

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 125,500

In the Matter of MITCHELL J. SPENCER,
Respondent.

ORIGINAL PROCEEDING IN DISCIPLINE

Original proceeding in discipline. Opinion filed February 10, 2023. Published censure.

Matthew J. Vogelsberg, Chief Deputy Disciplinary Administrator, argued the cause, and was on the formal complaint for the petitioner.

John E. Rapp, of Hinkle Law Firm LLC, of Wichita, and *Mitchell J. Spencer*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Mitchell J. Spencer, of Wichita, Kansas. Spencer received his license to practice law in Kansas in September 2017. Spencer also is a licensed attorney in Missouri, admitted in 2020.

On April 19, 2022, the Office of the Disciplinary Administrator (ODA) filed a formal complaint against Spencer alleging violations of the Kansas Rules of Professional Conduct. The complaint was filed after the ODA received a copy of a charging document filed by the Office of the Kansas Attorney General against the respondent in a misdemeanor traffic case. Spencer filed a timely answer to the formal complaint and participated in the investigation.

On July 7, 2022, the parties entered into a summary submission agreement under Supreme Court Rule 223 (2022 Kan. S. Ct. R. at 278) (summary submission is "[a]n agreement between the disciplinary administrator and the respondent," which includes "a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken"). In the summary submission agreement, the Disciplinary Administrator and Spencer stipulate and agree that Spencer violated the following Kansas Rules of Professional Conduct:

- KRPC 8.4(c) (2022 Kan. S. Ct. R. at 434) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and
- KRPC 8.4(g) (2022 Kan. S. Ct. R. at 435) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law).

Before us, the parties jointly recommend the respondent's license to practice law be suspended for a period of 90 days, that the suspension be stayed, and that the respondent be placed on probation for one year.

FACTUAL AND PROCEDURAL BACKGROUND

We quote the relevant portions of the parties' summary submission below.

"Findings of Fact

....

- "8. During the evening of October 7, 2019, respondent played golf with his mother at the golf club in Wellington, Kansas—the county seat of Sumner County. They rented a golf cart from the club.

- "9. Around 7:00 p.m., after respondent and his mother were finished playing golf, respondent dropped his mother off at her car and drove the rented golf cart through the club's parking lot to return it to the golf cart shed. Respondent's mother followed from a distance in her car.
- "10. While driving the golf cart through the parking lot, respondent drove into the rear end of an unoccupied 1995 Chevrolet pickup truck that was parked in the lot. Respondent was looking at his cellular phone at the time of the collision.
- "11. Surveillance video from the golf club shows that the golf cart collided into the back of the truck. The collision caused damage to [the] golf cart (cracked and scuffed the cart's body) and the truck (scuffed the rear bumper and broke off a piece of the bumper's plastic trim).
- "12. As a result of the collision, the cart became wedged onto the truck's rear bumper. Respondent attempted to dislodge the cart by putting the cart in reverse and backing it up. When that failed, respondent got out of the cart and lifted and pushed against the front of the cart for several seconds, eventually succeeding in dislodging the cart from the truck's rear bumper.
- "13. Once respondent dislodged the cart, he backed the cart away and then drove forward, stopping at the rear of the truck. In the video, the respondent appears to briefly inspect the back of the truck. He then gets out of the cart to pick up a piece of plastic from the ground. (The surveillance video shows that the piece of plastic broke off from the truck's rear bumper during the collision.) After picking up the plastic piece, the respondent returns to the cart and drives the cart forward to the golf cart shed, followed by respondent's mother in her car.

