass or burden a third person).

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In connection with Defendant's representation of Pollard, a website (justice4stacey.com) was created in July 2007 to solicit information from members of the public who may have had knowledge relating to the death of Pollard's son. News articles were also posted on the website, and there was a section where members of the public could post public comments.

In August 2011, Fagan filed a motion for a change of venue based on what she characterized as the "vilification" of her client resulting from the website, which she asserted was "sponsored" by Defendant. In response, Defendant filed an affidavit in which he falsely stated that he "did not 'sponsor' any website[.]" Defendant made this representation despite the fact that he (1) had taken part in discussions with Pollard's family regarding setting up the website; (2) was the initial registrant and administrator of the website and paid the web hosting fees; (3) possessed the password necessary to post materials on the website and did, in fact, post certain items; and (4) was listed as the website's contact person along with his email address and phone number.<sup>3</sup>

## **II. The Langston Matter**

In 2011, Defendant represented Rita Langston in a family law case in which the opposing counsel was Brantley Peck, Jr. During Langston's May 2011 deposition,

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<sup>3</sup> The DHC concluded that Defendant's misrepresentation regarding his sponsorship of the website violated Rule 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and Rule 8.4(d) (conduct prejudicial to the administration of justice).

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Defendant repeatedly interrupted Peck's questioning, provided testimony for Langston, and interjected his own questions. Defendant also accused Peck during the deposition of being "complicit" with theft and referred to one of Peck's statements as "a damn lie." Shortly after this attack, Defendant abruptly terminated the deposition and refused to allow Peck to complete his deposition of Langston.<sup>4</sup>

Approximately one year later, Defendant made two false statements in connection with the Langston Matter. First, Defendant informed the court that a corporation formed by the parties in the case had been "annulled" by North Carolina's Secretary of State because the opposing party had forged corporate documents. In reality, Defendant knew that the corporation had been administratively dissolved by the Secretary of State rather than dissolved because of fraud. Second, Defendant accused opposing counsel in open court of "slipping" a handwritten provision into a settlement agreement without Defendant's knowledge or approval when, in fact, Defendant knew about — and had actually agreed to — the added provision.<sup>5</sup>

### **III. The Gorham Matter**

During a trial in Greene County Superior Court in 2012 at which Defendant

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<sup>4</sup> The DHC concluded that Defendant's actions during this deposition violated Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), Rule 3.5(a)(4) (conduct intended to disrupt a tribunal), and Rule 8.4(d) (conduct prejudicial to the administration of justice).

<sup>5</sup> The DHC concluded that these misrepresentations violated Rule 8.4(c) (conduct involving dishonesty, deceit or misrepresentation), Rule 8.4(d) (conduct prejudicial to the administration of justice), and Rule 3.3(a)(1) (making a false statement of material fact to a tribunal).

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was representing a defendant charged with murder, Judge Phyllis Gorham admonished Defendant for repeatedly failing to display respect for the court and to yield to its rulings. Later in the trial, with the jury present in the courtroom, Defendant approached the bench without having received permission and in a “loud and argumentative” tone accused the prosecutor of attempting to offer inadmissible evidence. He then noticeably grimaced at Judge Gorham. This behavior necessitated Judge Gorham calling a recess in order to address Defendant’s behavior.<sup>6</sup>

#### **IV. The Davenport Matter**

In 2012, Defendant represented Jonathan Davenport in a dispute arising from a previous business relationship between Davenport and Billy Roughton. Davenport was ultimately charged by state and federal authorities with crimes arising from this business relationship. Defendant recorded, and then uploaded to YouTube, a video of an incident in which he confronted Pasquotank County Sheriff’s Office Investigator Sam Keith, the investigating officer in Davenport’s case, and accused the Sheriff’s Office of engaging in criminal conduct by not handing over certain property to Davenport. Defendant later admitted that his purpose in uploading the video to YouTube was not to further his representation of Davenport but rather to be a “smart

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<sup>6</sup> The DHC concluded that Defendant’s behavior before Judge Gorham violated Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), Rule 8.4(d) (conduct prejudicial to the administration of justice), and Rule 3.5(a)(4)(B) (conduct intended to disrupt a tribunal).

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aleck.”<sup>7</sup>

The following day, Defendant sent a letter on behalf of Davenport directly to Roughton and the Sheriff of Pasquotank County accusing them of conspiring to violate Davenport’s rights and engaging in malicious prosecution. At the time Defendant sent this letter — in which he demanded \$3 million to settle the matter — he knew that both Roughton and the sheriff were represented by counsel.<sup>8</sup>

### **V. The Shackley Matter**

In 2013, Defendant represented Norman Shackley on a charge of impersonating a law enforcement officer. In connection with the case, Defendant obtained by subpoena phone records from one of the State’s witnesses, Jimmy Hughes. At 10:00 p.m. one evening, Defendant called a phone number listed in these records and told the person who answered the phone, Jean Sugg (whom Defendant did not know), that Hughes had “hit on” Shackley’s wife, who had “big boobs” and ran a prostitute website.<sup>9</sup>

### **VI. The Dolenti Matter**

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<sup>7</sup> The DHC concluded that these actions violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

<sup>8</sup> The DHC concluded that Defendant’s actions in sending the letter violated Rule 4.2 (communicating with persons known to be represented by counsel).

<sup>9</sup> The DHC concluded that this conduct violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

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Defendant defended a client charged with child abuse in 2013. Upon learning that the district attorney had refused to drop the charges against his client, Defendant left a voicemail for Detective Nikki Dolenti, the investigating officer in the case, in which he made the following statement in a harsh and threatening tone: "You obviously don't know what the hell you're doing. So I'm just gonna whoop your ass real bad next week unless you get your ass down there and get this case dismissed. And do your job and have some sense."<sup>10</sup>

### **VII. The Deans Matter**

Defendant was arrested by the Pitt County Sheriff's Office as a result of his voicemail to Detective Dolenti. At the time, Defendant was representing the Pitt County Sheriff's daughter, Laura Deans, and son-in-law in an adoption proceeding that was set to be finalized within the month. Defendant, who was "mad as hell" and "wanted to get back at the [Sheriff]," left a voicemail with Deans stating that he had been handling her case "as a favor to your dad when I thought that he wasn't trying to f\*\*\* me too, but I can't do that anymore, and I don't know that you need to be in my office or I need to have y'all around." Defendant also made explicit and crude comments during the voicemail regarding the sheriff, his wife, and the Pitt County

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<sup>10</sup> The DHC concluded that this conduct violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person) and Rule 8.4(d) (conduct prejudicial to the administration of justice).



