

State of Michigan
Attorney Discipline Board

FILED
ATTORNEY DISCIPLINE BOARD

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Grievance Administrator,
Michigan Attorney Grievance Commission,

Petitioner,

ADB Case No. 09-47-GA

v

Michael L. Stefani, P-20938,

Respondent.

Petitioner's Reply Brief

Unrelated orders of consent discipline should not influence the Board's review of a hearing panel's decision on sanctions. Without a factual record to examine—and nearly every consent discipline lacks an underlying factual record—it cannot be ascertained from the Board's notice alone whether the consent discipline involves truly equivalent misconduct. A good example of the difficulties in this regard can be found on page 11 of Respondent's brief where he references the 2003 consent reprimand in *Grievance Administrator v Conlon*, Case No. 00-159-GA, to try to justify his own reprimand.

Conlon, according to Respondent, "appears to be extremely close to the facts at bar." And so it does, provided that one looks no further than the *pro forma* description of misconduct contained in the Board's Notice of Reprimand and quoted by Respondent. The Board, however, should not be content with "appearances," especially given the Supreme Court's expectation that discipline proceedings will involve fact-sensitive inquiries. An inquiry by means of judicial notice¹ into the facts of *Conlon* will definitively reveal that Mr.

¹ See, e.g., *Grievance Administrator v Arnold M. Fink*, Case No. 96-181-JC (ADB 1998).
(00013818.DOC)

Conlon's misconduct bears very little resemblance to Respondent's.

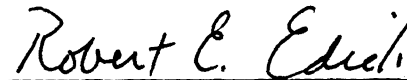
Mr. Conlon's misconduct took place during his representation of the criminal defendant in *People v Clarence Dunifin*, Kalamazoo County Circuit Court Case No. C96-0861—FC. Judge Richard Lamb conducted a show cause hearing at which Mr. Conlon testified. Mr. Conlon's testimony (pertinent excerpt attached as Exhibit A) and Judge Lamb's Opinion and Order (Exhibit B) disclose the following pertinent details:

- (1) Mr. Conlon's wife (also an attorney), not Mr. Conlon, was the one who attended the court hearing at which Judge Lamb ordered that the school records in question be sent to the court;
- (2) Mr. Conlon did not sign the subpoena;
- (3) a copy of the subpoena was sent to the prosecuting attorney; and,
- (4) when the sealed school records arrived at Mr. Conlon's office, they were forwarded, unread, to the court.

It is hard to imagine how Mr. Conlon's handling of the school records could be any more dissimilar to the Respondent's handling of the text messages. Respondent was personally aware of the *in camera* order; he personally issued the subpoena; he personally and deliberately did not serve a copy on the defendants; and, when the text messages arrived at his office, instead of forwarding them unread to the court, he read them, gave a copy to the newspaper reporter and eventually used them to leverage a quick settlement of the *Brown/Nelthrope* lawsuit.

A much more meaningful benchmark for the Board to employ in its review of the hearing panel's reprimand in this matter is the 179-day suspension recently imposed in *Grievance Administrator v Samuel E. McCargo*, Case No. 09-50-GA. Mr. McCargo and Respondent were both found to have committed misconduct during the *Brown/Nelthrope* lawsuit which presumptively called for a suspension. Each of them was able to point to a long and distinguished legal career with no history of discipline. Mr. McCargo was suspended. Respondent was reprimanded. The Board is now obliged to square these results.

Dated: October 1, 2010



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STATE OF MICHIGAN
NINTH JUDICIAL CIRCUIT COURT (KALAMAZOO COUNTY)

THE PEOPLE OF THE STATE OF MICHIGAN,
v
CLARENCE DUNIFIN,
Defendant.

Kalamazoo Circuit Court
File No.: C 98 0861 PC

FILED
JUN 17 1997
9th JUDICIAL CIRCUIT
COUNTY OF KALAMAZOO
KALAMAZOO, MICHIGAN

CONTINUATION OF SHOW CAUSE HEARING

BEFORE THE HONORABLE RICHARD RYAN LAMB, CIRCUIT JUDGE

Kalamazoo, Michigan - Friday, May 9, 1997

APPEARANCES:

For the People: GREGORY W. RUSSELL (P36700)
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For the Defendant: JAMES D. HILLS (P14978)
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RECORDED BY: Videotaped - Courtroom C

TRANSCRIBED BY: Dianne M. Sponseller
Certified Electronic Recorder, CER 3908
(248) 652-2710

1 or not. And, I never made such a comment. Absolutely
2 never.

