OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
FILED
10-28-2026
KSTEVENSON
ACTING DISCIPLINARY CLERK

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DAVID S. GINGRAS** Bar No. 021097 Respondent.	**No. PDJ 2026-9010** **REPLY IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

When circumstances change, a good lawyer must always reevaluate his position. More than six months ago, on April 14, 2026, Respondent filed a Motion to Dismiss arguing the State Bar's claims in this case violated Arizona's anti-SLAPP law, A.R.S. § 12–751. That motion also contained a separate and alternative request for summary judgment.

The PDJ later took the position the anti-SLAPP law did not apply here. Respondent respectfully disagrees. For now, this leaves the issue of summary judgment on three remaining issues:

1.) The State Bar's claim that Respondent failed to diligently investigate Ms. Owens' claims in *Owens v. Echard*;

2.) An allegation Respondent used improper means to exclude a witness named Michael Marraccini from appearing in *Owens v. Echard*; and

3.) An allegation Respondent made factually and/or legally groundless appellate arguments.

Having reviewed the Bar's MSJ response, Respondent informs the PDJ that he withdraws his request for summary judgment as to the first two issues.

The Bar's presentation of the facts is so confusing and misleading that it is impossible, as a practical matter, to show why summary judgment is appropriate (even though it is), given the extreme page limits applicable here.

For that reason, the most efficient thing is to withdraw the summary judgment request as to issues 1 and 2.[1] An evidentiary hearing, while burdensome, is the only realistic way for Respondent to show what happened here, and show why the Bar's position is so fundamentally incorrect.

Having said that, this leaves just one issue for the PDJ to address – the Bar's claims relating to the appeal in *Owens v. Echard*. As explained below, Respondent is entitled to summary judgment as to that part of the case.

II. DISCUSSION

Because this case is complicated and confusing, let's begin with a summary of Respondent's argument. The Bar accuses Respondent of pursuing "meritless" claims and arguments during the appeal in *Owens v. Echard*. Respondent now moves for summary judgment on those claims.

Something important to understand – the Bar's appeal-related claims are <u>not</u> based on a third-party complaint. Rather, the Bar's appeal-based claims were raised by one person – bar counsel James D. Lee. After nearly

[1] To be clear – Respondent's partial withdrawal of the summary judgment motion should not be seen in any way as affecting his prior argument that all claims in this matter are subject to the anti-SLAPP law, and that the Court erred by failing to apply that law to this case.

two years of investigation, Mr. Lee decided entirely on his own to charge Respondent misconduct arising from the appeal.

Mr. Lee's Complaint presents the appeal-related arguments in an entirely conclusory manner with no factual support; i.e., an appeal was filed, the lower court's judgment was affirmed, therefore Respondent acted unethically. That was Mr. Lee's short and plain statement of the claim.

The Bar's MSJ Response brief is clearer, but only slightly. According to the Bar, Respondent's appellate arguments in *Owens* were "unsupported" for two reasons:

- Respondent's appeal brief argued Ms. Owens was sanctioned under Family Law Rule 26, but actually she was not sanctioned under Rule 26 (instead, she was ordered to pay fees under *different* legal authorities based on her "unreasonable conduct").

- Respondent raised "structural error" arguments on appeal which were legally or factually incorrect.

Respondent is entitled to summary judgment on both issues for two reasons. First, because the Bar (the party with the burden of proof) has offered **zero admissible evidence** to support its claims. Second, the Bar's arguments are based on a misstatement of both the facts and the law.

a. The Bar Has Offered <u>No Evidence</u> To Support Its Claims

The standards of Rule 56 are clear – a party who does *not* bear the burden of proof (i.e., Respondent) may move for summary judgment by claiming the *other* party who has the burden of proof (the Bar) lacks evidence

to meet its burden. In this scenario, "a party moving for summary judgment need merely point out by specific reference to the relevant discovery that no evidence existed to support an essential element of the claim." *Orme School v. Reeves*, 166 Ariz. 301, 310 (Ariz. 1990).

That point was raised in Respondent's MSJ at page 36; "To date, the state bar has disclosed no evidence showing Respondent's arguments in the appeal violated any ethical rule." Having challenged the Bar's lack of evidence, the burden shifts to the Bar to offer *admissible* evidence sufficient to create a triable issue of fact; "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme School*, 166 Ariz. at 310. That is exactly the situation here.

The Supreme Court's discussion in *Orme School* is helpful to see why:

> Although the trial judge must evaluate the evidence to some extent in ruling on a motion for summary judgment, the trial judge is to apply the same standards as used for a directed verdict. … Thus, assuming discovery is complete, the judge should grant summary judgment if, on the state of the record, he would have to grant a motion for directed verdict at the trial.

Orme School, 166 Ariz. at 309 (emphasis added).