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district attorney.<sup>11</sup>

During a subsequent phone call with Deans, Defendant demanded immediate payment of his fee — despite the lack of a prior agreement as to when his fee would be due — and refused to respond to Deans' questions regarding the status of the adoption or the steps she needed to take to finalize the adoption. Defendant ceased work on the case and did not have any further interaction with Deans.<sup>12</sup>

\* \* \* \*

After determining in its 8 August 2014 order that Defendant had violated the Rules of Professional Conduct in connection with the seven matters summarized above, the DHC held hearings from 16–18 September and 22–23 October 2014 for the dispositional phase of the proceeding during which it received additional evidence and heard arguments. On 13 November 2014, the DHC issued its Order of Discipline — upon which the present appeal is based — in which it (1) recited the violations of the Rules of Professional Conduct it had found in its 8 August 2014 order; (2) made

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<sup>11</sup> The DHC concluded that Defendant's statements on the voicemail violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

<sup>12</sup> The DHC concluded that by virtue of his actions with regard to Deans' case, Defendant violated Rules 8.4(a) and (g) (attempting to intentionally prejudice a client during the course of the professional relationship), Rule 1.16(d) (failing to take reasonably practicable steps to protect a client's interests upon termination of the representation), Rule 1.4(a) (failing to comply with a reasonable request for information), and Rule 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions about the representation).

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additional findings of fact relating to the dispositional phase; and (3) imposed a five-year suspension of Defendant's law license.

The extensive additional findings of fact in the Order of Discipline relating to the dispositional stage described numerous other instances of abusive, belligerent, threatening, and profane communications and conduct by Defendant — both inside and outside of the courtroom — that occurred between 2008 and 2014.<sup>13</sup> The Order of Discipline also noted numerous examples of

a recurrent pattern in Defendant's practice of law. When Defendant believes someone with whom he interacts professionally is wrong about the facts, the law, procedure, or a matter of judgment, he demands instant redress. If the person with whom he disagrees does not immediately capitulate, Defendant threatens to harm that individual in some way.

The Order of Discipline further noted numerous incidents demonstrating Defendant's penchant for "us[ing] graphic sexual commentary to embarrass and/or demean others in professional contexts." It also cited numerous instances showing that "in retaliation for perceived wrongs, [Defendant] is willing to breach his duty of

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<sup>13</sup> These additional incidents included, without limitation, Defendant referring to the Pasquotank County Attorney as an "idiot" who made "asinine" assertions and "should be ashamed of himself"; accusing attorney Shearin of engaging in "Gestapo tactics"; acting "disruptive and disrespectful" to a Superior Court judge in Hertford County and accusing the district attorney in that case — in front of a jury — of lying; accusing another assistant district attorney of being "mentally ill" and a "f\*\*\*ing Nazi" and stating to him, "I am telling you this son, and I can call you son because that's what you deserve to be called, if I didn't have a bar license, you would be a greasy spot on that table"; referring to the Greensboro Police Chief alternatively as "Mohammed," "Sahheb," and "Ahmed" when his name was actually Hassan Aden; and ordering a Superior Court judge — in open court and in the presence of the public — to "wipe the smirk off [his] face."

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loyalty to clients and former clients by disclosing confidential information and/or attempting to prejudice their interests.” Finally, the Order of Discipline stated that

[t]here is no indication that Defendant has taken ownership of his misconduct or its consequences. He has not acknowledged violating the Rules of Professional Conduct, expressed remorse, or shown any insight regarding his lack of professionalism. In his testimony during the discipline phase of this case, Defendant maintained that he didn't do anything wrong, has nothing to apologize for, and will continue to conduct himself in the same manner if permitted to continue practicing law.

Defendant filed a timely notice of appeal on 10 December 2014.

**Analysis**

Defendant raises a variety of arguments on appeal, which can be organized into two general categories. First, he makes several constitutional and procedural arguments in connection with his disciplinary proceeding and the Order of Discipline. Second, he challenges the validity of certain findings of fact and conclusions of law made by the DHC in determining that he had violated the Rules of Professional Conduct. We address each category below.

**I. Standard of Review**

Pursuant to N.C. Gen. Stat. § 84-28, the DHC has the power to discipline any attorney admitted to practice law in the State of North Carolina upon determining that the attorney has violated the North Carolina Rules of Professional Conduct.

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N.C. Gen. Stat. § 84-28(b)(2) (2015). A party may appeal to this Court from a final order of the DHC. N.C. Gen. Stat. § 84-28(h).

We review disciplinary orders of the DHC under the whole record test, which

requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.] Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion.

*Talford*, 356 N.C. at 632, 576 S.E.2d at 309-10 (internal citation and quotation marks omitted). "Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing." *Id.* at 632, 576 S.E.2d at 310 (citation, quotation marks, and brackets omitted).

The whole record test also mandates that "the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn." *Id.* However, "[t]he mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the DHC. The DHC determines the credibility of the witnesses and the weight of the evidence." *N.C. State Bar v. Adams*, \_\_ N.C. App. \_\_, \_\_, 769 S.E.2d 406, 411 (2015) (internal citation, quotation marks, and brackets omitted). Thus, "[t]he whole record test does not allow the reviewing court to replace the

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[DHC's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992) (citation and quotation marks omitted), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

## **II. Constitutional and Procedural Arguments**

### **A. Constitutionality of the DHC's Disciplinary Authority**

Defendant asserts that the Order of Discipline is null and void because the "DHC encroaches on the judiciary and violates separation of powers" principles. In making this argument, Defendant directs our attention to Article III, Section 11 of the North Carolina Constitution, which states that

all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department.

N.C. Const. art. III, § 11. He then points to Article IV, Section 3, which provides that the "General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3.

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Defendant contends that the State Bar — through the DHC — may not constitutionally exercise judicial power because it is not housed in one of the 25 principal departments referenced in Article III, Section 11. However, Defendant provides no authority for this assertion, and we fail to see how it *could* be supported, given that the same constitutional language he relies upon specifically states that “[r]egulatory [and] quasi-judicial . . . agencies may, *but need not*, be allocated within a principal department.”<sup>14</sup> N.C. Const. art. III, § 11 (emphasis added).