3 Q So, there's just -- just a disagreement as to what was
4 said maybe as a mistake. Is that right?

5 A No. That's not a disagreement. It's a subject matter
6 that I never spoke about.

7 Q Okay. Thank you very much, Mr. Conlon.

8 MR. HILLS: I have nothing further, Your Honor.

9 THE COURT: Mr. Russell?

10 MR. RUSSELL: No questions, Your Honor. Thank you.

11 THE COURT: Okay. I wanna shift gears for a moment.
12 I have some questions, Mr. Conlon, about a subpoena and a
13 process. And, to focus your attention, we're talking
14 about some school records there.

15 At the last hearing before the intervention by the
16 other Courts, and we kept adjourning this, and your --
17 let's see, Mr. -- we adjourned the last hearing. Well,
18 when we were having a hearing and the Court of Appeals
19 came down with the order saying, Stop everything. -- I was
20 under the impression, at that point in time, that you were
21 going to have your wife testify about these subpoenaed
22 records, because she appeared in court one day when you
23 were somewhere else, and she is the pers-- the attorney
24 who was going to get the subpoena issued concerning some
25 school records of Paige Dunifin. And, then we had a --

1 the Court of Appeals stop the hearing. And, then a week
2 later they vacated that order. And, then we were gonna
3 set another hearing date. And, Mr. Hills was occupied,
4 otherwise, so we adjourned that date. And, now here we
5 are here today.

6 Who you want to have come and testify is up to you.
7 But, the focus of my inquiry here, and I'll get some
8 records in a minute, is pertaining to the process of that
9 subpoena, and how those records ended up in your office
10 when your wife had been in court, and you weren't here but
11 I reviewed the tapes. And, she made the motion to -- for
12 discovery to obtain the records of Paige Dunifin. I
13 stated on the record, in open-court, specifically to her,
14 Those records are -- you may have a subpoena but the
15 records are to be produced here in the courtroom for my
16 review in Chambers, in-camera. And, then she said, Well,
17 can I have another week or two because by the time we get
18 the subpoena out and tell the school people what process
19 they have to go through -- I forget the day of the week.
20 It may have been a Wednesday or Thursday. But, anyway,
21 the first Monday immediately after that hearing would've
22 been too short of time. So, she said, Can I have another
23 week or so? -- and I said, That's fine. So, we picked a
24 Monday for the return date of the subpoena. And, again, I
25 -- she said, I understand the process you're talking

1 about.

2 And, then the next thing I knew, under a cover letter
3 from your office, the school people were directed to send
4 the records to your office. And, they did, in fact, go
5 there.

6 Now, what do you know about that? How did all that
7 happen?

8 THE WITNESS: What I know...

9 THE COURT: ...record.

10 THE WITNESS: Okay. What I know about it, is:

11 Number one, the order for that was entered after all
12 of this took place. The order is October 9th, 1996.

13 THE COURT: After all of what's this took place?

14 THE WITNESS: The subpoena, the requesting of
15 records, the records winding up at my office, and things
16 of that sort the written order came down. Before the
17 written order was entered on October 9th, I had prepared
18 based on the information I'd received from my wife, the --
19 what I thought was the proposed order, which did not
20 include anything with reference to an in-camera hearing,
21 which is, I believe, what you're talking about.

22 THE COURT: Correct.

23 THE WITNESS: I'm familiar with the procedure, as
24 well.

25 And, essentially, the first subpoena, as it started,

1 was a subpoena of the Parchment, if I remember, North
2 Parchment School, I think, is the school. And, my wife,
3 acting on my behalf, sent it out, and sent it through the
4 courts.

5 And, I think if I remember correctly North Parchment
6 reported back to us that the child had changed schools and
7 then went to, I think, Portage, if I remember correctly.

