

**State of Michigan
Attorney Discipline Board**

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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 Brief in Support of Petition for Review

Statement of Question Presented

Is there sufficient evidence of mitigating factors to justify a downward departure from the suspension recommended by the Standards?

Hearing Panel answers: "Yes"

Petitioner answers: "No"

Respondent answers: "Yes"

Standard of Review

The Attorney Discipline Board reviews a hearing panel's findings for proper evidentiary support but possesses a greater measure of discretion with regard to the appropriate level of discipline. *Grievance Administrator v August*, 438 Mich 296; 475 NW 2d 256 (1991). The Board's review of a sanctions determination is somewhat more robust in light of the Board's own duty under *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW 2d 120 (2000), to use the American Bar Association's Standards for Imposing Lawyer Sanctions. *GA v Saunders V. Dorsey*, 02-118-AI (ADB 2005).

Statement of Facts

Respondent was found to have committed misconduct by knowingly disobeying an obligation under the rules of a tribunal, contrary to MRPC 3.4(c). Petitioner accepts and incorporates by reference the summary of testimony and evidence in the Misconduct Report of Tri-County Hearing Panel No. 26 dated March 2, 2010. This petition for review only addresses the level of discipline.

In their report on discipline, the hearing panel determined that Respondent's misconduct created the potential for injury to the legal process; they concluded that the applicable ABA Standard was 6.22 which recommends suspension.

The hearing panel found no factors in aggravation, and five factors in mitigation. The hearing panel declined to impose the recommended sanction of suspension. Respondent was reprimanded without conditions.

Petitioner filed a timely petition for review.

**The Aggravating and Mitigating Factors,
Properly Weighed, Do Not Justify a
Downward Departure from the Suspension
Recommended by the ABA Standards.**

Introduction

When the Supreme Court in *Lopatin*¹ officially ratified the long-standing practice of the Attorney Discipline Board's reliance on the ABA Standards for Improving Lawyer Sanctions, the Court emphasized at the outset of their opinion their expectation that application of the Standards "will produce reasoned decisions" facilitating review. *Id.* at 239. The Court also noted that the court rules governing attorney discipline proceedings are designed to "generate a record that contains the information this Court needs to engage in meaningful review when exercising its ultimate authority to regulate and discipline members of the bar." *Id.* at 244.

"Our review," observed the Court, "is often hampered by the absence of a clear explanation of the reasons for selecting a particular sanction." *Id.* at 247. The Court concluded its discussion of the importance of an adequate record by cautioning the Board and its hearing panels not to abdicate their responsibility to exercise independent judgment, provided that they give "articulated reasons" which "explain the basis." *Id.*

The three aggravating factors advanced by Petitioner at the sanctions hearing were rejected by the hearing panel with little or no explanation. Instead of discerning what Respondent's motive was on the date of his misconduct, the hearing panel looked to what his state of mind was three weeks later and treated that as a mitigating circumstance. The hearing panel pointed to Respondent's "cooperation" as a mitigating factor, with no

¹ *Grievance Administrator v Lopatin*, 462 Mich 235, 612 NW 2d 120 (2000).
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articulation of their factual basis. The discipline report does not adequately disclose the hearing panel's reasoning. The aggravating and mitigating factors, properly weighed, do not justify a departure from the suspension called for by the Standards.

Respondent Had a Dishonest or Selfish Motive

The analytical shortcomings of the discipline report are most evident from the way in which the hearing panel confronted the issue as to whether Respondent had a dishonest or selfish motive. Petitioner argued that Respondent's failure to notify opposing counsel about his two post-verdict subpoenas for the text messages was deliberate, done to retaliate against what Respondent believed to be extra-judicial efforts by his opponents to thwart production. Three cases were cited by Petitioner, in support of this argument: *In re Lackey*, 37 P 3d 172 (Or. 2002) (a vengeful act is evidence of a dishonest or selfish motive); *GA v Krupp*, 96-287-GA (ADB 2002) (a "win at all costs" approach is evidence of a dishonest or selfish motive); and *People v Paulter*, 35 P 3d 571 (Colo. 2001) (a dishonest or selfish motive need not be the only or even primary motive to be considered aggravating). The hearing panel declined to consider whether Respondent's retaliatory lack of notice should be treated as an aggravating factor because "the cases cited by Petitioner are distinguishable on their facts."

Of course the three cases are distinguishable on their facts. They were never represented to be identical or even similar to the facts of Respondent's misconduct. The cases offered to show, as a matter of law, that a dishonest or selfish motive could be aggravating even if it was not financially based, or even if it was not the primary motive. Attorney misconduct cases are "fact-sensitive inquiries that turn on the unique

circumstances of each case.” *Grievance Administrator v Deutch*, 455 Mich 149, 166; 565 NW 2d 369 (1997). The facts in attorney misconduct cases are usually comparable only to a limited and superficial extent, *Matter of Grimes*, 414 Mich 483; 326 NW 2d 380 (1982). The factually distinct nature of the cases cited by Petitioner did not relieve the hearing panel of its obligation to conduct a fact-sensitive inquiry into possible motives behind Respondent’s decision to keep opposing counsel in the dark about the subpoenas.

