

STATE OF MICHIGAN  
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,  
Attorney Grievance Commission

Petitioner,

Case No. 09-50-GA

v.

SAMUEL E. McCARGO, P 25298

Respondent.

FILED  
ATTORNEY DISCIPLINE BOARD  
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**DISCIPLINE REPORT OF TRI-COUNTY HEARING PANEL NO. 27.**

PANEL MEMBERS:

John R. Urso, Chairperson  
Stanley H. Pitts, Member  
Michael A. Gruskin, Member

APPEARANCES:

ATTORNEY GRIEVANCE COMMISSION  
BY: Stephen P. Vella, Senior Associate Counsel  
243 W. Congress, Ste. 256  
Detroit, MI 48226-3259

Appearing on behalf of Petitioner.

George J. Bedrosian (P10619)  
17701 W. Outer Drive  
Dearborn Heights, MI 48127

Darice E. Weber (P52084)  
660 Woodward Ave., Ste. 2490  
Detroit, MI 48226

Appearing on behalf of Respondent.

This panel previously found that Respondent, Samuel McCargo (McCargo), violated Michigan Rules of Professional Conduct 1.2(c), 3.3, 3.3(a), 3.4(a), and 8.1. The panel must now determine the appropriate level of discipline. The Grievance

Administrator asserts that McCargo should be suspended for two years and eleven months, the most significant suspension that does not require recertification by the Board of Law Examiners. Conversely, McCargo suggests that a reprimand is the appropriate discipline. For the reasons set forth below, we conclude that neither suggested discipline comports with the applicable factors we must consider. Applying these factors, we order that Samuel McCargo be suspended for 179 days. We also decide various motions and issues about costs that have been raised by the parties.

### I. THE APPLICABLE STANDARD

The paramount concern in a disciplinary proceeding is the protection of the public, the courts, and the legal profession, rather than punishment for wrongdoing. ABA Standards for Imposing Lawyer Sanctions, 1991 Edition, Standard 1.1; MCR 9.105. Though punishment is not the paramount concern, the Michigan Supreme Court has recognized that these goals are at times best achieved through the deterrent effect of punishment. *In Re Grimes*, 414 Mich 483 (1982).

In *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), the Michigan Supreme Court directed the Attorney Discipline Board (and hearing panels such as ours) to follow the ABA Standards for Imposing Lawyer Sanctions and to consider prior case law when analyzing the appropriate discipline for attorney misconduct.

The ABA's Theoretical Framework for the Standards for Imposing Lawyer Sanctions states in Chapter II that when there are multiple findings of misconduct, the sanction for the most serious instance should apply.

The standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors (see Standard 9.22). [Chapter II, p 7.]

In applying the ABA Standards, the Court has directed that this panel must consider the relevant factors set forth in ABA Standard 3.0 by initially answering three questions: 1) what ethical duties did the attorney violate – was it a duty to a client, the public, the legal system, or the profession?; 2) what was the lawyer’s mental state – did the lawyer act intentionally, knowingly, or negligently?; and 3) what was the extent of the actual or potential injury caused by the lawyer’s misconduct – was there a serious or potentially serious injury? *Lopatin*, 462 Mich at 239.

Second, the panel must select a sanction that corresponds to the type of misconduct committed by the attorney from the ABA’s recommended sanctions for a variety of types of misconduct.

Finally, after identifying the ABA’s recommended sanction for the particular misconduct, the panel must consider evidence of relevant aggravating and mitigating factors that may influence the appropriateness of a sanction under all the circumstances. After reviewing these factors, the panel decides whether to increase or decrease the recommended sanction. *Id* at 240, citing ABA Standard 9.1.

## II. LEGAL ANALYSIS

### A. Duty Violated, Mental State and Actual or Potential Injury.

This panel determined during the misconduct phase of this action that McCargo violated his duties under four different rules of professional conduct: MRPC 1.2(c), 3.3(a), 3.4(a), and 8.1(a). Our misconduct opinion concluded that he did so knowingly. See, e.g., *Misconduct Report of Tri-County Hearing Panel No. 27* at pp 66-68, 71-76, and 79-80. The ABA Standards classify this misconduct as an abuse of the legal process. ABA Standard 6.2.

We must now determine the extent of the actual or potential injury to the legal process caused by McCargo’s misconduct. The Grievance Administrator asserts that

McCargo caused actual injury because the City of Detroit incurred over \$500,000 in legal fees in connection with the lawsuit the *Detroit Free Press* brought against it under the Freedom of Information Act (FOIA Litigation). The Grievance Administrator argues that there would have been no need for the FOIA Litigation if McCargo had not suggested redrafting the settlement documents in an attempt to keep the text messages secret. The Grievance Administrator alleges that if this conduct had not occurred, the *Free Press* would not have had to file the FOIA Litigation, and the City would not have had to incur the costs of defense.