8 And, at that point in time, ... then sent over to
9 Portage to get the records, and the records got the list
10 from our office.

11 And, at that point in time, Attorney Kasson called me
12 and spoke with me, mentioning that they probably should've
13 gone to the court. And, I said, Well, I really don't know
14 anything about it, but I'll check with it. And, I checked
15 with my wife. And -- and, then my wife delivered back to
16 you -- to your office the records that had been delivered
17 to us. So, I think what we had was a miscommunications.
18 And, I'm not much more familiar with it than that,
19 although I am the attorney in charge of the case; and, I
20 respectfully understand that. And, it was not an
21 intentional disregard of your directions. And, that's the
22 best I can tell you about it.

23 I think one of the subpoenas bears my na-- name, but
24 I believe my wife signed that on my behalf, which I have
25 no problem with that at all.

1 But, I think that there was a -- either a
2 misunderstanding or miscommunications. And, I was in the
3 middle of a trial in Cass County at the time, I think.
4 We're talking about September. And, I was about a
5 week-and-a-half down there. I'm guessing. Maybe it was a
6 week. But, I think that's the time that that all took
7 place. And, that's the facts and circumstances as I
8 understand 'em.

9 So, with no disrespect intended to your directive it
10 was not followed, and I acknowledge that.

11 THE COURT: Now, let me come back. If you -- if you
12 prepared the letter, based upon what you -- the
13 conversation you had with your wife, my question is this:
14 How could a letter tell the school officials to deliver
15 the documents to your office when your wife, in
16 open-court, specifically stated, I understand the process,
17 and I need extra time so those records which might contain
18 privileged information will come to the court? Now, how
19 did that happen?

20 THE WITNESS: I think what you asked me before is
21 what I know about this process. I have told you what I
22 know about the process. I don't remember, specifically,
23 who it was that prepared the letter. We do have,
24 generally, have a standard form letter, and it could've
25 gone as having the secretary doing a standard form letter.

1 That's a possibility. But, I can't answer that because I
2 didn't even touch the records, because when I got the call
3 from Attorney Kasson I directed it to my wife, who was
4 familiar with it. And, my wife, if I remember correctly,
5 then shifted it back down to this court. I said, What was
6 the directive? What was involved? And, she didn't, if I
7 remember correctly, she didn't remember, specifically,
8 that it was in-camera. ...until you gave 'em to me in the
9 court.

10 THE COURT: Okay. Listen to this. I'm going to read
11 into the record, Mr. Conlon, a letter that's on your
12 letterhead, or stationery. It says, John J. Conlon and
13 Associates, P.C. And, then it has your address and your
14 phone number.

15 At the top it has John J. Conlon, Esquire, Attorney
16 at Law.

17 It's dated September 13, 1996.

18 It says, To: Parchment Northwood Elementary, with
19 their address. Re: People versus Dunifin.

20 And, then there's a court case number, and your file
21 number.

22 It says,

23 Dear Parchment Elementary School,

24 Attached herewith please find a subpoena duces
25 tecum to release the school records information

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pertaining to Paige, P-A-I-G-E, Dunifin, 7-18-87. We are in need of those records for purposes of evidence for a trial in the Circuit Court.

Even though the subpoena duces tecum requires your presence at court on Monday, September 23, 1996, if you provide photocopies of the records asked for on or before that date we will not make arrangements for your attendance at court. Please forward this information to the attention of the undersigned. If you are able to provide accurate photocopies they will suffice. The Court has agreed to examine these documents in-camera, if necessary.

Also, attached, please find our check in the amount of \$7.00 to cover the witness fee for your services.

Very truly yours,
John Conlon

And, then it has at the bottom: Enclosures.

Subpoena duces tecum, check for \$7.00.

Now, that's not your signature there.

THE WITNESS: Not my signature.

THE COURT: Okay.

THE WITNESS: I believe that's a standard, with due respect to the Court, it sounds...

THE COURT: Hang on, Mr. Conlon. We'll get -- I have

1 some questions.