- "14. After parking the golf cart at the shed, respondent got into his mother's car and left the golf club. At the time, respondent was aware that the accident had caused damage to both the truck and the golf cart.
- "15. When respondent left the golf club, he was not aware that anyone was still working at the golf club. Regardless, prior to leaving, respondent did not attempt to notify anyone regarding the accident.
- "16. L.S., an employee at the golf club, was working in the golf cart shed at the time of the accident. He heard the collision and saw respondent dislodge the cart from the truck. L.S. watched respondent return the cart to the shed and then leave the club.
- "17. L.S. looked at the golf cart that respondent had left at the shed and noticed the damage to the cart.
- "18. That evening, L.S. told B.S., an employee of the club who owned the truck with his father, S.S., that respondent had collided into the truck with the golf cart.
- "19. Three days later, on October 10, 2019, B.S. saw respondent at the golf club. According to a statement B.S. provided to the Wellington Police Department (WPD), B.S. asked respondent whether he had hit his truck with the golf cart. Respondent said yes, explained that he was on his phone when he had hit the truck, and apologized.
- "20. During the conversation, B.S. may have indicated to respondent that the damage the truck sustained from the collision was not much and that 'everything was fine.'

- "21. On October 13, 2019, B.H., the director of the golf club, filed a police report about the incident with the WPD.
- "22. On October 16, 2019—nine days after the collision—respondent sent a Facebook message to B.H., stating: 'Hey man; did you have any damage on a golf cart the other day? I already talked to [B.S.] about it the other day and he had said everything was fine.'
- "23. B.H. did not respond to respondent's message.
- "24. As part of the WPD's investigation into the collision, S.S. provided the WPD with a repair estimate for the truck's rear bumper (\$29.59 to replace the broken trim and \$90 in labor). B.H. provided an estimate of \$700 to repair the damage to the golf cart.
- "25. On October 23, 2019, WPD Police Chief Tracy Heath interviewed respondent about the collision. During the interview, respondent said that he was on his phone at the time he collided into the truck. Respondent told Heath that he did not report the accident because he did not see any damage caused by the collision. He also repeatedly said that he spoke to B.S. and that B.S. told him everything was fine. Respondent said that he took B.S.'s response as meaning there was no damage done to his truck. Respondent said that he had also messaged B.H. about the accident but did not get a response.
- "26. Chief Heath questioned respondent about his belief that the collision caused no damage when surveillance video clearly showed respondent picking up debris from the collision. After initially stating that he did not remember what he picked up, respondent said that it might have been a piece of plastic but claimed he did not know where the piece of plastic came from. Respondent reiterated that he did not report the accident because he did not see that the collision caused any damage. But,

respondent said that because he was now informed there was damage, he wanted to report the accident.

- "27. Heath issued a citation to respondent for violating K.S.A. 8-1605, duty of driver upon damaging unattended vehicle or other property, a class C misdemeanor.
- "28. Wellington city prosecutor Shawn DeJarnett dismissed the traffic citation and referred respondent's traffic case to the Kansas Attorney General's (AG's) Office for prosecution. In June 2020, the AG's Office instituted a traffic case against respondent in Sumner County District Court, Case No. 2020-TR-1251.
- "29. Prior to the AG's Office filing the traffic case, respondent paid S.S. and the golf club the estimates they obtained for repairing the damage to the truck and golf cart, respectfully.
- "30. In July 2020, attorney Michael Brown forwarded a copy of the complaint filed in Case No. 2020-TR-1251 to the Office of the Disciplinary Administrator (ODA). The ODA docketed the matter for investigation and asked the respondent to provide a response.
- "31. In his response, respondent stated:

I did not do anything unethical regarding the golf cart. I was texting while I was driving a golf cart and ran into an old pickup around 8pm at night when I was leaving the golf course on October 7, 2019. That is almost a year ago. No one was at the golf course. The only damage to the truck was a broken plastic piece that cost \$20 to fix. I was able to figure out whose vehicle it was by the next day and had a discussion with [B.S.], the owner of the truck, and he told me not to worry about it and that everything was fine. He also worked at the golf course at the time so

I thought that was also informing the golf course as well. Just to be safe, a few days later I sent a facebook [*sic*] message to [B.H.], the manager of the golf course, that said "Hey man; did you have any damage on a golf cart the other day? I already talked to [B.S.] about it the other day and he had said everything was fine." It was not until at least a week if not more time later that I was informed law enforcement was involved. I tried to take care of everything responsibly. [B.S.] and his father [S.S.] informed law enforcement that they did not want to have charges filed against me.'