We reject the Grievance Administrator's argument. As is clear from our Misconduct Opinion, many attorneys - not just McCargo - played an active role in trying to keep the text messages secret. We conclude that it would be inequitable and incorrect to conclude that McCargo was responsible for the City's costs in the FOIA Litigation. Further, while we found that McCargo played a role in the FOIA Litigation, he was not an attorney of record and his role was less involved than that of many others. Indeed, the fact that the Grievance Administrator asserted this exact same argument in *Grievance Administrator v. Stefani, Case No. 09-47-GA*, undercuts its assertion here that McCargo was solely responsible for all of the City's fees and costs in the FOIA Litigation.<sup>1</sup> See *Grievance Administrator v. Stefani, Case No. 09-47-GA, Misconduct Report of Tri-County Hearing Panel No. 26, June 23, 2010 ("Stefani")* at pp 3-4. Accordingly, like the *Stefani* panel, we hold that McCargo's misconduct did not cause actual injury to the legal process as it related to the FOIA Litigation.

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<sup>1</sup> Indeed, the weakness in the Grievance Administrator's "but-for" reasoning can be demonstrated by an alternative argument that McCargo might have made using the same approach: but for Stefani having improperly subpoenaed the text messages, there would have been no supplemental brief for Stefani to show McCargo in the parking lot, McCargo would never have committed the professional misconduct found by the panel, and McCargo should, at most, be reprimanded. We find both variations of the "but-for" analysis to be unpersuasive.

However, we agree with the reasoning of the *Stefani* panel that McCargo's misconduct created the potential for harm, even though no actual injury occurred. See *Stefani*, pp. 4-5. Accordingly, we find that McCargo's misconduct with regard to the FOIA Litigation created the potential for injury to the legal process.

Most importantly, we conclude that ABA Standards 6.11 and 6.12 apply to McCargo's conduct. We found that McCargo knew that false statements had been made to the court under oath by his client and Christine Beatty regarding when and why Brown and Nelthrope had been removed from their positions in the Detroit Police Department, as well as about Kilpatrick's relationship with Beatty. He improperly withheld material information from the court, and took no remedial action concerning the false testimony that both Kilpatrick and Beatty gave. As a result, McCargo caused serious or potentially serious injury to the City of Detroit, and caused a significant or potentially significant adverse effect on the legal proceeding.

Standards 6.11 and 6.12 require disbarment or a suspension of McCargo's license to practice law for knowing and deliberate violations of MRPC 1.2(c), 3.3(a) and 3.4(a). The Standards state:

6.1 False Statements, Fraud, and Misrepresentation

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 conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11. Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12. Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding. [Emphasis added]

The commentary to ABA Standard 6.11 states that an attorney who commits misconduct of this nature violates the most fundamental duty of an officer of the court. The commentary cites as an example an attorney who was disbarred for putting a client on the witness stand at trial to testify falsely. The commentary quotes: "A lawyer's participation in the presentation of knowing false evidence is the clearest kind of ethical breach." We conclude that McCargo's failure to disclose his client's perjury after learning of it (or take other remedial action) warrants serious discipline.<sup>2</sup>

**B. Determination of the ABA Recommended Sanction.**

Under the applicable ABA Standards, and before considering any mitigating or aggravating circumstances, either suspension or disbarment would be the appropriate discipline. Upon careful review of Standards 6.11 and 6.12, we believe that Standard 6.12 more closely reflects McCargo's conduct in this case. Thus, we conclude that the applicable ABA Recommended Sanction is suspension. Further, before consideration of any mitigating or aggravating circumstances, under Michigan's tiered discipline regime, McCargo's misconduct might well require a lengthy suspension that would require recertification by the Board of Law Examiners.<sup>3</sup> We now examine whether there are any

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<sup>2</sup> The Grievance Administrator also asserts that other ABA Standards, specifically Standards 5.11(b), 7.1, and 7.2, also apply to McCargo's conduct. We follow the ABA's suggested framework by focusing on what we believe to be McCargo's most serious violation - doing nothing about the false testimony by Kilpatrick and Beatty.

<sup>3</sup> In Michigan, discipline for misconduct generally falls into one of four categories: a reprimand (with no suspension), a suspension that does not require the attorney to

mitigating or aggravating factors that should impact our discipline and, as discussed below, conclude that a downward departure in discipline is appropriate due to several mitigating factors.

**C. Relevant Aggravating and Mitigating Factors.**

The Grievance Administrator alleges that McCargo had a dishonest motive to cover up his client's perjury and the text messages and that he engaged in "bad faith" obstruction of the disciplinary proceeding. He suggests that we should consider these as aggravating factors. Aggravation or aggravating circumstances are defined as "...any considerations or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standard 9.21*.