2 THE WITNESS: Sure.

3 THE COURT: And, then if you want to add something,
4 you may.

5 Now, I have with that, and we obtained these records,
6 the subpoena and the cover letter, we got them from the
7 school. There's a subpoena, it says, Order to appear. It
8 has the Case Number C 96 0861. It's entitled, People
9 versus Clarence Dunifin. It's directed to Parchwood -- or
10 Parchment Northwood Elementary School. And, it says,

11 You are ordered to appear personally at the time
12 and place stated below, and it has the court address
13 here, Monday, September 23rd, 1996, at 4:00 p.m.

14 Then, it says,

15 You are also ordered to produce the following
16 items: All records pertaining to the child Paige
17 Dunifin, a/k/a Paige Kirlin, K-I-R-L-I-N, dob
18 7-18-87.

19 And, then it has person requesting subpoena: John J.
20 Conlon.

21 Then, at the bottom there's a date: 9-13, of '96. A
22 signature block with a Bar number. But, that's your
23 signature, is it?

24 THE WITNESS: No, that's not my signature.

25 THE COURT: Okay. Now, there's the third page that

1 came with these documents is a -- it's a check. It has
2 the name Patricia N. Conlon, and an account number, dated
3 9-13-96. Check Number 8435. Pay to the order of
4 Northwood Elementary. \$7.00. It has, For B-U-S, I think
5 that is, slash Dunifin. And, then it has Pat Conlon's
6 signature on it. So, that's the check that went with the
7 subpoena?

8 THE WITNESS: That would be my belief.

9 THE COURT: Okay. And, then, finally, there's a
10 letter dated September 17, from the Parchment School
11 District addressed to you from Larry Seaver, S-E-A-V-E-R.
12 And, it's saying, basically, that the -- the subpoena
13 arrived, the check arrived, so here's the records.

14 Now, my question is this, if you know: Who -- who
15 prepared the letter that is to the Parchment Northwood
16 Elementary? Do you know?

17 THE WITNESS: I did not prepare the letter. It
18 sounds very consistent, not all parts of it, but a good
19 part of it, sounds consistent with our standard form
20 letter. We had it set up in that fashion so that if we
21 could get compliance so that people would not be
22 inconvenienced if we could possibly save from that. So,
23 that's a, in part, a standard form. I believe my wife
24 probably prepared that or directed that to be prepared.
25 That's my -- that's just my guess though. I -- but,

1 that's probably a reasonably good calculation.

2 THE COURT: So, you have no idea how my directive
3 that these records, including privileged materials, ended
4 up with them being delivered directly to your office. Is
5 that, basically, what you're saying?

6 THE WITNESS: A situation of haste makes waste. I
7 think error on our part, attributable to me as the senior
8 attorney, but not an intentional disregard of your
9 directive.

10 THE COURT: And, you don't wanna have any testimony
11 from your wife on this issue.

12 THE WITNESS: No, I -- I do not. She was scheduled
13 to come the last time. And, I don't know if she got here
14 or not. I don't remember what -- we had to adjourn. But,
15 that's -- I think I can provide you as much.

16 And, as I indicated, the order pertinent to your
17 directive...

18 THE COURT: Okay. The question, is: Do you wanna
19 have her here to give me information on how this
20 directive, which was so specifically stated on the record,
21 in open-court, and she acknowledged that she needed more
22 time to follow this procedure, you don't wanna have any
23 further explanation on that.

24 THE WITNESS: No, sir. I've given you the
25 explanation.

1 it because I just...

2 THE WITNESS: That's what I thought you said.

3 THE COURT: ...looked at it and skimmed at it. So,
4 maybe he -- maybe he said that, what you said. Here, let
5 me read into it,

6 Dear Mr. Conlon,

7 Enclosed, please find the subpoena ... Paige
8 Dunifin.

9 Okay. You're correct.

10 Her records were mailed from Northwood
11 Elementary to Moorsbridge Elementary on August 29,
12 1996.

13 If I can be of further assistance.

14 So, you're right.

15 THE WITNESS: That was my memory.

16 THE COURT: But, then the Moorsbridge School
17 apparently followed the procedure you're talking about
18 where they just delivered the records.

19 THE WITNESS: And, I believe I signed that subpoena,
20 to be truthful to this Court, but I was just trying to get
21 the records moved along.