Applying that standard, Respondent is entitled to summary judgment as to the Bar's appeal-related claims because the *only "*evidence" the Bar relies on is the appellate court's opinion and literally nothing else.

The Court of Appeals' decision contains a few conclusory statements suggesting the appeal was "not grounded in law or fact" (without ever explaining the basis for that conclusion). This is insufficient as a matter of law to defeat summary judgment for the same reason noted in *Orme School* – if the Bar offered no trial evidence other than the appellate court decision, would that be sufficient to avoid a directed verdict in Respondent's favor? NO, it would not; the Bar would lose as a matter of law.

Here's why -- the Court of Appeals' decision in *Owens* is inadmissible hearsay; "A court judgment is hearsay 'to the extent that it is offered to prove the truth of the matters asserted in the judgment.'" *United States v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007) *(*quoting *United States v. Boulware,* 384 F.3d 794, 806 (9th Cir. 2004)).

The reason for that rule is obvious: **Respondent cannot cross-examine a piece of paper**. The appellate court's written remarks are not subject to cross examination. As such, they cannot be tested or challenged (to show they were wrong). Because hearsay cannot be challenged, it cannot be used to prove the truth of the matters asserted; i.e., the Bar's claim that the appeal was "not grounded in fact or law". Those statements are classic inadmissible hearsay:

> An appellate court's description of facts is merely the hearsay assertions of the justices who delivered the opinion. Hearsay statements within the opinion are inadmissible unless they fall within an exception to the hearsay rule.

Kilroy v. State of California, 119 Cal. App. 4th 140, 148 (Cal. App. 2004).

Of course, this Court *can* take judicial notice of the *Owens* appellate decision (and any other pleadings), but the effect of this is limited; "While matters of public record, such as prior court proceedings, are proper subjects of judicial notice, a court may take notice only of the authenticity and existence of a particular order or pleading, not the veracity or validity of its contents." *Ramirez v. Medtronic Inc*., 961 F. Supp. 2d 977, 983 (D.Ariz. 2013) (emphasis added); *see also Hertz v. Coy*, 2014 WL 3610893, *7, ¶ 38 (Ariz.App. 2014) ("judicial notice is generally not appropriate when the notice sought concerns the truth of judicial findings of fact ….");[2] *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) ("a court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation.") (emphasis added) (citing extensive authority).

In short, *even if* the Court of Appeals had made a specific finding of misconduct by Respondent (which it did not), the written appellate opinion would not, by itself, suffice to prove misconduct, because the opinion is hearsay. Testimony or other admissible evidence would still be required before this Court could find any ethical violation. *See* Sup. Ct. R. 58(j)(3) (requiring the Bar shall prove its claims: "by clear and convincing evidence.")

[2] Pursuant to Supreme Court Rule 111, unpublished authority is cited for persuasive value only.

The requirement for the Bar's position to be supported by *admissible* evidence (not hearsay) is also mandated by the Supreme Court's decision in *Hancock v. O'Neil*, 253 Ariz. 509 (Ariz. 2022). Due to its posture, *Hancock* is especially helpful in illustrating the Bar's failure of proof here.

Hancock involved a lawyer who was sanctioned $548,240 for misconduct in a federal case. *See Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1223 (9th Cir. 2016). The sanctions ruling was later reversed by the U.S. Supreme Court because the fees awarded were not shown to have been directly caused by the attorney's misconduct. *See Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017).

The State Bar later charged Mr. Hancock with misconduct based on the district court's findings. The PDJ granted partial summary judgment in favor of the Bar based *solely* on those findings. In other words, the PDJ held the trial court's sanctions order was both admissible and entitled to *res judicata* effect in a discipline proceeding. Thus, the PDJ held the order itself was sufficient proof to support discipline without any other evidence required.

The Arizona Supreme Court ***reversed***. In doing so, the Court held sanctions orders do not have preclusive effect in discipline cases. The Supreme Court also made it clear that any attempt to punish a lawyer arising from a prior judicial order requires admissible evidence beyond the order itself; "Although the Bar cannot prevent an attorney from relitigating issues

determined in a sanctions order, a PDJ may admit transcripts and other evidence of collateral proceedings as permitted by the rules of evidence and credit the persuasiveness of such evidence." *Hancock*, 253 Ariz. at 514 (emphasis added). Here, even if the *Owens* appellate opinion was admissible for some other purpose, it *cannot* be admitted to prove the truth of hearsay statements contained in the decision itself.

To summarize – the State Bar claims Respondent's appellate arguments in *Owens* were *so bad* they crossed the line from unsuccessful to frivolous. But the only evidentiary basis for that claim is hearsay comments in the appellate ruling which are not admissible to prove the truth of those comments. Thus, after Respondent moved for summary judgment arguing the Bar had no *evidence* to support its appeal-related claims, the Bar was required to respond with admissible evidence to support the claim (which would have been easy to do – a simple affidavit from the appellate court judge explaining any misconduct he perceived would have sufficed). Instead, the Bar's *only* evidence remains inadmissible hearsay—the opinion itself.