"32. In his response, respondent failed to acknowledge that the damage he caused to B.S.'s truck cost over \$100 to repair. Furthermore, he failed to acknowledge that he had caused damage to the golf cart and that it cost \$700 to repair. The complaint did not refer to the amount of damage to either vehicle.

"33. Concluding his response, respondent stated:

'In summary, I did not do anything unethical and I am no longer a prosecutor in Sumner County. The only damage to the truck was \$20. Before I was aware law enforcement was involved, I was able to have an in-person conversation with [B.S.] about the damage to his truck, and he told me not to worry about it. I also contacted the manager of the golf course before I was aware law enforcement was involved. I also paid all restitution for both the truck and the golf cart before a case was ever filed by the attorney general.'

"34. In 2020, respondent left the Sumner County Attorney's Office and entered private practice in Wichita.

"35. On October 20, 2020, respondent entered into a diversion agreement in Case No. 2020-TR-1251 for violating K.S.A. 8-1605. In the diversion agreement, respondent stipulated to the following facts:

I was the driver of a vehicle on or about October 7, 2019, in Sumner County, Kansas which collided with another vehicle that resulted in damage to property that was not my own and that I failed to either immediately stop and locate and notify the property owner or attach securely in a conspicuous place on the other vehicle the notice required by K.S.A. 8-1605; and

I further stipulate to any police reports, witness statements, video and/or photographs, or any other evidence under Wellington Police Department Case Number 19-1985 and agree that they shall be admitted into evidence without further foundation in the event of revocation.'

"36. Respondent successfully completed diversion, and Case No. 2020-TR-1251 was dismissed with prejudice.

"37. On September 25, 2021, respondent provided a supplemental response to the complaint. In his supplemental response, respondent stated:

First, I would like to apologize for my prior response. I was under the misunderstanding I was supposed to be defending myself and that simply accepting responsibility was not an option. Instead of taking responsibility for my actions, I mistakenly and wrongly took the opportunity to focus my response on small town politics and issues with Mr. Brown. I now wish I would have sought the advice of counsel at that time to help me understand that this can be a productive and interactive process to make sure the circumstances and situation does not recur. I take this process very seriously. I pride myself on my honesty and integrity and apologize for my misunderstanding and missteps.

....

'I admit that I drove the golf cart and wedged it underneath the bumper of [B.S.'s] truck while I was texting and driving the golf cart approximately two years ago. I take responsibility for those actions. At the time of the incident, I did not think anyone was at the Wellington Golf Course to speak with. Nonetheless, I should have addressed the situation at that time. I have learned from that mistake and I apologize.

....

'Again, I apologize for any miscommunication and any missteps along the way, and I apologize for those whom I have made this process difficult. I now realize that I was wrong in multiple respects in handling the incident at issue. I should have immediately addressed the situation following the wreck, and I should have ensured that I spoke with all individuals affected by my actions and not made assumptions. [] I take full responsibility for all of my actions, and I am open for discussions and making a plan to make sure something like this does not happen in the future.'

"Conclusions of Law

"38. Under Rule 223(b)(1), the respondent admits that he engaged in misconduct. Under Rule 2[2]3(b)(2)(C), the disciplinary administrator and the respondent stipulate that the findings of fact stated above constitute clear and convincing evidence of violations of the following rules:

"KRPC 8.4(c) (engaging in conduct involving dishonesty)

"39. KRPC 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty. The respondent violated KRPC 8.4(c) during his interview with Police Chief Heath by falsely stating that

he was not aware that his accident at the golf club had caused any damage to either the truck or the golf cart.

"KRPC 8.4(g) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law)

- "40. KRPC 8.4(g) states that it is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law. The respondent violated KRPC 8.4(g) when he left the golf club without attempting to notify anyone of the accident, knowing that the accident had caused damage to the truck and the golf cart.