22 And, as I said, with all due respect to the Court, it
23 was not intentional disregard. And, we were a little bit
24 occupied, I was, but, obviously, that doesn't lessen my
25 responsibility to you, and I recognize that. I'm not new

1 at practice. And, but, it's a -- it was not intentionally
2 contemptuous or anything of that sort.

3 And, I would say that the pleadings that I've given
4 in this case, my motion, my letter of August 7th, those
5 are accurate recitation, with all due respect to whatever
6 anyone else says, as to the things that took place.

7 I have nothing else to say.

8 THE COURT: Okay. The -- there's one other memo
9 that's pertinent, it's dated September 20th, of '96. Memo
10 to Judge Lamb, Court C. It has, Re: People versus
11 Clarence Dunifin.

12 Dear Judge Lamb,

13 And then it says,

14 This unsealed envelope was received by our
15 office today from the Moorsbridge School. When I
16 realized that these were possibly the school records
17 of Paige Dunifin I called the Prosecutor, Judy
18 Kasson, and advised her that they were in our office,
19 since she had raised a question regarding the Court's
20 order in this case. I also advised her that I would
21 send them to your office immediately for
22 in-camera review.

23 I have no idea what these records consist of
24 since neither John nor I have reviewed them.

25 I have also subpoenaed the records of the school

1 Counsellor Ann Kneas, K-N-E-A-S, records for your
2 Court on September 23rd, 1996, at 4:30 p.m., for
3 in-camera review.

4 Would you please advise our office should you
5 require our presence?

6 I am assuming that the counsellor will just turn
7 the records over to you, at this point.

8 Very truly yours,

9 Patricia N. Conlon

10 Signed, Pat Conlon.

11 So, this memo would indicate that with reference to
12 Ann Kneas' records the procedure I ordered was followed.
13 But, with reference to the school records, it wasn't.

14 This -- and, this is not -- that's not your
15 signature, is it?

16 THE WITNESS: No, that's my wife's signature. And,
17 that's exactly how I remember the event. When the issue
18 came up from Attorney Casper (sic) I directed it back to
19 my wife. I'm not sure what day that she asked for Ann
20 Kneas', but I'm not familiar with that. And, she's
21 correct about the fact I didn't know it was there, and I
22 didn't even know it was there there when Attorney Casper
23 (sic) called, and I said I'd check it out.

24 THE COURT: Kasson, not Casper.

25 THE WITNESS: I stand corrected. Kasson.

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THE COURT: Okay. Thank you.

Okay. Anything else?

THE WITNESS: I have nothing.

MR. HILLS: I have nothing else, Your Honor.

THE WITNESS: May I step down?

THE COURT: Sure. I'm sorry. Go ahead.

THE WITNESS: Thank you.

THE COURT: You can step out of the witness box.

(At 10:23:08, witness excused)

THE COURT: Anything else, Mr. Russell?

Anything, with reference to Ms. Kasson?

Do you have a sharp difference of opinion?

MR. RUSSELL: No, Your Honor.

THE COURT: Okay. Okay. I will -- I will submit a
written opinion.

MR. RUSSELL: Thank you, Your Honor.

THE COURT: Thank you.

MR. HILLS: Thank you, Your Honor.

MR. CONLON: Thank you, Your Honor.

THE COURT: Court is in recess.

(At 10:23:41 a.m., this proceeding concluded)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

In re John J. Conlon

PEOPLE OF THE STATE OF MICHIGAN

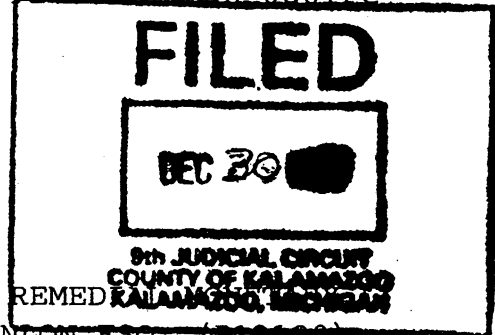
Plaintiff

HON. RICHARD RYAN LAMB
Circuit Judge (P16362)

v

CLARENCE DUNIFIN
Defendant

File No. C96-0861EC



OPINION AND ORDER IMPOSING CIVIL REMEDY
SANCTIONS ON ATTORNEY JOHN J. CONLON ESQ. (P12128)

At a session of said Court held in the
City and County of Kalamazoo, Michigan
on this 30 day of December, 1997

Introduction:

In this matter Attorney John J. Conlon was retained by the defendant to represent him on an 11 count complaint charging criminal sexual conduct.