We also find meritless Defendant’s contention that the State Bar impermissibly encroaches on the power of North Carolina’s Judicial Branch to impose discipline in cases involving attorney misconduct. Our Supreme Court has specifically held that the State Bar and the courts of North Carolina “share concurrent jurisdiction over matters of attorney discipline” and that “questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar.” *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citation omitted). That concurrent jurisdiction does not undermine the “inherent powers of a court to deal with its attorneys.” *Id.* (citation omitted). This Court has explained that

under the system of concurrent jurisdiction over attorney  
conduct and discipline in effect in North Carolina, both the

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<sup>14</sup> In his brief, Defendant cites to *N.C. State Bd. of Dental Examiners v. F.T.C.*, \_\_ U.S. \_\_, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015), a case considering whether the North Carolina Board of Dental Examiners was entitled to immunity from suit under federal antitrust law. However, he fails to demonstrate how that case is relevant to the present action.

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State Bar and the courts have an important role to play in assuring that attorneys conduct themselves properly, with the courts focusing on protecting themselves from fraud and impropriety and serving the ends of the administration of justice, while the State Bar has responsibility for the broad range of questions relating to the propriety and ethics of an attorney, and with neither to act in such a manner as to disable or abridge the powers of the other.

*Cunningham v. Selman*, 201 N.C. App. 270, 284, 689 S.E.2d 517, 526 (2009) (internal citations, quotation marks, and brackets omitted).

Defendant provides no basis for his assertion that the State Bar's actions in the present case usurped the role of North Carolina's judiciary in regulating attorney misconduct. Accordingly, we overrule Defendant's argument on this issue.

**B. Due Process**

In his brief, Defendant makes the sweeping assertion that the entire disciplinary "process was biased and void of fairness and due process and must be vacated." In support of this contention, Defendant expresses his disagreement with various witnesses' testimony, actions of the State Bar, statements of DHC members, and rulings of the DHC.

However, because Defendant fails to provide any substantive arguments or legal authority supporting his contention that the proceeding as a whole violated his right to due process on account of bias or unfairness, we deem this issue abandoned pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. See N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which

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no reason or argument is stated, will be taken as abandoned.”); *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 668, 657 S.E.2d 378, 387 (2008) (“[D]efendant fails to cite any authority for his assignments of error regarding DHC’s failure to properly weigh the aggravating and mitigating factors. As such, these assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6)[.]”).

Moreover, based on our own thorough review of the extensive record in this case, we are satisfied that the DHC conducted a fair and unbiased process that fully comported with principles of due process. Defendant was given proper notice of the allegations against him; he was allowed access to the evidence supporting these allegations; he was permitted to call his own witnesses, introduce evidence, and cross-examine opposing witnesses; and he was able to file motions and make legal arguments. This disciplinary action spanned one-and-a-half years and produced a record exceeding 10,000 pages. The DHC ruled on numerous motions filed by Defendant and issued orders containing extensive and detailed findings of fact and conclusions of law. Therefore, the record belies Defendant’s assertion that he was denied due process in connection with his disciplinary proceeding.

### **C. Freedom of Speech**

Defendant next makes the broad assertion that the Rules of Professional Conduct are unconstitutional — either facially or as applied to him — to the extent that they allowed him to be punished for speech that is protected by the First



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Amendment to the United States Constitution.<sup>15</sup> However, Defendant fails to make any particularized arguments as to which rules he specifically believes are either facially unconstitutional or have been unconstitutionally applied to him. As such, he has waived his right to appellate review of this issue by failing to satisfy his burden as the appellant in this appeal to show a specific deprivation of his legal rights. See *State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981) (“[T]he appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued.” (citation and quotation marks omitted)).

Nevertheless, we take this opportunity to reject Defendant’s categorical assertion that the First Amendment provides attorneys with blanket immunity from facing disciplinary sanctions for violating the ethical rules applicable to lawyers in North Carolina simply because those violations involve some form of speech. As a general proposition, the First Amendment does not immunize an attorney from being disciplined for violating the Rules of Professional conduct simply because the attorney employs “speech” in committing the violations. As with all constitutional rights, the right to free speech is not absolute.

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<sup>15</sup> We note that while this case was pending before the DHC, Defendant asserted several First Amendment claims arising from this disciplinary proceeding in a lawsuit against the State Bar filed in Wake County Superior Court. That complaint was dismissed, and Defendant did not appeal the decision.

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As our Supreme Court has stated,

[f]reedom of speech is not an unlimited, unqualified right. Speech may be subordinated to other values and considerations, and may be reasonably restrained as to time and place. It is well settled that, within proper limits, the right of free speech is subject to legislative restriction when such restriction is in the public interest. . . . The constitutional right of freedom of speech does not extend . . . to every use and abuse of the spoken and written word.

*State v. Leigh*, 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971) (internal citation omitted).

Indeed, the United States Supreme Court has recognized that certain restrictions on speech apply uniquely to attorneys.

It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. *Even outside the courtroom, a majority of the Court in two separate opinions [has] observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.*

*Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071, 115 L. Ed. 2d 888, 921 (1991); *see, e.g., id.* at 1073, 115 L. Ed. 2d at 922 (noting that in cases relating to regulation of advertising the Supreme Court has "not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses"); *Sheppard v. Maxwell*, 384 U.S. 333, 363, 16 L. Ed. 2d 600, 620 (1966) (explaining that "[c]ollaboration between counsel and the press as to information affecting the fairness

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of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures”).

In balancing the First Amendment rights of attorneys against the ability of states to discipline attorneys for unethical conduct, courts are to “engage[ ] in a balancing process, weighing the State’s interest in the regulation of a specialized profession against a lawyer’s First Amendment interest in the kind of speech that was at issue.” *Gentile*, 501 U.S. at 1073, 115 L. Ed. 2d at 922. The Supreme Court has explained that “[s]tates have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625, 132 L. Ed. 2d 541, 550 (1995) (citation, quotation marks, and ellipses omitted).

Moreover, “[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 44 L. Ed. 2d 572, 588 (1975) (citation omitted). As such, the Supreme Court has recognized the substantial interest possessed by states both in “protect[ing] the integrity and fairness of a State’s judicial system,” *Gentile*, 501 U.S. at 1075, 115 L. Ed. 2d at 923, and in “protect[ing] the flagging reputations of . . .

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lawyers by preventing them from engaging in conduct that . . . is universally regarded as deplorable and beneath common decency . . . [.]” *Went For It*, 515 U.S. at 625, 132 L. Ed. 2d at 550 (quotation marks omitted).

We recognize that the precise contours of the restrictions that the First Amendment imposes on the power of states to regulate attorney speech are not always clear. However, judicial resolution of such questions may only occur in cases where, unlike here, the issues have been properly presented to the court.