Instead, the hearing panel focused on the motive behind Respondent’s eventual settlement of his client’s lawsuits. “Rather than revealing a dishonest **financial** motive,” opined the hearing panel, “we believe [Respondent’s] conduct in this regard indicated instead that he was focused on his client’s best interests and express wishes in pursuing a settlement of their cases.” (Discipline Report, p 7) (emphasis supplied). The problem with this reasoning is that the hearing panel cleared Respondent of the misconduct charges relating to his settlement of the cases. The formal complaint originally alleged that Respondent compounded a felony by threatening to disclose the text messages in order to force a settlement, but that theory was rejected by the hearing panel in their findings of misconduct. Respondent was found to have committed no offense in that regard, so there was nothing to mitigate.

Evidence of aggravation or mitigation is admissible only if it is relevant. MCR 9.115(J)(3). Respondent’s motive for settling the cases is no more relevant for purposes of this disciplinary action than, for example, his motive for giving the text messages to a newspaper reporter. Aggravating and mitigating factors generally fall into three categories: (1) those which relate to the offense at issue; (2) those matters which are independent of the specific offense but relevant to fitness to practice; and, (3) those matters arising

incident to the disciplinary proceeding. Standard § 9.1, Commentary. Respondent's motive for settling his clients' cases has no bearing on his motive, three weeks earlier, for issuing secret subpoenas.

The relevant motive for the offense at issue in this appeal is easy enough to discern. Respondent testified quite plainly and consistently as to why he didn't copy either of his post-verdict subpoenas on opposing counsel.

Q: There was also no contemporaneous copy [of the third subpoena] sent to any defense counsel; is that correct?

A: That's correct.

Q: Why was that? Why didn't you send a copy to the mayor's lawyers, the city's lawyers?

A: Because when we talked to the former [SkyTel] employee, he told us that someone, a woman from the city, had called and said they were filing another motion to suppress and not to send the records. I believe that if the other side had a copy of the subpoena in advance, that the records would be lost forever if the records even existed..." (Tr 10/8/09, pp 71-2).

* * *

A: I didn't give him a copy of the subpoena because I felt very strongly that there was a real good possibility they would rush in on an emergency motion for – and it'd be assigned to the presiding judge or another judge who would be more sympathetic to the mayor and we would never see the text messages for whatever they held.

Q: So in your mind, the possibility of that happening justified not alerting defense counsel to the fact that you'd issued this third subpoena?

A: **Fool me once, shame on you. Fool me twice, shame on me, so.**

Q: So your answer is yes?

A: Answer is yes.

- Q: **Yes, you were justified in not following the court rules because of what you perceived as bad faith on the part of your opposing counsel?**
- A: **No. It wasn't perceived, it was real.**
- Q: **So that that justified –**
- A: **I'd been dealing with it for almost four and a half years.**
- Q: **That justified you not following the court rules in terms of service of pleadings and giving notice to opposing counsel?**
- A: **It – in my mind it did justify it.** But I'm not saying that – I'm not saying that I didn't violate the court rules. I thought that it was in the best interest my clients and the public to see these text messages. Because after I found out that they surreptitiously went behind my back and told SkyTel not to send them, then I thought, well, hey, maybe there is something in here that bears directly on your case, because why else would they do that. And at that point in time I decided that I didn't consider not serving a copy of the subpoena to be a major breach in the ethics. I thought it was something that – it was not proper. It was not proper, there's no question about it. (Tr 10/8/09, pp 75-6) (emphasis supplied).

On his second day of testimony, Respondent reiterated that his opponents were "playing dirty," and said that **"morality told [him] to...not serve a copy of the subpoena on the other side in order for them not to pull another dirty trick. As I said before, fool me once, shame on you, fool me twice, shame on me."** (Tr 11/12/09, pp 19,32) (emphasis supplied).

Respondent Never Acknowledged the Wrongful Nature of His Conduct

Petitioner's claim that Respondent refused to acknowledge the wrongful nature of

his conduct was rejected because, according to the hearing panel, "Respondent admitted he did not use good judgment." (Discipline Report, p 6). However, if the particular statement of Respondent cited by the hearing panel is read in context, as well as considered together with the rest of Respondent's testimony, then it becomes clear that Respondent did no such thing:

Q: But the third subpoena, in any event, on September 25, 2007, directs SkyTel to send those messages specifically to you; is that correct?

A: That's correct.