The defendant was arrested on May 21, 1996 and arraigned in District Court on the same date. His preliminary examination was

conducted on June 4, 1996 and June 17, 1996. On June 17, 1996 he was bound over to Circuit Court on 10 charges of criminal sexual conduct.

During the course of the court proceedings Mr. Conlon violated scheduling orders and court rules. The court finds that civil remedial monetary sanctions are appropriate to address Mr. Conlon's conduct.

Mr. Conlon claimed that he had many reasons for his failure to follow the scheduling orders. Included in the reasons was the fact that his chief secretary had been away from his office on maternity leave and decided not to return about the time the Dunifin case was being prepared for trial. He stated that he was extremely busy during this time with his law practice and in addition to that his wife was involved in a judicial election. The court can understand the demands placed upon a sole practitioner and the demands of a judicial race. If the failure of Mr. Conlon to follow scheduling orders was an isolated incident, the court would not order sanctions. The problem with Mr. Conlon's claims is that his conduct continued throughout the Circuit Court proceedings after he became aware of the fact that the matter was scheduled for trial in

October 1996, and after he was granted leave to file motions beyond the time set forth in the scheduling orders. His failure to follow the scheduling orders necessitated an adjournment of the trial, objections by the people and claims of prejudice to the people which necessitated hearings during the trial.

Adjournment of Trial

Trial in this matter was originally scheduled for October 1, 1996. This trial date was mentioned in a motion filed in July, 1996, by the defendant requesting an extension of time to file motions. At a hearing held on August 6, 1996, the October 1 trial date was mentioned on the record 4 times. At that hearing Mr. Conlon made specific reference to the fact that his witnesses from Minnesota, including Dr. Ralph Underwager, had to be notified of the trial date.

One week before trial Mr. Conlon filed a motion requesting an adjournment of the trial because he stated his witnesses, one of whom was Dr. Ralph Underwager described as a key, critical defense witness, would be unavailable for trial because he was going to be out of the country.

At a show cause hearing Mr. Conlon described his failure to notify his "key" witness as an oversight. The assistant prosecutor representing the people in this case testified that before the August 6, 1996, hearing Mr. Conlon twice stated to her that he was extremely busy in his law practice and was involved in his wife's judicial campaign and "there's no way this trial is going October 1st. That's not gonna happen." Mr. Conlon's response to this testimony of the assistant prosecutor was "I hate to put it this way but it's a lot of balderdash. I never talked about the trial. I wasn't even concerned about the trial as much as I was about doing what I had to do on the day in question. I never spoke about the wa-- the trial. Never said anything about the trial date. Never made any comment of that sort. And, it's a lot of nonsense. And, it was not for me to control when the trial would go on or wouldn't go on. And, I'm not even sure if at that date that I was focusing on October 1st, or not. And, I never made such a comment. Absolutely never."

The court will evaluate the circumstances surrounding the failure to produce this witness for the October 1 trial date.

Mr. Conlon was admitted to practice in June, 1972. He was an

assistant prosecuting attorney in Wayne County for approximately 3-1/2 years. He has been private practice for over 20 years and has represented clients in civil and criminal cases. He is familiar with the practices and procedures in Circuit Court. In July, 1996, he found himself in a position where he had failed to comply with scheduling orders of the court. His explanation for not being able to produce a witness he described as critical to the defense was that he failed to notify the witness of the trial date and therefore he was unaware of the fact that the witness would be unavailable on October 1. The court finds that Mr. Conlon's claim of "oversight" is not credible. It is too much for coincidence that an experienced criminal trial attorney who is a former assistant prosecutor would "forget" to notify a key defense witness of a trial date. This record and the events leading up to the adjournment of the trial convince the court that Mr. Conlon's failure to notify the key witness was part of an effort to adjourn the October 1 trial date. His effort was successful as the trial had to be adjourned to a later date. The people were ready for trial on October 1 and objected to the adjournment. The court adjourned the case for three weeks.