**D. Assistance of Co-counsel**

Defendant next contends that the DHC violated his right to counsel by granting the State Bar’s motion that he be required to choose between either representing himself or being represented by counsel. At the beginning of his disciplinary proceeding, Defendant attempted to simultaneously represent himself *and* employ the assistance of co-counsel. The DHC ruled that Defendant would have to choose between proceeding *pro se* or, alternatively, being represented by counsel.

According to N.C. Gen. Stat. § 1-11, “[a] party may appear either in person or by attorney in actions or proceedings in which he is interested.” N.C. Gen. Stat. § 1-11 (2015). Our Supreme Court has construed this provision to mean that a litigant “has no right to ‘appear’ both by himself and by counsel.” *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 384-85 (1981). While Defendant argues that this general rule should be modified when the party is an attorney, he cites no legal

authority for this position, and we have been unable to locate any caselaw that would support his argument. Accordingly, we conclude that the DHC's ruling on this issue was proper.

**E. Amendment to Complaint**

Defendant also contends that the DHC improperly allowed the State Bar to file a second amended complaint containing additional allegations that were not sufficiently related to the allegations in the original complaint. The motion seeking leave to file the second amended complaint was filed on 4 November 2013, and it was granted on 3 December 2013 without any response from Defendant having been filed. The DHC heard evidence relating to the new allegations during the hearings for the adjudicatory phase, which concluded on 11 June 2014. Defendant did not raise any challenge to this amendment until 6 August 2014 — approximately eight months after the motion to amend was granted and almost two months after the DHC concluded its evidentiary hearings on all of the allegations, including those contained in the second amended complaint.

Unless an issue is automatically preserved by law, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a *timely* request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1) (emphasis added). Defendant has presented no legal

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authority supporting the proposition that this issue was automatically preserved or was preserved by his untimely objection filed months after the motion to amend was filed and granted. Accordingly, we hold that due to his failure to raise a timely objection to the filing of the second amended complaint, Defendant has waived his right to appellate review of this issue. *See N.C. State Bar v. Beaman*, 100 N.C. App. 677, 684, 398 S.E.2d 68, 72 (1990) (because “no objection to the State Bar’s motion to amend its complaint to include [the defendant]’s alleged violation of Rule 1.2(D) was made and . . . his alleged violation of this rule was argued before the Committee . . . [.] the issue will be treated as being properly pled”).

### **F. Signatures on Complaints**

Defendant next argues that the DHC lacked subject matter jurisdiction because the chairperson of the State Bar’s Grievance Committee did not physically sign the original complaint or the second amended complaint. According to the State Bar Discipline and Disability Rules, once the Grievance Committee has determined that probable cause exists to believe that a violation of the Rules of Professional Conduct has occurred, a formal complaint is filed. 27 N.C. Admin Code 1B.0113(a). “Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.” 27 N.C. Admin Code 1B.0113(n).

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Here, the original complaint contained a digital image of the signature of the then-chairperson of the Grievance Committee, Margaret M. Hunt. That complaint, as well as the second amended complaint, also bore the signatures of counsel for the State Bar.<sup>16</sup> Defendant has cited to no legal authority providing that it was impermissible for the Grievance Committee chairperson to use an electronic reproduction of her signature on the initial complaint.

Indeed, our Supreme Court has explained that “public documents may be authenticated by mechanical reproduction of the signature of the authorized officer when he intends to adopt the mechanical reproduction as his signature.” *State v. Watts*, 289 N.C. 445, 449, 222 S.E.2d 389, 392 (1976); *see id.* at 448, 222 S.E.2d at 391 (“[I]n legal contemplation ‘to sign’ means to attach a name or cause it to be attached by any of the known methods of impressing the name on paper with the intention of signing it.”). Accordingly, we reject Defendant’s argument that subject matter jurisdiction was lacking simply because Hunt signed the original complaint by means of an electronic signature.<sup>17</sup>

### **G. Notice of Factors to be Considered at Dispositional Phase**

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<sup>16</sup> After Defendant challenged the lack of an original signature on the initial complaint, the DHC allowed the State Bar to retroactively file versions of the complaints containing Hunt’s original ink signature.

<sup>17</sup> We note that pursuant to 27 N.C. Admin Code 1B.0113(n), the Grievance Committee chairperson was only required to approve, rather than sign, the amended complaints.

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Defendant also argues that he was not provided advance “notice of the aggravating factors that the [State] Bar intended to use against him” during the dispositional phase of the proceeding. Pursuant to the Discipline and Disability Rules, “[i]f the charges of misconduct are established, the hearing panel will then consider any evidence relevant to the discipline to be imposed.” 27 N.C. Admin. Code 1B.0114(w). These rules, in turn, list factors that the DHC is to consider in all cases, *see* 27 N.C. Admin. Code 1B.0114(w)(3), as well as additional factors to be considered in cases where the DHC imposes a sanction of disbarment or suspension, *see* 27 N.C. Admin. Code 1B.0114(w)(1).

Defendant provides no authority — nor have we found any — in support of his contention that the State Bar was required to notify him in advance of which *particular* factors in 27 N.C. Admin. Code 1B.0114(w) it planned to argue were relevant at the dispositional phase. Moreover, the statute itself gave Defendant notice of the list of factors that the State Bar could rely upon. We note that Defendant does not dispute that he received in discovery notice of all the facts the State Bar sought to establish in both the adjudicatory and dispositional phases of the proceedings. Accordingly, we do not find merit in Defendant’s argument on this issue.

### **H. Adequacy of Findings and Conclusions at Dispositional Phase**

In addition, Defendant contends that the DHC never provided him with adequate reasons for the sanction it imposed against him and that the DHC acted



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improperly in largely adopting the proposed findings and conclusions submitted by the State Bar.

In imposing a disciplinary sanction, the DHC must support its “choice with written findings that . . . are consistent with the statutory scheme of N.C.G.S. § 84-28[.]” *Talford*, 356 N.C. at 638, 576 S.E.2d at 313. N.C. Gen. Stat. § 84-28 provides five levels of punishment for attorney misconduct: disbarment, suspension, censure, reprimand, and admonition. N.C. Gen. Stat. § 84-28(c). Our Supreme Court has explained that the statutory scheme set out in N.C. Gen. Stat. § 84-28 “clearly evidences an intent to punish attorneys in an escalating fashion keyed to: (1) the harm or potential harm created by the attorney’s misconduct, and (2) a demonstrable need to protect the public.” *Talford*, 356 N.C. at 637-38, 576 S.E.2d at 313 (emphasis omitted). Furthermore,

in order to merit the imposition of suspension or disbarment, there must be a clear showing of how the attorney’s actions resulted in significant harm or potential significant harm to [a client, the administration of justice, the profession, or members of the public], and there must be a clear showing of why suspension and disbarment are the only sanction options that can adequately serve to protect the public from future transgressions by the attorney in question. . . . Thus, upon imposing a given sanction against an offending attorney, the DHC must provide support for its decision by including adequate and specific findings that address these two key statutory considerations.