"Aggravating and Mitigating Factors

- "41. Under Rule 223(b)(2)(D), the disciplinary administrator and the respondent stipulate that the following aggravating and mitigating factors are applicable in this case:

"Aggravating Factors

- "42. *Dishonest or Selfish Motive.* Respondent had a dishonest motive when he left the golf club without attempting to report the accident to the golf club or the owner of the truck. Respondent left the golf club, knowing that he caused damage to the golf cart and the truck. Respondent nonetheless told Police Chief Heath that he was not aware that the accident had caused damage to either the golf cart or the truck.
- "43. *Engaging in Deceptive Practices During the Disciplinary Process.* Respondent engaged in deceptive practices when he submitted his initial response to the disciplinary complaint. Respondent's initial response failed to acknowledge the full extent of the damage the collision caused to the golf cart and truck. Furthermore, respondent gave the impression

in his response that he had timely notified B.S. and B.H. of the accident. The investigation disclosed that B.S. approached respondent at the golf club three days after the accident to ask him about his involvement. The investigation also disclosed that respondent waited nine days after the accident to send a Facebook message to B.H., asking about the damage to the golf cart. These communications did occur, however, prior to law enforcement contacting respondent regarding the accident.

"Mitigating Factors

- "44. *Absence of a Prior Disciplinary Record.* Respondent has no prior disciplinary record.
- "45. *Personal or Emotional Problems if Such Misfortunes have Contributed to a [sic] Violations of the Kansas Rules of Professional Conduct.* As detailed in Dr. Parker's report . . . , respondent suffers from an anxiety disorder that contributed to respondent's 'maladaptive response' to the accident. As Dr. Parker states in his report:

'Unfortunately, his response to ignore (denial) the matter started a snowball of stressful events that Mitch continued to reflexively respond to with additional denial defense mechanisms. He may have minimized and obfuscated matters to investigators out of his reflexive use of denial as a defense mechanism to protect himself from the guilt/shame for not living up to his own unreasonably high standards of himself—which served to make matters worse.

'Based on the psychological testing results, it appears that Mitch holds himself to very high standards of performance and resorts to denial as a psychological defense mechanism. When someone holds themselves to very high standards and they fail to meet their own standards, anxiety and shame are generated. Under normal circumstances, this would have

led Mitch to have seen his actions of texting while driving a golf cart and hitting a pickup as significant failure to uphold the very high personal, performance and ethical standards of conduct he had set for himself. But, being the Assistant City Prosecutor who had filed ethics complaints on two other attorneys, this would have heightened his awareness of his failure and that personal shock of failing to meet his own standards led to the panicked deployment of denial out of which he parked the cart and went home—an uncharacteristic behavior. Even though he eventually calmed and attempted to resolve the matter with the pickup owner and golf course, the ongoing fallout from the incident created additional anxiety that Mitch responded to with further denial mechanisms which served to only overly complicate what should have been a very simple matter in the beginning.'

Dr. Parker recommended that respondent attend short-term counseling to (1) 'develop stress and anxiety management skills to give him additional psychological defense tools other than denial'; and (2) 'develop more reasonable standards and expectations of himself.'

"46. *Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct.* Though there was some delay in notifying B.S. and B.H. regarding the accident, respondent paid for the damage his accident caused to the truck and golf cart prior to being charged in Sumner County District Court for violating K.S.A. 8-1605.

"47. *Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings.* Once formal disciplinary proceedings were instituted against respondent, he fully cooperated in the process and willingly entered into this summary submission agreement, stipulating to facts and rule violations.

- "48. *Inexperience in the Practice of Law.* At the time respondent engaged in the underlying conduct, he had been practicing law for approximately two years.
- "49. *Previous Good Character and Reputation in the Community Including any Letters from Clients, Friends, and Lawyers in Support of the Character and General Reputation of the Attorney.* Respondent has submitted numerous letters from colleagues in support of his character and reputation as a talented and hardworking attorney. Respondent received the Samuel E. Hooper Award from the University of Oklahoma College of Law on March 9, 2017. It is awarded to a law student with a reputation for candor and integrity.
- "50. *Imposition of Other Penalties or Sanctions.* As a result of failing to report the accident, respondent was charged with a violation of K.S.A. 8-1605. He entered into a diversion agreement and successfully completed diversion, resulting in the charge being dismissed with prejudice.
- "51. *Remorse.* Respondent has expressed genuine remorse for engaging in the conduct that led to a disciplinary complaint being filed against him.