On this record, there is nothing more for the PDJ to do. The Court of Appeals' decision in *Owens* is insufficient as a matter of law to prove any misconduct on Respondent's part. Because the Bar has offered no other **admissible evidence** of appeal-related misconduct, summary judgment on that part of the case is required, just as a directed verdict would be.

b. The Bar Misstates the Facts & The Law

Because the Bar has failed to offer any evidence to support its appeal-related claims, no further analysis is needed. But, if the PDJ is inclined to delve deeper, it is still apparent Respondent is entitled to judgment as a matter of law for two reasons.

First, the Bar's arguments boil down to this – Respondent took positions that were rejected by the Court of Appeals. Three specific instances are set forth in ¶ 110 of the Bar's separate statement of facts, shown below:

> 110. The Court of Appeals found that:
>
> a. Respondent's first argument was based on the "incorrect assertion that the trial court ordered sanctions under Rule 26," RJN Ex. 145 at 4 (¶ 6);
>
> b. Respondent's "assertion that the court intentionally 'tried to conceal [its] misconduct' in 'performing [its own post-trial] investigation into the facts' by 'falsely attributing the testimony' to Echard's expert" was "unsupported and speculative," *id.* at 10 (¶ 22); and
>
> c. Respondent incorrectly argued that he did "not need to make a separate showing of resulting prejudice," *id.* at 10 (¶ 24).

With respect to the first two points, all they show is this: Respondent made arguments the Court of Appeals did not accept. That is *not* sufficient to prove a violation of any rule; "a claim is not groundless if it is 'fairly debatable,' even if such claim constitutes a long shot[.]' In other words, a claim may lack winning merit without being sufficiently devoid of rational

support to render it groundless." *Arizona Republican Party v. Richer*, 257 Ariz. 237, 243 (Ariz. 2024) (quoting *Goldman v. Sahl*, 248 Ariz. 512, 531 ¶ 68, 462 P.3d 1017, 1036 (App. 2020); *Johnson v. Mohave County*, 206 Ariz. 330, 335 ¶ 19, 78 P.3d 1051, 1056 (App. 2003) (holding a claim that requires "considerable examination" is "fairly debatable" and thus non-frivolous)).

Here, Respondent's appellate briefs cited extensive case law and evidence for every position he took. The Court of Appeals simply disagreed with those arguments (which Respondent maintains were correct, both factually and legally). Other than showing Respondent made *unsuccessful* arguments, the Bar has offered literally *nothing* to show Respondent took groundless positions. **Unsuccessful and groundless are different things.**

That leads to the second issue – the Bar misstates the facts and the law as to the third point in ¶ 110 of its SOF. That point involved a question of law regarding "structural error" which was addressed extensively in the appeal. In the end, the Court of Appeals held a party claiming structural error must also show prejudice. *See* RJN Ex. 145 at 10, ¶ 24.

The Court of Appeals' decision on that issue was 100% wrong as a matter of law. That conclusion was based on the same legal authorities the Court cited, including *State v. Emanuel*, 159 Ariz. 464 (App. 1989).

Emanuel involved a defendant charged with theft. At her sentencing, the defendant asked the trial judge to recuse himself based on bias. In

response, the judge admitted he conducted an *ex parte* investigation into the facts by interviewing witnesses and the victim (the court clerk). However, the judge claimed at least some of the extra-judicial evidence he considered was "favorable" to the defendant.

After the trial judge refused to recuse, the Court of Appeals reversed. The Court held the "*ex parte* investigation by the judge" violated the defendant's rights and required automatic reversal *without* any showing of prejudice. This was the same argument asserted in Ms. Owens' appeal.

Why the Court of Appeals failed to correctly apply *Emanuel* (and the other authorities cited) is unknown. That is exactly why cross-examination is mandatory here. If the Bar claims Respondent's arguments in the appeal were frivolous, that claim must be supported by admissible evidence, preferably in the form of a witness who can be cross examined. But because the Bar has offered no admissible evidence on this issue, that point is simply moot.

III. CONCLUSION

For the reasons stated, the PDJ should grant summary judgment in favor of Respondent as to all claims arising from the appeal in *Owens v. Echard*.

Respectfully submitted October 28, 2026.

David S. Gingras, #021097
Gingras Law Office, PLLC
Tel.: (480) 264-1400
David@GingrasLaw.com
Respondent

CERTIFICATE OF SERVICE

Original filed and COPY of the foregoing emailed
October 28, 2026 to:
Craig Henley
Craig.Henley@staff.azbar.org
Senior Bar Counsel