The fact of an adjournment for three weeks is not as significant as is the timing of Mr. Conlon's motions and his method of bringing this matter before the court. Had Mr. Conlon complied with the scheduling orders and the additional time granted to him to file motions, this problem would have surfaced earlier than one week before the trial date. Alternative arrangements for the testimony of Dr. Underwager might have been arranged and the trial might have been adjourned earlier rather than shortly before trial. Mr. Conlon knew, or in the exercise of reasonable attention to the trial date should have known, of this conflict long before the date he filed his motion to adjourn trial one week before the trial date. This case was one of a number of capital cases scheduled for trial on October 1. The jury clerk had summoned a large number of jurors to address the court's need for jurors. The prosecutor had subpoenaed witnesses for trial. Canceling a trial one week before the scheduled date does not allow enough time to make adjustments for the number of jurors summoned nor for witnesses to adjust their schedules in a timely manner.

Violation of Discovery Orders

Reports of an Expert

During trial the late production of records by Dr. Lawrence Dugan necessitated a hearing based upon the prosecutor's motion to prevent the witness from testifying. The prosecutor was presented during the first week of trial with a potential witness who produced 80 to 100 pages of records for review during trial. Dr. Dugan administered psychological tests to the defendant. The prosecutor had requested such material for review by filing a discovery request pursuant to MCR 6.201.

Based upon the late production of this material, the assistant prosecutor moved to have the court preclude the use of Dr. Dugan as a witness. The court was required to hold a hearing on Monday, October 28, 1996, after the first week of trial. Dr. Dugan testified at this hearing that Mr. Conlon had not told him that the assistant prosecutor had requested this material until Friday, October 25, 1996. He also testified that on Friday, October 25, 1996, the assistant prosecutor had contacted him and requested the tests that he administered to Mr. Dunifin. Dr. Dugan produced the material upon learning of this request. Mr. Conlon's position on

this issue was that the court rule on discovery mentions the word report and that report does not include a test. Mr. Conlon's claim that he interpreted the word "report" to mean only a written report is contradicted by a P.S. in a letter dated June 11, 1996, to Dr. Dugan. In this letter, Mr. Conlon mentions his plan to obtain via discovery a video tape of his client at a polygraph exam. In fact, no such video tape existed, but this P.S. in Mr. Conlon's letter to Dr. Dugan demonstrates Mr. Conlon's awareness of discovery in June, 1996. His mention of obtaining a video tape he believed existed contradicts his claim that he believed only a written report is subject to the discovery rule.

The rule on discovery in criminal cases requires that a party upon request must provide all other parties any report of any kind produced by or for an expert witness whom the party intends to call at trial. The words used in the court rule are written to be all inclusive and include psychological tests.

Privileged School Records

Of particular concern to the court was the method by which a subpoena was utilized to obtain school records of the minor child who was the victim in this case. These records are privileged by

statute, MCL 600.2165. At a hearing on September 10, 1996, the court issued an oral directive to Mr. Conlon's wife who was appearing in Mr. Conlon's place that a subpoena would be authorized requiring the production of the records in court for an in-camera inspection by the court. In addition to this oral directive from the court, MCR 6.201(C) prohibits certain discovery. This subparagraph of the court rule states that there is no right to discover information or evidence that is protected from disclosure by a privilege. The rule further states that if a defendant demonstrates a good faith belief that such information protected by privilege is necessary to the defense, the trial court shall conduct an in-camera inspection of the records.

Although Mr. Conlon was not in court on the day of the hearing when the court issued its oral directive, he is charged with the knowledge of MCR 6.201(C). He testified that although his name appeared on a subpoena to produce the records, the signature was not his. He also acknowledged that the responsibility for compliance with court rules and protecting privileges was his as the attorney representing the defendant. Notwithstanding the court's oral directive and MCR 6.201(C), the cover letter that went

with the subpoena informed the custodian of the records that the records could be sent directly to Mr. Conlon's office. The records were in fact sent directly to Mr. Conlon's office. The fact that it was not Mr. Conlon who signed the subpoena does not allow him to eschew his responsibility in regard to the subpoena, production of the records and compliance with the court rule.