"Recommendation for Discipline

- "52. Under Rule 223(b)(3), the disciplinary administrator and respondent jointly recommend that the Supreme Court suspend the respondent's license to practice law for a period of 90 days, that the suspension be stayed, and that respondent be placed on probation for one year.
- "53. The conditions of probation are outlined in Respondent's Proposed Probation Plan, found in Volume I of the record.

"54. Respondent will comply with Supreme Court Rule 227(f) (2022 Kan. S. Ct. R. at 283) prior to oral argument before the Supreme Court.

.....

"Waiver of Hearing on the Formal Complaint"

"62. Under Rule 223(b)(4), the disciplinary administrator and the respondent hereby waive the hearing on the formal complaint.

"Statement of No Exceptions"

"63. Under Rule 223(b)(5), the disciplinary administrator and the respondent agree that no exceptions to the findings of fact and conclusions of law will be taken in this case.

"Additional Acknowledgments"

"64. The disciplinary administrator and the respondent understand and agree that if the summary submission agreement is rejected by the Board chair, under Rule 223(e)(3), the hearing on the formal complaint will proceed under Rule 222 (2022 Kan. S. Ct. R. at 277).

"65. The disciplinary administrator and the respondent understand and agree that if the summary submission agreement is approved by the Board chair, under Rule 223(e)(2), the hearing on the formal complaint will be canceled and the case will be docketed with the Supreme Court under Rule 228 (2022 Kan. S. Ct. R. at 287).

"66. The disciplinary administrator and respondent further understand and agree that the summary submission agreement is advisory only and does not prevent the Supreme Court from making its own conclusions

regarding rule violations or imposing discipline greater or lesser than the parties' recommendation.

"67. Finally, the disciplinary administrator and the respondent agree that the summary submission agreement may be exchanged and executed by electronic transmission and that electronic signatures will be deemed to be original signatures."

DISCUSSION

In a disciplinary proceeding, this court generally considers the evidence, the disciplinary panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see also Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281) (a misconduct finding must be established by clear and convincing evidence). "Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable.'"" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009).

The Disciplinary Administrator provided the respondent with adequate notice of the formal complaint. The Disciplinary Administrator also provided the respondent with adequate notice of the hearing before the panel, but he waived that hearing after entering into the summary submission agreement. Under Rule 223, a summary submission agreement

"must be in writing and contain the following:

- (1) an admission that the respondent engaged in the misconduct;
- (2) a stipulation as to the following:
 - (A) the contents of the record;
 - (B) the findings of fact;
 - (C) the conclusions of law, including each violation of the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office; and
 - (D) any applicable aggravating and mitigating factors;
- (3) a recommendation for discipline;
- (4) a waiver of the hearing on the formal complaint; and
- (5) a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken." Supreme Court Rule 223(b) (2022 Kan. S. Ct. R. at 278).

The Kansas Board for Discipline of Attorneys approved the summary submission and canceled a hearing under Rule 223(e)(2). As a result, the factual findings in the summary submission are admitted. See Supreme Court Rule 228(g)(1) (2022 Kan. S. Ct. R. at 288) ("If the respondent files a statement . . . that the respondent will not file an exception . . . , the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent.").

The summary submission and the parties' stipulations before us establish by clear and convincing evidence the charged conduct violated KRPC 8.4(c) and KRPC 8.4(g). We adopt the findings and conclusions set forth by the parties in the summary submission.

The remaining issue is deciding the appropriate discipline. The parties jointly recommend a 90-day suspension of Spencer's law license with the suspension being stayed while the respondent is placed on probation for one year. An agreement to proceed by summary submission is advisory only and does not prevent us from imposing discipline greater or lesser than the parties' recommendation. Supreme Court Rule 223(f). After careful consideration, we find the lesser sanction of published censure is appropriate under the circumstances here. A minority of the court would impose the jointly agreed to recommended discipline of a 90-day suspension with the suspension being stayed while the respondent is placed on probation for one year.