*Id.* at 638, 576 S.E.2d at 313 (quotation marks and emphasis omitted).

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Here, the dispositional portion of the Order of Discipline included (1) extensive factual findings as to Defendant's actions that clearly caused significant — or potentially significant — harm to clients, the administration of justice, the profession, and members of the public;<sup>18</sup> (2) conclusions of law regarding the specific factors set forth in 27 N.C. Admin. Code 1B.0114(w) relevant to this case; and (3) an explanation as to why a five-year suspension was the least severe sanction necessary to protect the public from future transgressions by Defendant.

On this last point, the DHC stated the following in its Order of Discipline:

7. Defendant's persistent pattern of misconduct up through and including his actions in this disciplinary proceeding indicate that Defendant is either unwilling or unable to conform his behavior to the requirements of the Rules of Professional Conduct. Defendant refuses to acknowledge the wrongfulness of his conduct and stated that he does not intend to modify his behavior. Accordingly, if Defendant were permitted to continue practicing law, he would pose a significant risk of continued harm to clients, the profession, the public, and the administration of justice.

8. The Hearing Panel finds that admonition,

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<sup>18</sup> The DHC dedicated 13 single-spaced pages of the dispositional portion of its Order of Discipline to describe numerous incidents involving actual or potential harm caused by Defendant's actions. Defendant does not make any specific challenges to these findings. Rather, he asserts that (1) the DHC did not tie the incidents described in those findings to specific violations of the Rules of Professional Conduct; and (2) some of those incidents occurred outside of the six-year statute of limitations that generally applies to the filing of attorney misconduct grievances, *see* 27 N.C. Admin. Code 1B.0111(f)(4). However, Defendant fails to point to any authority mandating that facts relevant at the *dispositional* phase — as opposed to facts underlying a particular *adjudication* of misconduct — must be specifically tied to a particular disciplinary rule or have occurred within six years of the filing of a grievance. In fact, “[i]f the charges of misconduct are established, the hearing panel will then consider *any* evidence relevant to the discipline to be imposed.” 27 N.C. Admin. Code 1B.0114(w) (*emphasis added*).

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reprimand, or censure would not be sufficient discipline because of the gravity of the harm to the administration of justice and to the legal profession in the present case. Furthermore, the Panel finds that any sanction less than suspension would fail to acknowledge the seriousness of the offenses committed by Defendant, would not adequately protect the public, and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in this State.

9. Notwithstanding repeated prior warnings about the impropriety of his conduct and an attempt to reform his behavior through mentoring, Defendant exhibits escalating misconduct and a wholly unrepentant attitude. Accordingly, the protection of the public requires that Defendant be required to demonstrate rehabilitation and reformation before he may be permitted to resume practicing law.

10. The Hearing Panel finds and concludes that the public can only be adequately protected by an active suspension of Defendant's law license, with reinstatement to the practice of law conditioned upon a showing of reformation and other reasonable conditions precedent to reinstatement.

Defendant also asserts that the Order of Discipline is deficient because many of its findings were taken verbatim from the proposed order of discipline submitted by the State Bar. Defendant asserts that such action amounts to an abdication of the DHC's authority. We are not persuaded.

It is the accepted practice in North Carolina for the prevailing party to draft and submit a proposed order that the decision-making body may then issue as its own — with or without amendments. *See, e.g., In re J.B.*, 172 N.C. App. 1, 25, 616 S.E.2d

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264, 279 (2005) (“Nothing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf.”); *Farris v. Burke Cty. Bd. of Educ.*, 355 N.C. 225, 242, 559 S.E.2d 774, 784 (2002) (upholding propriety of school superintendent’s counsel preparing findings of fact to be adopted by board of education and noting that “[s]imilar procedures are routine in civil cases, where a judge is permitted to ask the prevailing party to draft a judgment”); *Johnson v. Johnson*, 67 N.C. App. 250, 257, 313 S.E.2d 162, 166 (1984) (“The trial judge properly directed the attorney for the [prevailing party] to prepare proposed findings and conclusions and draft the judgment, and adopted the judgment as his own when tendered and signed.”).

Here, Defendant has not directed our attention to any applicable statute or regulation prohibiting the DHC from adopting the proposed findings and conclusions submitted by the State Bar. Accordingly, he has failed to show error. Moreover, we conclude that the DHC fully complied with the requirements of N.C. Gen. Stat. § 84-28 in imposing its sanction in this case.

### **I. Assessment of Fees and Costs**

Defendant next asserts that the DHC erred in assessing fees and costs against him in the amount of \$35,315.95. However, because Defendant neither cites to any legal authority in support of this argument nor explains why he believes the amount of fees and costs assessed was unreasonable, we deem this issue waived pursuant to

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Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. *See Ethridge*, 188 N.C. App. at 668, 657 S.E.2d at 387 (holding that because “defendant fail[ed] to cite any authority” for certain assignments of error, those “assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6)”).<sup>19</sup>

### **III. Challenges to Factual Findings and Conclusions of Law**

Having rejected all of Defendant’s constitutional and procedural arguments, we next turn our attention to Defendant’s specific challenges to the DHC’s findings of fact and conclusions of law as to each of the seven matters summarized earlier in this opinion that formed the basis for his disciplinary proceeding. We address in turn each of Defendant’s arguments regarding these seven matters.

#### **A. The Pollard Matter**

Defendant contends that the DHC’s findings of fact do not support its conclusion of law that his behavior during the deposition of Pollard constituted “conduct intended to disrupt a tribunal” in violation of Rule 3.5(a)(4) because the deposition did not constitute a “tribunal.” Defendant asserts that depositions were only included within the meaning of the term “tribunal” by virtue of a 2015

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<sup>19</sup> Moreover, we note that N.C. Gen. Stat. § 84-34.2 expressly permits the State Bar to impose certain types of fees, including an “administrative fee for any attorney against whom discipline has been imposed.” N.C. Gen. Stat. § 84-34.2 (2015). In its brief, the State Bar has represented to this Court that “[i]n April 2010, the [State Bar] Council adopted a schedule of administrative fees for the disciplinary program that included a fee of \$1,500.00 per day for each day spent in a contested DHC hearing that resulted in the imposition of discipline.”