Late Motions and Oral Motions

In July, 1996 the court granted Mr. Conlon's application for leave to file delayed motions and authorized him to file a number of delayed motions. Mr. Conlon filed motions which did not include a motion to quash the information. Mr. Conlon testified at a show cause hearing that he had drafted a motion to quash the information but did not file it. On October 1, 1996, the original scheduled date of the trial, the court heard a number of matters pertaining to this case. At the conclusion of these hearings the court asked if there were any other matters that needed to be raised. Mr. Conlon stated that he had no other motions. On October 1, 1996, the trial was adjourned to October 22. On October 22, 1996, when trial was about to commence, Mr. Conlon announced that he had oral motions to raise. One motion was a motion in limine to prohibit

the testimony of an expert witness whose report Mr. Conlon had had for approximately two months. The other motion was a motion to quash certain counts of the information because Mr. Conlon claimed that the time frames alleged in the information were not specific enough so that he could adequately defend against the allegations. He said that his motion was of constitutional importance because he claimed the information violated double jeopardy principles and duplicity. He said that the basis for his motion became clear to him the night before he raised the oral motion in court. His claim is contradicted by the following facts.

At the preliminary examination held in June 1996, one of the first issues raised by Mr. Conlon with the District Judge was a claim that the time frames were so broad that he could not adequately defend the case. At an evidentiary hearing in circuit court on August 6, 1996, Mr. Conlon stated that he intended to file a motion to quash the information because of a lack of specificity in the dates alleged in the complaint. Mr. Conlon also mentioned the nonspecificity of the charges as something that presented a problem to him defending the lawsuit during the proceedings held on Tuesday, October 1, 1996, the original scheduled jury trial date.

The oral motions raised on the morning of the adjourned trial date and the failure to produce discovery materials concerning Dr. Dugan illustrate Mr. Conlon's continued failure to follow scheduling orders which were amended to address the circumstances which he claimed caused his original violation of the scheduling orders.

SUMMARY

Mr. Conlon is assessed \$250.00 as a civil remedial monetary sanction for the reasons stated in this opinion. This amount is to be paid to the clerk of the court not later than January 23, 1998. This order resolves all of the issues raised in the December 27, 1996, ~~at the preliminary hearing~~ first issues raised by Mr. Conlon with the District Judge was a claim that the time frames were so broad that he could not adequately defend the case. At an evidentiary hearing in circuit court on August 6, 1996, Mr. Conlon stated that he intended to file a motion to quash the information because of a lack of specificity in the dates alleged in the complaint. Mr. Conlon also mentioned the nonspecificity of the charges as something that presented a problem to him defending the lawsuit during the proceedings held on Tuesday, October 1, 1996, the original scheduled jury trial date.

PROOF OF MAILING

I, Velma Jerome, certify that on this date, I mailed a copy of this Opinion and Order Imposing Civil Remedial Monetary Sanctions on Attorney John J. Conlon Esq. (P12128) to Counsel for the parties by ordinary mail to their above stated addresses.

Date: December 30, 1997


Velma Jerome, Judicial Aide

State of Michigan

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD

10 OCT -1 PM 4:37

Grievance Administrator,
Michigan Attorney Grievance Commission,

Petitioner,

v

ADB Case No. 09-47-GA

Michael L. Stefani, P-20938,

Respondent.


Proof of Service

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

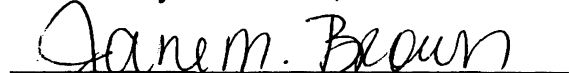
Charlene J. Varacalli, being duly sworn, deposes and says that on October 1, 2010, she served a copy of a Petitioner's Reply Brief upon the following:

Kenneth M. Mogill
Attorney for Respondent
27 E. Flint St., 2nd Floor
Lake Orion, MI 48362

via ordinary mail by enclosing same in a sealed envelope properly addressed with sufficient postage affixed.


Charlene J. Varacalli

Subscribed and sworn to before me
this 1st day of October, 2010


Notary Public, Wayne, Michigan
(Acting in Wayne County, Michigan)
My Commission Expires: 9/15/2014