Although not in the summary submission, counsel for both parties presented information at oral argument about the negotiation process and the legal basis for their decision to jointly recommend stayed suspension with a one-year probation. ODA counsel provided a summary of the negotiation process in opening argument. The respondent's attorney initially approached ODA counsel about the possibility of a published censure. ODA counsel responded that the misconduct warranted more than a published censure because—at the time of the misconduct—the respondent was a prosecutor and should be held to a higher standard of ethical conduct than an attorney who is not a prosecutor. With that said, ODA counsel communicated to the respondent's counsel that he believed the respondent should be able to continue practicing law, which is how the parties ultimately came to agree on a suspended suspension with a plan of probation.

For his part, the respondent's counsel agreed it was appropriate to hold the respondent to a higher standard of professional conduct because the respondent was a prosecutor when the misconduct occurred. The court pushed back, asking respondent's counsel to cite authority for the legal proposition that prosecutors are held to a higher standard of professionalism than non-prosecutors under the rules of professional conduct. Respondent's counsel deferred the question. At that point, ODA counsel returned to the podium for rebuttal and advised the court that the higher standard of professionalism for prosecutors comes from this court's caselaw. ODA counsel cited *In re Holste*, 302 Kan. 880, 889, 358 P.3d 850 (2015), and the cases cited therein to support this higher standard.

We have reviewed the cases relied on by ODA counsel and find them factually distinguishable. Unlike the facts presented here, the prosecutors in those cases engaged in misconduct *while acting in the scope of their official prosecutorial duties*. And the cases cited appear to have some legal infirmities as well. In order to flush out those infirmities, we begin with the two Kansas Rules of Professional Conduct relied on in these cases—KRPC 3.8 and KRPC 8.4—keeping in mind that "[i]nterpretation of the Kansas Rules of Professional Conduct is a question of law over which this court has unlimited review." *In re Bryan*, 275 Kan. 202, 211, 61 P.3d 641 (2003).

KRPC 3.8

We begin with KRPC 3.8 (2022 Kan. S. Ct. R. at 401), which bears the title "Special Responsibilities of a Prosecutor" and imposes the following enumerated responsibilities on prosecutors in criminal cases while they are acting in the scope of their official prosecutorial duties:

"The prosecutor in a criminal case shall:

"(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

"(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

"(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

"(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

"(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

"(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose,

refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule."

While prosecutors are also subject to the ethics rules governing all lawyers (such as the duty of candor to the court, confidentiality, conflicts of interest, and so on), KRPC 3.8 imposes "special" responsibilities on prosecutors since certain tasks are unique to the prosecutor's office. See KRPC 3.8, Comment [1] (2022 Kan. S. Ct. R. at 401) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."). Whether the special responsibilities imposed by KRPC 3.8 should be characterized as *additional* standards of ethical conduct unique to prosecutors or *heightened* standards of ethical conduct for prosecutors is an issue never addressed by this court. We find it unnecessary to decide the issue here because KRPC 3.8 is inapplicable under the facts presented. Specifically, the language of KRPC 3.8 and the comments appended to the rule make clear that the enumerated special responsibilities imposed on prosecutors in criminal cases *apply only when the prosecutors are acting in the scope of their official prosecutorial duties*. Although the respondent was employed as a prosecutor at the time of the misconduct here, there is no dispute between the parties that his misconduct occurred in his private life, outside the scope of his official prosecutorial duties.

KRPC 8.4

Many of the cases cited by ODA counsel relied on Comment [4] of KRPC 8.4 as the basis for the legal proposition that prosecutors—as lawyers holding public office—are held to a higher duty of ethical conduct than a non-prosecutor. KRPC 8.4 bears the title "Misconduct" and governs an attorney's responsibility to maintain the integrity of the profession, whether the attorney is acting in a personal capacity or acting within the scope of official prosecutorial duties. Compare KRPC 3.8 (setting forth attorney's responsibilities in enumerated circumstances, all of which necessarily occur within the scope of official prosecutorial duties). Importantly, the cases do not cite to the substantive language of Rule 8.4, but instead rely on the language of Comment [4] (2022 Kan. S. Ct. R. at 435) to support imposing a heightened duty of ethical conduct for prosecutors:

"[4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization."