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amendment to the Rules of Professional Conduct such that a deposition could not properly have been considered a “tribunal” at the time of Pollard’s 2011 deposition.

However, at the time of Pollard’s deposition, the official commentary to the Rules of Professional Conduct stated, in pertinent part, that “[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, *including a deposition.*” N.C. Rev. R. Prof. Conduct 3.5, cmt. 10 (2011) (emphasis added). “The Comment accompanying each Rule [of Professional Conduct] explains and illustrates the meaning and purpose of the Rule.” N.C. Rev. R. Prof. Conduct 0.2[8]. As such, the official commentary does “not add obligations to the Rules but provide[s] guidance for practicing in compliance with the Rules.” N.C. Rev. R. Prof. Conduct 0.2[1].

This Court has previously utilized the commentary to the Rules of Professional Conduct in construing their meaning. *See, e.g., N.C. State Bar v. Merrell*, \_\_ N.C. App. \_\_, \_\_, 777 S.E.2d 103, 114 (2015) (scope of Rule 1.7(a) regarding representation involving conflict of interest); *N.C. State Bar v. Simmons*, \_\_ N.C. App. \_\_, \_\_, 757 S.E.2d 357, 363-64 (meaning of “criminal act” under Rule 8.4(b)), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 848 (2014); *N.C. State Bar v. Key*, 189 N.C. App. 80, 91-92, 658 S.E.2d 493, 501 (2008) (scope of “conduct prejudicial to the administration of

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justice” under Rule 8.4). Therefore, we dismiss Defendant’s argument that the DHC erred in treating a deposition as a “tribunal” for purposes of Rule 3.5.<sup>20</sup>

Defendant also argues that the DHC did not make sufficient findings to support its conclusion that his comments during the Pollard deposition constituted “conduct prejudicial to the administration of justice in violation of Rule 8.4(d).” The Comment to Rule 8.4 states that

[a] showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a *reasonable likelihood of prejudicing the administration of justice*. . . . The phrase “conduct prejudicial to the administration of justice” in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings.

N.C. Rev. R. Prof. Conduct 8.4, cmt. 4 (emphasis added). We have previously adopted the standard set forth in this Comment in construing Rule 8.4. *See Key*, 189 N.C. App. at 91-92, 658 S.E.2d at 501 (applying “reasonable likelihood of prejudicing the administration of justice” standard contained in Comment to Rule 8.4).

Here, we are satisfied that the DHC’s findings — which showed that Defendant repeatedly interjected his own questions and commentary, made sarcastic remarks, coached Pollard on how to respond to particular questions, and answered questions

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<sup>20</sup> Our holding on this issue applies equally to Defendant’s challenges to Conclusions Nos. 2(d)-(e) of the DHC’s conclusions of law from the adjudicatory phase in which he makes the same argument with respect to his conduct during the Langston deposition.

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for Pollard — supported its conclusion that Defendant violated Rule 8.4(d) as it was reasonable to conclude that such disruptive and improper tactics “had a reasonable likelihood of prejudicing the administration of justice.” N.C. Rev. R. Prof. Conduct 8.4, cmt. 4.

Defendant also contests several of the DHC’s findings of fact relating to his statement in an affidavit that he did not sponsor the justice4stacey.com website. Defendant specifically challenges Finding No. 31, which states that “Defendant never specifically billed Barbara Pollard to be reimbursed for the website expenses.” He argues that “Barbara Pollard and [Defendant] testified that she reimbursed all website expenses and no one testified otherwise.” However, the fact that Pollard may at some point have reimbursed Defendant for the website costs does not undermine Finding No. 31, which simply states that he never specifically billed her for these expenses.

Defendant next challenges Finding No. 32, which states that

[a]lthough Defendant has contended that he was reimbursed by his client for the cost of registering the website, he did not produce any documents in response to a request for production of all documents reflecting payments by him in connection with the justice4stacey website and his efforts to obtain reimbursement from Ms. Pollard. At this hearing, Defendant testified that he did not produce the documents because he did not have them.

Defendant asserts that he attempted to enter such documentation into evidence during the hearing but the DHC denied his request. Our review of the



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hearing transcript reveals that based upon the State Bar's objection, the DHC denied Defendant's attempt to enter the receipts into evidence because he had failed to provide them in discovery despite the State Bar's unambiguous request for him to do so. Defendant has not presented any argument that this evidentiary ruling was erroneous. Accordingly, we find no merit to Defendant's challenge to Finding No. 32.

Defendant also challenges Conclusion No. 2(c), which states as follows:

By swearing in an affidavit submitted to the court that he did not sponsor the website and that another person was responsible for the expenses of the website when in fact he was the initial registrant and administrator of the website and paid for the registration, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]

Defendant contends that "[t]here is no supportive finding that [Defendant] was the 'sponsor' of the website . . . ." However, the DHC made the following findings regarding the website:

24. Defendant was involved in discussions and meetings about setting up the website.

....

26. Defendant was the initial registrant and administrator of the website which was registered on July 11, 2007.

27. Defendant paid the domain registrar for the website to be registered.

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28. Defendant was identified as the contact person on the website and his name, address, telephone number, and email address were listed. As a result, Defendant received numerous phone calls and correspondence from visitors to the website.

29. A passcode was required to post material to the website. Defendant had the passcode and posted some documents on the website.

30. Defendant was involved in the decision to take the website down.

31. Defendant never specifically billed Barbara Pollard to be reimbursed for the website expenses.

These findings describe Defendant's role in planning, registering, paying to set up, controlling access to, and providing content for the website. Therefore, we conclude the DHC's determination that Defendant was the sponsor of the justice4stacey.com website is sufficiently supported by the DHC's findings of fact.

Defendant also argues that the DHC erred in Conclusion No. 2(c) in determining that his misstatement regarding his sponsorship of the website was "conduct prejudicial to the administration of justice[.]" However, we believe that the DHC's findings did, in fact, demonstrate that Defendant's actions "had a reasonable likelihood of prejudicing the administration of justice" as they showed that Defendant made a false representation about a matter material to Fagan's motion to change venue that was pending before the court.