Q: Or to your law firm. Now, did you think this was in keeping with the protective orders that had been entered back in 2004?

A: **I didn't think those orders were still operative because the trial was over.** And the intent of the orders was to screen them before they would be used to impeach the mayor, Beatty. And with the trial being over, there was no danger they would unfairly influence the jury, or that they would be introduced at the trial. It was over. **And I believed that the judge's order was no longer operative for that reason and for a number of others.**

Q: Judge Callahan never indicated to you in so many words that those orders are no longer effective, did he?

A: Not specifically, **but his conduct led me to believe that he didn't consider them to be operative.** But nevertheless, during the trial, I followed the order and asked that they be sent to the judge. But even during trial, by him asking me to produce the records and then telling him, reminding him that he had an order that they go to him. And when he told me to have them resubmitted, he never mentioned the order. He just said, have SkyTel resubmit them.

Q: But you've already agreed that McCargo -- Mr. McCargo had emailed you copies of both court orders on August 29, which would have been 11 or 12 days before the end of trial?

A: That is correct, and I did consider them. **I did**

consider it still in effect until the trial was over. And then rightfully or wrongfully, I believed in all sincerity that the order was no longer operative. I mean they weren't going to be introduced at the trial. And the whole purpose of sending them to judge Callahan was for him to see if this privilege had attached before, and if they impeached Beatty or the mayor before I could introduce them at trial.

And now the trial was over and I couldn't introduce them at trial and I thought – just as he also issued a gag order during the trial. **I mean I assumed the gag order ran its course at the end of trial and I assumed this order ran its course at the end of trial.** And you know, maybe I'm – maybe in hindsight I didn't use the best judgment, **but I can tell you that I, in good faith, did not think the order was still – any more than the gag order was still binding.** (Tr. 10/8/09, pp 77-79).

Respondent's statement that "maybe in hindsight I didn't use the best judgment" clearly referred to his assumption that the protective order was no longer in effect once the trial ended. That is not the same as acknowledging that his conduct was wrongful. Respondent never accepted responsibility for intentionally violating the court order.

Respondent was careful throughout his entire testimony to distinguish the court rules from the rules of professional conduct. Respondent testified that he "intentionally did not serve a subpoena on the defense, **and if that's - - that is a violation of the Court Rules, I admit it.** Whether or not it's an ethical violation, you know, **that's up to the Panel to decide, I guess.**" (Tr. 11/12/09, p 18) (emphasis supplied).

Continuing in that same vein, Respondent said "On Day One I violated the Court Rule by not serving a subpoena. **I did not violate the judge's order. I violated the**

Court Rule, and I admit that. And the consequences I have to pay for that I'm willing to accept." (Tr. 11/12/09, p 23) (emphasis supplied).

Respondent concluded his second day of testimony by describing how his disclosure of the text messages served the public good:

Q: (By Mr. Mogill). Now, you've been asked a lot of questions today, most of them on cross-examination by Mr. Edick, about your conduct in disclosing these text messages to the Free Press.

As you sit there today, do you have a belief as to whether that disclosure served the public good and if so, specifically in what ways?

MR. EDICK: Objection; irrelevant.

CHAIRPERSON WIDLAK: Overruled.

You can answer the question.

A: Yes, I think it – I really believe this from the bottom of my heart, but not only did it do good for – serve the public good because it revitalized the confidence that many members of the public have in the judicial system. When they saw the text messages printed they realized that the jury did a good job, despite the allegation that it was somehow racially imbalanced. So I think it did good in the sense that it showed people that the system, although not perfect, is a good system.

I think it really helped the legal profession, and that's one of the things that I found the most distasteful of these charges against me, the charge that I brought disgrace or obloquy to the legal profession when my belief it's just the opposite. I've had so many people, lawyers, total strangers, almost every time I walk down the street somebody will recognize me from within the Free Press and say thank you for what you did for our city. And I'm talking about all nationalities. They really believe that this lawyer (indicating) showed the people that the legal profession could champion a little guy against a very powerful public official that was engaged in dishonesty.

I mean, Kilpatrick was extremely powerful. He can take a 30-year old clerk – I mean a \$30,000 a year clerk and one stroke of the pen make her assistant head of – assistant in public lighting. I seen it happen in this case. An attractive lady gets promoted from 30,000 to 90,000. That's power. And the people of the City appreciated what we did as lawyers, our firm did as lawyers to help the little man prevail against what is really a powerful, powerful but dishonest public official.

So, you know, I'm amazed at how many – just yesterday – it happens ever day thank you for what you've done for our city. Thank you for what you've done for the City of Detroit. It is – it's almost becoming embarrassing. And then to say that – I've got people praying for me. Everybody that bumps into me, total strangers, we're praying for you today. At lunch today it happened, two guys I never saw in my life before.