As noted above, each case cited by ODA counsel that relied on Comment [4] to hold prosecutors to a heightened duty of ethical conduct involved prosecutors acting in the scope of their official prosecutorial duties. But Comment [4] is inapplicable to a prosecutor acting in the scope of official prosecutorial duties because non-lawyer citizens cannot hold the public office of prosecutor. See Comment [4] ("Lawyers holding public office assume legal responsibilities going beyond those of other citizens.").

Reading Comment [4] in its entirety persuades us that the comment was intended to apply to public office positions that (1) impose a duty of public trust and (2) can be held by both lawyers and non-lawyers. Examples of these positions include state senator, state board of education member, county commissioner, mayor, and sheriff. An attorney holding public office assumes legal responsibilities beyond those of non-attorney citizens holding public office because an attorney's "abuse of public office" suggests an inability to fulfill the professional role of an attorney. The comment goes on to compare an attorney's abuse of public trust to a private attorney's "abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization."

In this case, we already have found clear and convincing evidence that the respondent violated

- KRPC 8.4(c) (engaging in conduct involving dishonesty) during his interview with Police Chief Tracy Heath by falsely stating that he was not aware that his accident at the golf club had caused any damage to either the truck or the golf cart; and
- KRPC 8.4(g) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law) when he left the golf club without attempting to notify anyone of the accident, knowing that the accident had caused damage to the truck and the golf cart.

The public office held by the respondent was assistant county prosecutor. But the respondent's misconduct did not occur in the scope of executing his official duties of public office, so he cannot be said to have abused his public office as specified in Comment [4]. And even if his misconduct had occurred in the scope of executing his

official duties of public office, Comment [4] would not apply because the legal responsibility for attorneys is enhanced as compared to non-attorney citizens, who cannot hold the public office of prosecutor in the first place. See KRPC 8.4, Comment [4] ("Lawyers holding public office assume legal responsibilities going beyond those of other [non-lawyer] citizens.").

In sum, and because the respondent's violations of KRPC 8.4(c) and (g) did not occur while he was acting within the scope of his official prosecutorial duties, we hold that neither KRPC 3.8 nor Comment [4] imposed a heightened duty of ethical conduct on the respondent for his misconduct. Our holding in this regard is critical to deciding the appropriate discipline here because, when asked by the court, ODA counsel expressly acknowledged that in deciding to reject a joint recommendation of published censure in favor of a stayed suspension with one year of probation, ODA counsel applied a higher standard of ethical conduct to the respondent because he was a prosecutor at the time of the misconduct as opposed to a non-prosecutor. We find ODA counsel's application of the higher standard of ethical conduct for prosecutors under the facts of this case to be legal error, without support in the law.

In deciding the proper discipline without applying a higher standard of ethical conduct, we consider the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions ("Standards"). We already have set forth the duty violated, the lawyer's mental state, the injury caused by the lawyer's misconduct, and the aggravating and mitigating factors to which the parties stipulated in the summary submission agreement. In addition to those factors, we consider the following Standards:

- "5.1 Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects

adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

"5.11 Disbarment is generally appropriate when:

"(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

"(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

"5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

"5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

"5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law."

The parties agree, and clear and convincing evidence establishes, the respondent committed a misdemeanor that involved dishonesty, fraud, deceit, or misrepresentation which adversely reflected on his fitness to practice law but did not seriously adversely reflect on his fitness to practice law. Thus, we hold published censure is an appropriate sanction. A minority of the court would impose the jointly agreed to recommended discipline of a 90-day suspension with the suspension being stayed while the respondent is placed on probation for one year.

We assess the costs of these proceedings to the respondent and order this opinion be published in the official Kansas Reports.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Mitchell J. Spencer is disciplined by published censure to be published in accordance with Supreme Court Rule 225(a)(5) (2022 Kan. S. Ct. R. at 281) for violations of KRPC 8.4(c) and 8.4(g).

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to the respondent and that this opinion be published in the official Kansas Reports.