**B. The Langston Matter**

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Defendant challenges the DHC's conclusion that "[b]y abruptly leaving Ms. Langston's deposition with the deponent prior to the completion of opposing counsel's questioning without filing a motion to terminate the deposition, Defendant knowingly disobeyed an obligation under the rules of the tribunal in violation of Rule 3.4(c)[.]" He argues that this conclusion is unsupported because the DHC never specifically named the rule that Defendant disobeyed. However, it is clear that the DHC's conclusion was a reference to Rule 30(d) of the North Carolina Rules of Civil Procedure,<sup>21</sup> which is titled "Motion to terminate or limit examination" and explains that a *judge* — as opposed to counsel for a party — may "cease" or "limit" a deposition "on motion of a party . . . ." The fact that the DHC was referring to Rule 30(d) is apparent because the DHC specifically discussed Defendant ending the deposition

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<sup>21</sup> N.C. R. Civ. P. 30(d) provides as follows:

(d) Motion to terminate or limit examination. — At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order before whom the examination is being taken to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of a judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

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without “filing a motion to terminate the deposition[.]” Accordingly, this argument is without merit.

Defendant also challenges the following findings of fact with respect to one of his misstatements during the Langston Matter:

55. On May 2, 2012, in a hearing on the plaintiff's motion to prevent waste of marital and separate property pending equitable distribution, Defendant represented to the presiding judge that R & L Investment Homes, LLC had been dissolved by the North Carolina Secretary of State because Mr. Langston[, the ex-husband of Defendant's client,] had forged documents, stating, “Yes, your Honor, and the Secretary of State just annulled the entity because he forged three of ‘em that say something different.”

56. At the time Defendant made this statement to the court, Defendant knew the North Carolina Secretary of State had issued a Certificate of Administrative Dissolution of R & L Investment Homes, LLC for failure to file an annual report.

Defendant asserts that these findings “do not say that [he] knew the statement at issue was false as required by RPC 8.4 and it [sic] omits undisputed testimony from [him] and Ms. Lee that they both believed the statement to be true.” However, the record shows that Defendant himself admitted that he knew the corporation had been administratively dissolved rather than having been dissolved due to fraud. Defendant further acknowledged that at the time he made the statement that the corporation had been “annulled” because of fraud, he “knew there was a letter stating

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that it was administratively dissolved.” Accordingly, Findings Nos. 55 and 56 are adequately supported by the evidence.

For similar reasons, we reject Defendant’s challenge to Conclusion No. 2(g), which states, in pertinent part, that

[b]y falsely representing to the court that the Secretary of State had dissolved the LLC because of forgery, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]

Defendant argues that the DHC did not make a specific finding that he *knowingly* made the false statement. However, as explained above, both the DHC’s findings and the supporting evidence show that Defendant was indeed aware of the falsity of his statement.

Defendant also contends that the DHC’s findings do not support its conclusion that Defendant’s misstatement had a prejudicial impact on the administration of justice. This assertion is meritless as the DHC could reasonably have determined that the misrepresentation “had a reasonable likelihood of prejudicing the administration of justice” in that it would have caused the trial court to labor under the false notion that a party in the case had committed forgery.

Defendant next challenges Finding No. 62, which states that

Defendant’s statement accusing Mr. Miller[, Defendant’s opposing counsel in the Langston Matter,] of slipping the handwritten provision into the mediated settlement

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agreement after Defendant had signed it and without Defendant's knowledge or approval was false and Defendant knew at the time he made the statement that it was false.

In his brief, Defendant states that "Finding #62 that [Defendant] *knew* . . . the statement was false is not supported by the record. [W]here the Bar's own witness contradicted the allegation and 2 witnesses said [Defendant] did not make the statement." (Internal citations omitted.)

We are satisfied that the record contains sufficient evidence from which the DHC could have found that Defendant did, in fact, knowingly make a false statement regarding Miller "slipping" a provision into the settlement agreement without Defendant's knowledge. Miller testified before the DHC that "[Defendant] accused me of slipping [the provision] in before he signed the document and without his knowledge. And that statement was made to Judge Paul."

Judge Paul confirmed in his testimony before the DHC that Defendant made such an accusation in his presence. In addition, the mediator who oversaw the settlement negotiations testified that he had "a specific recollection of pointing out [the added provision] to [Defendant]" and then asking Defendant and his client if "either of you have any problem" with the additional provision at which point the mediator "showed them the provision" and "[t]hey both said they had no problem with it." This testimony is reflected in the DHC's Finding No. 61, which states that "[p]rior

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to Defendant signing the mediated settlement agreement, the mediator had pointed out the handwritten provision to Defendant and Defendant agreed to the provision.”

We note that Defendant correctly points out that Finding No. 62 incorrectly states that Defendant accused Miller of slipping in the provision *after* Defendant signed the settlement agreement rather than *before* he signed it. However, we find this discrepancy immaterial to the overall finding — which, as shown above, is supported by the evidence — that Defendant falsely accused Miller of adding a provision to the settlement agreement without Defendant’s knowledge or approval. That finding, in turn, supports the DHC’s conclusion of law that Defendant “knowingly made a false statement of material fact to a tribunal in violation of Rule 3.3(a)(1), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).”

Therefore, even though Finding No. 62 — as written — is partially unsupported by the evidence of record, the remaining portion of Finding No. 62, in conjunction with Finding No. 61, adequately supports the DHC’s legal conclusion. *See, e.g., Meadows v. Meadows*, \_\_ N.C. App. \_\_, \_\_, 782 S.E.2d 561, 566 (2016) (“[E]ven assuming, *arguendo*, that both findings are not supported by competent evidence, it is of no consequence to the instant case. The remaining binding findings of fact, cited above, are sufficient to support the trial court’s judgment . . . .”); *Estate*

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of *Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) (“[W]here there are sufficient findings of fact based on competent evidence to support the tribunal’s conclusions of law, the decision will not be disturbed because of other erroneous findings which do not affect the conclusions.” (citation, quotation marks, and brackets omitted)). Accordingly, we find Defendant’s argument on this issue to be without merit.

**C. The Gorham Matter**

Defendant next challenges the following conclusion of law with regard to Defendant’s conduct toward Judge Gorham:

By being disrespectful to the judge during a jury trial after having been warned by the Court about his conduct, Defendant knowingly disobeyed an obligation under the rules of the tribunal in violation of Rule 3.4(c), engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d), and engaged in conduct intended to disrupt a tribunal by engaging in undignified or discourteous conduct that is degrading to a tribunal in violation of Rule 3.5(a)(4)(B)[.]