We disagree. While McCargo's actions constituted professional misconduct, we do not believe they rise to the level of an aggravating factor. Further, we also disagree with the Grievance Administrator's suggestion that McCargo refused to acknowledge the wrongful nature of his conduct. McCargo conceded in his brief concerning discipline, and at the discipline hearing, that he should have attempted to consult confidentially with an ethics expert, and that he should have stood up to Stefani. Finally, we also decline to adopt the Grievance Administrator's implicit suggestion that McCargo's long career somehow constitutes an aggravating factor. As discussed below, we consider the fact that McCargo has practiced law for almost 35 years without any disciplinary record to be a mitigating, not aggravating, factor in our analysis.

**D. Mitigating Factors.**

Several mitigating factors are relevant to our analysis. It is undisputed that McCargo has no record of professional misconduct or discipline during the almost 35

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petition for reinstatement (179 days or less), a suspension that requires an attorney to petition for reinstatement but not have to seek recertification before the Board of Law Examiners (more than 179 days but less than 3 years), or a suspension that requires recertification (3 years or more). Michigan discipline rules do not have an option for permanent disbarment. See *generally* MCR 9.123.

years he has been licensed to practice law in Michigan. We also conclude that McCargo's misconduct is unlikely to be repeated. As noted above, McCargo also acknowledged that he erred in not seeking the ethical advice of others once Stefani handed him the now infamous draft brief in the parking lot. As we said on page 81 of our Misconduct Opinion:

We do not doubt that McCargo was acting in what he honestly believed was an appropriate and ethical course of action from the time Stefani handed him the draft of the Supplemental Brief in the parking lot in October 2007 containing excerpts from the SkyTel text messages.

We also note that McCargo demonstrated a cooperative attitude throughout these proceedings. While we did not agree with him on several important issues, he was forthright with the panel in explaining his rationale for his decisions. We also acknowledge the several witnesses who provided favorable testimony about McCargo's character, integrity, and professionalism throughout his career.

Finally, we note that several of the ethical issues involved in this case were extremely difficult and complex, as was evidenced by the extensive briefing and expert testimony provided to us by both sides. There was little or no precedent on several of the issues we had to decide.

### **III. DISCIPLINE**

Weighing all of the evidence and factors discussed above, we agree with the ABA recommended sanction of suspension. In our view, the seriousness of McCargo's misconduct, especially the violations of MRPC 3.3 and 3.4, demand no less of a sanction. McCargo violated an ethical obligation at the core of the American legal system - an attorney cannot allow false testimony to go unchallenged before a tribunal. This obligation is so fundamental that it overrides another basic tenet of our adversary system - attorney-client privilege. Despite the mitigating factors discussed above, we believe that a suspension is necessary in light of the seriousness of the violations and to

heighten the sensitivity of attorneys generally to the importance of this obligation. In our opinion, a suspension will also serve the basic goal of the disciplinary system mandated by the Michigan Supreme Court: to protect “the public, the courts and the legal profession.” The public’s already skeptical view of the legal profession would only be further diminished if someone who violates the fundamental ethical duty to take steps to correct false testimony is not suspended for some period of time.

The remaining question for us to decide is the length of the suspension. We reject the Grievance Administrator’s suggested suspension of just less than three years as being clearly excessive. Given the lack of prior discipline and other mitigating factors discussed above, we also do not believe that McCargo should be required to apply for reinstatement after his suspension is over. Accordingly, we conclude that McCargo should be suspended for 179 days; this is the longest suspension that does not require McCargo to petition for reinstatement after it has been served. Given all of the factors in this case, we believe it best satisfies the *Lopatin* standard.<sup>4</sup>

#### IV. MOTIONS

There are two pending motions which have been filed with us that we now address. McCargo has filed a motion (objection) asking us to rule that he is not responsible for paying for the fees of the Grievance Administrator’s expert witness, Professor Dubin. Although we are somewhat sympathetic to his request based solely on the amount involved, we deny the motion. We note that there is no assertion that Professor Dubin did not put in the time that the Grievance Administrator is seeking payment for, nor is there any assertion that Professor Dubin’s rate, or time, are excessive. Further, we point out that it was McCargo who sought and was granted permission to present expert testimony to the panel; it was reasonable for the Grievance

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<sup>4</sup> We have reviewed the various discipline decisions submitted by the parties and find them either distinguishable on their facts and/or not entirely reflective of the various factors we find relevant to our discipline decision.

Administrator to want to do the same once we allowed McCargo to do so. Finally, we conclude that under MCR 9.128, these costs are properly taxed against him and we do not have discretion to reduce them. See MCR 9.128(A) (Attorney Discipline Board "may not reduce the assessment for actual expenses" provided for in MCR 9.128(B)(2).)