So it really annoys me that the Attorney Grievance Commission suggests that I brought disgrace to the legal profession, when, in fact, I think I restored confidence in the legal profession.

So whether I violated a professional – Code of Professional Responsibility, that's not the issue. I mean, if this Panel decides that I should have not – should have given them a copy of the subpoena, or shouldn't have violated the judge's order, the issue is that, you know, what I did, I did for the good of my clients and for the public interest.

And I think it has had the exact opposite effect of what this man says it has. I've had lawyers come up to me, I swear to God, lawyers who I don't even know, come up and say aren't you Michael Stefani, and I'm talking about lawyers downtown that I've never seen before. And I say yeah. And they say, you know, you made me proud to be a lawyer. And I'm telling you, that was one of the nicest compliments anybody ever gave me, and I had it happed a number of times.

I had lawyers in a group just the other day, they say we're having a group of lawyers and they all agree, if we had those text messages, we would have used them to the benefit of our client, too. (Tr. 11/12/09, pp 231-34). (emphasis supplied).

Even after the hearing panel issued their findings as to misconduct, Respondent continued to insist that it was only the court rule, not the protective order, that he knowingly violated. (Respondent's Memorandum of Law Regarding Sanctions, pp 4-5).

Respondent's Attitude During The Hearing Was One of Compliance, Not Cooperation

Respondent was found by the hearing panel to have "demonstrated a cooperative attitude throughout these proceedings." (Discipline Report, p 8). Describing Respondent's attitude as cooperative is curious given his eleventh-hour disclosure just prior to the first hearing date admitting that he gave the text messages to the Free Press, as well as his decision to be interviewed on television despite the hearing panel's request that the parties refrain from public statements, and notwithstanding a pledge by Respondent's counsel that "we all intend to observe that request one hundred percent." (Tr. 10/8/09, p 123).

In any event, because the hearing panel's report does not identify any particular acts of cooperation by Respondent, it is unclear whether they had anything in mind other than Respondent's willingness to attend the hearings and subject himself to cross-examination; in other words, to do precisely what he already was obliged to do under MCR 9.115.

A respondent's "cooperation," if it is to be meaningfully treated as a mitigating factor, requires more than just doing one's duty. "Cooperation" is surely not the equivalent of "no evidence of lack of cooperation." After all, to the extent Respondent cooperated, it was to his advantage. A refusal to cooperate would have been treated as an aggravating factor or

even as an independent act of misconduct.

It is one thing, as the Board for example did in *Matter of Peter R. Barbara*, DP-195/80 (ADB 1981), to mitigate for cooperation when a respondent admits misconduct, eliminates the need for a hearing, and agrees to the independent monitoring of his law firm records. It is quite another to credit a respondent for cooperation which does not go above and beyond what is expected from every Michigan attorney. See, e.g., *In re Disciplinary Proceeding Against Trejo*, 185 P 3d 1160 (Wash. 2008).

Respondent's attitude during these discipline proceedings is more accurately described as compliance, not cooperation, and ordinary compliance should not entitle him to mitigation.

Respondent's Substantial Experience in the Practice of Law, and His Experience as a Hearing Panelist, are Aggravating Factors

After declining to treat Respondent's substantial experience practicing law as an aggravating factor, the hearing panel then opened their analysis of the mitigating factors by stressing that Respondent has had no record of discipline **during the 41 years he has been licensed to practice law.** (Discipline Report, p 7) (emphasis supplied). The hearing panel took what is intended by the Standards to be an aggravating factor and used it to amplify the mitigating effect of Respondent's lack of prior discipline. Aggravating and mitigating factors are supposed to be balanced, not swallowed up by one another.

Respondent's experience as a hearing panelist should also be considered as an aggravating factor. The judges of this state are held to the highest standards of personal and professional conduct, *Matter of Bennett*, 403 Mich 178; 267 NW 2d 914 (1978), and

hearing panelists are the trial judges in our discipline system. A hearing panelist, according to the Board's website, is a lawyer who enjoys "a reputation in his or her local community for adherence to the highest ethical standards." Respondent, despite having sat as a hearing panelist since 1989, apparently thinks the Code of Professional Responsibility is still in effect (Tr. 11/12/09, pp 20, 154, 157, 233); didn't know lawyers have an ethical obligation under MRPC 8.3 to report misconduct (Tr. 11/12/09, pp 153-58); and needed to have a newspaper reporter remind him there was such an obligation (Tr. 11/12/09, pp 156-57). A hearing panel should not be able to pick and choose which aspects of a respondent's career they will consider in aggravation or mitigation.

Request for Relief

Petitioner requests that the hearing panel's order of discipline imposing a reprimand without conditions be vacated, and further requests that the Board enter an order suspending Respondent's license to practice law in Michigan.

Dated: August 27, 2010



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