Defendant contends that there is no finding or evidence indicating that he “knowingly disobeyed an obligation under the rules of the tribunal” or engaged in conduct “degrading to a tribunal.” Rather, he asserts that the record shows that nothing happened “more than the morning recess in a murder trial.”

The DHC made the following findings with regard to this incident:

64. During the course of the trial Defendant spoke disrespectfully to the judge at a bench conference



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and Judge Gorham admonished Defendant about engaging in disrespectful behavior toward the court.

65. Subsequently, at another bench conference on August 1, 2012, while the jury was present in the courtroom, Defendant grimaced at Judge Gorham and in an angry tone of voice accused Judge Gorham of allowing the prosecutor to get inadmissible evidence to the jury.

66. Defendant's conduct prompted Judge Gorham to declare a recess in the trial and give the jury a break so that she could address Defendant's conduct.

67. During the in-chambers discussion about Defendant's conduct, Defendant stated: a) "And I do think if I was angry, I am sorry that I was angry and I expressed it. I'm not going to deny that I was." and b) "you said that I appeared disrespectful and I had a grimace and I am trying to explain that I was upset and the reasons that have gone into my [being] upset."

68. Rule 12 of the North Carolina General Rules of Practice for the Superior and District Courts provides: "Counsel are at all times to conduct themselves with dignity and propriety ... Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court."

These findings — which are supported in the record by the testimony of Assistant District Attorney Mike Muskus, who was the prosecutor present during these events — clearly support the DHC's conclusions. To the extent Defendant argues there is no evidence that he *knew* he was violating a rule or causing a disruption, it is axiomatic that one's state of mind is rarely shown by direct evidence and must often be inferred from the circumstances. *See Johnson v. Phoenix Mut. Life*

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*Ins. Co.*, 300 N.C. 247, 260, 266 S.E.2d 610, 619 (1980) (“A litigant’s state of mind is seldom provable by direct evidence but must ordinarily be proven by circumstances from which it may be inferred.”). Here, it was eminently reasonable for the DHC to conclude that Defendant understood he was not conducting himself “with dignity and propriety,” “yield[ing] gracefully to rulings of the court,” “avoid[ing] detrimental remarks both in court and out[,]” and “promot[ing] respect for the court.”

**D. The Davenport Matter**

With respect to his representation of Davenport, Defendant first challenges the DHC’s finding that he “sent a demand letter” to Roughton and the Sheriff of Pasquotank County. However, Defendant admitted in his answer filed with the DHC that he sent the demand letter. Accordingly, he may not challenge on appeal the DHC’s finding as to that fact. *See Baker v. Mauldin*, 82 N.C. App. 404, 406, 346 S.E.2d 240, 241 (1986) (holding that a defendant is bound by admissions in his answer).

Defendant also challenges Finding No. 84, which states, in relevant part, that Defendant “was aware that [Norman] Shearin represented Roughton in the dispute with Davenport . . . .” However, among other evidence establishing that Defendant knew Roughton was represented by counsel, the record shows that (1) Roughton’s attorney, Shearin, testified that he had conversations with Phillip Hayes, Defendant’s co-counsel, regarding the dispute between Roughton and Davenport; and

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(2) within a month prior to sending the demand letter, Defendant contacted Shearin's office about taking Roughton's deposition. Accordingly, this evidence supports the DHC's finding that Defendant did indeed know Roughton was represented by counsel at the time he sent the demand letter.

Defendant next challenges the DHC's Conclusion No. 2(j), which states that

[b]y impugning the integrity of the investigating officer in Davenport's pending criminal cases and accusing the Sheriff's Department of a criminal act in a video posted online, Defendant used means in representing a client that had no substantial purpose other than to embarrass or burden a third person in violation of Rule 4.4(a)[.]

Specifically, Defendant contends that "[t]here is no finding or fact in the record which shows that [he] accused [Investigator] Keith of being dishonest or lacking in integrity nor even that Keith was 'the investigating officer.' "

However, the Pasquotank County Attorney, Mike Cox, testified that Investigator Keith was indeed the officer investigating Davenport. Moreover, both the DHC's findings of fact and the video evidence of the encounter, which is in the record, establish that when Investigator Keith refused to release certain property to Defendant, Defendant referenced North Carolina's embezzlement statute and stated that it was a "class C felony by the sheriff" for him not to return to the proper owner property obtained under color of law.

Given the contents of the video and Defendant's admission that he put the video on the Internet to be "a smart aleck" rather than to further his representation

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of Davenport, we are satisfied that there is support in the record for the DHC's conclusion that Defendant "used means in representing a client that had no substantial purpose other than to embarrass or burden a third person in violation of Rule 4.4(a)."

**E. The Shackley Matter**

Defendant challenges Findings Nos. 95 and 97 in connection with the Shackley Matter, which state as follows:

95. Thereafter during the phone conversation, Defendant made a number of assertions about Hughes, including that Hughes had "hit on" Shackley's wife, who "had big boobs" and ran a prostitution website.

.....

97. Immediately after the phone conversation, Hughes's acquaintance called Hughes and reported — among other things — that Defendant had referenced Hughes'[s] preference for bigbreasted women, and his interest in a "prostitute."

While Defendant contends that these findings are "misleading to a fraudulent degree," he fails to explain how this is so. Moreover, these findings are largely supported both by Sugg's testimony and the handwritten notes she made on the evening of the call.

**F. The Dolenti Matter**

Defendant argues that the characterization in Finding No. 103 of the tone of the voicemail he left for Dolenti as "threatening, insulting, and intimidating" is

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unsupported because Detective Dolenti never testified at the disciplinary proceeding. However, based on our consideration of the voicemail — which is contained in the record on appeal as an audio recording — we believe that the evidence fully supported the DHC's finding that Defendant's tone was "threatening, insulting, and intimidating."

**G. The Deans Matter**

We also find no merit in Defendant's challenge to Finding No. 110, which states that "Defendant's comments to Mrs. Deans about her father and stepmother and the Pitt County District Attorney were malicious and vindictive." Defendant's sole ground for challenging this finding is that neither the complaint nor the Order of Discipline included the actual words used in the voicemail. However, the voicemail was entered into evidence during the proceeding and is part of the record on appeal. The recording supports the DHC's determination that the comments made about Deans' father and stepmother and the district attorney were "malicious and vindictive." Nor are we persuaded by Defendant's argument that the DHC was required to quote verbatim the inappropriate comments he made.

**Conclusion**

For the reasons stated above, we affirm the DHC's 13 November 2014 Order of Discipline.

**AFFIRMED.**

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Chief Judge McGEE and Judge STEPHENS concur.