McCargo has also filed a motion to stay the penalty decision and reopen the proofs in respondent's disciplinary hearing. We deny this motion.

**V. PRIOR DISCIPLINE**

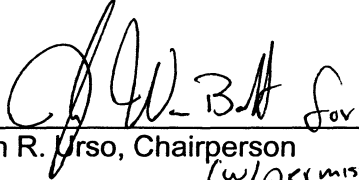
None.

**VI. ITEMIZATION OF COSTS**

Attorney Grievance Commission: (See Itemized Statement filed 04/27/10)	\$25,780.10
Attorney Discipline Board:	
Conference call held 07/08/09	\$ 20.98
Hearing held 07/13/09	\$ 1,259.00
Hearing held 07/23/09	\$ 870.00
Hearing held 07/27/09	\$ 1,067.00
Hearing held 07/30/09	\$ 946.50
Hearing held 08/13/09	\$ 1,057.50
Hearing held 08/20/09	\$ 1,203.00
Hearing held 08/31/09	\$ 735.50
Hearing held 09/04/09	\$ 974.50
Conference call held 03/10/10	\$ 6.64
Hearing held 03/29/10	\$ 667.50
Excerpt of testimony from GA v Valerie Colbert-Osamuede	\$ 366.75
Administrative Fee [MCR 9.128(B)(1)]	<u>\$ 1,500.00</u>
<b>TOTAL:</b>	<b>\$36,454.97</b>

**ATTORNEY DISCIPLINE BOARD**  
Tri-County Hearing Panel #27

By:

  
John R. Urso, Chairperson  
(w/permission)

DATED: September 10, 2010

Concurring opinion of Panel Member Michael A. Gruskin:

I join the panel opinion. Recognizing that the panel opinion is unlikely to be the last word as to what discipline will be imposed, I write separately to make a few observations about our decision to impose a considerable suspension on McCargo in contrast to the *Stefani* panel's decision to impose only a reprimand.

First, I recognize that the allegations of professional misconduct before this panel were not the same as those before the *Stefani* panel<sup>1</sup>, and I respect the right of the *Stefani* panel to reach different conclusions applying the *Lopatin* standard than the panel did in this case. Second, I also recognize that the roles of McCargo and Stefani were not exactly the same with regard to all of the underlying factual issues. For example, Stefani had no explicit role in the Free Press' FOIA litigation against the City of Detroit over the Brown/Nelthrope settlements, while we found that McCargo was providing advice to the City in the FOIA Litigation (despite his statements to the contrary), and also found that he violated MRPC 8.1 when he told the Grievance Administrator an incorrect date as to his knowledge of the Free Press' FOIA requests.

Despite these differences, in what I view as our core findings of professional misconduct - McCargo's failure to inform the judge of false testimony by Kilpatrick and Beatty at trial, and his participation in the attempted coverup of the settlement agreement and other documents in the *Brown/Nelthrope* case - Stefani was the other key protagonist involved in the conduct. For example, Stefani improperly subpoenaed the text messages which started the course of events that led to him preparing the draft

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<sup>1</sup> I note that one issue that was not before the *Stefani* panel was this panel's conclusion that Stefani gave false testimony to this panel when he denied that he was a source for the Free Press concerning the text messages between Kilpatrick and Beatty. To date, the Attorney Grievance Commission has taken no action regarding this finding.

brief which he gave to McCargo in the parking lot, and from which McCargo made a series of poor judgments which eventually led to the panel's findings of professional misconduct. Further, Stefani was instrumental in going along with McCargo's plan to attempt to keep parts of the Settlement Agreement and other documents concerning the text messages from public view.

The Attorney Discipline Board has discussed in numerous decisions its views that discipline should be imposed in a proportional and consistent manner (i.e. the level of discipline should depend on the type of misconduct, and similar misconduct should result in similar discipline). I admit to having some difficulty concluding that McCargo's role in professional misconduct in which Stefani also participated warrants a lengthy suspension when the *Stefani* panel held that Stefani's conduct only merited a reprimand. While the Attorney Discipline Board or the Supreme Court may find a basis to reconcile what I view as inconsistent discipline decisions for McCargo and Stefani, I am left with a disquieting feeling that the discipline decisions reached by us and the *Stefani* panel cannot both be correct.

Having said this, our panel can only make its best judgment based on the record before it, our misconduct decision, and applicable case law. It will be up to the Attorney Discipline Board or the Michigan Supreme Court to reconcile if necessary the various discipline imposed on the attorneys in the Kilpatrick debacle who are found to have committed professional misconduct. For the reasons stated in the panel decision, I believe that we have applied the *Lopatin* factors correctly and that the discipline we have imposed on McCargo is appropriate.

With these observations, I join the panel opinion.